THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

AUGUST 26, 2008 and SEPTEMBER 14, 2009

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XVII

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

For the benefit of the State of Nebraska

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No. A-08-757: **State v. Patterson**. Reversed and remanded in part, and in part affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-764: **Simon Contractors v. G & R, LLC**. Affirmed in part, and in part reversed and remanded with directions. Carlson, Irwin, and Moore, Judges.

†No. A-08-765: **Vermaas Land Co. v. Fulton**. Reversed and vacated, and cause remanded with directions. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-08-775: **Stevens v. Dolan**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-783: **State v. Bourn**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-785: **Wilson v. Housing Auth. of City of Omaha**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-08-791: **State v. Stewart**. Sentence vacated, and cause remanded with directions. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-08-792: **In re Interest of Grace J**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-08-800: **Mlakar v. Union Pacific RR. Co**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Carlson, Judges.

†No. A-08-804: **State v. Williams**. Reversed. Cassel, Carlson, and Moore, Judges.

No. A-08-819: **Brentzel v. Peterson**. Affirmed. Carlson, Irwin, and Moore, Judges.

†No. A-08-822: **Schulte v. Douglas Cty. Bd. of Equal**. Affirmed. Irwin, Carlson, and Moore, Judges.

†No. A-08-837: **State v. Glassco**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-839: **In re Guardianship & Conservatorship of Violetta R**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-840: **Dizmang v. Dizmang**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-08-842: **State v. Hansen**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-08-852: **Rattigan v. State**. Affirmed with directions. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-08-853: **State v. Call**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-08-858: **Nealon v. City of Omaha**. Affirmed. Irwin, Carlson, and Moore, Judges.

†No. A-08-864: **MBNA America Bank v. Boykin**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-08-865: **Haworth v. Compass Group**. Affirmed. Irwin, Carlson, and Moore, Judges.

†No. A-08-866: **In re Interest of Keijuan W. & Keijon T**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-08-869: **Lammermann v. Lammermann**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-08-876: **Kanger v. Dyer**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-08-877: **Nick & Bob, L.L.C. v. Teichman**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-08-879: **McLean v. McLean**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-880: **Pinales v. Pinales**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-08-882: **Cheramie v. Hafeman**. Reversed and remanded with directions to dismiss. Carlson, Irwin, and Moore, Judges.

†No. A-08-886: **Stonington Ins. Co. v. Beimdiek Ins. Agency**. Affirmed in part, and in part reversed and remanded. Irwin, Carlson, and Moore, Judges.

†No. A-08-890: **Arnold v. Arnold**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-894: **Burkhardt v. Adkinson**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-08-903: **Slosburg v. New England Life Ins. Co**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-08-904: **Schmaderer v. Schmaderer**. Affirmed as modified. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-906: **In re Interest of Sire E. et al**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-08-907: **In re Interest of Trevaun M**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-08-913: **Valley Cty. Sch. Dist. 88-0005 v. Ericson State Bank**. Affirmed. Sievers and Cassel, Judges. Moore, Judge, participating on briefs.

†No. A-08-914: **In re Interest of Andrea J**. Affirmed. Carlson, Moore, and Cassel, Judges.

†Nos. A-08-915 through A-08-918: **In re Interest of Gabriel N. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-924: **State v. Von Dollen**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-938: **State v. Cartier**. Affirmed. Cassel, Judge (1-judge).

No. A-08-940: **Morsett v. Motor Club Ins. Assn**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-08-941: **Schultz v. Western United Mut. Ins. Assn**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-950: **In re Interest of Khrystofer C**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-08-952: **State v. Gonzalez**. Affirmed. Irwin, Sievers, and Cassel, Judges.

†No. A-08-960: **Zambrano v. Heartland Wood Floors**. Affirmed. Carlson, Irwin, and Moore, Judges.

†No. A-08-966: **State on behalf of Oliver v. Rising**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-08-967: **Boyd County Motel v. Katzer**. Affirmed as modified. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-993: **In re Interest of Nathaniel G. et al**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-08-1000: **State v. Smith**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-1001: **State v. Prater**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-08-1007: **In re Interest of Dannie H**. Reversed and remanded for further proceedings. Moore, Irwin, and Carlson, Judges.

†No. A-08-1016: **In re Guardianship of Allena P**. Affirmed. Irwin, Carlson, and Moore, Judges.

†No. A-08-1020: **Ray v. Thirty LLC**. Affirmed in part, affirmed in part as modified, and in part reversed. Moore, Irwin, and Carlson, Judges.

No. A-08-1025: **Hughes v. Hughes**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-08-1028: **Moody v. Service Master of Chadron**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-08-1032: **Remmen v. Department of Roads**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1038: **Hronek v. Tri-State By-Products**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-08-1039: **Dillon v. Metschke**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-08-1044: **State v. Idles**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1050: **State v. Calderon**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-08-1054: **TnT 2000 v. Villasenor**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-08-1060: **State v. Tylka**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-08-1062: **Johnson v. Disabled American Veterans**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1063: **Jones v. Platteview Apartments**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-08-1064: **Slothower v. Slothower**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1065: **Ball v. Ball**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-08-1070: **Stobbe v. Cortinas**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-08-1072: **State v. Hernandez-Medrano**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-08-1074: **Lehr v. Double O Transport**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-1075: **Ostergard v. Ostergard**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-08-1090: **In re Interest of Dakota L. et al**. Reversed and remanded with directions. Moore and Carlson, Judges. Sievers, Judge, participating on briefs.

No. A-08-1094: **Romano v. Cannon**. Reversed and remanded for further proceedings. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-08-1101: **Knight v. City of Fort Calhoun**. Affirmed in part, and in part reversed and remanded for further proceedings. Sievers, Irwin, and Cassel, Judges.

†No. A-08-1112: **KLH Retirement Planning v. McIntyre**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-1116: **State v. Arellano**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-08-1119: **In re Interest of Tate P**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-08-1130: **Lin v. Fang**. Affirmed in part, and in part vacated. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-1136: **In re Interest of Enrique G**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-08-1142: **Shrago v. Shrago**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-1145: **In re Interest of Roman C**. Affirmed. Carlson, Irwin, and Moore, Judges.

†No. A-08-1147: **Bunger v. Ortgiesen**. Affirmed in part, and in part vacated. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-08-1153: **In re Interest of Dannon C. et al**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-08-1158: **In re Guardianship of Cleora S**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-08-1162: **Ellis v. Union Pacific RR. Co**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-08-1164: **In re Interest of Benjamin H. et al**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-1166: **Kehr v. Kehr**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-08-1186: **State v. Larsen**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1187: **Allen v. Lincoln Air Center**. Affirmed in part, affirmed in part as modified, and in part reversed and vacated. Sievers, Irwin, and Cassel, Judges.

†No. A-08-1198: **State v. Zimmerman**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-08-1199: **State v. Campuzano**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-1206: **Chipman v. Chipman**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-08-1215: **Broening v. Bonner**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†No. A-08-1217: **In re Interest of N.R. et al**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Irwin, and Carlson, Judges.

No. A-08-1219: **State v. Pierce**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-1221: **Hurst v. Hurst**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1223: **Rockhold v. KL and DC Corp**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-08-1224: **In re Interest of Mary W**. Affirmed. Carlson, Irwin, and Moore, Judges.

†No. A-08-1229: **State v. Beutler**. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge (1-judge).

No. A-08-1245: **In re Interest of Mathea D**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-1246: **Krivan v. Irwin Industrial Tool**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-08-1252: **Johnson v. Guest**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-08-1254: **Beeck v. Health & Human Servs**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-08-1257: **State v. Lucchino**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-08-1258: **Wilson v. Wilson**. Affirmed. Carlson, Irwin, and Moore, Judges.

†No. A-08-1263: **State v. Hitchcock**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1269: **Roberts v. Janicek**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-08-1270: **Murillo v. Imperial Manor Nursing Home**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-08-1272: **Mengedoht v. Blick**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-08-1295: **State v. Henson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-08-1303: **State v. Donnelly**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-08-1320: **State v. Peeks**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-08-1325: **Martin v. Britten**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-08-1326: **Durham v. City of Lincoln**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-08-1332: **Lopez v. M.G. Waldbaum Co**. Affirmed in part, in part reversed and vacated, and remanded with directions. Inbody, Chief Judge, and Carlson and Moore, Judges.

Nos. A-08-1335, A-08-1336: **State v. Chapman**. Affirmed as modified. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-09-007: **State v. Croft**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-09-010: **In re Interest of Alexis L. et al**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-09-024: **State v. Stoltz**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-09-026: **In re Interest of Layla H**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-09-033: **State on behalf of Babutzke v. Bazelman**. Affirmed in part, and in part reversed and remanded with directions. Cassel, Sievers, and Moore, Judges.

No. A-09-041: **White v. Adair**. Affirmed. Sievers, Irwin, and Cassel, Judges. Irwin, Judge, concurring.

†No. A-09-063: **Webster v. Drivers Mgmt., Inc**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-09-066: **In re Estate of Meyers**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-082: **State v. Nelson**. Reversed and remanded for further proceedings. Moore, Judge (1-judge).

†No. A-09-089: **In re Interest of Carlos R. et al**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-09-094: **Mack v. Mack**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-09-099: **In re Interest of Royceon S**. Reversed. Cassel, Irwin, and Sievers, Judges.

No. A-09-119: **McIntosh v. Union Pacific RR. Co**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-09-120: **Wells v. Union Pacific RR. Co**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-09-121: **Chapman v. Union Pacific RR. Co**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-09-136: **State v. Red**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-09-207: **In re Interest of Renee R**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-09-208: **In re Interest of Joey R**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-09-218: **State on behalf of Collette v. Collette**. Affirmed. Cassel, Irwin, and Sievers, Judges.

†No. A-09-224: **In re Change of Name of Chamberlain**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-263: **Roberts v. Richter**. Appeal dismissed. Cassel, Irwin, and Sievers, Judges.

No. A-09-354: **Borer v. Borer**. Reversed and remanded with direction. Cassel, Irwin, and Sievers, Judges.

No. A-09-405: **State v. Peterson**. Affirmed. Inbody, Chief Judge (1-judge).

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-07-531: **Armstrong v. Neth**. Affirmed. See, § 2-107(A)(1); *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

No. A-07-646: **Nedved v. Nedved**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs and attorney fees on appeal.

No. A-07-647: **Mathok v. Shan**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 43-1238(a)(1) (Reissue 2004); *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006); *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004).

No. A-07-787: **Hubbard v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-916: **Houston v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-957: **White v. Tyco Fire & Security**. Affirmed. See, § 2-107(A)(1); *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007); *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989).

No. A-07-1011: **Donovan v. Donovan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-07-1030: **Pasewalk v. Hale**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-07-1181: **Hortman v. Ex-Mark Mfg. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-1217: **Pfitzer v. Pfitzer**. Stipulation to dismiss appeal and cross-appeal sustained; appeal dismissed.

No. A-07-1236: **Luthy v. Luthy**. Affirmed. See § 2-107(A)(1).

No. A-07-1263: **County of Gage v. Meints**. Affirmed. See, § 2-107(A)(1); *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007); *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007).

No. A-07-1288: **In re Interest of Joshua C**. Summarily dismissed. See § 2-107(A)(2).

No. A-07-1289: **In re Interest of Joshua C**. Summarily dismissed. See § 2-107(A)(2).

No. A-07-1290: **In re Interest of Joshua C**. Summarily dismissed. See § 2-107(A)(2).

No. A-07-1291: **In re Interest of Joshua C**. Summarily dismissed. See § 2-107(A)(2).

No. A-07-1292: **In re Interest of Joshua C**. Summarily dismissed. See § 2-107(A)(2).

No. A-07-1307: **In re Interest of Diego G**. Appeal dismissed as moot. See § 2-107(A)(2).

No. A-07-1332: **State v. Espinoza**. Motion of appellee for summary affirmance sustained; conviction and sentence affirmed. See § 2-107(B)(2).

No. A-07-1352: **Miles v. Director, Dept. of Motor Vehicles**. Summarily reversed and remanded with directions to affirm decision of director. See, § 2-107(A)(3); *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008).

No. A-08-015: **Hopkins v. Murray**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-039: **Moore v. Drivers Mgmt**. Stipulation allowed; appeal dismissed.

No. A-08-041: **City of Omaha v. Tract 1**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-044: **State v. Payne**. Summarily affirmed. See § 2-107(A)(1). See, also, Neb. Rev. Stat. § 60-6,131 (Reissue 2004); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

No. A-08-052: **Young v. Crampton**. Affirmed. See, § 2-107(A)(1); *Blue Creek Farm v. Aurora Co-op Elev. Co.*, 259 Neb. 1032, 614 N.W.2d 310 (2000); *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

No. A-08-082: **Finn v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005); *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003).

No. A-08-104: **State v. Henning**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-116: **State v. Becker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-131: **State v. Torres**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

No. A-08-133: **Brown v. Department of Motor Vehicles**. Affirmed. See, § 2-107(A)(1); *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

No. A-08-149: **Powers v. Mangiameli**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-159: **State v. Carter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-160: **State v. Hightower**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 28-324 (Reissue 1995); *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008); *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-08-168: **Wilson v. Neth**. Summarily reversed. See, § 2-107(A)(3); *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

No. A-08-172: **State v. Henderson**. Motion of appellee for summary affirmance sustained. See § 2-107(B)(2).

No. A-08-173: **Lewis v. Lewis**. Affirmed. See, § 2-107(A)(1); *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

No. A-08-182: **State v. Burns**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

No. A-08-213: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006); *State v. Burns*, 16 Neb. App. 630, 747 N.W.2d 635 (2008).

No. A-08-232: **Spaustat v. Roth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-233: **168th and Blondo, L.L.C. v. Roth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-249: **State v. Smoak**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-255: **In re Guardianship & Conservatorship of Ellen W**. Affirmed. See § 2-107(A)(1).

No. A-08-264: **State v. Jenkins**. Stipulation allowed; appeal dismissed.

No. A-08-272: **State v. Birch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-08-275, A-08-276: **State v. Breazeale**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, Neb. Rev. Stat. § 28-517 (Reissue 1995); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-290: **State v. Chinn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-294: **Carter v. Metropolitan Util. Dist**. Affirmed. See, § 2-107(A)(1); *Borrenpohl v. DaBeers Properties*, 276 Neb. 426, 755 N.W.2d 39 (2008).

No. A-08-298: **State v. Lake**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jones*, 274 Neb. 271, 793 N.W.2d 193 (2007).

No. A-08-304: **Williams v. Flagstar Bank**. Affirmed. See, § 2-107(A)(1); *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002); *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945).

Nos. A-08-308, A-08-318: **State v. Bryant**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-315: **Anderson v. Anderson**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-321: **State v. Ornelas-Escorza**. Affirmed. See, § 2-107(A)(1); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

No. A-08-322: **State v. Epp**. Affirmed. See, § 2-107(A)(1); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Cervantes*, 15 Neb. App. 457, 729 N.W.2d 686 (2007); *State v. Muse*, 15 Neb. App. 13, 721 N.W.2d 661 (2006).

No. A-08-334: **Cottrell v. State Patrol**. Affirmed. See, § 2-107(A)(1); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

No. A-08-335: **Pittman v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-337: **State v. Towns**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-348: **Strohmyer v. McDonald**. Affirmed. See, § 2-107(A)(1); *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008); *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008).

No. A-08-349: **State v. Justus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-351: **Downing v. Neth**. Affirmed. See, § 2-107(A)(1); *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

No. A-08-355: **State v. Estrada**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-361: **State v. Bossaller**. Motion of appellee for summary affirmance sustained. See § 2-107(B)(2).

No. A-08-373: **In re Interest of Levi T**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-206 (Reissue 1995); *State v. Mason*, 232 Neb. 400, 440 N.W.2d 490 (1989); *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989); *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981).

No. A-08-374: **State v. Gallagher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-377: **Bauer v. Bauer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-379: **State v. Le**. Affirmed. See, § 2-107(A)(1); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

No. A-08-381: **Behnke v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-384: **State v. Morganflash**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 60-4,100(3) (Reissue 2004); *State v. Moderow*, 226 Neb. 470, 411 N.W.2d 647 (1987); *State v. Garst*, 175 Neb. 731, 123 N.W.2d 638 (1963).

No. A-08-385: **Heavey v. Heavey**. Reversed and remanded with instructions.

No. A-08-388: **State v. Guardado-Lazo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-08-392: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-409: **In re Interest of Sylena M**. Appeal dismissed. See, § 2-107(A)(2); *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985).

No. A-08-411: **State v. Monje**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006). See, also, *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

Nos. A-08-413, A-08-414: **State v. Duester**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-418: **Versch v. Farm Bureau Mut. Ins. Co**. Reversed and remanded for further proceedings. See, § 2-107(A)(3); *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

No. A-08-419: **Leborious v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-426: **State v. Franklin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-428: **State v. Turner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-429: **State v. Gomez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-431: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-436: **PBX, Inc. v. Corbitt**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-439: **Swires v. Diamond Hill Farms**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

No. A-08-441: **City of Omaha v. Tract No. 3**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-447: **State v. Arrington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Pieper*, 274 Neb. 768, 743 N.W.2d 360 (2008).

No. A-08-448: **State v. Matz**. Affirmed. See § 2-107(A)(1).

No. A-08-455: **Villarreal v. Tran**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-08-456: **State v. Ladeaux**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-457: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-458: **State v. Freeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-459: **State v. Kerl**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-464: **State v. Swanson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-473: **Eckstrom v. Stanton Cty. Bd. of Comrs**. Stipulation allowed; appeal dismissed.

No. A-08-477: **Hardin v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

No. A-08-478: **Ball v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-480: **Buggs v. Lehr**. Affirmed. See, § 2-107(A)(1); *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007); *Jurgens v. Wiese*, 151 Neb. 549, 38 N.W.2d 261 (1949).

No. A-08-482: **State v. Sharples**. Vacated and dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2729 (Reissue 2008).

No. A-08-483: **Hillard v. Houston**. Affirmed. See § 2-107(A)(1).

No. A-08-490: **State v. Harper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-495: **State v. Shiley**. Affirmed.

No. A-08-497: **State v. Blair**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-500: **Centurion Capital Corp. v. Witcher**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-08-509: **Lewis v. Grossoehmig**. Affirmed. See § 2-107(A)(1).

No. A-08-510: **State v. Adams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-511: **State v. Myrick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-512: **In re Estate of Davis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-514: **State v. Valadez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-08-515, A-08-516: **State v. Weibel**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-518: **Villarreal v. Ferrigutti**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-519: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-521: **State v. Kydney**. Motion of appellee for summary affirmance sustained. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-531: **State v. Ware**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-532: **State v. Lunkwitz**. Affirmed. See, § 2-107(A)(1); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006); *State v. Lankford*, 17 Neb. App. 123, 756 N.W.2d 739 (2008).

No. A-08-570: **State v. Tuggle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-573: **State v. Segura**. Affirmed. See, § 2-107(A)(1); *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

No. A-08-575: **State v. Brooks**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-577: **In re Interest of Nohemi C**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 43-286(4)(b)(iii) (Reissue 2004).

No. A-08-593: **State v. Brockman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-594: **State v. Watson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-597: **State v. Payan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-599: **Thurber v. Health & Human Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-600: **Lewis v. Lancaster Cty. Sheriff Dept**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-603: **State v. Enzminger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-610: **State v. Mentzer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-611: **State v. Kaasch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *State v. Boyd*, 242 Neb. 144, 493 N.W.2d 344 (1992).

No. A-08-617: **State v. Burr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-629: **In re Estate of Cornelius**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-633: **State v. Candando**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-636: **Banner County v. Brenner**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-08-637: **State v. Lewis**. Appeal dismissed. See, § 2-107(A)(2); *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-08-640: **Brunner v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002); *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986).

No. A-08-641: **Warnke v. Warnke**. Summarily affirmed. See § 2-107(A)(1).

No. A-08-642: **State v. Kavan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008); *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Tierney*, 7 Neb. App. 469, 584 N.W.2d 461 (1998).

No. A-08-647: **Graff v. Graff**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-648: **Sharp v. Ndebele**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 27-803(1) (Cum. Supp. 2006); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

Nos. A-08-649, A-08-850: **Portfolio Recovery Assocs. v. Young**. Affirmed. See § 2-107(A)(1).

No. A-08-653: **State on behalf of Claypool v. Bush**. Appeal dismissed. See, § 2-107(A)(2); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995).

Nos. A-08-654, A-08-655: **State v. Isley**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-657: **MacGregor v. Williams**. Motion of appellee Houston for summary dismissal sustained; appeal dismissed. See, Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006); *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

No. A-08-662: **State v. Hajiani**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-663: **State v. Miller**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

No. A-08-664: **State v. Chiles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-665: **Sorensen v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-699: **State v. Edmunds**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-701: **State v. Williams**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-702: **State v. Betts**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008); *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

No. A-08-706: **Dumas v. Daro**. Affirmed. See § 2-107(A)(1).

No. A-08-707: **Dumas v. Daro**. Affirmed. See § 2-107(A)(1).

No. A-08-711: **State v. Peterson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-713: **In re Estate of Carlson**. Matter summarily dismissed. See Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2006).

No. A-08-715: **Renneke v. Health & Human Servs**. Motion of appellee for summary dismissal sustained; appeal dismissed for lack of jurisdiction. Judgment vacated, and cause remanded with directions. See, § 2-107(B)(1); Neb. Rev. Stat. § 84-917(2)(a) (Cum. Supp. 2006); *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007).

No. A-08-718: **Portfolio Recovery Assocs. v. Young**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-720: **State v. Sepulveda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-721: **State v. Mann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-722: **Mousa v. American Fam. Ins. Group**. Affirmed. See, § 2-107(A)(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-08-727: **State v. Dexter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-730: **State v. Obermiller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-731: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-734: **State v. Rouse**. Affirmed. See, § 2-107(A)(1); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

No. A-08-736: **State v. Partsch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-741: **State v. Murph**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-743: **State v. Kor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-744: **State v. Toney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-749: **State v. Chambers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-750: **State v. Bittner**. Affirmed. See, § 2-107(A)(1); *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008); *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000).

No. A-08-752: **Woods v. Kimball Cty. Hospital**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-753: **Goc v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-754: **Cronk v. Dorcey**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-758: **Harrison v. Harrison**. Affirmed. See § 2-107(A)(1).

No. A-08-760: **State v. Gilbert**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-08-761 through A-08-763: **State v. Bell**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

No. A-08-766: **Kenney v. Harper**. Appeal dismissed.

No. A-08-771: **Reinke v. Reinke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-772: **State v. Brooks**. Motion of appellee for summary affirmance sustained. See § 2-107(B)(2).

No. A-08-773: **State v. Fernandez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-776: **In re Guardianship & Conservatorship of Mary L**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-780: **G W Tackett, Inc. v. Maguire**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-08-782: **State v. Sanchez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-787: **Kroger v. Kroger**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-788: **State v. Kodad**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008).

No. A-08-789: **State v. Gaskins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-790: **State v. Truksa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-794: **State v. Mackey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-795: **State v. Mackey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-797: **Graham v. Dietze**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-799: **State v. Bradford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-802: **State v. Rice**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-803: **State v. Baumgartner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-805: **State v. Torres**. Stipulation allowed; appeal dismissed.

No. A-08-806: **Murray v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-808: **Midland Funding v. Schetzer**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-08-809: **In re Guardianship & Conservatorship of Debra J**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-812: **Aeon Financial v. James**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-08-814: **Swanson v. Swanson**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-08-815 through A-08-818: **State v. Ramirez**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-820: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-821: **State v. Berg**. Affirmed. See § 2-107(A)(1).

No. A-08-825: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-826: **State v. Nelson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-827: **State on behalf of Claypool v. Bush**. Appeal dismissed. See, § 2-107(A)(2); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995).

No. A-08-828: **State v. Freeman**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-829: **State v. Nelson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

No. A-08-831: **Nesbitt v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-832: **Evans v. Bates**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-833: **Manos v. Manos**. Affirmed. See, § 2-107(A)(1); *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-08-834: **In re Interest of Summer K. & Anna B**. Stipulated motion for summary reversal sustained; order reversed and cause remanded for further proceedings. See, § 2-107(C)(1); 390 Neb. Admin. Code, ch. 6, § 001.01 (2002).

No. A-08-838: **State v. Richard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-08-844, A-08-845: **State v. Monaghan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-849: **Spence v. Bush**. Appeal dismissed. See, § 2-107(A)(2); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995).

No. A-08-851: **Candlewood Home Owners Assn. v. Kaiser**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-854: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

No. A-08-856: **Barnes v. Green**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-857: **McWilliams v. Zornes**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-08-860: **State v. Peterson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-861: **State v. Hieb**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

No. A-08-862: **State v. Thompson**. Appellee's suggestion of remand sustained. Conviction reversed and cause remanded for further proceedings. See, *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

No. A-08-863: **Hillard v. Buskirk**. Affirmed. See, § 2-107(A)(1); *Gavin v. Rogers Tech. Servs.*, 276 Neb. 437, 755 N.W.2d 47 (2008).

No. A-08-867: **State v. Ramsey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-868: **State v. Ramsey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-08-870, A-08-871: **State v. Bridgeman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-872: **State ex rel. Tyler v. Heartland Towing**. Affirmed. See § 2-107(A)(1).

No. A-08-873: **State ex rel. Evans v. Nebraska Attorney General**. Appeal dismissed. See, § 2-107(A)(2); *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

No. A-08-874: **In re Guardianship of Helen W**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-875: **Mayo v. City of Gering**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-885: **State v. Heredia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-887: **State v. Schubauer**. Appellee's suggestion of remand sustained. Cause remanded with directions. See, *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996); *State v. Puls*, 13 Neb. App. 230, 690 N.W.2d 423 (2004).

No. A-08-889: **Borer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-891: **State v. Maas**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-893: **Lewis v. Fisher**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-895: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-896: **State v. Hoffman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

No. A-08-899: **State v. Waldron**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-2321 (Cum. Supp. 2006).

No. A-08-900: **State v. Underwood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-901: **State v. Romero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-902: **State v. Menzel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-905: **State v. Montin**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-08-909: **Foster v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 84-917(2)(a) (Cum. Supp. 2006); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-08-910: **Klausen v. Singh**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-08-911: **Robinson v. I-80 Auto Auction**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-920: **State v. Mohr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-922: **Hossaini v. Hossaini**. Motion of appellant to dismiss appeal considered; appeal dismissed at cost of appellant.

No. A-08-923: **State v. Woodrum**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 29-824 and 29-825 (Cum. Supp. 2006); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-08-925: **State v. Brisby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-926: **In re Estate of Covey**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-927: **In re Estate of Covey**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-928: **State v. Hinchey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-929: **State v. Hinchey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-931: **State v. Knauer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-932: **State v. Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-934: **Prouse v. Prouse**. Affirmed. See, § 2-107(A)(1); *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003). See, also, *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003).

No. A-08-935: **Doe v. Fay**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-936: **State v. Cardona**. Stipulation allowed; appeal dismissed.

No. A-08-939: **State v. Perez**. Motion for summary affirmance sustained. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 28-320(1)(a) and 28-318(5) and (8) (Reissue 2008); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008); *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008); *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992); *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987).

No. A-08-942: **9th Street Apt. v. D. R. Anderson Constructors Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-08-943: **Villarreal v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008); *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002).

No. A-08-944: **State v. Hempel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-945: **In re Interest of Heidi L**. Stipulation allowed; appeal dismissed.

No. A-08-946: **In re Interest of Heidi L**. Stipulation allowed; appeal dismissed.

No. A-08-951: **State v. Adams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-955: **Maddox v. Maddox**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-956: **Turner v. Turner**. Appeal dismissed. See, § 2-107(A)(2); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-08-957: **State v. Nash**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-958: **State v. Nash**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 60-6,197.06 (Cum. Supp. 2006) and 28-105(1) (Reissue 2008); *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

No. A-08-961: **Gray v. Britten**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-963: **State v. Kovar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-964: **Clark v. Clark**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-965: **State v. Sanders**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-968: **Insurance Auto Auctions v. Rosales**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1215(1) (Cum. Supp. 2006).

Nos. A-08-970, A-08-977: **State v. Fox**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-971: **Agarwal v. Van Arsdel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-972: **Larsen v. Laidlaw Transit**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-08-976: **In re Interest of Zachary E**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-978: **State v. Palamo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-979: **Donaldson v. Schmidt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-981: **In re Estate of Hue**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-08-982: **In re Estate of Crawford**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-984: **Stark v. Stark**. Stipulation allowed; appeal dismissed.

No. A-08-988: **In re Interest of Myriah F**. Affirmed. See, § 2-107(A)(1); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001).

No. A-08-989: **In re Interest of Tyrell F**. Affirmed. See, § 2-107(A)(1); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001).

No. A-08-990: **Schumacher v. Schumacher**. Affirmed. See, § 2-107(A)(1); *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

No. A-08-992: **Schmitz v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-994: **In re Interest of Donnivan G. et al**. Appeal dismissed.

No. A-08-995: **Hall v. Hall**. Stipulation allowed; appeal and cross-appeal dismissed.

No. A-08-997: **Elken v. Fisher**. Affirmed. See § 2-107(A)(1).

No. A-08-998: **In re Estate of Urban**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 25-1912(1) and 30-1601(1) and (3) (Cum. Supp. 2006).

No. A-08-999: **State v. Tunin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-1002: **State v. Dietz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-1003: **Ellis v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1004: **Anderson v. Gardner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1005: **State v. Reising**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1006: **State v. Reising**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1010: **State v. Burnett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-1012: **Parks v. Neth**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-08-1014: **State v. Keith**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1015: **State v. Keith**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1017: **State v. Gross**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1018: **Russell v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *Abdullah v. Nebraska Dept. of Corr. Servs.*, 246 Neb. 109, 517 N.W.2d 108 (1994); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-08-1021: **State on behalf of Reynoldson v. Judd**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-08-1022, A-08-1023: **State v. Christie**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-1029: **McNeill v. McNeill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1030: **State v. Owen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005).

No. A-08-1031: **In re Interest of Corey D**. Affirmed. See, § 2-107(A)(1); *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

No. A-08-1033: **River Village Twin Creek v. Advantage Investments**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-08-1034: **In re Interest of Willow S. et al**. Appeal dismissed, and motion of appellant for stay of execution overruled. See, § 2-107(A)(2); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

Nos. A-08-1035, A-08-1036: **State v. Staley**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-1037: **Trussell v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1046: **In re Estate of Edlund**. Stipulation allowed; appeal dismissed.

No. A-08-1048: **In re Interest of Gregory A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1049: **In re Interest of Gregory A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1051: **State v. Ponce**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1052: **State v. Buckley**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1053: **Bazar v. Neth**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-08-1055: **Humphrey v. Malone**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-1056: **Williams v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1057: **Snogren v. Arias**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1059: **State v. Witmer**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1066: **State v. Holthus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 28-907(1)(a) (Reissue 2008); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

No. A-08-1067: **State v. Utecht**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-08-1068, A-08-1069: **State v. Smith**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-1071: **Davis v. Crete Carrier Corp**. Appeal dismissed. See, § 2-107(A)(2); *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

No. A-08-1073: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-1077: **Said v. University of Nebraska**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008); *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

No. A-08-1078: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1080: **Brooks v. Go E-Z**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-1081: **In re Interest of Noe D**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1083: **State v. Bartlett**. Motion of appellee for summary affirmance sustained. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Mulinix*, 12 Neb. App. 836, 687 N.W.2d 1 (2004).

No. A-08-1084: **City of Deshler v. Hillman**. Appeal dismissed. See, § 2-107(A)(2); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-08-1085: **Penny v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-08-1086: **Cummings v. Seward**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 36-105 (Reissue 2008); *Pallas v. Black*, 226 Neb. 728, 414 N.W.2d 805 (1987).

No. A-08-1087: **State v. Weang**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1088: **Seybold v. City of Trenton**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-08-1089: **Forney v. Fargo Assembly of PA**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-08-1091: **Clow v. Hinze**. Stipulation allowed; appeal dismissed.

No. A-08-1092: **Tyler v. Heartland Towing**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-08-1093: **State v. McNew**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1100: **State v. Means**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-1102: **In re Estate of Petersen**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-1104: **State v. Allen**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2201 (Reissue 2008); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006); *State v. Barker*, 231 Neb. 430, 436 N.W.2d 520 (1989); *State v. Dunn*, 14 Neb. App. 144, 705 N.W.2d 246 (2005).

No. A-08-1106: **Simon v. Simon**. Appeal dismissed.

No. A-08-1107: **Tyler v. Finegan & Assocs**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-1108: **Smith Family Trust v. Douglas Cty. Bd. of Equal**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-08-1110: **State v. Masters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-1111: **State v. Bliven**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1113: **State v. West**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1114: **Tyrrell v. State Patrol**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007); *Michel v. Nuway Drug Serv.*, 14 Neb. App. 902, 717 N.W.2d 528 (2006).

No. A-08-1120: **State v. Palomo**. Stipulation allowed; appeal dismissed.

No. A-08-1121: **State v. Arellano**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-08-1122 through A-08-1126: **State v. Walker**. Affirmed. See § 2-107(A)(1). See, also, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-1127: **State v. Schmidt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

No. A-08-1128: **State v. Yates**. Affirmed. See § 2-107(A)(1).

No. A-08-1129: **State v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1133: **In re Guardianship of Diana Z**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-1135: **In re Interest of Jesean M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1137: **State v. Journey**. Affirmed. See, § 2-107(A)(1); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982).

No. A-08-1138: **State v. Cummins**. Stipulation allowed; appeal dismissed.

No. A-08-1139: **State v. Honeycutt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1140: **State v. Gonzales**. Affirmed. See, § 2-107(A)(1); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Davenport*, 17 Neb. App. 1, 755 N.W.2d 816 (2008).

No. A-08-1141: **State v. Briceno**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-1143: **Blair v. State Farm Ins. Co**. Appeal dismissed. See, § 2-107(A)(2); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992).

No. A-08-1144: **Cordell v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1146: **State v. Copeland**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-08-1148: **Eckhardt v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

No. A-08-1152: **Linares v. Farmland Foods**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008).

No. A-08-1154: **State v. Torres**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-08-1156: **Engelman v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1157: **Ballard v. Snyder Indus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1160: **State v. Sanford**. Summarily affirmed. See, § 2-107(A)(1); *State v. Molina-Navarette*, 15 Neb. App. 966, 739 N.W.2d 771 (2007).

No. A-08-1161: **Hilgers v. United Healthcare of the Midlands Network**. Stipulation allowed; appeal dismissed with prejudice.

No. A-08-1163: **State v. Tyler**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

Nos. A-08-1168 through A-08-1172: **State v. Chanhdara**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-08-1174: **State v. Tolston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1175: **State v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1176: **State v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-08-1178: **State v. Jordan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1179: **River Village Twin Creek v. Advantage Inv**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-08-1180: **Chambers v. God**. Appeal dismissed; order of district court vacated. See § 2-107(A)(2).

No. A-08-1185: **State v. Robertson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-1191: **Barger v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1194: **State v. Slonaker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-759 (Reissue 2008); *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984); *State v. Nearhood*, 2 Neb. App. 915, 518 N.W.2d 165 (1994).

No. A-08-1197: **In re Interest of Willow S. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

No. A-08-1200: **State v. Axtell**. Stipulation allowed; appeal dismissed.

No. A-08-1205: **State v. Gloria**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1207: **Destefano v. Destefano**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-1208: **State v. Doyle**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-08-1210: **State v. Piso**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1211: **Dryden v. Wilcox**. Stipulation allowed; appeal dismissed.

No. A-08-1213: **In re Estate of Urban**. Appeal dismissed.

No. A-08-1216: **In re Interest of Xilance A**. Affirmed. See §§ 2-107(A)(1) and 2-101(B)(1)(b).

No. A-08-1218: **State v. Carman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1220: **State v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-1817 (Reissue 2008); *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007).

No. A-08-1222: **State v. Larson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1225: **Chapman v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-1226: **Moore v. Lancaster Cty. Jail**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-1227: **Cole v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1228: **Simmons v. Henn**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1233: **State v. Obley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1234: **May-Bral v. Bral**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1235: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-08-1236, A-08-1237: **State v. Lesiak**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-1238: **Mama's Salsa v. Mastronardi Products Ltd**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-08-1239: **In re Estate of Sehi**. Stipulation allowed; appeal dismissed.

No. A-08-1240: **Swanson v. Swanson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1241: **Banner County v. Brenner**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-08-1242: **Tyler v. Glaze**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 25-2309 (Reissue 2008).

No. A-08-1243: **State v. Hibberd**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001 (Reissue 2008); *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

No. A-08-1244: **State v. Michon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1247: **State v. Hernandez-Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1248: **State v. Maruca**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1250: **General Collection Co. v. Petersen**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

No. A-08-1256: **State v. Harper**. Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. A-08-1260: **Nagengast v. State Patrol**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1264: **State v. Briceno**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

Nos. A-08-1265, A-08-1266: **State v. Christie**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-1267: **State v. Valentine**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-08-1273: **Miller v. Bradford & Coenen Law Firm**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-301 (Reissue 2008); *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Spicer Ranch v. Schilke*, 15 Neb. App. 605, 734 N.W.2d 314 (2007). See, also, *In re Marshall*, 307 B.R. 517 (E.D. Va. 2003).

No. A-08-1275: **In re Interest of Kody K. & Logan S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1277: **Arrow "C" Ranch v. Board of Supervisors of Buffalo Cty**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-08-1279, A-08-1280: **State v. Booth**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-1282: **State v. Price**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006); *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005).

No. A-08-1284: **State v. Hallowell**. Affirmed. See, § 2-107(A)(1); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

No. A-08-1286: **In re Interest of Alex W**. Affirmed. See, § 2-107(A)(1); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

No. A-08-1287: **In re Interest of Cyrus L**. Affirmed. See, § 2-107(A)(1); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

Nos. A-08-1288, A-08-1289: **State v. Washington**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-08-1296: **State v. Jensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). See, also, *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

No. A-08-1297: **State v. Pilcher**. Stipulation allowed; appeal dismissed.

No. A-08-1298: **Tyler v. Omaha Police**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1299: **Tyler v. Roe**. By order of the court, appeal dismissed for failure to file briefs.

No. A-08-1300: **Ferguson v. Ferguson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1301: **Graves v. Royal**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008). See, also, Neb. Rev. Stat. § 25-1301 (Reissue 2008).

No. A-08-1304: **State v. Hayden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1305: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

No. A-08-1306: **Montelongo v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 83-4,122 (Reissue 2008); *Witmer v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 297, 691 N.W.2d 185 (2005); *Sepulveda v. Nebraska Dept. of Corr. Servs.*, 9 Neb. App. 133, 609 N.W.2d 42 (2000).

No. A-08-1309: **State v. Newsome**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1310: **Jones v. Jones**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1312: **Wolodkewitsch v. Wolodkewitsch**. Appeal dismissed. See § 2-107(A)(2).

No. A-08-1317: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1318: **State v. Craig**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-08-1319: **State v. Doyle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007).

No. A-08-1324: **Capital One Bank v. Gember**. Affirmed. See § 2-107(A)(1).

No. A-08-1327: **Ebel v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 60-6,197(5) (Reissue 2004); *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002).

No. A-08-1331: **State v. Red Bear**. Count II affirmed. Count I vacated in part, and remanded for resentencing.

No. A-08-1338: **State v. Letsch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1340: **Zvolanek v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-08-1342: **State v. Bowman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-08-1343: **Arias v. Heineman**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-08-1344: **State v. Rugland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-001: **State v. Graves**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009).

No. A-09-002: **State v. Brockman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-004: **Markheim v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-006: **State v. Gooden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-4120 (Reissue 2008); *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007); *State v. McDonald*, 269 Neb. 604, 694 N.W.2d 204 (2005).

No. A-09-008: **Stouffer v. Neth**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *DeBoer v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 760, 751 N.W.2d 651 (2008).

No. A-09-012: **Ourada v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-09-013: **Village of Hallam v. Farmers Cooperative**. Appeal dismissed. See, § 2-107(A)(2); *Halac v. Girton*, 17 Neb. App. 505, 766 N.W.2d 418 (2009).

No. A-09-015: **First v. Department of Motor Vehicles**. Appeal dismissed. See, § 2-107(A)(2); *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-09-021: **Scholl v. Scholl**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-025: **Boord v. Robey**. Affirmed. See, § 2-107(A)(1); *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007).

No. A-09-031: **State v. McFerrin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-032: **State v. Wacker**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-035: **Schrier v. Schrier**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-09-036: **State v. Goings**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-037: **State v. Feliciano-Soto**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-038: **State v. Feliciano-Soto**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-039: **State v. Fitzgerald**. Sentence vacated, and cause remanded for resentencing. See, Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Reissue 2008); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

Nos. A-09-042, A-09-043: **State v. James**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-09-044, A-09-045: **State v. Wait**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-046: **State v. Sainz**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-3001 (Reissue 2008); *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993); *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989).

No. A-09-047: **Riedel v. Neth**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 60-498.01(6)(a) (Reissue 2004).

No. A-09-049: **State v. Mesteth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-051: **State v. Waters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-052: **State v. Rawles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

Nos. A-09-053, A-09-054: **State v. Deckard**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-055: **State v. Potter**. Affirmed. See § 2-107(A)(1).

No. A-09-057: **State v. Marial**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-064: **Sayer v. Sayer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

No. A-09-065: **State v. Porter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-067: **State v. Cash**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

No. A-09-069: **State v. Fuller**. Affirmed. See § 2-107(A)(1).

No. A-09-071: **Symonds v. Symonds**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-072: **In re Trust of Amore**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-073: **Progressive Northern Ins. Co. v. Goodrich**. Motion of appellant to dismiss appeal considered; appeal dismissed; each party to pay own costs.

No. A-09-076: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-078: **In re Interest of Kevin B**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-084: **State v. Coleman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009); *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008); *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000).

No. A-09-085: **State v. Chamley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-087: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-090: **State v. True**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-091: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-092: **State v. Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-093: **Hooper v. Capital Equity Fund**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

No. A-09-095: **Tyler v. Omaha Police**. Affirmed. See § 2-107(A)(1).

No. A-09-096: **Tyler v. Roe**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-097: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-098: **State v. Cartier**. Stipulation allowed; appeal dismissed.

No. A-09-103: **State v. Zimmerman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-106: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-108: **State v. Pope**. Affirmed. See, § 2-107(A)(1); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

No. A-09-109: **State v. Kitt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-112: **State v. Loughry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

No. A-09-114: **Moore v. Thurber**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-116: **State v. Cockrill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-123: **State ex rel. Freeman v. Freeman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-124: **Freeman v. Freeman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-126: **State v. Bayone**. Motion of appellee for summary affirmance sustained; judgment of sentence affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-09-132: **Irene v. Irene**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-133: **Bryson v. Kazlow**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-135: **State v. Bell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-140: **State v. Decoteau**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-142: **State v. Bourn**. Affirmed. See, § 2-107(A)(1); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-09-143: **State v. Boston**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-09-144, A-09-145: **State v. Kongin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Andersen*, 16 Neb. App. 651, 748 N.W.2d 124 (2008).

No. A-09-146: **State v. Ducharme**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006); *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986).

No. A-09-149: **State v. Braun**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2261 (Reissue 2008); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-09-154: **Laughner v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-09-155: **In re Interest of Jal C. et al**. Appeal dismissed. See, § 2-107(A)(2); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-09-157: **State v. Smith**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-158: **Tyler v. McLaughlin**. Affirmed. See § 2-107(A)(1).

No. A-09-160: **Cada v. Love**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-161: **State v. Zechmann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-162: **In re Interest of Kerry P. & Khari P**. Appeal dismissed. See, § 2-107(A)(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003). See, also, *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990).

No. A-09-168: **Corona De Camargo v. Schon**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-169: **Corona De Camargo v. Schon**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-173: **State v. Cox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-174: **State v. Curry**. Stipulation to dismiss appeal sustained; appeal dismissed.

No. A-09-176: **Homan v. Ganser**. Affirmed. See § 2-107(A)(1).

No. A-09-177: **Malcolm v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992); *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988).

No. A-09-183: **Tjaden v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-185: **State v. Walker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-187: **Coble v. Kieborz**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-09-189, A-09-190: **State v. Spencer**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-191: **D&S Realty v. Markel Ins. Co**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-193: **Reed v. Saunders**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-194: **State v. Creelman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-197: **State v. Nelson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-198: **Wiederstein v. Wiederstein**. Appeal dismissed. See, § 2-107(A)(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-09-201: **State v. Sherrod**. Motion of appellee for summary dismissal sustained; appeal dismissed for lack of jurisdiction. See, § 2-107(B)(3); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006).

No. A-09-203: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-204: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-210: **Erickson v. Erickson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-211: **Elken v. Fisher**. Motion of appellee for summary dismissal sustained; appeal dismissed as moot.

No. A-09-217: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-219: **Malone v. Omaha Housing Authority**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-09-220: **State v. Alamilla**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-226: **Tyler v. Heartland Towing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-233: **State v. Turpen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-234: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-09-237: **Taylor v. Chapman**. Motion of appellee for summary dismissal sustained; appeal dismissed as moot.

No. A-09-239: **American Exchange Bank v. Nebraska Pub. Serv. Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-09-240: **State v. Poole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

No. A-09-241: **State v. Phillips**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-242: **State v. Heslep**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-243: **State v. Graves**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-09-245: **State v. Kelly**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-247: **State v. Hinojosa**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-248: **Hineline v. Neth**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007); *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987).

No. A-09-250: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-251: **Euchner v. Euchner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-254: **State v. Soper**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-255: **Kafka v. Dann**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-09-258: **State v. Huff**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-259: **In re Interest of Mikhail B**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-261: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-262: **State v. Wilmore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-264: **Anderson Excavating Co. v. Essex Crane Rental Corp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-268: **In re Interest of Avery W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-269: **State v. Dinh**. Affirmed. See § 2-107(A)(1).

No. A-09-270: **Thunder Bay, Inc. v. Kawa**. Appeal dismissed.

No. A-09-271: **State v. Schlick**. Appellee's suggestion of remand sustained. Cause remanded with directions.

No. A-09-280: **Cook v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-283: **State v. Foster**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-284: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-288: **Morrell v. Reynolds**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-293: **State v. Mynster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006); *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), *disapproved on other grounds, State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991).

No. A-09-294: **State v. Hruza**. Stipulation allowed; appeal dismissed at cost of appellant.

Nos. A-09-298, A-09-299: **State v. Berks**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-09-300, A-09-301: **State v. Smith**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-302: **State v. Gaines**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

No. A-09-305: **Zierke v. Hall Cty. Dept. of Corrections**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-306: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-307: **Snyder v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-312: **State v. Carpenter**. Affirmed. See, § 2-107(A)(1); *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

No. A-09-313: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-09-315, A-09-316: **State v. Beckman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

Nos. A-09-317, A-09-318, A-09-321: **State v. Moss**. Appeals dismissed. See, § 2-107(A)(2); *Wooden v. County of Douglas*, 16 Neb. App. 336, 744 N.W.2d 262 (2008).

No. A-09-319: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-320: **State v. Shinnick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-324: **Christensen v. Christensen**. Appeal dismissed. See, § 2-107(A)(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-09-330: **State v. Johnson**. Affirmed. See, § 2-107(A)(1); *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

No. A-09-331: **Cenovic v. Cenovic**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-333: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-336: **Harvey v. Harvey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-337: **Blythe v. Blythe**. Stipulation allowed; appeal dismissed.

No. A-09-343: **Academic Adv. Child Dev. Ctr. v. Health & Human Servs**. Motion of appellee for summary dismissal on grounds that appeal is moot sustained; appeal dismissed. See, *Hormandl v. Lecher Constr. Co.*, 231 Neb. 355, 436 N.W.2d 188 (1989); *D B Feedyards v. Environmental Sciences*, 16 Neb. App. 516, 745 N.W.2d 593 (2008).

No. A-09-345: **State v. Kirkendall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-357: **Dugan v. County of Cheyenne**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-09-358: **Robinson v. Thomas**. Appeal dismissed. See, § 2-107(A)(2); *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007).

No. A-09-359: **State v. Harsin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-361: **State v. Jaycox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-362: **State v. Jaramillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-363: **State v. Woods**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-366: **Harris v. Frazier**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-09-373: **Federal National Mortgage Assocs. v. Yah**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-379: **Ballard v. Union Pacific RR. Co**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

No. A-09-383: **State v. Trujillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-384: **State v. Thayer-Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-388: **Kurtenbach v. Farmer**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-389: **Ferguson v. Village of Miller**. Motion of appellee for summary dismissal for mootness sustained; appeal dismissed.

No. A-09-391: **Kubr v. Kubr**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-394: **State v. Wade**. Stipulation allowed; appeal dismissed.

No. A-09-396: **State v. Vinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-397: **Hill v. South Dakota State Cement**. Stipulation allowed; appeal dismissed.

No. A-09-402: **State v. Hillard**. Appeal dismissed. See, § 2-107(A)(2); *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008).

No. A-09-410: **Penigar on behalf of Pierson v. Pierson**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-411: **State v. Julian**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-412: **State v. McMorris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-415: **State v. Huffman**. Stipulation allowed; appeal dismissed.

No. A-09-416: **State v. Huffman**. Stipulation allowed; appeal dismissed.

No. A-09-419: **State v. O'Neal**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-419: **State v. O'Neal**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-421: **Vital Learning Corp. v. Talent Plus**. Appeal dismissed. See, § 2-107(A)(2); *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004).

No. A-09-422: **State v. Spale**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-423: **Strelko v. Larson**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

No. A-09-426: **State v. Detweiler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-431: **Sokol v. Deck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-436: **State v. Franco**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-09-438, A-09-439: **State v. Chard**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-441: **State v. Murray**. Stipulation allowed; appeal dismissed.

No. A-09-443: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-447: **Jackson v. Needham**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-449: **In re Interest of Joseph B**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-450: **State on behalf of Claypool v. Bush**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-451: **Spence v. Bush**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-452: **State v. Reinke**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-454: **Omaha Sch. Psychol. Assn. v. Omaha Pub. Sch. Dist. #1**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-09-457: **Merkel-Leuchtman v. Leuchtman**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-459: **State v. Malone**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-461: **State ex rel. Bonner v. McSwine**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1144.01 (Reissue 2008).

No. A-09-463: **In re Interest of Dakoda A**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-464: **In re Interest of Dakoda A**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-465: **Harris v. Harris**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-466: **Big John Billiards v. City of Omaha**. Motion of appellant for summary dismissal due to mootness sustained; appeal dismissed.

No. A-09-468: **Moore v. Babin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-470: **Bush v. Thurber**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-478: **Kohl v. Wells Fargo Bank**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

No. A-09-479: **State v. Kurtzhals**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-480: **State on behalf of Tolliver v. Garrett**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-481: **State on behalf of Waters v. Garrett**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-489: **Moore v. Thurber**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-491: **State on behalf of Chanhdara v. Chanhdara**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-495: **Smith v. Neth**. Appeal dismissed. See, § 2-107(A)(2); *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

No. A-09-498: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See, § 2-107(A)(2); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

No. A-09-501: **State v. Hubbard**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-09-503: **State v. Parnell**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-504: **In re Estate of Lebron**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-512: **Snell Services v. Avco Corp**. Appeal dismissed. See, § 2-107(A)(2); *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

No. A-09-514: **Lewis v. Platte Cty. Detention Facility**. Motions of appellees for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 25-2156 and 25-2157 (Reissue 2008); *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999); *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998).

No. A-09-516: **State v. Shephard**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-522: **State v. Smith**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-526: **Moore v. Colman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-527: **State on behalf of Claypool v. Bush**. Appeal dismissed. See, § 2-107(A)(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-09-528: **State v. Eagle Elk**. Appellee's suggestion of remand and concession thereto by appellant considered. Appellant's conviction and sentence vacated, and cause remanded for further proceedings.

No. A-09-534: **Bayliss v. Otgonbayatz**. Stipulation allowed; appeal dismissed.

No. A-09-538: **State v. Tyler**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-539: **State v. Craven**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-540: **State v. Craven**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-545: **Fowler v. Biotest Plasma Center**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-09-550: **State v. Parnell**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-551: **Martin v. Omaha Police Dept**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-582: **Ballard v. Union Pacific RR. Co**. Appeal dismissed and district court's certification of final judgment vacated. See § 2-107(A)(2).

No. A-09-596: **State v. Castonguay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-597: **State on behalf of McCowin v. Wells**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-599: **State v. Bush**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-09-602: **State v. Maser**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 64-107 (Reissue 2003); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-09-606: **Central Valley Ag Coop. Nonstock v. Stewart**. Appeal dismissed and district court's order of affirmance ordered vacated. See § 2-107(A)(2).

No. A-09-610: **In re Guardianship of Elizabeth P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-625: **In re Interest of Brent B**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 2008); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998).

No. A-09-626: **In re Interest of Savanah H**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 2008); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998).

No. A-09-627: **State v. Boss**. Stipulation allowed; appeal dismissed.

No. A-09-628: **State v. Wiig**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-09-629: **Tyler v. Dr. Finegan & Assocs**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-649: **In re Interest of Colton G**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-666: **Hokanson v. Nebraska Real Property Appraiser Bd**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

No. A-09-673: **Kim v. Kim**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-677: **State v. Pangborn**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-09-693: **Worthman v. Herman**. Appeal dismissed. See, § 2-107(A)(2); *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002).

No. A-09-699: **In re Interest of Raymond F**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-700: **In re Interest of Raymond F**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-701: **In re Interest of Raymond F**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-709: **State v. Butler**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-739: **Davenport Ltd. Partnership v. 75th & Dodge II**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-756: **Weis v. Interstate Securities**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-757: **State v. Knight**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008); *Barney v. Platte Valley Public Power and Irrigation District*, 144 Neb. 230, 13 N.W.2d 120 (1944).

No. A-09-793: **State v. Reed**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-33-080003: **State v. Peterson**. Dismissed for lack of jurisdiction.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-05-1255: **Woerman v. Green**. Petition of appellant for further review denied on September 10, 2008.

No. A-05-1358: **McCroy v. Clarke**. Petition of appellee for further review denied on September 10, 2008.

No. A-06-499: **Forman v. Pacific Realty Group**. Petition of appellant for further review denied on September 10, 2008.

No. A-06-649: **Pittman v. Houston**. Petition of appellant for further review denied on August 27, 2008.

No. A-06-681: **Dowd Grain Co. v. County of Sarpy Bd. of Adj**. Petition of appellee for further review denied on September 17, 2008.

No. A-06-681: **Dowd Grain Co. v. County of Sarpy Bd. of Adj**. Petition of intervenor-appellee for further review denied on September 17, 2008.

No. A-06-682: **Dowd Grain Co. v. County of Sarpy**. Petition of appellee County of Sarpy for further review denied on September 17, 2008.

No. A-06-682: **Dowd Grain Co. v. County of Sarpy**. Petition of appellee OSI Properties Ltd. Partnership for further review denied on September 17, 2008.

No. A-06-1221: **Coffey v. Coffey**. Petition of appellant for further review denied on August 27, 2008.

No. A-06-1250: **Ramirez-Flores v. State**. Petition of appellant for further review denied on September 24, 2008.

No. A-06-1250: **Ramirez-Flores v. State**. Petition of appellant pro se for further review denied on September 24, 2008.

No. A-06-1326: **Morgan v. Mysore**, 17 Neb. App. 17 (2008). Petition of appellant for further review denied on November 13, 2008.

No. A-06-1331: **State v. Davenport**, 17 Neb. App. 1 (2008). Petition of appellant for further review denied on October 21, 2008.

No. A-06-1403: **Myhra v. Myhra**, 16 Neb. App. 920 (2008). Petition of appellant for further review denied on November 26, 2008.

No. A-07-003: **Frasier v. Frasier**. Petition of appellee for further review denied on October 21, 2008.

No. A-07-121: **Lee v. Burlington Northern Santa Fe Ry. Co**. Petition of appellee for further review denied on October 29, 2008.

No. A-07-146: **S&L Farms v. Haarberg**. Petition of appellant for further review denied on February 19, 2009.

No. A-07-180: **Jacob v. Schlichtman**, 16 Neb. App. 783 (2008). Petition of appellant for further review denied on September 10, 2008.

No. A-07-209: **Harris v. Rummel**. Petition of appellant for further review denied on September 24, 2008.

No. A-07-251: **Drew on behalf of Reed v. Reed**, 16 Neb. App. 905 (2008). Petition of appellant for further review denied on October 21, 2008.

Nos. A-07-283, A-07-284: **Bligh v. Douglas Cty. Sch. Dist. No. 0017**. Petitions of appellee for further review denied on August 27, 2008.

No. S-07-325: **Kline v. Farmers Ins. Exchange**. Petition of appellee for further review sustained on September 10, 2008.

No. A-07-358: **Baldwin v. Olsen**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-439: **Gehring v. Gehring Constr. & Ready Mix Co**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-455: **Tiny's Boat & Motors v. Ellis**. Petition of appellant for further review denied on September 10, 2008.

No. A-07-462: **Holsapple v. All Nations Acquisition**. Petition of appellant for further review denied on September 10, 2008.

No. A-07-553: **Wilken v. City of Lexington**, 16 Neb. App. 817 (2008). Petition of appellant for further review denied on September 10, 2008.

No. A-07-568: **Sauer v. Sauer**. Petition of appellee for further review denied on September 17, 2008.

No. A-07-601: **Vencil v. Vencil**. Petition of appellant for further review denied on December 17, 2008.

No. A-07-626: **State v. Wilson**, 16 Neb. App. 878 (2008). Petition of appellant for further review denied on January 14, 2009.

No. A-07-682: **State v. Rathjen**, 16 Neb. App. 799 (2008). Petition of appellant for further review denied on September 17, 2008.

No. A-07-730: **American Fam. Mut. Ins. Co. v. Allstate Ins**. Petition of appellant for further review denied on September 10, 2008.

No. A-07-767: **Kearns v. Kearns**. Petition of appellant for further review denied on September 17, 2008.

No. A-07-773: **Ferer v. Aaron Ferer & Sons Co.**, 16 Neb. App. 866 (2008). Petition of appellant for further review denied on November 13, 2008.

No. A-07-796: **State v. Parker**. Petition of appellant for further review denied on March 9, 2009, for lack of jurisdiction.

No. A-07-809: **State v. Patterson**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-820: **Whittamore v. Howell**. Petition of appellant for further review denied on September 17, 2008.

No. A-07-827: **State v. Munoz**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-830: **Duda v. American Fam. Ins. Group**. Petition of appellant for further review denied on September 2, 2008, as filed out of time.

No. A-07-853: **Noordam v. Noordam**. Petition of appellant for further review denied on October 29, 2008.

No. A-07-860: **State v. Benish**. Petition of appellant for further review denied on February 11, 2009.

No. A-07-882: **Faltin v. Nelson**. Petition of appellees for further review denied on September 10, 2008.

No. A-07-887: **State ex rel. Linder v. Remmen**. Petition of appellant for further review denied on October 15, 2008.

No. S-07-903: **Regency Homes Assn. v. Schrier**. Petition of appellant for further review sustained on August 27, 2008.

No. A-07-909: **In re Estate of Wegelin**. Petition of appellant for further review denied on September 24, 2008.

No. A-07-928: **State v. Pitzer**. Petition of appellant for further review denied on September 10, 2008.

No. A-07-932: **Howard Sales Co. v. Bradley**. Petition of appellee for further review denied on October 16, 2008, as filed out of time.

No. A-07-957: **White v. Tyco Fire & Security**. Petition of appellant for further review denied on November 13, 2008.

Nos. A-07-985 through A-07-988: **State v. Schlotfeld**. Petitions of appellant for further review denied on September 17, 2008.

No. A-07-989: **Bihuniak v. Robert Corrigan Farm**, 17 Neb. App. 177 (2008). Petition of appellant for further review denied on December 23, 2008.

No. S-07-991: **Incontro v. Jacobs**. Petition of appellee for further review sustained on August 27, 2008.

No. A-07-1005: **Mann v. Rich**, 16 Neb. App. 848 (2008). Petition of appellee for further review denied on December 10, 2008.

No. A-07-1010: **State v. Mazza**. Petition of appellee for further review denied on October 15, 2008.

No. A-07-1013: **Villotta v. Tuzzio**. Petition of appellant for further review denied on September 23, 2008, as filed out of time.

No. A-07-1065: **State v. Cave**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-1071: **Wolf v. Grubbs**, 17 Neb. App. 292 (2009). Petition of appellees for further review denied on March 18, 2009.

No. S-07-1072: **Sears v. Sears**. Petition of appellant for further review sustained on November 13, 2008.

No. S-07-1072: **Sears v. Sears**. Petition of appellant for further review dismissed on February 19, 2009, as having been improvidently granted.

No. A-07-1105: **Charf v. Nebraska Dept. of Motor Vehicles**. Petition of appellee for further review denied on May 20, 2009.

No. A-07-1142: **Henderson v. Henderson**. Petition of appellant for further review denied on September 24, 2008.

No. A-07-1155: **State v. Craven**, 17 Neb. App. 127 (2008). Petition of appellant for further review denied on November 26, 2008.

No. A-07-1172: **Belitz v. Belitz**, 17 Neb. App. 53 (2008). Petition of appellant for further review denied on January 28, 2009.

No. A-07-1174: **Zitterkopf v. Aulick Indus.**, 16 Neb. App. 829 (2008). Petitions of appellant for further review denied on August 27, 2008.

No. A-07-1178: **Paben v. Paben**. Petition of appellant for further review denied on November 19, 2008.

No. A-07-1185: **ABC Native American Consulting v. Hatch**. Petition of appellant for further review denied on January 14, 2009.

No. A-07-1186: **Gangwish v. Gangwish**. Petition of appellant for further review denied on April 22, 2009.

No. A-07-1196: **State v. Hansen**. Petition of appellant for further review denied on February 19, 2009.

No. A-07-1216: **State v. Turner**. Petition of appellant for further review denied on December 10, 2008.

No. A-07-1223: **State v. Burdette**. Petition and amended petition of appellant for further review denied on December 10, 2008.

No. A-07-1230: **State v. Connor**, 16 Neb. App. 871 (2008). Petition of appellee for further review denied on August 27, 2008.

No. A-07-1251: **State v. Wells**. Petition of appellant for further review denied on December 10, 2008.

No. A-07-1251: **State v. Wells**. Petition of appellant pro se for further review denied on December 10, 2008.

No. A-07-1262: **Citta v. DJV, L.L.C**. Petition of appellee for further review denied on February 11, 2009.

No. A-07-1275: **Cavanaugh v. Cavanaugh**. Petition of appellant for further review denied on February 19, 2009.

No. A-07-1295: **In re Interest of Courtney S. et al**. Petition of appellant for further review denied on August 27, 2008.

No. A-07-1301: **Burnham v. Pacesetter Corp**. Petition of appellant for further review denied on November 13, 2008.

No. A-07-1307: **In re Interest of Diego G**. Petition of appellant for further review denied on October 29, 2008.

No. A-07-1316: **State v. Richardson**. Petition of appellant for further review denied on February 11, 2009.

No. A-07-1324: **McGinley-Schilz Co. v. Wunschel**. Petition of appellant for further review denied on February 11, 2009.

No. A-07-1328: **Johnson v. Eittreim**. Petition of appellant for further review denied on May 14, 2009.

No. S-07-1346: **Metcalf v. Metcalf**, 17 Neb. App. 138 (2008). Petition of appellant for further review sustained on December 10, 2008.

No. A-07-1352: **Miles v. Director, Dept. of Motor Vehicles**. Petition of appellee for further review denied on October 21, 2008.

No. A-07-1364: **State v. Tolliver**. Petition of appellant for further review denied on December 17, 2008.

No. A-07-1376: **State v. Walls**, 17 Neb. App. 90 (2008). Petition of appellant for further review denied on December 10, 2008.

No. A-08-004: **Omni Behavioral Health v. Keenan Ins. Agency**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-005: **Riverview Properties v. Q O Chemicals**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-020: **State v. Hiatt-King**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-022: **State v. Kelley**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-033: **State v. Refior**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-034: **State v. Schaefer**. Petition of appellant for further review denied on September 17, 2008.

No. A-08-048: **State v. Burr**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-049: **In re Interest of Ashantay H**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-052: **Young v. Crampton**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-053: **Tyler v. "Glaze"**. Petition of appellant for further review denied on September 15, 2008, as untimely filed.

No. A-08-063: **State v. Dugan**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-069: **Zabawa v. Douglas Cty. Bd. of Equal.**, 17 Neb. App. 221 (2008). Petition of appellee for further review denied on February 19, 2009.

No. A-08-078: **State v. Muhammad**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-081: **State v. Lacz**. Petition of appellant for further review denied on September 17, 2008.

No. A-08-083: **Herrick v. Herrick**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-089: **Babel v. Schmidt**, 17 Neb. App. 400 (2009). Petition of appellees for further review denied on May 20, 2009.

No. A-08-090: **State v. Delgado**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-095: **Weiler v. Square D Co**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-099: **State v. Nicholson**. Petition of appellant for further review denied on August 27, 2008.

No. S-08-102: **City of Scottsbluff v. Strong Constr. Co**. Petition of appellee for further review sustained on March 11, 2009.

No. A-08-103: **Maranville v. Dworak**, 17 Neb. App. 245 (2008). Petition of appellant for further review denied on February 19, 2009.

No. A-08-104: **State v. Henning**. Petition of appellant for further review denied on September 29, 2008, as filed out of time.

No. A-08-107: **Countrywide Home Loans v. Allender**. Petition of appellant for further review denied on October 21, 2008.

No. S-08-113: **State v. Dragoo**, 17 Neb. App. 267 (2008). Petition of appellee for further review sustained on January 14, 2009.

No. A-08-115: **Villas of Southwind v. Southwind Homeowners Assn**. Petition of appellee for further review denied on April 8, 2009.

No. A-08-118: **Nerison v. National Fire Ins. Co. of Hartford**, 17 Neb. App. 161 (2008). Petition of appellant for further review denied on January 22, 2009.

No. A-08-122: **Gonzalez v. Metropolitan Utilities Dist**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-131: **State v. Torres**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-140: **Rassette v. Rassette**. Petition of appellant for further review denied on January 14, 2009.

No. S-08-141: **Kuhn v. Wells Fargo Bank of Neb**. Petition of appellant for further review sustained on April 15, 2009.

No. S-08-146: **Russell v. Kerry, Inc**. Petition of appellee for further review sustained on August 26, 2009.

No. A-08-161: **State v. Morgan**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-165: **Murante v. Cutchall**. Petition of appellee for further review denied on February 19, 2009.

No. A-08-172: **State v. Henderson**. Petition of appellant for further review denied on October 15, 2008.

No. A-08-173: **Lewis v. Lewis**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-176: **State v. Hillard**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-196: **In re Interest of Sarah L. et al.**, 17 Neb. App. 203 (2008). Petition of appellant for further review denied on January 14, 2009.

No. A-08-197: **State v. Heslep**, 17 Neb. App. 236 (2008). Petition of appellant for further review denied on January 14, 2009.

No. A-08-198: **Camp Clarke Ranch v. Morrill Cty. Bd. of Comrs.**, 17 Neb. App. 76 (2008). Petition of appellant for further review denied on December 10, 2008.

No. A-08-199: **Esch v. State Farm Mut. Auto. Ins. Co**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-200: **Zion Lutheran Church v. Mehner**. Petition of appellant for further review denied on March 27, 2009, as untimely filed.

No. A-08-202: **State v. Johnson**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-206: **Nielsen v. Daubert**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-210: **In re Adoption of Rylee R**. Petition of appellee for further review denied on January 22, 2009.

No. A-08-212: **Wade-Delaine v. Metro Area Transit**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-226: **In re Interest of Kyara W. et al**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-239: **State v. Dinh**. Petition of appellant for further review dismissed on September 17, 2008, as moot.

No. A-08-241: **In re Interest of Danielle H**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-248: **State v. Jennings**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-249: **State v. Smoak**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-260: **In re Interest of Justice S. et al**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-265: **State v. Owen**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-266: **Capps v. Capps**. Petition of appellant for further review denied on July 1, 2009.

No. A-08-267: **State v. Davis**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-274: **Walter C. Diers Partnership v. State**, 17 Neb. App. 561 (2009). Petition of appellant for further review denied on July 15, 2009.

No. A-08-277: **Jacob v. Department of Corr. Servs**. Petition of appellant for further review denied on September 17, 2008.

No. A-08-278: **State v. Aguilar**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-280: **In re Interest of McKenzi D**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-282: **Marrison v. Green**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-283: **Schiefelbein v. School Dist. No. 0013**, 17 Neb. App. 80 (2008). Petition of appellant for further review denied on October 29, 2008.

No. A-08-286: **State v. Lopez**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-287: **Smith v. Brand Hydraulics Co**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-292: **State v. Davlin**. Petition of appellant pro se for further review denied on January 14, 2009.

No. A-08-294: **Carter v. Metropolitan Util. Dist**. Petition of appellant for further review denied on October 15, 2008.

No. A-08-295: **Archibald v. Clark**. Petition of appellant for further review denied on April 22, 2009.

No. A-08-304: **Williams v. Flagstar Bank**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-306: **Pate v. Gies**. Petition of appellant for further review denied on January 14, 2009.

Nos. A-08-308, A-08-318: **State v. Bryant**. Petitions of appellant for further review denied on November 13, 2008.

Nos. A-08-313, A-08-314: **State v. Breazeale**. Petitions of appellant for further review denied on August 27, 2008.

No. A-08-322: **State v. Epp**. Petition of appellant for further review denied on October 21, 2008.

Nos. A-08-323, A-08-324: **State v. Davis**. Petitions of appellant for further review denied on February 11, 2009.

No. A-08-325: **State v. Gooden**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-333: **Coleman v. Kahler**, 17 Neb. App. 518 (2009). Petition of appellant for further review denied on June 17, 2009.

No. A-08-334: **Cottrell v. State Patrol**. Petition of appellant for further review denied on November 10, 2008, as filed out of time.

No. A-08-336: **State v. Gray**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-337: **State v. Towns**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-363: **Lowe v. Lancaster Cty. Sch. Dist. 0001**, 17 Neb. App. 419 (2009). Petition of appellee for further review denied on August 26, 2009.

No. A-08-364: **Jensen v. Farmers' Ins. Group**. Petition of appellant for further review denied on February 19, 2009.

No. A-08-372: **Swift v. KCC Feeding**. Petitions of appellant for further review denied on February 19, 2009.

No. A-08-374: **State v. Gallagher**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-378: **State on behalf of Riley R. v. Patrick L**. Petition of appellant for further review denied on June 24, 2009.

No. A-08-379: **State v. Le**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-382: **Sasges v. Eaton Corp**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-384: **State v. Morganflash**. Petition of appellant for further review denied on September 24, 2008.

No. A-08-388: **State v. Guardado-Lazo**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-398: **In re Interest of Tyler C**. Petition of appellant for further review denied on December 10, 2008.

No. S-08-409: **In re Interest of Sylena M**. Petition of appellant for further review sustained on December 23, 2008.

No. A-08-411: **State v. Monje**. Petition of appellant for further review denied on November 17, 2008, as filed out of time.

No. A-08-412: **State v. Harms**. Petition of appellant for further review denied on May 20, 2009.

Nos. A-08-413, A-08-414: **State v. Duester**. Petitions of appellant for further review denied on November 13, 2008.

No. A-08-422: **In re Interest of Jacob T**. Petition of appellee for further review denied on February 19, 2009.

No. A-08-425: **State v. Morris**. Petition of appellant for further review denied on January 28, 2009.

No. A-08-426: **State v. Franklin**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-444: **In re Interest of Adonaven G. & Izarel G**. Petition of appellant for further review denied on November 19, 2008.

No. A-08-453: **Rousseau v. Zoning Bd. of Appeals of Omaha**, 17 Neb. App. 469 (2009). Petition of appellant for further review denied on May 20, 2009.

No. A-08-455: **Villarreal v. Tran**. Petition of appellant for further review denied on July 1, 2009.

No. A-08-468: **State v. Alama**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-477: **Hardin v. Neth**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-488: **Goeden v. Goeden**. Petition of appellant for further review denied on September 10, 2008.

No. A-08-490: **State v. Harper**. Petition of appellant for further review denied on October 21, 2008.

No. A-08-493: **In re Interest of M.H**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-494: **Phoenix Properties v. Biggs**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-495: **State v. Shiley**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-496: **State v. Bridges**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-511: **State v. Myrick**. Petition of appellant for further review denied on November 13, 2008.

No. A-08-513: **Govier v. Govier**. Petition of appellant for further review denied on March 18, 2009.

Nos. A-08-515, A-08-516: **State v. Weibel**. Petitions of appellant for further review denied on January 14, 2009.

No. A-08-517: **In re Guardianship & Conservatorship of McDowell**, 17 Neb. App. 340 (2009). Petition of appellees for further review denied on June 4, 2009.

No. A-08-528: **In re Interest of Daniel L**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-529: **In re Interest of Elizabeth L**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-571: **Citimortgage, Inc. v. Clausen**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-572: **In re Interest of Dakota L. et al**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-573: **State v. Segura**. Petition of appellant for further review denied on February 19, 2009.

No. A-08-579: **State v. Jackson**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-589: **Johnson v. County of Loup**. Petition of appellant for further review denied on October 15, 2008.

No. A-08-591: **State v. Gade**. Petition of appellant for further review denied on February 19, 2009.

No. A-08-595: **In re Interest of Elvis T**. Petition of appellant for further review denied on December 10, 2008.

Nos. A-08-605, A-08-606: **Nebco, Inc. v. Dodge Cty. Bd. of Equal**. Petitions of appellant for further review denied on March 11, 2009.

No. A-08-609: **State v. Flores**, 17 Neb. App. 532 (2009). Petition of appellant for further review denied on June 17, 2009.

No. S-08-623: **State v. Tucker**, 17 Neb. App. 487 (2009). Petition of appellant for further review sustained on May 20, 2009.

No. A-08-624: **In re Interest of Levi T**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-625: **In re Interest of Kayla T**. Petition of appellant for further review denied on December 23, 2008.

No. A-08-630: **Parent v. City of Bellevue Civil Serv. Comm.**, 17 Neb. App. 458 (2009). Petition of appellant for further review denied on June 24, 2009.

No. A-08-634: **Reinhardt v. Metropolitan Prop. & Cas. Ins. Co**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-638: **State v. Werth**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-640: **Brunner v. Department of Motor Vehicles**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-643: **Lawler v. Lawler**. Petition of appellant for further review denied on September 10, 2008.

Nos. A-08-651, A-08-652: **In re Interest of Bianca H. & Eternity H**. Petitions of appellant for further review denied on January 22, 2009.

No. A-08-663: **State v. Miller**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-666: **Lewis v. Pecha**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-667: **Lewis v. Henningson**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-668: **Lewis v. Kavars**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-669: **Lewis v. Charlisle**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-670: **Lewis v. Starlin**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-671: **Lewis v. Circo**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-672: **Lewis v. Carmody**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-673: **Lewis v. Behren**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-674: **Lewis v. Lucero**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-675: **Lewis v. Smith**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-676: **Lewis v. Novotny**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-677: **Lewis v. Washington**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-678: **Lewis v. Grossoehang**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-679: **Lewis v. Bart**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-680: **Lewis v. Teply**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-681: **Lewis v. Yaghotfam**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-682: **Lewis v. Stranglen**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-683: **Lewis v. Shada**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-684: **Lewis v. Bart**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-685: **Lewis v. Butler**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-686: **Lewis v. Brunning**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-687: **Lewis v. Rummel**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-688: **Lewis v. Love**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-689: **Lewis v. Barnes**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-690: **Lewis v. Osier**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-691: **Lewis v. Gaskell**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-692: **Lewis v. Herout**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-693: **Lewis v. Friend**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-694: **Lewis v. Vaccaro**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-695: **Lewis v. Tonsoni**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-696: **Lewis v. Daley**. Petition of appellant for further review denied on August 27, 2008.

No. A-08-702: **State v. Betts**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-710: **State v. Frederick**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-715: **Renneke v. Health & Human Servs**. Petition of appellant for further review denied on February 12, 2009, as filed out of time. See § 2-102(F)(1).

No. A-08-717: **Gallagher v. TSCI Med. Dept**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-718: **Portfolio Recovery Assocs. v. Young**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-720: **State v. Sepulveda**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-721: **State v. Mann**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-729: **Shepard v. Roach**. Petition of appellant for further review denied on November 26, 2008.

No. A-08-730: **State v. Obermiller**. Petition of appellant for further review denied on January 14, 2009.

No. S-08-735: **State v. Clark**, 17 Neb. App. 361 (2009). Petition of appellant for further review sustained on March 25, 2009.

No. A-08-738: **State v. Monaghan**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-739: **State v. Gilchrist**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-750: **State v. Bittner**. Petition of appellant for further review denied on December 17, 2008.

No. A-08-757: **State v. Patterson**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-760: **State v. Gilbert**. Petition of appellant for further review denied on February 19, 2009, as filed out of time.

No. A-08-765: **Vermaas Land Co. v. Fulton**. Petition of appellees for further review denied on May 6, 2009.

No. A-08-779: **State v. McDaniel**, 17 Neb. App. 725 (2009). Petition of appellant for further review denied on August 26, 2009.

No. A-08-783: **State v. Bourn**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-784: **Halac v. Girton**, 17 Neb. App. 505 (2009). Petition of appellant for further review denied on June 24, 2009.

No. A-08-785: **Wilson v. Housing Auth. of City of Omaha**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-786: **Spence v. Bush**. Petition of appellant for further review denied on October 29, 2008.

No. A-08-788: **State v. Kodad**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-790: **State v. Truksa**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-804: **State v. Williams**. Petition of appellee for further review denied on April 8, 2009.

No. S-08-819: **Brentzel v. Peterson**. Petition of appellant for further review sustained on June 17, 2009.

No. A-08-829: **State v. Nelson**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-831: **Nesbitt v. Houston**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-842: **State v. Hansen**. Petition of appellant for further review denied on May 5, 2009, for failure to comply with § 2-102(A).

No. A-08-865: **Haworth v. Compass Group**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-883: **Kruid v. Farm Bureau Mut. Ins. Co.**, 17 Neb. App. 687 (2009). Petition of appellee for further review denied on August 26, 2009.

No. A-08-905: **State v. Montin**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-913: **Valley Cty. Sch. Dist. 88-0005 v. Ericson State Bank**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-925: **State v. Brisby**. Petition of appellant for further review denied on February 27, 2009, as untimely filed.

No. A-08-934: **Prouse v. Prouse**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-939: **State v. Perez**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-941: **Schultz v. Western United Mut. Ins. Assn**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-943: **Villarreal v. Hansen**. Petition of appellant for further review denied on March 18, 2009.

No. A-08-947: **In re Interest of Shayla H. et al.**, 17 Neb. App. 436 (2009). Petition of appellee for further review denied on May 14, 2009.

No. A-08-950: **In re Interest of Khrystofer C**. Petition of appellant for further review denied on May 14, 2009.

No. S-08-962: **In re Interest of Chance J.**, 17 Neb. App. 645 (2009). Petition of appellee for further review sustained on August 26, 2009.

No. A-08-963: **State v. Kovar**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-981: **In re Estate of Hue**. Petition of appellants for further review denied on July 15, 2009.

No. A-08-987: **State v. Fenin**, 17 Neb. App. 348 (2009). Petition of appellant for further review denied on April 8, 2009.

No. A-08-993: **In re Interest of Nathaniel G. et al**. Petition of appellant for further review denied on April 22, 2009.

No. A-08-999: **State v. Tunin**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-1000: **State v. Smith**. Petition of appellant for further review denied on July 8, 2009.

No. A-08-1005: **State v. Reising**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-1006: **State v. Reising**. Petition of appellant for further review denied on December 10, 2008.

No. A-08-1007: **In re Interest of Dannie H**. Petition of appellee for further review denied on June 23, 2009, as untimely filed.

No. A-08-1008: **State v. Aguilar-Moreno**, 17 Neb. App. 623 (2009). Petition of appellant for further review denied on August 26, 2009.

No. A-08-1010: **State v. Burnett**. Petition of appellant for further review denied on June 4, 2009.

No. A-08-1013: **State v. Smith**, 17 Neb. App. 633 (2009). Petition of appellant for further review denied on August 26, 2009.

No. A-08-1030: **State v. Owen**. Petition of appellant for further review denied on March 18, 2009.

No. A-08-1044: **State v. Idles**. Petition of appellant for further review denied on July 24, 2009, as untimely filed.

No. A-08-1050: **State v. Calderon**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1059: **State v. Witmer**. Petition of appellant for further review denied on February 19, 2009.

No. A-08-1063: **Jones v. Platteview Apartments**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1067: **State v. Utecht**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1070: **Stobbe v. Cortinas**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1071: **Davis v. Crete Carrier Corp**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-1072: **State v. Hernandez-Medrano**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-1076: **Elkhorn Ridge Golf Partnership v. Mic-Car, Inc.**, 17 Neb. App. 578 (2009). Petition of appellants for further review denied on June 24, 2009.

No. A-08-1094: **Romano v. Cannon**. Petition of appellee for further review denied on August 26, 2009.

No. A-08-1100: **State v. Means**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1116: **State v. Arellano**. Petition of appellant for further review denied on July 8, 2009.

No. A-08-1121: **State v. Arellano**. Petition of appellant for further review denied on April 8, 2009.

Nos. A-08-1122 through A-08-1126: **State v. Walker**. Petitions of appellant for further review denied on May 20, 2009.

No. A-08-1127: **State v. Schmidt**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1128: **State v. Yates**. Petition of appellant for further review denied on June 24, 2009.

No. A-08-1136: **In re Interest of Enrique G**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-1137: **State v. Journey**. Petition of appellant pro se for further review denied on May 8, 2009, for failure to file brief in support.

No. A-08-1140: **State v. Gonzales**. Petition of appellant for further review denied on June 4, 2009.

No. A-08-1145: **In re Interest of Roman C**. Petition of appellant for further review denied on July 15, 2009.

No. A-08-1148: **Eckhardt v. Neth**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-1150: **In re Interest of Tayla R.**, 17 Neb. App. 595 (2009). Petition of appellant for further review denied on July 1, 2009.

No. A-08-1151: **In re Interest of Lea D.**, 17 Neb. App. 595 (2009). Petition of appellant for further review denied on July 1, 2009.

No. A-08-1163: **State v. Tyler**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-1185: **State v. Robertson**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1194: **State v. Slonaker**. Petition of appellant for further review denied on June 10, 2009.

No. A-08-1197: **In re Interest of Willow S. et al**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-1198: **State v. Zimmerman**. Petition of appellant for further review denied on June 4, 2009.

No. A-08-1208: **State v. Doyle**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-1217: **In re Interest of N.R. et al**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1217: **In re Interest of N.R. et al**. Petition of appellee N.R. for further review denied on August 26, 2009.

No. A-08-1219: **State v. Pierce**. Petition of appellant for further review denied on June 4, 2009.

No. S-08-1220: **State v. Williams**. Petition of appellant for further review sustained on March 18, 2009.

No. A-08-1277: **Arrow "C" Ranch v. Board of Supervisors of Buffalo Cty**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-1319: **State v. Doyle**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1320: **State v. Peeks**. Petition of appellant for further review denied on August 24, 2009, as untimely filed.

No. A-08-1324: **Capital One Bank v. Gember**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1342: **State v. Bowman**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-1344: **State v. Rugland**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-001: **State v. Graves**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-007: **State v. Croft**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-013: **Village of Hallam v. Farmers Cooperative**. Petition of appellee for further review denied on May 20, 2009.

Nos. A-09-044, A-09-045: **State v. Wait**. Petitions of appellant for further review denied on August 26, 2009.

No. A-09-065: **State v. Porter**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-067: **State v. Cash**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-069: **State v. Fuller**. Petition of appellant for further review denied on July 1, 2009.

No. A-09-092: **State v. Martin**. Petition of appellant for further review denied on July 15, 2009.

No. A-09-108: **State v. Pope**. Petition of appellant pro se for further review denied on August 26, 2009.

No. A-09-109: **State v. Kitt**. Petition of appellant for further review denied on May 6, 2009.

No. A-09-140: **State v. Decoteau**. Petition of appellant for further review denied on May 14, 2009.

No. A-09-146: **State v. Ducharme**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-177: **Malcolm v. Department of Corr. Servs**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-224: **In re Change of Name of Chamberlain**. Petition of appellant for further review denied on July 8, 2009.

No. A-09-233: **State v. Turpen**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-234: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on June 24, 2009.

No. A-09-234: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on July 21, 2009, for lack of jurisdiction.

No. A-09-240: **State v. Poole**. Petition of appellant for further review denied on June 24, 2009.

No. A-09-248: **Hineline v. Neth**. Petition of appellant for further review denied on May 6, 2009.

No. A-09-269: **State v. Dinh**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-358: **Robinson v. Thomas**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-449: **In re Interest of Joseph B**. Petition of appellant for further review denied on July 15, 2009.

No. A-09-538: **State v. Tyler**. Petition of appellant for further review denied on August 26, 2009.

STATE OF NEBRASKA, APPELLEE, V. RICKY R. DAVENPORT, APPELLANT.

755 N.W.2d 816

Filed August 26, 2008. No. A-06-1331.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings will not be disturbed unless they are clearly erroneous.
2. **Postconviction.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
4. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
5. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
6. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
7. **Effectiveness of Counsel: Appeal and Error.** Whether counsel's performance was deficient and whether that deficiency prejudiced the defendant are legal determinations that an appellate court resolves independently of the lower court's decision.
8. **Postconviction: Appeal and Error.** A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.
9. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
10. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
11. **Postconviction: Waiver: Appeal and Error.** To use a procedural default or waiver as a means of ignoring a plain error that results in an unconstitutional incarceration

would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless.

12. **Effectiveness of Counsel.** The failure to anticipate a change in existing law does not constitute ineffective assistance of counsel.
13. **Postconviction: Constitutional Law: Proof: Records.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
14. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Ricky R. Davenport, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In 1993, a jury convicted Ricky R. Davenport of manslaughter, use of a firearm in the commission of a felony, and possession of a firearm by a felon. On direct appeal, we affirmed Davenport's convictions and sentences, and we later affirmed the denial of his motion for postconviction relief. Subsequently, the Nebraska Supreme Court determined in *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), that a defendant could not be convicted of an intentional crime, such as use of a weapon to commit a felony, when the underlying felony is an unintentional crime, such as manslaughter. Based upon the *Pruett* decision, Davenport filed a second motion for postconviction relief alleging that he received ineffective assistance of counsel at the trial and appellate levels. The district court denied the motion without an evidentiary hearing. We affirm.

BACKGROUND

The State charged Davenport with second degree murder, use of a firearm in the commission of a felony, and possession of a firearm by a convicted felon. The information alleged that Davenport killed the victim "intentionally, but without premeditation." Davenport presented a self-defense theory at trial. The court instructed the jury that in order to convict Davenport of manslaughter, the State had to prove that Davenport killed the victim "without malice, either (a) intentionally upon a sudden quarrel, or (b) unintentionally while in the commission of the unlawful act of assault," and that his action was not justified as set out in the jury instruction pertaining to self-defense. The jury convicted Davenport of the lesser charge of manslaughter, along with use of a firearm in the commission of a felony and possession of a firearm by a felon. The Douglas County public defender's office represented Davenport at trial and on direct appeal.

On direct appeal, in addition to the numerous assignments of error raised by Davenport's counsel, he argued in a pro se brief that the court failed to adequately instruct the jury because it did not define the term "recklessly" with regard to the manslaughter instruction. We affirmed the convictions and sentences in all respects. See *State v. Davenport*, No. A-94-009, 1994 WL 642698 (Neb. App. Nov. 15, 1994) (not designated for permanent publication).

Davenport later filed a motion for postconviction relief claiming ineffective assistance of counsel in a number of specified ways, including failing to request a jury instruction (1) on self-defense against a group of people and (2) defining the term "recklessly" for purposes of manslaughter. We held that the record affirmatively showed Davenport was not entitled to postconviction relief and that the district court did not err in overruling the motion without a hearing. See *State v. Davenport*, No. A-98-571, 1999 WL 703624 (Neb. App. Sept. 7, 1999) (not designated for permanent publication).

On November 3, 2006, Davenport filed a second motion for postconviction relief. Under the broad heading "Defendant's Claims," Davenport claimed "violations of his right to [e]ffective [a]ssistance of [c]ounsel, his right to a [f]air [t]rial, and his right to [d]ue [p]rocess of [l]aw, guaranteed by the Fifth,

Sixth and the Fourteenth Amendments." Under the heading "Claim I," Davenport asserted that in *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998)—decided 8 months prior to the decision in his direct appeal—the Nebraska Supreme Court held there was no requirement of intent to kill in manslaughter, and he asserted that the stepped jury instruction given in Davenport's case for murder in the second degree and the lesser-included offense of manslaughter was contrary to the ruling in *Jones*. Under the heading "Claim II," Davenport alleged that after the decisions in his direct appeal and first motion for postconviction relief, the Nebraska Supreme Court determined in *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), that a defendant could not be convicted of an intentional crime—use of a weapon to commit a felony—when the underlying felony is an unintentional crime, such as manslaughter. He also alleged that using a procedural default to ignore plain error resulting in an unconstitutional incarceration "would render the plain error doctrine and postconviction relief remedies meaningless." The district court dismissed the motion without an evidentiary hearing, stating that "[t]here are no facts raised by [Davenport] leading to issues that could not have been raised on direct appeal or in the prior Motion for Post-Conviction Relief and [Davenport] is not entitled to maintain successive motions for post-conviction relief."

Davenport timely appealed to this court. We sustained in part the State's motion for summary affirmance, affirming the district court's dismissal as to Davenport's "Claim I," but we allowed Davenport's appeal to continue as to his "Claim II."

ASSIGNMENTS OF ERROR

Davenport assigns that the district court erred in (1) finding that his claims were procedurally barred when plain error existed, (2) failing to find that he received ineffective assistance of counsel at the trial and appellate levels, and (3) failing to grant him an evidentiary hearing.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings

will not be disturbed unless they are clearly erroneous. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[2,3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *Id.* When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. *Id*.

[4,5] Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id*.

[6,7] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Jackson, supra*. Whether counsel's performance was deficient and whether that deficiency prejudiced the defendant are legal determinations that an appellate court resolves independently of the lower court's decision. *Id.*

ANALYSIS

Before reaching Davenport's assignments of error, we set forth the case law leading up to, and including, the decision in *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

In *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), the Nebraska Supreme Court determined that an unintentional crime could not serve as the predicate offense for use of a deadly weapon to commit a felony. Gerald Dean Ring was convicted of felony motor vehicle homicide and of using a motor vehicle as a deadly weapon in the commission of the homicide. The Supreme Court held that in order to convict Ring of the use of a deadly weapon charge under Neb. Rev. Stat. § 28-1205 (Reissue 1985), the State had to prove Ring used his vehicle, the weapon at issue, "*for the purpose of* committing a felony." 233 Neb. at 725, 447 N.W.2d at 911. The *Ring* court vacated Ring's use of a weapon conviction after determining that felony motor vehicle homicide was, by definition, a felony which is committed unintentionally

and that nothing in the record indicated that Ring sought or intended to commit the felony motor vehicle homicide.

In *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), the Nebraska Supreme Court determined that there was no requirement of intention to kill in committing manslaughter and that the distinction between second degree murder and manslaughter upon a sudden quarrel was the presence or absence of an intention to kill.

Next, the Nebraska Supreme Court rejected a challenge based upon *Ring* to a plea-based conviction. In *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000), Jeffrey Burkhardt pled guilty to manslaughter and use of a firearm to commit a felony in exchange for the State's amending its charge of first degree murder to manslaughter and filing no further charges. The trial court accepted the plea and convicted Burkhardt of both charges. Burkhardt appealed his convictions, arguing that he could not be convicted of manslaughter and use of a weapon to commit a felony, based upon *State v. Ring, supra*. But the Supreme Court rejected such argument, stating that "[t]he voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional." *State v. Burkhardt*, 258 Neb. at 1053, 607 N.W.2d at 515.

Then, in 2002, the Supreme Court released its decision in *State v. Pruett, supra*. In that case, Stuart R. Pruett, planning "to mess with" his friend, loaded a gun with a "dummy round," and fired it; but the gun instead fired an actual round, which struck and killed Pruett's friend. 263 Neb. at 102, 638 N.W.2d at 813. A jury convicted Pruett of manslaughter by unintentionally causing another's death while committing the offense of reckless assault. After the Supreme Court discussed its decision in *State v. Kistenmacher*, 231 Neb. 318, 436 N.W.2d 168 (1989), regarding the term "recklessly" and the irrelevancy of subjective intent, the court held that reckless assault was not an intentional crime. The *Pruett* court then stated: "As a result, under *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), Pruett could not be convicted of using a weapon to commit a felony when the underlying felony was manslaughter due to unintentionally

causing [the victim's] death while in the commission of reckless assault." *State v. Pruett*, 263 Neb. 99, 106, 638 N.W.2d 809, 816 (2002). In so ruling, the Supreme Court specifically rejected the State's argument that Pruett could still be convicted of use of a weapon to commit a felony because he intentionally committed the crime of reckless assault. We note, incidentally, that the *Kistenmacher* court ultimately affirmed the defendant's convictions for manslaughter and use of a firearm to commit a felony.

With this background in place, we turn to the issues raised in Davenport's appeal.

Whether Davenport's Claims Are Procedurally Barred.

The district court stated in its order that Davenport "has not raised any issues which could not have been raised on direct appeal" and that "[t]here are no facts raised by [Davenport] leading to issues that could not have been raised on direct appeal or in the prior [m]otion for [p]ost-[c]onviction [r]elief." Although the district court did not explicitly state that Davenport's claims were procedurally barred, it appears that the court relied upon this concept.

[8,9] A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred when (1) the defendant was represented by a different attorney on direct appeal than at trial, (2) an ineffective assistance of trial counsel claim was not brought on direct appeal, and (3) the alleged deficiencies in trial counsel's performance were known to the defendant or apparent from the record. *Id.* When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). Because Davenport was represented by the public defender's office at trial and on direct appeal, his initial postconviction action was his first opportunity to raise claims of ineffective assistance of counsel.

[10] In Davenport's first postconviction action, he challenged the effectiveness of his counsel, but none of the areas of alleged ineffectiveness dealt with his convictions for both manslaughter and use of a weapon to commit a felony. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006). Although the decision in *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), had not been released at the time of Davenport's first postconviction action, as discussed above, the *Pruett* decision was driven in part by *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989). And *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), eliminated any requirement of intention to kill in committing manslaughter. The *Jones* opinion was released shortly after Davenport filed his initial brief on appeal, but prior to the filing of his reply brief and the issuance of our decision. He certainly could have raised any claims based upon *Jones* in his first postconviction action. Because Davenport could have raised in his first postconviction action—based upon the reasoning in *State v. Ring, supra*, and *State v. Jones, supra*—essentially the same issues he now raises based upon *State v. Pruett, supra*, his claims are procedurally barred.

Effect of Plain Error on Procedural Bar.

[11] In Davenport's brief, he does not seem to quarrel with a determination that his claims are procedurally barred. Rather, he urges that his convictions and sentences for both manslaughter and use of a weapon to commit a felony are contrary to controlling law in Nebraska and thus constitute plain error. Because of the alleged plain error, Davenport argues that the court erred in "procedurally defaulting" his claim. Brief for appellant at 16. In support of his argument, he cites to *State v. Burlison*, 255 Neb. at 193, 583 N.W.2d at 34 (quoting *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996), *overruled on other grounds, State v. Burlison, supra*), for the following proposition: "'[T]o use a procedural default or waiver as a means of ignoring a plain

error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless.'" This proposition originated in *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995), *overruled on other grounds, State v. Burlison, supra*, where the trial court omitted malice as a material element of second degree murder in its jury instruction and the State argued that the defendant waived his right to raise it in postconviction proceedings because the issue of the erroneous jury instruction was not raised at trial or on direct appeal. The Nebraska Supreme Court reasoned that the omission of the material element of malice from the second degree murder instruction made the defendant's conviction for second degree murder "constitutionally invalid, and postconviction relief is proper to rectify a constitutionally invalid conviction." *Id.* at 56, 532 N.W.2d at 622. The Nebraska Supreme Court similarly considered claims that would otherwise be procedurally barred in *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), and *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996), *overruled on other grounds, State v. Burlison, supra*. In our opinion, the instant case presents an analogous situation. Accordingly, despite what would otherwise be procedurally barred, in this instance we will consider whether Davenport's counsel failed to provide effective assistance.

Ineffective Assistance of Counsel.

Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), Davenport has the burden to show that (1) counsel performed deficiently—that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area—and (2) this deficient performance actually prejudiced him in making his defense. See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008) (construing *Strickland v. Washington, supra*). The prejudice prong requires that Davenport show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different. See *State v. Jackson, supra*. A reasonable probability is a probability sufficient to undermine

confidence in the outcome. *Id.* An appellate court can assess the prongs in either order. See *id.*

We rejected a postconviction claim similar to Davenport's in *State v. Drinkwalter*, 14 Neb. App. 944, 720 N.W.2d 415 (2006). But there is a key distinction. The convictions in *Drinkwalter* were the result of a plea bargain, which we recognized to be a "significant benefit" to the defendant. *Id.* at 954, 720 N.W.2d at 423. To demonstrate the benefit to the defendant, we noted:

> [I]n the first trial, he had been sentenced to death for the first degree murder conviction and 6 to 12 years' imprisonment on the use of a weapon to commit a felony conviction. After the Supreme Court reversed the decision and remanded the cause for a new trial, [the defendant] faced the charges of use of a weapon in the commission of a felony and first degree murder again, which could mean a death sentence again or life in prison without parole. He entered into negotiations for a plea agreement. The State offered a greatly reduced charge of manslaughter, a Class III felony, which is punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment, and the State retained the charge of using a weapon to commit a felony, a Class III felony.

Id. at 954-55, 720 N.W.2d at 423-24. Like in *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), but in contrast with *Drinkwalter*, Davenport was convicted following a trial; thus, no plea agreement was involved.

[12] As discussed above, the *Pruett* decision was released well after Davenport's trial, direct appeal, and first postconviction proceeding. Davenport's argument recognizes that under *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), there is no such crime as intentional manslaughter. He then cites to the holding in *Pruett* and states that his "[t]rial/[a]ppella[te] [c]ounsel failed to address this issue at trial or on direct appeal." Brief for appellant at 15-16. Although in *Pruett* the Supreme Court extended to manslaughter the rationale of *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), *Ring* did not involve manslaughter. And although the decision in *Ring* was available at the time of Davenport's trial, the *Jones* case had

not been decided. In other words, at the time of Davenport's convictions, it was not clear that manslaughter was a purely unintentional crime. The failure to anticipate a change in existing law does not constitute ineffective assistance of counsel. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). Accordingly, Davenport's trial counsel was not ineffective.

We also conclude that on direct appeal, Davenport's counsel was not ineffective. As we noted above, the *Jones* decision was released shortly after Davenport's counsel filed the appellate brief containing the various assignments of error. Nonetheless, the significance of the *Jones* decision in relation to the *Ring* case did not become manifest until the Supreme Court's decision in *Pruett*. The fact that the *Pruett* decision makes no mention of *Jones* in determining that Pruett's manslaughter conviction could not support the use of a weapon charge reinforces our conclusion that Davenport's counsel was not ineffective in not linking *Jones* to *Ring*. We cannot conclude that Davenport's appellate counsel failed to perform at least as well as a criminal lawyer with ordinary training and skill in the area.

Finally, the doctrine of ineffective assistance of counsel has no application to Davenport's first postconviction proceeding. Because Davenport had the same counsel at trial as on direct appeal, his initial postconviction proceeding was the first "real" opportunity to raise ineffectiveness of counsel. Although the district court provided Davenport with appointed counsel for the appeal in his first postconviction proceeding, there is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel. See *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

Denial of Evidentiary Hearing.

[13,14] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is

required. *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008). Although we considered Davenport's claims as though they were not procedurally barred, we agree that the records and files affirmatively show that Davenport was not entitled to postconviction relief. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

CONCLUSION

We considered Davenport's claim based upon *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), even though it would otherwise be procedurally barred. However, we conclude that he failed to show that his trial or appellate counsel performed deficiently. Because the record affirmatively shows that Davenport was not entitled to postconviction relief, we affirm the district court's denial, without holding an evidentiary hearing, of Davenport's second motion for postconviction relief.

AFFIRMED.

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V.
EDWIN E. ELDRIDGE, APPELLANT.

756 N.W.2d 167

Filed August 26, 2008. No. A-07-1154.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.
4. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned.

5. **Summary Judgment: Records: Appeal and Error.** The only issue which will be considered on appeal of a summary judgment in the absence of a bill of exceptions is the sufficiency of the pleadings to support the judgment.
6. **Records: Presumptions: Appeal and Error.** The absence of a bill of exceptions, being the only vehicle for bringing evidence to an appellate court, results in the presumption that the evidence sustains the trial court's findings that there was no genuine issue as to any material fact and that the case was correctly decided.
7. **Courts: Appeal and Error.** Despite a failure to file a statement of errors in the district court, a higher appellate court may still consider the errors actually considered by the district court.
8. **Federal Acts: Banks and Banking.** The National Bank Act authorizes national banks to issue, market, and service credit cards.

Appeal from the District Court for Dodge County, JOHN E. SAMSON, Judge, on appeal thereto from the County Court for Dodge County, KENNETH VAMPOLA, Judge. Judgment of District Court affirmed.

Edwin E. Eldridge, pro se.

Karl Von Oldenburg, of Brumbaugh & Quandahl, P.C., L.L.O., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

First National Bank of Omaha (the Bank) sued Edwin E. Eldridge for failing to make payments on a credit card it issued to Eldridge. The county court entered summary judgment in the Bank's favor and overruled Eldridge's motion to alter or vacate the judgment, and the district court affirmed. This appeal focuses on Eldridge's claim that a national bank may not "lend its credit." Because a bank is loaning money when it extends credit via a credit card, we affirm.

BACKGROUND

In December 2006, the Bank sued Eldridge in county court. The complaint alleged that the Bank, a national banking association, issued a credit card to Eldridge "whereas [Eldridge] was/were extended credit." The complaint further alleged that Eldridge used the credit card, that he went into default after failing to make payments on the charges, and that he owed

the Bank nearly $17,000. Eldridge filed an answer, denying the above allegations and raising as affirmative defenses that he never entered into a contract with the Bank, that he never received a credit card agreement from the Bank, that he was not informed of any terms or conditions of a contract, and that he never received any demand for payment.

The Bank moved for summary judgment, and the county court sustained the motion. The court later denied Eldridge's motion to alter or vacate the judgment.

Eldridge appealed to the district court. During the hearing, the court received the bill of exceptions from the county court's hearing on the motion to alter or vacate the judgment. The district court affirmed the county court's judgment for the Bank.

Eldridge timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Eldridge assigns seven errors. He alleges, consolidated and restated, that the district court erred in failing to find (1) that a bank has no power to lend its credit, (2) that the Bank did not produce any admissible evidence to prove it was allowed to lend its credit to Eldridge, (3) that the records custodian did not lay a proper foundation for authentication of a valid cardmember agreement existing between the Bank and Eldridge or for the statements in his affidavit, and (4) that the Bank's counsel made no attempt to state facts through a competent witness.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions. *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

ANALYSIS

[4-6] Due to the absence of a bill of exceptions from the summary judgment hearing, the only assignment of error that we reach is whether the court erred in failing to find that a national bank has no power to lend its credit. The transcript contains the affidavit of a records custodian for the Bank and Eldridge's affidavit. However, our record contains no bill of exceptions from the hearing on the motion for summary judgment. It is incumbent upon the party appealing to present a record which supports the errors assigned. *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998). The only issue which will be considered on appeal of a summary judgment in the absence of a bill of exceptions is the sufficiency of the pleadings to support the judgment. *Id.* The absence of a bill of exceptions, being the only vehicle for bringing evidence to an appellate court, results in the presumption that the evidence sustains the trial court's findings that there was no genuine issue as to any material fact and that the case was correctly decided. *Id.*

[7] We may consider this assignment of error despite the absence in our record of the statement of errors required by Neb. Ct. R. § 6-1452(A)(7) on the appeal to the district court. Despite a failure to file a statement of errors in the district court, a higher appellate court may still consider the errors actually considered by the district court. See *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997). It is clear from the district court's statements and judgment on appeal that Eldridge filed a statement of errors and that he raised the issue of a bank lending its credit. We now turn to the only issue properly before us.

In support of Eldridge's argument that the Bank may not lend its credit, he cites "Title 12 U.S.C. Section 24, Paragraph 75," brief for appellant at 7; quotes several older federal cases stating that a national bank may not lend its credit; and directs us to three old cases contained in the first series of the Southeastern

Reporter. The authority cited by Eldridge does not address a national bank's ability to issue credit cards, and the cases are simply not on point. See, e.g., *Federal Intermediate Credit Bank v. L'Herisson*, 33 F.2d 841 (8th Cir. 1929); *Farmers' & Miners' Bank v. Bluefield Nat. Bank*, 11 F.2d 83 (4th Cir. 1926); *Merchants' Bank of Valdosta v. Baird*, 160 F. 642 (8th Cir. 1908); *Bowen v. Needles Nat. Bank*, 94 F. 925 (9th Cir. 1899); *National Bank of Commerce v. Atkinson*, 55 F. 465 (C.C.D. Kan. 1893). Although we conclude below that issuance of credit cards does not constitute lending of a bank's credit, we note in passing that current statutory and regulatory authority does permit a national bank to lend its credit under certain circumstances. See 12 C.F.R. § 7.1017(a) (2008).

[8] "[T]he [National Bank Act] authorizes national banks to issue, market, and service credit cards." *Capital One Bank (USA), N.A. v. McGraw*, 563 F. Supp. 2d 613, 617 (S.D. W. Va. 2008). A national banking association has the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking" and may "loan[] money on personal security." 12 U.S.C. § 24 (2000). A national bank may make loans or extensions of credit. 12 C.F.R. § 32.1(2) (2008). It may "make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate." 12 C.F.R. § 7.4008(a) (2008).

Although the issue is determined by federal law, we observe that the laws governing banks chartered by the State of Nebraska are consistent with the federal law on this issue. The Nebraska Banking Act defines "[m]aking loans" to include "advances or credits that are initiated by means of credit card or other transaction card," Neb. Rev. Stat. § 8-101(11) (Cum. Supp. 2006), and defines a "[p]ersonal loan" to "include loans or advances initiated by credit card or other type of transaction card," Neb. Rev. Stat. § 8-815(5) (Cum. Supp. 2006). Banks are in the business of loaning money and extending credit; issuing and servicing credit cards is just another method of carrying out its business.

The Bank contends that by issuing credit cards to consumers, the Bank is not lending its credit, but, rather, loaning its money.

We agree. When a consumer uses a credit card, the consumer is deferring payment and the issuer pays for the purchases on the consumer's behalf. In return, the consumer is obligated to repay the money loaned and may have to pay interest. When a bank makes a loan, it uses funds deposited by other customers. When the Bank initially pays for the consumer's credit card purchases, it is not lending its credit. Rather, the Bank is extending credit using money deposited by its customers. Eldridge's assignment of error lacks merit.

CONCLUSION

We conclude that the district court did not err in affirming the county court's judgment in favor of the Bank and in finding no error in the county court's denial of Eldridge's motion to alter or vacate.

AFFIRMED.

WILLIAM E. MORGAN, JR., A MINOR, BY AND THROUGH HIS PARENT AND NEXT FRIEND, WILLIAM E. MORGAN, SR., AND WILLIAM E. MORGAN, SR., INDIVIDUALLY, APPELLANTS, V. MOHAN MYSORE, M.D., AND CHILDREN'S MEMORIAL HOSPITAL, A NEBRASKA CORPORATION, APPELLEES.

756 N.W.2d 290

Filed September 2, 2008. No. A-06-1326.

1. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
3. **Rebuttal Evidence.** It is within the trial court's discretion whether to allow rebuttal evidence.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
5. **Trial: Witnesses: Evidence.** The holding in *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), regarding a party's changing his

or her testimony concerning the material facts on a vital issue applies only when there are two versions of the pertinent story told under oath.

6. **Trial: Rebuttal Evidence.** The general rule is that rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced by the adverse party; it is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case in chief or should have been introduced during the case in chief.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., L.L.O., for appellants.

Patrick G. Vipond and Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellees.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

William E. Morgan, Sr., individually and as the parent and next friend of William E. Morgan, Jr. (Billy), brought a medical malpractice action against Mohan Mysore, M.D., and Children's Memorial Hospital (CMH) arising out of the care and treatment Billy received during his hospitalization at CMH on and after July 5, 2002. A jury returned a verdict in favor of Mysore and CMH. Based on the analysis that follows, we affirm.

BACKGROUND

On July 5, 2002, Billy, who was 17 years of age at the time, was admitted to the intensive care unit at CMH at around 10 a.m. Billy had been transferred to CMH from the emergency department of another hospital where he was seen earlier that morning for vomiting and decreased level of consciousness. Billy's blood glucose level in the emergency room was over 1,400, with the normal range being 70 to 110. Billy had been an insulin-dependent diabetic since age 7. He had previously been hospitalized twice as a result of his diabetes, once at the time of diagnosis and once several years before his admission to CMH for reeducation.

Mysore was the doctor or intensivist on duty in the intensive care unit at CMH when Billy was admitted, and he assumed responsibility for Billy's care. After examining Billy, Mysore concluded that Billy was suffering from diabetic ketoacidosis (DKA) and began treating him for his symptoms. DKA is a potentially life-threatening complication of insulin-dependent diabetes where the person becomes progressively dehydrated, has low insulin levels, and develops high blood glucose levels. DKA can affect multiple organs of the body. Mysore attributed the cause of Billy's DKA to Billy's noncompliance with his insulin regimen. There are three other recognized causes of DKA in diabetics in addition to poor insulin management, one of which is infection.

As the day progressed, Billy's glucose levels decreased, indicating that the DKA was being appropriately treated. At around 8 p.m., Billy's nurse noted that Billy appeared to be weak in his lower extremities. At around 10 p.m., the nurse noted that she could not detect any movement in Billy's lower extremities. The nurse's notes indicate that she reported her finding to Mysore and a resident physician working with Mysore, who then examined Billy. At 10 p.m., Billy's condition significantly deteriorated. His mental condition was such that he was unable to communicate and unable to cooperate with an examination. His heart rate increased, his blood pressure decreased, and he developed a high fever. He also had massive abdominal distension. Mysore and the staff at CMH spent the next several hours trying to stabilize Billy's critical condition.

By 6 a.m. on July 6, 2002, Billy's mental alertness had improved. He was able to follow commands and cooperate with those examining him. It was confirmed at that time that Billy had lost movement and sensation in his lower extremities. A pediatric neurology consult was obtained and MRI's of his brain and spine were performed, at which time it was discovered that a spinal epidural abscess was compressing the spinal cord. A spinal epidural abscess is an infectious process that occurs in and around the spinal column. Billy was taken to surgery later that day for spinal cord exploration and decompression. However, Billy has never regained use of his legs and is paralyzed from the chest down.

On November 8, 2002, Morgan filed an action against Mysore and CMH (collectively appellees) alleging that they were "negligent in failing to follow standard protocol, policies and procedures for assessment and treatment of Billy's condition." In January 2003, Morgan served interrogatories and requests for production of documents on appellees. In February, appellees provided Morgan with answers to interrogatories and responses to requests for production of documents. Morgan's counsel took Mysore's deposition on April 7, 2003. In December 2003 or January 2004, Mysore prepared a narrative summary of the events that transpired on July 5 and 6, 2002.

In February 2005, Morgan requested copies of all documents reviewed by appellees' experts. A few days later, appellees notified Morgan that they would send copies of the documents reviewed by their experts. Subsequently, the issue was addressed by letters between the parties dated March 16, 2005, July 6, 2005, August 24, 2005, and September 27, 2005. On October 3, in anticipation of Morgan's taking the deposition of one of appellees' expert witnesses, appellees provided Morgan with a list of documents the expert reviewed. The list included "Narrative of Dr. Mysore." On October 24, Morgan requested copies of documents reviewed by appellees' experts that had not yet been turned over to Morgan, including Mysore's narrative. On November 4, Morgan received a copy of Mysore's narrative. At no time did appellees provide any supplemental responses to Morgan's original request for production of documents, nor did they provide any supplemental responses to Morgan's interrogatories.

On November 10, 2005, Morgan filed a motion for sanctions alleging that Mysore's narrative contained information that was inconsistent with that contained in CMH's medical records and Mysore's deposition testimony. The motion alleged that as a result of the inconsistent information in Mysore's narrative, Morgan may need to provide the narrative to his experts to see if it changes the experts' opinions, redepose Mysore regarding the narrative, and depose additional witnesses. The motion stated that the above actions would not be necessary but for appellees' failure to timely comply with Morgan's requests for documents, including Mysore's narrative, and appellees' failure

to supplement their responses to Morgan's discovery requests, which the motion alleged are violations of Nebraska's discovery rules. See Neb. Ct. R. Disc. § 6-326(e)(2)(B). Following a hearing on Morgan's motion for sanctions, the court overruled the motion, finding that Mysore did not change his testimony in his narrative, but, rather, explained his actions, which were not asked for by Morgan's counsel at Mysore's deposition. Morgan filed a motion to continue the trial date to allow him time to conduct further discovery. The trial court granted the motion.

Appellees filed a motion to limit further discovery, and a hearing was held on the motion. Following the hearing, the trial court entered an order setting forth specific restrictions and deadlines for additional discovery. The order allowed Morgan to redepose Mysore and allowed Morgan to submit the narrative and redeposition to his experts to supplement their opinions in response to additional information obtained through Mysore's narrative, redeposition, and other additional discovery. The order also allowed Morgan to designate additional fact witnesses.

Another hearing was subsequently held pursuant to a motion by appellees to limit the scope of Mysore's second deposition. Morgan presented a list of 10 areas he wanted to explore during Mysore's second deposition. The trial court denied some of the requested areas of inquiry and allowed others. The second deposition of Mysore was taken on April 6, 2006.

Trial was held from July 12 to 24, 2006. Morgan tried to prove that appellees were negligent in failing to timely diagnose and treat Billy's spinal epidural abscess, which led to paralysis in Billy's lower extremities. Appellees tried to show that Billy was irreversibly paralyzed by 10 p.m. on July 5, 2002, giving them only 12 hours to diagnose and treat a rare condition, when Billy's signs and symptoms were reasonably explained by his DKA. Appellees contended that during these 12 hours, Billy was critically ill and medically unstable and appellees were trying to stabilize Billy's condition and save his life. Following trial, the jury returned a verdict in favor of appellees.

ASSIGNMENTS OF ERROR

Morgan assigns, restated, that the trial court erred in (1) failing to apply and enforce the Nebraska discovery rules, (2) failing

to instruct the jury that portions of Mysore's testimony should be disregarded as a matter of law, (3) failing to give two other jury instructions that Morgan proffered, and (4) not allowing him to present rebuttal evidence.

STANDARD OF REVIEW

[1] Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002); *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

[2] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Higginbotham v. Sukup*, 15 Neb. App. 821, 737 N.W.2d 910 (2007).

[3,4] It is within the trial court's discretion whether to allow rebuttal evidence. See *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

ANALYSIS

Trial Court's Rulings Regarding Discovery.

Morgan first argues that the trial court failed to apply and enforce the discovery rules, thereby denying Morgan a fair trial. Morgan alleges that the trial court abused its discretion by overruling the motion for sanctions and in limiting further discovery when appellees failed to comply with the rules of discovery by not disclosing the narrative earlier than they did.

Morgan contends that throughout the discovery process, Morgan requested information from appellees regarding the medical records; copies of all records prepared by appellees, including Mysore; and all documents provided to their experts. Morgan further contends that after all discovery had been completed, and only 3 weeks before the case was to go to trial, appellees provided Morgan with a copy of Mysore's narrative. Morgan contends that appellees' failure to disclose the narrative

and provide him with a copy at an earlier date was a violation of appellees' duty to supplement their discovery responses pursuant to § 6-326(e)(2)(B) and a violation of § 6-326(b)(4)(A)(i), which requires a party to divulge the facts upon which an expert is expected to testify and the grounds for his opinions. Based on appellees' actions during the discovery process, Morgan argues that the trial court should have granted the motion for sanctions and should not have limited further discovery, specifically Mysore's second deposition, to the extent it did.

Although the trial court overruled Morgan's motion for sanctions, the trial court subsequently granted Morgan's motion for a continuance, allowing Morgan additional time to conduct discovery. The trial court allowed Morgan to redepose Mysore, which he did; allowed Morgan to submit Mysore's narrative and redeposition to Morgan's experts for review and analysis; and allowed him to designate additional factual witnesses. Therefore, Morgan was able to question Mysore about alleged inconsistencies in his narrative and submit this information to his experts to see if it changed their opinions. In addition, the fact that the narrative existed had been disclosed to Morgan prior to Morgan's taking the depositions of appellees' expert witnesses in a list setting forth the material that the experts had reviewed.

In regard to the court's limits on further discovery, the trial court did not allow Morgan to explore all the areas he requested in his redeposing of Mysore, but it did grant some of his requests. The court's order discussed each area requested by Morgan and explained why it was or was not allowing Morgan to explore each area. One of the main areas of alleged inconsistency in Mysore's narrative was Mysore's account of his actions between 8 and 10 p.m. on July 5, 2002. The court allowed Morgan to explore this area, specifically ordering that Morgan "may inquire of . . . Mysore as to what [he] was told by the nurse(s) at 8:00 p.m. on July 5, 2002, and what his activities were and where he was from that time until approximately 2:00 a.m. July 6, 2002." Assuming without deciding that appellees violated the discovery rules, Morgan was able to prepare for trial without surprise. He was allowed to clear up inconsistencies before trial, and he was allowed time before trial to find out if any of his experts' opinions changed as a result of the information in Mysore's

narrative. Morgan suffered no prejudice as a result of the court's rulings. Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002); *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999). We determine that the trial court did not abuse its discretion in overruling Morgan's motion for sanctions or in the limits it placed on further discovery.

Momsen *Instruction.*

As previously discussed, Morgan contends that Mysore's narrative contains testimony that is inconsistent with that given in his initial deposition. He therefore argues that the trial court erred in failing to instruct the jury that parts of Mysore's testimony were discredited as a matter of law. Specifically, Morgan contends that any information within the narrative that relates to the timeframe between 8 and 10 p.m. was a significant, material change from Mysore's deposition. Morgan proposed such an instruction to the trial court, which provided:

> The Court has determined that . . . Mysore's testimony regarding whether he was notified by [the nurse] of the change in [Billy's] neurological status at 8:00 p.m., and whether he was in [Billy's] room between 8:00 p.m. and 10:00 p.m., is discredited as a matter of law.
>
> Therefore, you must accept as true . . . Mysore's original deposition testimony that he does not recall whether the [n]urse told him about her finding, at 8:00 p.m., that Billy . . . had leg weakness, and that [Billy's] temperature had gone up. You must also accept as true . . . Mysore's original deposition testimony that he did not see Billy . . . at 8:00 p.m., and that he did not see Billy . . . until called into the room at 10:00 p.m.

The trial court refused to give the instruction.

[5] Morgan relies on *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), which held that where a party, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded. In *Momsen*, the change in testimony occurred during

the time between a defendant's deposition and his testimony at trial, which were obviously both done under oath. In the present case, Mysore's narrative was not given under oath and does not constitute testimony. *Momsen* is clear that the doctrine applies when there are two versions of the pertinent story told under oath. That is not the case here. As a result, *Momsen* is inapplicable to the facts of this case and the trial court did not err in refusing to give a *Momsen* instruction.

Other Jury Instructions.

Morgan also assigns that the trial court erred in failing to give two other jury instructions that he proffered. The first jury instruction Morgan proposed that the trial court refused to give explained the concept of a reliable "differential diagnosis." Morgan contends that the jury was presented with testimony regarding the concept of differential diagnosis and with whether Mysore conducted a proper differential diagnosis when treating Billy. Morgan's proposed instruction cites *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006), and *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004), as the sources of his instruction. These cases involved a *Daubert* hearing that took place before trial to determine whether a medical expert's opinion regarding the cause of a party's condition or injuries was relevant and reliable and thus, admissible. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under the *Daubert* framework, for an expert's opinion to be admissible, the expert must have conducted a reliable differential diagnosis, which involves compiling a list of potential causes of a patient's symptoms and then eliminating potential causes based on a continuing examination of the evidence to reach the most likely cause of the patient's condition. Morgan's instruction sets forth how a differential diagnosis must be conducted to be considered reliable for purposes of a *Daubert* hearing. The instant case does not involve a *Daubert* analysis, and therefore, the instruction relates to a differential diagnosis process that is not relevant to this case. We conclude that the instruction proposed by Morgan is inapplicable and that the trial court did not err in refusing to give such instruction.

The second instruction Morgan contends the trial court erred in failing to give is a nondelegable duty instruction, which stated in part:

> An intensivist, working in a pediatric intensive care unit, has the duty to be aware of all reasonably available medical information significant to the health of his patient during the time that he is providing medical care to his patient. This is a non-delegable duty. That means that the intensivist, by assigning to another the duty to read such medical information, is not relieved from liability arising from this duty if it is negligently performed.

No one disputes that Mysore was the doctor or intensivist in charge of Billy's care on July 5, 2002. Based on the record before us, Morgan did not present evidence that Mysore delegated or assigned duties in regard to Billy's available medical information and appellees did not contend that Mysore was not required to be aware of all the medical information. We conclude that the tendered instruction was not warranted by the evidence and that the trial court did not err in failing to give Morgan's nondelegable duty instruction.

Rebuttal Evidence.

Finally, Morgan contends that the trial court erred in not allowing him to present rebuttal evidence. Morgan sought to offer the testimony of Dr. Theresa Hatcher on rebuttal. Appellees objected on the basis of improper rebuttal evidence, and the trial court sustained the objection. Hatcher stated, in an offer of proof, that she had reviewed two entries in CMH's medical records written by a pediatric surgeon who examined Billy around 11 or 11:30 p.m. on July 5, 2002. According to Hatcher, the pediatric surgeon's notes indicate that he performed a rectal examination on Billy and the result was normal. If allowed to testify, Hatcher would have stated that she would not expect a patient with paralysis below his diaphragm to have a rectal examination with normal results and that she would be able to note the paralysis upon doing the rectal examination.

Morgan contends that the time that Billy became paralyzed was an important issue in this case and that Hatcher's testimony would have proved that Billy's paralysis had not occurred by

10 p.m. on July 5, 2002, as appellees tried to prove in their case in chief. Morgan also believes that the testimony of Hatcher should have been allowed to refute Mysore's testimony that he did not know whether the result of a rectal examination of Billy in his current state of paralysis would be abnormal.

[6] The general rule is that rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced by the adverse party; it is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case in chief or should have been introduced during the case in chief. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996).

Hatcher's testimony does not explain, disprove, or counteract evidence introduced by appellees. Appellees did not introduce evidence regarding the significance of a rectal examination in a patient such as Billy. The result of the rectal examination performed by the pediatric surgeon was not evidence introduced by appellees. The pediatric surgeon's notes from his examination of Billy were part of Billy's medical records from CMH, which Morgan had before trial. If Morgan wanted to point out that a rectal examination with normal results in a patient indicates no paralysis, he could have called Hatcher for that very reason in his case in chief.

Further, Mysore's testimony that he did not know whether a rectal examination of Billy in his current state of paralysis would be abnormal was not introduced by appellees—rather, it was brought out by Morgan on cross-examination of Mysore.

Hatcher's testimony would have been proper evidence for Morgan's case in chief because it related directly to Morgan's principal allegation that the failure of appellees to timely diagnose and treat a spinal epidural abscess in Billy caused him to suffer permanent paralysis. Thus, Morgan sought to adduce evidence on rebuttal that simply reinforced the theory of the case he advanced in his case in chief. It is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case in chief or should have been introduced during the case in chief. *Westgate Rec. Assn., supra*. We conclude that the trial court did not abuse

its discretion in not allowing Hatcher's testimony to be used as rebuttal evidence. This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we find no error in the proceedings before the district court and therefore affirm its judgment in favor of appellees.

AFFIRMED.

SAND LIVESTOCK SYSTEMS, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, AND FURNAS COUNTY FARMS, A NEBRASKA GENERAL PARTNERSHIP FORMERLY KNOWN AS ENTERPRISE PARTNERS, APPELLEE, V. AMY SVOBODA ET AL., APPELLEES.

756 N.W.2d 299

Filed September 16, 2008. No. A-06-1441.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Final Orders: Appeal and Error.** A trial court's decision to certify a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is reviewed for an abuse of discretion.
3. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
4. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
5. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
6. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
7. **Final Orders: Appeal and Error.** Certification of a final judgment must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.

8. **Judges: Final Orders: Parties.** The power Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) confers upon the trial judge should only be used in the infrequent harsh case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.
9. **Courts: Final Orders.** When a trial court concludes that entry of judgment under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.
10. **Courts: Final Orders: Appeal and Error.** A trial court considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.
11. ____: ____: ____. As a starting point for considering certification of a final judgment, it is appropriate for the trial court to consider whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would ever have to decide the same issues more than once even if there were subsequent appeals.
12. **Claims: Courts: Appeal and Error.** The potential that claims remaining in the trial court could obviate claims in the appellate court is a consideration against immediate appealability.
13. **Libel and Slander: Words and Phrases.** Libel is defamation where the defamatory words are written or printed.
14. **Libel and Slander: Negligence.** A claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.
15. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
16. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
17. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
18. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

19. **Jury Instructions: Pleadings: Evidence.** A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
20. **Summary Judgment.** The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law.
21. **Actions: Proof.** In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to the plaintiff.
22. **Probable Cause: Words and Phrases.** Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty.
23. **Probable Cause: Evidence: Juries.** Whether facts and circumstances established by uncontradicted evidence amount to probable cause for a criminal prosecution is a question of law for the court, and not an issue of fact for the jury.
24. **Actions: Courts: Verdicts: Juries: Damages.** Under Neb. Rev. Stat. § 25-21,243(1) (Reissue 1995), a trial court must first determine as a matter of law whether the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. If the court determines that a substantial basis did exist, then the court should direct a verdict against the defendant who maintains a claim against such action. If the court determines that a substantial basis did not exist, then the jury (unless a jury is waived) should be instructed to determine whether the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights. In addition, the jury should decide the compensatory damages, if any, to be awarded under this portion of the statute.
25. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

John F. Recknor and Randall Wertz, of Recknor, Williams & Wertz, for appellant Sand Livestock Systems.

Clark J. Grant, of Grant & Grant, for appellants Sand and Cumberland.

John C. Brownrigg, Thomas J. Culhane, and Sara A. Lamme, of Erickson & Sederstrom, P.C., for appellee Furnas County Farms.

Charles F. Speer, of Speer Law Firm, P.A., Richard H. Middleton, Jr., of The Middleton Firm, and Patricia A. Knapp for appellees Svoboda, Hamilton, and Fortkamp.

Sean T. McAllister for amicus curiae SLAPP Resource Center.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Sand Livestock Systems, Inc. (Sand Livestock), Furnas County Farms (FCF), Charles W. Sand, Jr., and Timothy A. Cumberland filed suit in the district court for Keith County against Amy Svoboda, Char Hamilton, Duane Fortkamp, and Area Citizens for Resources and Environmental Concerns (ACRES), bringing actions for libel and false light invasion of privacy (defamation suit). Svoboda, Hamilton, and Fortkamp answered and brought a counterclaim against Sand Livestock, FCF, Sand, and Cumberland, alleging a violation of Neb. Rev. Stat. §§ 25-21,241 to 25-21,246 (Reissue 1995) (Nebraska's statutory provisions concerning strategic lawsuits against public participation, or "SLAPP's"). ACRES also brought a counterclaim. Following a jury trial in which ACRES did not participate, the jury found in favor of Svoboda, Hamilton, and Fortkamp on the libel and false light actions and awarded damages totaling $900,000 on their anti-SLAPP counterclaim.

Sand Livestock has appealed, and FCF, Sand, and Cumberland have joined in the appeal. Throughout this opinion, we have referred collectively to Sand Livestock, FCF, Sand, and Cumberland as "the Appellants" and to Svoboda, Hamilton, Fortkamp, and ACRES as "the Appellees." Because the jury instructions given by the district court allowed the jury to determine a question of law with respect to the counterclaim, we find plain error, and we reverse, and remand for a new trial on the counterclaim between Svoboda, Hamilton,

and Fortkamp and the Appellants. We affirm the portion of the judgment which found against the Appellants on the defamation suit.

BACKGROUND

Parties.

Sand Livestock is a Nebraska corporation in the business of constructing, among other things, hog confinement facilities. Sand Livestock has never owned any hogs or managed any swine operations. Sand and Cumberland are shareholders in Sand Livestock, and in 1999, Sand was the president of Sand Livestock.

FCF is a general partnership, which owns various swine operations. Sand and Cumberland are partners in FCF.

ACRES is an unincorporated organization of individuals in Hayes County, Nebraska, who were concerned about the environmental effects of having large hog lagoons located in that county. Hamilton and Fortkamp were the copresidents of ACRES and, as such, coordinated the group's activities and made certain decisions for the group. Svoboda is an attorney who was hired by ACRES to assist with local zoning matters and aid in preparing a public comment to a permit application received by the Nebraska Department of Environmental Quality (DEQ).

Dispute.

The dispute at issue in this appeal arose following an application by FCF and Sand Livestock for a permit to construct a livestock waste control facility in Hayes County. At the time of FCF and Sand Livestock's application, Nebraska's Livestock Waste Management Act required the DEQ to issue a notice providing an opportunity for any interested person to submit written comments on any application submitted to the DEQ pursuant to Neb. Rev. Stat. § 54-2409 (Reissue 1998) (since repealed). See Neb. Rev. Stat. § 54-2411 (Reissue 1998) (since transferred in part to Neb. Rev. Stat. § 54-2433 (Cum. Supp. 2006)). The DEQ issued notice of the public comment period in this case by publishing an advertisement in the Hayes County newspaper.

In response to the notice, Hamilton, on behalf of ACRES, contacted Svoboda to investigate and help prepare a public comment letter to the DEQ (the DEQ letter). The DEQ letter consisted of a cover letter, dated November 10, 2000; "Part 1," the technical comments prepared by an environmental services firm; and "Part 2," the comments prepared by Svoboda that are at issue in this case. The cover letter to the DEQ letter bears Hamilton's and Fortkamp's signatures as copresidents for ACRES. The cover letter is addressed to the director of the DEQ and states, "Please find enclosed our comments on the [FCF] (Sand Livestock . . .) Application for a Permit to Construct a Livestock Waste Control Facility . . . in Hayes County, Nebraska." The cover letter goes on to state that the second part of the comments "contains our comments relating to [FCF's] suitability to be a permit holder prepared by our attorney . . . Svoboda." In the interest of brevity, we have not reproduced the contents of Part 2 of the DEQ letter in this opinion, although we have reviewed that portion of the letter carefully in conjunction with our review of the record as a whole and the applicable assignments of error.

On November 29, 2000, a demand for a retraction of Part 2 of the DEQ letter was sent by counsel on behalf of FCF, Sand, and Cumberland to Fortkamp, Hamilton, and Svoboda. Svoboda replied in an undated letter, in which she stated,

> [I]f there are aspects of our statements that could be better stated we would be happy to correct them if you could inform us specifically of them. Or if you would like to set up a meeting with us and [the] DEQ to "correct the record" we would be happy to attend.

FCF and Sand Livestock received the permit from the DEQ, but did not build the facility in Hayes County due to zoning regulations that had been implemented in the meantime.

Initial Pleadings.

The Appellants filed an amended petition in this case on March 6, 2001, bringing actions against the Appellees for libel and false light invasion of privacy arising out of allegedly false and defamatory statements contained in the DEQ letter

(the defamation suit). We note that the false light action was brought by Sand and Cumberland only.

On April 9, 2001, Svoboda, Hamilton, and Fortkamp answered and asserted a counterclaim based upon an alleged violation of Nebraska's anti-SLAPP statutes (the anti-SLAPP counterclaim). Specifically, Svoboda, Hamilton, and Fortkamp asserted that the defamation suit was filed for the purpose of harassing, intimidating, punishing, and maliciously inhibiting the free exercise of the Appellees' right to petition. Svoboda, Hamilton, and Fortkamp asked for attorney fees and costs pursuant to § 25-21,243, as well as compensatory damages.

The record shows that a counterclaim was also filed by ACRES but does not reveal the exact nature of that counterclaim. We have searched the voluminous transcript from both the first appeal of this case and the present appeal and have been unable to locate the actual counterclaim filed by ACRES.

Summary Judgment Proceedings.

The parties filed various motions for summary judgment and partial summary judgment. In an order filed September 14, 2005, the district court denied the various motions as to the defamation suit and the anti-SLAPP counterclaim, finding that genuine issues of material fact remained for trial on all claims.

Dismissal of ACRES.

On October 19, 2005, the Appellants filed offers to confess judgment in favor of the Appellees. Just prior to the start of trial on October 25, the Appellants agreed to dismiss ACRES as a party defendant. ACRES' attorney advised the court that ACRES had accepted the Appellants' offer to confess judgment. One of the Appellants' attorneys advised the court that the Appellants' offer was contingent upon acceptance by all of the Appellees. The court agreed that "this issue will be litigated separately at a later time" and excused ACRES' attorney from participating in the trial proceedings.

Trial.

A jury trial was held on the litigation between the Appellants and Svoboda, Hamilton, and Fortkamp on October 25 through

28, 2005. On October 28, the jury returned verdicts on the defamation suit in favor of Svoboda, Hamilton, and Fortkamp against each of the Appellants. The jury also found in favor of Svoboda, Hamilton, and Fortkamp on their anti-SLAPP counterclaim, awarding damages totaling $900,000 plus court costs and attorney fees (damages of $75,000 to each participating defendant against each Appellant). On November 2, the district court entered judgment in accordance with the jury's verdicts.

Posttrial Proceedings.

The Appellants filed various posttrial motions, including several motions for new trial. The district court entered an order on December 16, 2005, ruling on the pending posttrial motions. With regard to the Appellants' motions, the court reviewed the amount of damages awarded against the Appellants on the anti-SLAPP counterclaim and stated, "The jury obviously determined that [Svoboda, Hamilton, and Fortkamp each] suffered a sizeable and equal amount of damage." The court stated further:

> Although I agree with counsel for the [Appellants] that there was a dearth of evidence which was presented to the jury as to any economic damages which [Svoboda, Hamilton, and Fortkamp] sustained, there was substantial evidence adduced through the testimony of [Svoboda, Hamilton, and Fortkamp] and members of their families that they had suffered significant mental suffering, humiliation, and injury to reputation or character as a proximate result of the actions of the [Appellants]. Based upon my prior experience in numerous cases wherein juries have awarded substantial damages for pain, suffering and/or emotional distress, I cannot reasonably conclude that the verdict of the jury in this case shocks my conscience. Similarly, I cannot rationally ascertain the extent that any verdict should be reduced even if I were to believe that it was excessive. Therefore, I cannot properly require a remittitur.

The court then denied each of the Appellants' posttrial motions.

First Appeal.

On January 12, 2006, Sand Livestock filed a notice of its intention to appeal the district court's order of December 16, 2005, which appeal was designated as case No. A-06-082. Notices of appeal were also filed by FCF, Sand, and Cumberland.

On January 17, 2006, ACRES filed a motion for entry of judgment. On January 18, the district court on its own motion entered an order staying all proceedings below until further order, including a hearing on ACRES' motion for entry of judgment.

Because ACRES' counterclaim was still unresolved at the time of the appeal in case No. A-06-082, this court granted ACRES' motion for summary dismissal, citing Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006). The mandate summarily dismissing the appeal was issued on July 25, 2006.

Proceedings on Remand.

On November 20, 2006, the district court entered an order ruling on various pending matters, including ACRES' motion for entry of judgment. As to ACRES' motion, the district court found that there was never a meeting of the minds between counsel for the Appellants and counsel for the Appellees. The court found that the only reasonable interpretation of the offers to confess judgment was that they were lump-sum offers by the Appellants in the sums of $25,000 and $20,000, which were intended to represent a complete settlement with all the Appellees, and that they could not be accepted by a single appellee. Accordingly, the court denied ACRES' motion and indicated that, since the case was still at issue between the Appellants and ACRES on the counterclaim filed by ACRES, a pretrial conference should be scheduled.

The district court then recognized that there were multiple parties involved in the litigation and, pursuant to § 25-1315(1), expressly determined that there was no just reason to delay the entry of a final judgment in the litigation between the Appellants and Svoboda, Hamilton, and Fortkamp. The court stated:

> Therefore, the jury verdicts rendered in this case on October 28, 2005, together with all other orders involving the [Appellants] and . . . Svoboda, Hamilton and Fortkamp, including but not limited to the [December 16, 2005, order], as well as this [order], shall be deemed final and subject to appeal, notwithstanding the fact that the claims or the rights and liabilities of the [Appellants] and . . . ACRES, remain for future determination.

Second Appeal.

On December 19, 2006, Sand Livestock filed notice of its intent to appeal the district court's order of November 20, 2006, which appeal has been designated as case No. A-06-1441. A second notice of appeal was filed by FCF, and FCF has filed a brief as "Appellee and Cross-Appellant." However, FCF has not filed a cross-appeal in this matter. See Neb. Ct. R. App. P. §§ 2-101(C), 2-101(E), and 2-109(D)(4). FCF is therefore technically an appellee only. Sand and Cumberland joined in the appeal filed by Sand Livestock and the "cross-appeal" filed by FCF.

On June 29, 2007, the Nebraska Supreme Court decided *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), setting forth more stringent requirements for certification of final judgments pursuant to § 25-1315(1).

ACRES filed a stipulated motion to withdraw from the appeal in case No. A-06-1441 on July 9, 2007, stating that it had been dismissed as a defendant from the case prior to trial, that it had settled its counterclaims with the Appellants, and that an order dismissing its counterclaims was entered by the district court on May 25, 2007. The stipulation was allowed, and the appeal was dismissed as to ACRES only.

This court issued an order to show cause on September 27, 2007, asking the parties why the matter should not be dismissed under *Cerny v. Todco Barricade Co., supra*. On October 10, FCF responded to the order by way of a supplemental brief, in which all other remaining parties have joined, urging this court to retain jurisdiction. On October 29, we issued a minute entry, allowing the appeal to proceed but reserving the issue of jurisdiction for determination after oral argument.

ASSIGNMENTS OF ERROR

Because of the similarities between and the overlap of the errors assigned by Sand Livestock on appeal and FCF in its brief on "cross-appeal," which assignments of error are joined in by Sand and Cumberland, we have reordered and restated those errors as follows: The Appellants assert (1) that the jury's verdict against the Appellants in the defamation suit was not supported by the evidence, (2) that the district court committed plain error in instructing the jury concerning the anti-SLAPP counterclaim and in submitting to the jury any issues associated with the counterclaim, (3) that the evidence at trial was insufficient to support the jury's award of damages on the anti-SLAPP counterclaim, (4) that the district court erred in not granting the Appellants' motion for new trial, and (5) that the district court erred in not granting the Appellants' motion for remittitur.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Cerny v. Todco Barricade Co., supra*. A trial court's decision to certify a final judgment pursuant to § 25-1315(1) is reviewed for an abuse of discretion. *Cerny v. Todco Barricade Co., supra.*

[3,4] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006). A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Id.*

[5] Whether a jury instruction given by a trial court is correct is a question of law. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

Jurisdiction.

[6] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). In this case, we must first consider, as did the Nebraska Supreme Court in *Cerny* and this court in *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007), whether the district court abused its discretion in making a certification under § 25-1315(1). The district court did not explain the reasoning for its § 25-1315(1) determination, which of course was made prior to *Cerny*, and we again take this opportunity to encourage trial court judges to follow the direction in *Cerny* to make specific findings rather than just reciting the statutory language. In this case, as we did in *Murphy*, we examine the facts in light of the factors summarized in *Cerny*.

[7-9] The *Cerny* court determined that certification of a final judgment must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. *Cerny v. Todco Barricade Co., supra*. The power § 25-1315(1) confers upon the trial judge should only be used in the infrequent harsh case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case. *Cerny v. Todco Barricade Co., supra.* When a trial court concludes that entry of judgment under § 25-1315(1) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order. *Cerny v. Todco Barricade Co., supra.*

[10-12] The *Cerny* court stated that a trial court considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence

or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. *Cerny v. Todco Barricade Co., supra*. As a starting point for considering certification of a final judgment, it is appropriate for the trial court to consider whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would ever have to decide the same issues more than once even if there were subsequent appeals. *Id.* The potential that claims remaining in the trial court could obviate claims in the appellate court is a consideration against immediate appealability. *Id.*

In its supplemental brief, FCF argues that *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), and *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007), do not compel dismissal of the present appeal, but, rather, allow the reviewing court to examine the facts in light of the various factors cited, which is what FCF is urging us to do. FCF suggests that this case qualifies as the "'"unusual case" in which potential hardship to the litigants outweighs the strong policy against piecemeal appeals.'" Supplemental brief for appellee Furnas County Farms at 11. FCF distinguishes this case factually from *Cerny* and our subsequent case of *Murphy*, which both involved certification after orders granting summary judgment. Specifically, *Cerny* involved a partial summary judgment against the plaintiffs on all but one of their claims, reserving the remaining claim for trial. *Murphy* involved the grant of summary judgment in favor of one defendant, but leaving the claim against the remaining defendant for later disposition.

FCF argues that in this case, all of the claims between all of the parties to this appeal were adjudicated by the judgment following the jury trial and nothing remains to be done in the district court that would affect the parties' rights and liabilities vis-a-vis one another. Because there is a full-blown trial record in this case, as opposed to summary judgment records as were

involved in *Cerny* and *Murphy*, FCF argues that there is no risk in this case that the trial court might wish to reconsider its dismissal of certain claims on the complete fact record developed at trial. FCF further argues that there is no conceivable way any further action by the trial court in connection with the ACRES issues, which were still pending at the time of the certification, could moot any of the issues on the merits that are raised in this appeal, and that conversely, there is nothing that the outcome of this appeal could do to affect the rights and liabilities between the appellants and ACRES. Finally, FCF argues that delaying this appeal further would work an unusual hardship on the parties, because the lawsuit was pending over 4 years at the time of trial, judgment was rendered in November 2005, and in November 2006, the district court correctly certified that the judgment was a final order for purposes of § 25-1315(1).

We are mindful that our review concerns whether the district court abused its discretion in making the certification in November 2006 based on the facts known to it at the time; however, we are also mindful of the fact that ACRES has since been dismissed as a defendant in the underlying litigation and that an order dismissing ACRES' counterclaim has been entered. We agree that *Cerny* and *Murphy* do not require automatic dismissal in the absence of detailed findings by the trial court and that in those cases, the appellate courts have reviewed the record to determine whether the trial court abused its discretion in certifying judgments as final under § 25-1315(1). We conclude that given the length of time the litigation had been pending and the fact that a full jury trial had been brought to conclusion regarding the issues between the Appellants and Svoboda, Hamilton, and Fortkamp, this is the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. See, *Cerny v. Todco Barricade Co., supra*; *Murphy v. Brown, supra*. Accordingly, the district court did not abuse its discretion in making the certification under § 25-1315(1), and we have jurisdiction to consider the merits of this appeal. Thus,

we first consider the Appellants' assignment of error relating to the defamation suit and then consider the assignments of error relating to the anti-SLAPP counterclaim.

Sufficiency of Evidence in Defamation Suit.

[13,14] The Appellants assert that the jury's verdict against them in the defamation suit was not supported by the evidence. The Appellants brought claims for libel and false light invasion of privacy. "Libel is defamation where the defamatory words are written or printed . . . ." 50 Am. Jur. 2d *Libel and Slander* § 9 at 379 (2006). A claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004). The elements of a false light claim are found in Neb. Rev. Stat. § 20-204 (Reissue 1997), which provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

We note that the jury was instructed that the false light claim applied to Sand and Cumberland only.

[15] It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006). In considering the defamation suit, the jury clearly credited and gave greater weight to the evidence presented by the Appellees. We have reviewed the vast amount of evidence presented at trial by the parties, although we do not set forth the details of that evidence here in the interest of brevity. In our review, we have

considered the evidence most favorably to the Appellees and have resolved evidential conflicts in their favor as we must. See *id*. Because the record reveals competent evidence upon which the jury could have found for the Appellees, the verdict is sufficient, and we cannot say that it was clearly wrong.

What Are SLAPP's?

Before proceeding to address the merits of the Appellants' remaining assignments of error on appeal, we first provide a brief background on the origin and nature of anti-SLAPP legislation and then a summary of Nebraska's anti-SLAPP statutes.

The following commentary provides a succinct statement as to the nature and conceptual background of SLAPP's:

> SLAPP is the acronym for "Strategic Lawsuits Against Public Policy," [which have been] described . . . in the literature as intimidation lawsuits against citizen advocates . . . . [I]t has become generally accepted that there is a large and growing constellation of lawsuits that are fashioned as traditional lawsuits for tortious misconduct but are in actuality thinly-disguised efforts to abuse the litigation process in order to silence citizen discussions on issues affecting the public well-being.
>
> The purpose of the SLAPP, it is asserted, is distinctly not to succeed on the merits, but to so intimidate the private citizen (or even the government official) that citizen activity ceases because the expense, risk and anxiety engendered by the process of litigating a SLAPP is too great. The SLAPP plaintiff does not intend—nor often succeed—on the merits, but achieves the intended result essentially by abusing the litigation process for an improper purpose or engaging in "frivolous" litigation.
>
> SLAPP-back procedures, actions and statutory actions arising out of state Public Participation or anti-SLAPP statutes seek to cure this abuse in addition to special procedural mechanisms developed by individual courts.
>
> SLAPPs are not simply matters of private injustices. United States Supreme Court decisional law . . . makes it explicitly clear that when such conduct exists, paramount public law issues of freedom to exercise First Amendment

> right of expression and right to petition the government for redress are directly involved.
>
> While many federal and state courts have now acknowledged SLAPPs and the need to combat them under federal and state constitutional principles, variations locally occur in the procedural mechanics and remedies applied to cure them.

22 C.O.A.2d 317, § 2 at 322 (2003). See, also, 2 Rodney A. Smolla, Law of Defamation § 9:107 (2d ed. 2008); California Anti-SLAPP Project, What are SLAPPs?, http://www.casp.net/slapps/mengen.html (last visited April 21, 2008).

Nebraska's statutory scheme concerning public petition and participation was enacted in 1994. See §§ 25-21,241 to 25-21,246. In enacting these sections, the Legislature determined that "[i]t is the policy of the state that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence." § 25-21,241(1). The Legislature further determined that "[t]he threat of [SLAPP's], personal liability, and burdensome litigation costs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights." § 25-21,241(3). The Legislature also determined that the purpose of §§ 25-21,241 to 25-21,246 is "to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speech, and association," among other things, and "to protect and encourage public participation in government," "to establish an efficient process for identification and adjudication of [SLAPP's]," and "to provide for costs, attorney's fees, and actual damages." § 25-21,241(4).

Nebraska limits coverage of its anti-SLAPP statutes by the identity of the "slapper." Nebraska defines an "[a]ction involving public petition and participation" as "an action, claim, cross-claim, or counterclaim for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on,

rule on, challenge, or oppose the application or permission." § 25-21,242(1). Other states limiting the protection of their anti-SLAPP statutes to situations where the "slapper" is an applicant or permittee seeking approval before a government agency include New York and Delaware. See, N.Y. Civ. Rights §§ 70-a and 76-a (McKinney Cum. Supp. 2008); N.Y.C.P.L.R. §§ 3211(g) and 3212(h) (McKinney 2005); Del. Code Ann. tit. 10, §§ 8136 to 8138 (1999).

The provision of Nebraska's anti-SLAPP statutes which is most relevant to our consideration in the present appeal is § 25-21,243(1). Section 25-21,243(1) details when a defendant may bring an anti-SLAPP counterclaim, and what damages may be recovered in such a counterclaim, and provides as follows:

> A defendant in an action involving public petition and participation may maintain an action, claim, cross-claim, or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action. Costs and attorney's fees may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. Other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights.

We also note §§ 25-21,245 and 25-21,246, which provide for expedited review of motions to dismiss and motions for summary judgment, respectively, in actions involving public petition and participation, which may be defeated upon a showing by the party responding to the motion that the original SLAPP action "has a substantial basis in law [fact and law in the case of a motion for summary judgment] or is supported by a substantial argument for an extension, modification, or reversal of existing law."

Submission of Counterclaim to Jury.

[16-19] The Appellants assert that the district court committed plain error in instructing the jury concerning the anti-SLAPP counterclaim and in submitting to the jury any issues associated with the counterclaim; however, the Appellants did not object to the jury instruction in question. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.* We have reviewed the jury instruction on the counterclaim for plain error, because the trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999). In our plain error review, we have considered the following questions raised by the Appellants in connection with the submission of the counterclaim to the jury: (1) whether in surviving the summary judgment motions directed at the defamation suit, the Appellants established a "substantial basis in fact and law" sufficient to defeat the counterclaim; (2) whether the court improperly instructed the jury on a question of law; and (3) in the event that the counterclaim involved a question of fact for the jury, whether the instruction given was proper.

We first consider the Appellants' argument that because the defamation suit survived a motion for summary judgment, it had a substantial basis in fact and law and thus the counterclaim should not have been submitted to the jury. We reject the Appellants' argument based upon our consideration of *Anderson Development Co. v. Tobias*, 116 P.3d 323 (Utah 2005), wherein the Utah Supreme Court considered this same question. The Utah anti-SLAPP statutes have a provision

similar to Nebraska's § 25-21,243, allowing a defendant in a SLAPP action to file a counterclaim for the recovery, among other things, of costs and attorney fees upon a demonstration that the SLAPP action "was commenced or continued without a substantial basis in fact and law." Utah Code Ann. § 78-58-105 (2002). In the *Anderson Development Co.* case, the plaintiff argued on appeal that its claim had a substantial basis in fact and law because the claim had survived a motion for summary judgment. The Utah Supreme Court disagreed, finding that meeting the summary judgment threshold was not the equivalent of demonstrating that the plaintiff's claim was supported by a substantial basis in fact and law. Specifically, the court stated:

> Because dismissal of a claim based on either a motion to dismiss or a motion for summary judgment denies the nonmoving party of the right to litigate his claim on the merits, the threshold for surviving such a motion is relatively low. *See Buckner v. Kennard*, 2004 UT 78, ¶ 9, 99 P.3d 842 ("Only if it is clear that the claimant is not entitled to relief under any state of facts that could be proven to support the claim should a motion to dismiss be granted."); *Staker v. Ainsworth*, 785 P.2d 417, 429 (Utah 1990) ("To successfully oppose a motion for summary judgment, it is not necessary for the party to prove its legal theory. Indeed, it only requires one sworn statement to dispute the claims on the other side of the controversy and create an issue of fact." (footnote omitted)). Meeting this threshold does not equate to a demonstration that the claims are supported by a *substantial* basis in fact and law. Accordingly, [the defendants] may properly pursue their [anti-SLAPP counterclaim] despite the fact that [the plaintiff's] claim against them for intentional interference with economic relations survived a motion to dismiss and motions for summary judgment.

116 P.3d at 337.

[20] In Nebraska, the overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that

there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). As did the *Anderson Development Co.* court, we conclude that meeting the summary judgment threshold in this case was not the equivalent of demonstrating that the defamation suit was supported by a substantial basis in fact and law. In ruling on the motions for summary judgment, the district court simply found genuine issues of material fact as to both the defamation suit and the counterclaim. We note that none of the motions for summary judgment in this case sought summary judgment under § 25-21,246 (the anti-SLAPP summary judgment statute), and we express no opinion as to the effect of a ruling by the district court under that section.

We next consider whether the district court improperly allowed the jury to consider a question of law by instructing the jury to determine whether the Appellants had demonstrated that the defamation suit "was commenced or continued without a substantial basis in fact and law."

We have reviewed the case law from the jurisdictions with anti-SLAPP statutes with a "substantial basis" standard for overcoming an anti-SLAPP counterclaim and have found no guidance in interpreting this standard to determine whether a question of law, a question of fact, or a mixed question of fact and law is involved. See, §§ 25-21,241 to 25-21,246; N.Y. Civ. Rights §§ 70-a and 76-a; N.Y.C.P.L.R. §§ 3211(g) and 3212(h); Utah Code Ann. §§ 78-58-101 to 78-58-105 (2002); Del. Code Ann. tit. 10, §§ 8136 to 8138.

Certain other states impose a "probability of success on the claim" standard. See, generally, Cal. Civ. Proc. Code §§ 425.16 to 425.18 (West Cum. Supp. 2008); La. Code Civ. Proc. Ann. art. 971 (2005). There is case law from both California and Louisiana stating that the determination regarding the probability of success on the claim under the anti-SLAPP statutes in those states is a question of law. See, *1100 Park Lane Associates v. Feldman*, 160 Cal. App. 4th 1467, 74 Cal. Rptr. 3d 1 (2008); *Zamos v. Stroud*, 32 Cal. 4th 958, 87 P.3d 802, 12 Cal. Rptr. 3d 54 (2004); *Lee v. Pennington*, 830 So. 2d 1037 (La. App. 2002). While the case law from these jurisdictions

provides some guidance, we note that the anti-SLAPP statutes in California and Louisiana provide only for special motions to dismiss and not for bringing of a counterclaim for damages as do Nebraska's statutes. See, §§ 25-21,241 to 25-21,246; Cal. Civ. Proc. Code §§ 425.16 to 425.18; La. Code Civ. Proc. Ann. art. 971.

[21] In evaluating the "substantial basis in fact and law" standard found in Nebraska's anti-SLAPP statutes, we find some guidance in Nebraska's case law concerning malicious prosecution. In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to the plaintiff. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

[22] In *Rose v. Reinhart*, 194 Neb. 478, 233 N.W.2d 302 (1975), the Nebraska Supreme Court addressed the question of whether the "probable cause" determination in a malicious prosecution action was one for the court or for the jury. The plaintiff brought the action as a result of the defendant, a bank president, causing a criminal complaint to be filed against the plaintiff for uttering an insufficient fund check with intent to defraud. The jury verdict awarded damages to the plaintiff. On appeal, the court determined that the bank's motion for directed verdict should have been sustained and, accordingly, the judgment was reversed and remanded with directions to dismiss the plaintiff's petition. In so holding, the court found that the facts were sufficient to demonstrate probable cause as a matter of law. The court noted that "'[t]he existence or lack of probable cause is the very gist of an action for malicious prosecution. The question to be decided is whether there is sufficient uncontradicted evidence to show the existence of probable cause at the time the complaint was filed.'" *Id.* at 481, 233 N.W.2d at 304, quoting *Jones v. Brockman*, 190 Neb. 15, 205 N.W.2d 657 (1973). The court also noted that want of probable cause is an essential and indispensable element of a malicious prosecution

action in either a civil or criminal action, "'"no matter what the results."'" *Id.*, quoting *Brumbaugh v. Frontier Refining Co.*, 173 Neb. 375, 113 N.W.2d 497 (1962). The court defined probable cause as a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. *Id.*

[23] In *Jones v. Brockman, supra*, the Nebraska Supreme Court also determined that the existence of probable cause in a malicious prosecution case was a question of law for the court and not an issue of fact for the jury. In that case, the defendant, a special deputy sheriff, was attempting to serve the plaintiff with a legal notice. The plaintiff was subsequently charged with resisting an officer. In affirming the trial court's grant of summary judgment in favor of the defendant, the Supreme Court assumed that the trial judge predicated his ruling on the premise that the facts and circumstances established by uncontradicted evidence were sufficient to establish probable cause for the criminal prosecution. The court reiterated an earlier holding in which the court said, "'"Whether facts and circumstances established by uncontradicted evidence amount to probable cause for a criminal prosecution is a question of law for the court, and not an issue of fact for the jury. This is not only the law of Nebraska, but is a generally accepted rule."'" *Id.* at 17, 205 N.W.2d at 659, quoting *Kersenbrock v. Security State Bank*, 120 Neb. 561, 234 N.W. 419 (1931). The court in *Jones* concluded that while some of the facts supporting probable cause were disputed by the plaintiff's testimony, there were other undisputed facts upon which the defense of probable cause might be predicated. The court held that in such circumstances, the question of probable cause is one of law for the court.

In the present case, the court instructed the jury concerning the issues, burden of proof, effect of findings, and defenses applicable to the libel and false light causes and to the counterclaim. We note the jury was instructed that the burden of proof as to the libel and false light causes was clear and convincing evidence and that the burden applicable to the counterclaim was the greater weight of the evidence, which burdens were defined

in a separate instruction. Specifically, with regard to the burden of proof on the counterclaim, instruction No. 7 provided:

> Before one or more of the [Appellees] can recover against one or more of the [Appellants] on the [Appellees'] counterclaim in this action, [an appellee] must prove by the greater weight of the evidence, each and all of the following:
>
> 1(a)[.] That this lawsuit was commenced or continued by the [Appellants] against the [Appellees] without a substantial basis in fact and law; (Consider 1(b) only if you have found that 1(a) is true)
>
> 1(b)[.] That the [Appellants'] lawsuit was commenced or continued for [the] purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights of the [Appellees]; and
>
> 2. That these actions on the part of the [Appellants] were a proximate cause of some damage to one or more of the [Appellees]; and
>
> 3. the nature and extent of that damage.

The need for the jury to make a determination of whether the litigation was "commenced or continued without a substantial basis in fact and law" was also referenced several times in the jury instruction concerning the award of damages. The jury was not given a definition of "substantial basis in fact and law" or any information as to under what set of circumstances the Appellants would or would not have had a substantial basis in fact and law for commencing or continuing the litigation.

One of the difficulties in this case with the instructions relating to the counterclaim is that the instructions left the jury with no way to distinguish between a finding that the Appellants did not prove their case in the defamation suit and a finding that the Appellants did or did not have a substantial basis in fact and law for commencing or continuing the defamation suit. The concern we have with allowing the jury in this case to make the "substantial basis" determination was aptly discussed by the California Supreme Court in a malicious prosecution case, wherein the court discussed the propriety of allowing the jury to make the probable cause determination:

> An important policy consideration underlies the common law rule allocating to the court the task of determining whether the prior action was brought with probable cause. The question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors, and courts have recognized that there is a significant danger that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim.

Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 875, 765 P.2d 498, 504, 254 Cal. Rptr. 336, 342 (1989).

We conclude that it was plain error for the trial court to allow the jury to determine the question of whether the Appellants had a substantial basis in fact and law to commence or continue the defamation suit. Essentially, this question revolves around the legal validity of the defamation claim and is uniquely within the province of the court. We sympathize with the trial court, given the dearth of guidance in the area of anti-SLAPP claims in general and, particularly, what is appropriate for the jury to decide. Nevertheless, because the jury was allowed to determine a question of law, the substantial rights of the Appellants were prejudicially affected such that we are required to reverse the judgment of the district court.

[24] We hold that under § 25-21,243(1), a trial court must first determine as a matter of law whether the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. If the court determines that a substantial basis did exist, then the court should direct a verdict against the anti-SLAPP claim. If the court determines that a substantial basis did not exist, then the jury (unless a jury is waived) should be instructed to determine the second portion of § 25-21,243(1), namely, whether the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights. In addition, the jury should decide the

compensatory damages, if any, to be awarded under this portion of the statute.

Remaining Assignments of Error.

[25] Given our resolution of the above assignment of error, we need not address the Appellants' remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

CONCLUSION

We affirm that portion of the judgment which found against the Appellants on their defamation suit. We reverse the judgment of the district court and remand for a new trial on the counterclaim between Svoboda, Hamilton, and Fortkamp and the Appellants, consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

KATHLEEN BELITZ, NOW KNOWN AS KATHLEEN MONACO, APPELLANT, V. JOHN F. BELITZ, JR., APPELLEE.

756 N.W.2d 172

Filed September 16, 2008. No. A-07-1172.

1. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to settle jurisdictional issues presented by a case.
2. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
5. **Final Orders.** When the substantial rights of the parties to an action remain undetermined and the cause is retained for further action, the order is not final.

6. **Appeal and Error.** The trial court has no inherent power, directly or indirectly, to extend time for taking appeal.
7. **Divorce: Final Orders.** A journal entry does not finally determine the rights of the parties when it directed the parties to advise the court if any material issues were not resolved and when it contemplated that the decree was to be prepared by counsel for opposing counsel's review and for later court signature and filing.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Order vacated in part, and appeal dismissed.

Kathleen Monaco, pro se.

Joan Watke Stacy for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

This appeal presents, among other jurisdictional issues, the question of whether a trial court can extend the time in which to appeal to this court beyond that time provided by Nebraska statutes through a provision for such extension in its order.

PROCEDURAL BACKGROUND

This ongoing custody dispute now makes its third appearance in this court. In *Belitz v. Belitz*, 8 Neb. App. 41, 587 N.W.2d 709 (1999), we affirmed the decree of dissolution of the Douglas County District Court which awarded Kathleen Belitz, now known as Kathleen Monaco, custody of the parties' three minor daughters and granted her permission to remove the children to the State of Illinois. Thereafter, on a motion to modify decided on July 18, 2002, the district court awarded John F. Belitz, Jr., custody of the parties' minor children and the children were returned to the State of Nebraska. We affirmed that decision. See *Belitz v. Belitz*, No. A-02-973, 2003 WL 21648118 (Neb. App. July 15, 2003) (not designated for permanent publication).

The instant appeal is traced to January 12, 2005, when Kathleen filed an application for modification requesting custody of the parties' minor children. In an order signed on July 6, 2007, and file stamped on July 9 (July 9 order), the trial court dismissed such application and assessed an attorney fee of $10,000 against Kathleen. Next, on September 14, 2007, the

trial judge signed an order denominated as "ORDER (VISITATION TIME)." This order made a finding that "exhibit 63 [John's proposed parenting plan] shall be the parenting plan" and provided that "the court requests that the parties submit the parenting plan which conforms to this order within 14 days of the date of this order." The "ORDER (VISITATION TIME)" was file stamped by the clerk of the court on September 17 (September 17 order).

The September 17 order provided in its final paragraph as follows: "This Order is incorporated into the Court's Order of July 6, 2007 [July 9 order], and the combined Orders shall become a final Order for purposes of appeal effective 14 days from the date of this Order. DATED this 14 day of September, 2007."

There were no motions filed to toll the time in which to appeal. Kathleen filed her notice of appeal on November 1, 2007, and on April 4, 2008, John moved to dismiss the appeal arguing that this court lacked jurisdiction because the appeal was not timely and properly perfected. On May 7, we overruled the motion to dismiss without prejudice to our further consideration of such after completion of briefing and examination of the bill of exceptions. The parties have now completed briefing, and we have the bill of exceptions. We have entered an order dispensing with oral argument pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1).

FACTUAL BACKGROUND

The factual background of this protracted custody dispute is extensively detailed in our two previous opinions referenced above, and the reader is referred to those opinions. Additional facts and evidence will be detailed as necessary in the analysis section of our opinion.

PROCEDURAL BACKGROUND REGARDING JURISDICTION

Kathleen's application for modification filed January 12, 2005, was tried before the district court for Douglas County, Nebraska, on May 2, 3, and 9, 2007. Initially, we turn to the argument and discussion among the trial judge and counsel at the close of the trial on May 9. At the end of that

discussion, after the court asked counsel if there was "anything else," Kathleen's lawyer mentioned the subject of a parenting plan and the court immediately stated: "I'll incorporate that." However, additional discussion followed, and it was agreed that while the matter of the application for modification was under submission, counsel for the parties would attempt to reach agreement on as many of the visitation, telephone call, and travel issues as they could, bearing in mind that the trial court had not yet decided who would have custody and whether the children would live in Illinois or Nebraska. We note that the application for modification being tried specifically asked for the implementation of "a detailed parenting plan."

Any attempt to agree upon a parenting plan was unsuccessful as evidenced by the bill of exceptions, which begins anew with a hearing on July 6, 2007. At the beginning of the July 6 hearing, the court asked counsel for John: "And I believe this is your hearing, correct?" Counsel answered in the affirmative, stating that "the motion is based on post-closing arguments." We note that the motion referenced by counsel is not in our transcript. However, given the May 9 discussion referenced above and the exchange at the beginning of this July 6 proceeding, it is evident that John's counsel at some point after May 9 filed a motion for the court to adopt a parenting plan. John's counsel explained to the court that the parties were unable to reach complete agreement about a parenting plan "[a]nd so we decided to schedule this hearing today to submit two proposals and then leave it up to the Judge's discretion . . . ." At this point in the proceedings, Kathleen's proposed parenting plan, exhibit 65, was offered and received in evidence as was John's parenting plan, exhibit 63. Then approximately 15 pages of "back and forth" occurred between counsel and the court about the various problems in agreeing on a parenting plan. The trial judge then injected the fact that he had drafted the decision on the motion to modify and that while he had been unsure whether it would be ready for the July 6 hearing, he now had it and would be giving it to the parties. The court then verbally announced that there would be no modification of custody and that the children would remain in Omaha in John's custody.

The written order so concluding—the July 9 order—was signed by the judge on July 6 and file stamped on July 9.

The court stated it would review the competing parenting plans and make a decision, but counsel asked for clarification as to whether the July 9 order "is the final order." The court responded that it "was intended as a final order [but visitation] issues . . . remain outstanding" and thus "[the July 9 order] won't be a final order and I'll enter an order to that effect, okay?" Before the hearing was concluded, the trial judge again iterated that he would enter an order "saying this is not a final order and—because there's still some visitation issues and I'll schedule another hearing in about three weeks, 30 days, I'll let you know when it is and that will keep that from a final order." But no further hearing occurred. Rather, the court entered another order—what we have earlier referenced as the September 17 order. This order begins as follows:

> THIS MATTER came before the Court on July 6, 2007, on the Court's own motion to determine the terms and conditions of the parenting plan between the parties. Counsel for both parties appeared. The Court previously entered its Order on Plaintiff's Application to Modify on July 6, 2007, but the Court left unresolved the issue of the parenting plan, and, thus, that Order was not a final Order for purposes of appeal. The Court ordered the parties to try to resolve the issue of the parenting plan, and, if they could not, this hearing would be held. The parties advised the Court that some, but not all, issues have been resolved.

The court then found that exhibit 63, which it described as John's proposed parenting plan, "shall be the parenting plan, with the addition . . . that [John] is awarded the legal and physical custody of the minor children." The September 17 order then provided:

> The Court requests that the parties submit the parenting plan which conforms to this Order within 14 days of the date of this Order.
>
> This Order is incorporated into the Court's Order of July 6, 2007, and the combined Orders shall become a

final Order for purposes of appeal effective 14 days from the date of this Order.

DATED this 14 day of September, 2007.

On October 3, 2007, a document entitled "Parenting Plan" was file stamped by the clerk of the district court, and on the previous day, underneath the words "BY THE COURT," the trial judge had signed the same. This 14-page document states that it is "made and entered into between Kathleen . . . and John." On November 1, Kathleen filed her notice of appeal, stating that she was appealing from the order entered on October 2.

JURISDICTIONAL ANALYSIS

[1,2] It is the duty of an appellate court to settle jurisdictional issues presented by a case. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005). This court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a defect which prevents acquisition of appellate jurisdiction. *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995). Although the procedural history leading to the jurisdictional issues certainly is complex, there are no disputes of fact.

[3] There is no more fundamental jurisdictional precept than the doctrine that appeals can only be taken from final orders. See *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002) (for appellate court to acquire jurisdiction of appeal, there must be final order entered by court from which appeal is taken; conversely, appellate court is without jurisdiction to entertain appeals from nonfinal orders).

Kathleen's Appeal From Attorney Fee Assessment.

Kathleen's first assignment of error is that the trial court erred in assessing $10,000 against her for John's counsel. This award is found in the July 9 order, but Kathleen's notice of appeal was not filed until November 1, 2007, nearly 90 days thereafter. The notice of appeal was filed well outside the 30-day timeframe for appealing to this court set forth in Neb.

Rev. Stat. § 25-1912(1) (Cum. Supp. 2006). If the July 9 order was a final order, the appeal of the assessment of attorney fees is obviously out of time.

[4] On the basis of *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990), we find that the July 9 order was not a final, appealable order. *Huffman* holds as follows:

> Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.

236 Neb. at 105, 459 N.W.2d at 219.

The Supreme Court explained and applied this rule as follows:

> In the present case, there was a solitary pleading, the application for modification of a dissolution decree. The application requested that the dissolution decree be modified to grant child custody to Bruce Huffman and that a schedule of visitation rights be determined for the noncustodial parent. The tenor of the modification application may be expressed in the alternative: a change in custody or, if such change were denied, a new schedule of visitation rights. Thus, Bruce Huffman's application was a solitary pleading which raised multiple issues, namely, custody and visitation of children, which were determinable in one proceeding regarding modification of a prior dissolution decree. Therefore, we hold that when an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal. For that reason, this court has jurisdiction

> to review the district court's action on Bruce Huffman's modification application.

Id. at 106, 459 N.W.2d at 220.

[5] In the instant case, while the July 9 order did not specifically reserve the matter of the parenting plan for future decision, the order itself did not decide the matter, and the court expressly reserved such for future determination in the discussions on the record. Accordingly, we find that *Huffman, supra*, is controlling and that the July 9 order was not a final order because the matter of the parenting plan was unresolved and reserved for future action. See, also, *Lewis v. Craig*, 236 Neb. 602, 463 N.W.2d 318 (1990) (when substantial rights of parties to action remain undetermined and cause is retained for further action, order is not final).

Can Trial Court Extend Time to Appeal Its July 9 Order Assessing Attorney Fees?

[6] The September 17 order said that it was "incorporated" into the earlier July 9 order and that "the combined Orders shall become a final Order for purposes of appeal effective 14 days from the date of this Order." In short, the trial court attempted to determine the appeal time by tacking on an extra 14 days in which to appeal. This is outside of the authority and power of the courts—and that has long been the applicable law. *Morrill County v. Bliss*, 125 Neb. 97, 249 N.W. 98 (1933) (trial court has no inherent power, directly or indirectly, to extend time for taking appeal). The trial court's attempted 14-day extension of the time in which to appeal was error as a matter of law and is of no force and effect on the question of whether this court has appellate jurisdiction. We vacate that portion of the district court's September 17 order.

Kathleen's Attempted Appeal Regarding Parenting Plan.

Kathleen's second assignment of error concerns three disagreements that she has with the parenting plan, and again we face a jurisdictional issue. The trial court's September 17 order "finds that Exhibit 63 will be the parenting plan" with the addition of the court's earlier determination that John would have legal and physical custody of the children. The court's

order then said, "The Court requests that the parties submit the parenting plan which conforms to this Order within 14 days of the date of this Order." On October 2, 2007, the trial judge signed a document entitled "Parenting Plan" which was then file stamped by the clerk of the district court on October 3. The notice of appeal filed November 1 is obviously out of time from the September 17 order, given our holding above that the trial court cannot extend the time in which to appeal. Thus, unless the parenting plan file stamped October 3 is the final, appealable order, which incidentally would encompass the July 9 order containing the attorney fee award about which Kathleen complains in her first assignment of error, the notice of appeal filed November 1 is out of time.

We make a number of observations about exhibit 63 and the parenting plan file stamped October 3, 2007, having compared the contents of the two documents. They are virtually identical, as one would expect, given that the September 17 order makes exhibit 63 the operative parenting plan. The only changes are as follows: (1) the addition of a sentence providing that John is the custodial parent, which is merely reflective of both the July 9 order and the September 17 order, and (2) in several places what was "his/her" in exhibit 63 is changed to a definite "his" or "her" in accordance with the fact that John would be the custodial parent. Therefore, the October 3 parenting plan is merely a memorialization of what was decided in the September 17 order. Additionally, the October 3 parenting plan recites that it is a parenting plan "made and entered into" between John and Kathleen, and the document contains no order of the court that the parties do anything. In short, it is the agreement of the two parties as to how they will parent the children, which just happens to have the judge's signature and the clerk's date stamp. Thus, while the parties had the court decide between competing parenting plans, the fact is that the operative decision was made in the September 17 order, when the court designated exhibit 63 as the parenting plan. We assume for purposes of discussion that a trial court's choice of competing parenting plans affects a parent's substantial right and is thus appealable. However, the decision about the operative plan was made in the court's September 17 order. Granted,

the September 17 order requested later submission of the actual parenting plan selected by the trial court; however, in our view, that request does not mean that the September 17 order was not a final, appealable order.

A similar situation was presented in *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006). The City of Ashland brought a declaratory judgment action against appellants Ashland Salvage, Inc., and Arlo Remmen, "seeking a declaration as to the existence and lawful boundaries of certain public rights-of-way claimed by the city and further seeking an injunction against appellants' improper use of the public rights-of-way." *Id.* at 363, 711 N.W.2d at 864. Following a trial, in a file-stamped journal entry dated November 22, 2004, the district court ruled in favor of the city in the declaratory judgment action, "declaring the boundaries of appellants' property and the existence of the city's public rights-of-way. Specifically, in its journal entry, the district court stated that 'a public right-of-way exists and its legal boundaries are as set forth in Exhibit 14.'" *Id.* at 365, 711 N.W.2d at 866. Further, in the journal entry, the district court "'enjoined [appellants] from any use of [the disputed] property inconsistent with its use as a public right-of-way.'" *Id.* The journal entry also "directed the city to prepare an 'injunction,' and an 'Order of Permanent Injunction' was subsequently filed on December 6." *Id.* at 365-66, 711 N.W.2d at 866. On November 30, the appellants filed their notice of appeal from the adverse ruling, and the Nebraska Supreme Court considered whether appellate jurisdiction existed in the case or whether notice of appeal was premature. The Nebraska Supreme Court concluded:

> [T]he district court's file-stamped journal entry of November 22, 2004, found in favor of the city, declared the boundaries of the rights-of-way, and enjoined appellants from any use of the disputed property inconsistent with the city's rights-of-way. This ruling resolved all issues raised in the city's declaratory action. Although the November 22 journal entry also directed the city to prepare an injunction, the November 22 ruling nevertheless disposed of the whole merits of the case . . . .

Id. at 367, 711 N.W.2d at 867. The Supreme Court therefore determined that because the November 22 journal entry disposed of all the claims, the appeal taken from the November 22 journal entry was timely.

We have great difficulty in distinguishing the present case from *City of Ashland, supra*, which we think we would have to do to find that the instant appeal was timely. In the September 17 order, the trial court selected the operative parenting plan, exhibit 63. And the directive of the trial court to submit such to the court, incorporating the fact that John would be the custodial parent, seems to us to be indistinguishable from the directive to "prepare an injunction" in *City of Ashland, supra.* We do note that the document states on the first page, "The Mother and the Father wish to have this Plan and the terms and conditions contained herein approved by the Court and incorporated by the Court in the Decree of Dissolution to be entered in this case." But the decree was not modified to include the parenting plan, and although the judge's signature can be seen as "approval," the court's decision as to which plan would control, and the terms thereof, was made in the September 17 order, not by the filing of October 3, 2007.

Additionally, two other cases need to be mentioned. In *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004), the district court signed and filed a journal entry which indicated that the court had considered all matters properly before it and set forth its findings thereupon. However, that document in *Hosack* contained a provision that counsel should "'advise the court . . . if the court failed to rule on any material issue presented.'" 267 Neb. at 936, 678 N.W.2d at 750. The journal entry also specified that counsel was to "'prepare the decree and provide it to [opposing counsel] for review [and then present it] to the Court for signature.'" *Id.* Counsel prepared a decree in conformance with the journal entry, the court signed the decree, it was file stamped, and an appeal was taken.

[7] The Supreme Court in *Hosack, supra*, determined that the journal entry did not finally determine the rights of the parties because it directed the parties to advise the court if any material issues were not resolved and because it "contemplated that the decree was to be prepared" by counsel for opposing

counsel's review and for later court signature and filing. *Id.* at 939, 678 N.W.2d at 752. Thus, the Supreme Court concluded that the journal entry "was not the final determination of the rights of the parties in [the] action." *Id.* at 939-40, 678 N.W.2d at 752. As such, the appeal from the actual decree, prepared in accordance with the directions of the journal entry filed by the court, was timely.

From our perspective, the present case seems dissimilar from *Hosack, supra*, because here the parties were not to submit an agreed-upon decree as in *Hosack*, but, rather, a "plan" that conformed to a specified exhibit, and no issue submitted to the court remained to be resolved via the later submission. Furthermore, the preparing party was not required to submit the plan for opposing counsel's review and for later court signature—although the court did sign the parties' plan.

Finally, in our jurisdictional discussion, we come to the recent decision of *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008), in which the court once again addressed the recurring problem of signed and file-stamped letters by trial judges deciding cases and directing counsel to prepare a decree. In *Wagner v. Wagner*, 16 Neb. App. 328, 743 N.W.2d 782 (2008), we found that such a letter from the trial judge had started the running of the time in which to appeal, and thus the appeal was out of time. Upon further review, the Supreme Court found that the letter was not a final judgment, apparently for two very different reasons: First, the letter did not find that the marriage was irretrievably broken and order it dissolved, and second, the letter directed counsel to prepare a decree and submit it to opposing counsel for approval, and then to the court. Although the Supreme Court's opinion suggests that the first reason alone would be enough to prevent the letter from being a final, appealable order, the court left no doubt that the second reason prevented the letter from operating as a final, appealable order. With respect to this second reason, the court said:

> Here, the court's direction to counsel to prepare a final decree, and submit that decree for approval to opposing counsel and then the court, clearly indicates that the letter was not intended to be the court's final adjudication

> of the rights and liabilities of the parties. As in *Hosack*, the court's preliminary findings contemplated that the decree was to be prepared for opposing counsel's review and were not the final determination of the rights of the parties.

275 Neb. at 700, 749 N.W.2d at 142-43.

Therefore, the question for us, after the Supreme Court's decision in *Wagner*, is whether the direction from the trial judge in its September 17 order for the parties to "submit" the plan, which the court had decided would be exhibit 63, delays the beginning of the time in which to appeal until the plan is submitted. And we quote from *Wagner, supra*, "But just as important is the fact that, as in *Hosack*, the trial court's letter was written only in contemplation of a decree to be entered later." 275 Neb. at 699, 749 N.W.2d at 142. But here, there were no preconditions set forth in the September 17 order before exhibit 63 would be operative, such as approval by one or both counsel or signature by the court. Rather, the trial court merely requested the submission of the plan, and the court could have simply been contemplating the submission of a plan signed only by Kathleen and John evidencing the plan, or not signed by either of them—because the September 17 order contains nothing by which it can be said that such order was entered "in contemplation of a decree" or some other further action by the court. And it seems to us that a key component of the delayed final order doctrine from *Wagner, supra*, is the trial court's contemplation that a decree will be later entered, but we can find no such evidence of such an intent in the present case.

We conclude that the request to submit the plan to the court did not prevent the September 17 order from being the final, appealable order because in contrast to *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008), and *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004), the directive did not require signature or approval by counsel or signature by the court in order for exhibit 63 to be the operative parenting plan. And equally important, the September 17 order left nothing unresolved. In short, the effectiveness of exhibit 63 was not made contingent upon further action by the court and counsel

of the nature found crucial in *Wagner* and *Hosack*. Finally, we are unable to distinguish the directive in *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006), to prepare an injunction from the directive in this case to "submit the plan."

Therefore, for these reasons, any appeal had to be taken within 30 days of the September 17 order, which, incidentally, was when the July 9 order on attorney fees, which Kathleen seeks to address in her first assignment of error, also became final. Therefore, we lack jurisdiction over Kathleen's appeal.

CONCLUSION

While Nebraska jurisprudence on the subject of appellate jurisdiction and final, appealable orders is undoubtedly difficult for a pro se litigant such as Kathleen to navigate, the trial court's procedure and orders made the jurisdictional shoals rockier than usual. That said, Kathleen's appeal was filed out of time as explained above, and thus, we dismiss her appeal. We also vacate that portion of the September 17 order attempting to extend the time in which to appeal.

ORDER VACATED IN PART, AND APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
MICKEY L. SHIPLER, APPELLANT.
758 N.W.2d 41

Filed September 23, 2008. No. A-07-1176.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial: Pretrial Procedure.** Oral or other informal statements are obviously a poor procedure when speedy trial rights are involved.
4. **Speedy Trial: Motions for Continuance: Prosecuting Attorneys.** It is not error for a trial court to grant a prosecutor an oral motion for a continuance under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) even though the only showing is by the oral statements of the prosecutor when the defendant and his or her counsel

are present and do not object on the record to the oral motion and showing, and where the facts as stated by the prosecutor would be sufficient if they had been contained in an affidavit or otherwise made under oath.

5. **Speedy Trial: Proof.** The burden of proof is upon the State to show that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) are applicable when the defendant is not tried within 6 months.
6. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
7. ____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded with directions to dismiss.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

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

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Mickey L. Shipler appeals the order of the district court for Sarpy County that denied his motion for absolute discharge. Because we find that the court was clearly erroneous in its determination that Shipler's statutory right to a speedy trial was not violated, we reverse, and remand the matter with directions to dismiss. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument.

BACKGROUND

The State filed the initial information in this case on May 24, 2006, charging Shipler with first degree sexual assault on a child, incest, and sexual assault of a child.

Shipler filed a number of pretrial motions, which are relevant to the speedy trial calculation. Shipler filed a motion to quash on June 9, 2006, which the district court denied on June 19. At a pretrial hearing on July 25, Shipler's counsel made a motion for discovery and review of videotapes. Upon Shipler's motion, the pretrial hearing was continued to August 23. On August 23, Shipler filed a motion to suppress and a motion in limine, which motions were denied by the court on November 21. A docket entry dated February 7, 2007, shows that Shipler made an oral motion for continuance on that date, which was granted by the district court, and the trial scheduled for February 12 was canceled. Shipler filed a motion to continue on February 9, which apparently corresponds with his oral motion of February 7. Trial was subsequently scheduled for March 14. Shipler also filed a written motion to continue on March 9, which the district court granted on that date, continuing the jury trial date to May 9.

On May 4, 2007, the State filed a written motion to continue. The State averred that the "State's witness is out-of-state and will not be available for Trial on May 9, 2007." The State requested "a finding of good cause for the continuance." The State did not attach an affidavit to its motion.

The district court heard the State's motion for continuance on May 9, 2007. At the hearing, the prosecutor informed the court that one of the State's "key witnesses" was in Washington, D.C., and was unavailable for trial. Shipler objected to the motion, arguing that Shipler had been in custody 378 days and hoped for a resolution. Shipler's counsel concluded:

> And I understand that the [S]tate usually calls more witnesses than the defense, and I understand that — the circumstances in this case, but — I think we're in a position where despite the fact that we've had prior continuances, we need to let the Court know that we — we object to this continuance on the basis of what you have in front of you in terms of the motion and — just that and the motion.

The following colloquy then took place:

> THE COURT: Who is the witness that isn't here?

> [The State]: Investigator Martins. He interrogated . . . Shipler, was part of the interrogation. . . . Shipler did end up ultimately confessing during the two-part interrogation to both [I]nvestigator Martins and Investigator Teuscher, they did the interrogation.
>
> THE COURT: Was there a motion to suppress filed?
>
> [The State]: Yes, there was, and you overruled it.
>
> THE COURT: Okay. The Court will find for good cause the [S]tate's motion for continuance is sustained. Matter's continued — I have no jury term in June, so it's continued to July the 5th at 9 a.m.

In a docket entry dated May 9, 2007, the court noted, "The Court having considered the State's Motion for Continuance finds just cause for reason of the unavailability of the State's key witness." The court set the trial date for July 5.

Shipler filed a motion in limine on July 2, 2007. At that time, the court continued the jury trial date, pending its ruling on Shipler's motion. On July 27, the court denied Shipler's motion in limine. A jury trial was subsequently scheduled for September 10.

Shipler filed his motion to discharge on speedy trial grounds on September 4, 2007, and the State filed an objection. The district court conducted a hearing on the motion on October 10. At the hearing, the State presented its speedy trial calculations, which excluded time for the State's May 4 motion to continue "because there was a finding of good cause." Shipler argued that the State's motion to continue was improperly granted because the motion was unsupported by an affidavit or other documentation. Shipler's speedy trial calculation which was received into evidence by the court did not exclude the time associated with the State's motion for continuance.

The district court entered an order on November 5, 2007, denying Shipler's motion to discharge. In its calculation, the district court excluded time attributable to the State's motion to continue "for good cause shown." Shipler appeals.

ASSIGNMENT OF ERROR

Shipler asserts, consolidated and restated, that the district court erred in denying his motion to discharge by excluding

the time attributable to the State's motion to continue from its speedy trial calculation.

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. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Schinzel*, 271 Neb. 281, 710 N.W.2d 634 (2006).

ANALYSIS

State's Motion to Continue.

Shipler argues that the district court erred in denying his motion to discharge by excluding the time attributable to the State's motion to continue from its speedy trial calculation. In addressing Shipler's assignment of error, we must consider whether the time attributable to the State's motion was excludable and under which subsection of Neb. Rev. Stat. § 29-1207 (Reissue 1995) it should be considered. In order to evaluate whether the time is excludable, we must determine what evidence is available for our consideration, and in doing so, we first consider the method by which the State sought a continuance.

Shipler argues that the State's method for seeking a continuance in this case did not comply with the requirements of Neb. Rev. Stat. § 25-1148 (Reissue 1995). That section provides:

> Whenever application for continuance or adjournment is made by a party or parties to any cause or proceeding pending in the district court of any county, such application shall be by written motion entitled in the cause or proceeding and setting forth the grounds upon which the application is made, which motion shall be supported by the affidavit or affidavits of person or persons competent to testify as witnesses under the laws of this state,

> in proof of and setting forth the facts upon which such continuance or adjournment is asked. After the filing of such application and the affidavits in support thereof, the adverse party shall have the right to file counter affidavits in the matter. Either party may, upon obtaining leave of the court, introduce oral testimony upon the hearing of such application. The court may, upon the hearing, in its discretion, grant or refuse such application, and no reversal of such cause or proceeding shall be had on account of the action of the court in granting or refusing such application except when there has been an abuse of a sound legal discretion by the court.

Neb. Rev. Stat. § 29-1206 (Reissue 1995) provides that motions for continuance in the criminal context shall be made in accordance with the above civil procedure statute. Shipler points out that the State's motion to continue was not supported by affidavits, thereby depriving Shipler of the opportunity to file affidavits in response. He also complains that the State introduced oral testimony at the hearing on the motion through the prosecutor's remarks but did not obtain leave to do so.

[3,4] In *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003), this court considered whether the oral, unsworn statements made by the prosecutor to the court in the presence of the defendant and his counsel was a satisfactory method to seek a continuance in order to obtain the presence of three necessary witnesses at trial. No written motion for a continuance was filed. We acknowledged that oral or other informal statements are obviously a poor procedure when speedy trial rights are involved. *Id.* However, after analyzing cases from other jurisdictions, we concluded that it is not error for a trial court to grant a prosecutor an oral motion for a continuance under § 29-1207(4) even though the only showing is by the oral statements of the prosecutor when the defendant and his or her counsel are present and do not object on the record to the oral motion and showing, and where the facts as stated by the prosecutor would be sufficient if they had been contained in an affidavit or otherwise made under oath. *State v. Roundtree, supra.* The *Roundtree* court then proceeded to consider whether the facts in the record and in the

prosecutor's statement were sufficient to satisfy the elements of § 29-1207(4)(c)(i).

In the instant case, the State did not include affidavits with its written motion, but Shipler did not specifically object to the State's showing at the hearing; rather, he objected to the continuance in general. Moreover, although the prosecutor did not formally seek leave to present oral testimony, such leave was impliedly given by the district court when the court itself elicited the prosecutor's testimony. In light of our holding in *State v. Roundtree, supra*, we conclude that the method by which the State sought a continuance, although not ideal, is not in itself a sufficient basis for finding error in the granting of the continuance. Accordingly, we will proceed to consider whether the facts in the record and the facts in the prosecutor's statement are sufficient to satisfy the elements of the relevant subsection of § 29-1207(4). In doing so, we will not consider any statements of the trial judge made at the hearing on the State's motion for continuance. See, *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000) (holding that statements of judge could not be used to show good cause under § 29-1207(4)(f)); *State v. Roundtree, supra* (ignoring statements made by judge in appellate court's analysis of excludable time under § 29-1207(4)(c)(i)).

As to the relevant subsection of § 29-1207(4), Shipler argues that the correct subsection is § 29-1207(4)(c)(i) rather than § 29-1207(4)(f). We agree. Section 29-1207(4) provides that the following periods shall be excluded in computing the time for trial:

> (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
>
> (i) The continuance is granted because of the unavailability of evidence material to the [S]tate's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

Although the State's motion requested a continuance "for good cause," the prosecutor and the court used the phrase "good cause" at the hearing on the State's motion, and the court's docket entry and order stated that it had granted the State a continuance for good cause shown, we take these references to "good cause" as references to the "good cause" requirement in § 29-1206 (in criminal cases, district court grants continuance only upon showing of good cause and only for so long as is necessary) rather than as a reference to § 29-1207(4)(f). Section 29-1207(4)(f) applies to "[o]ther periods of delay not specifically enumerated," while § 29-1207(4)(c)(i) applies to periods of delay resulting from a continuance granted at the request of the prosecuting attorney, if "[t]he continuance is granted because of the unavailability of evidence material to the [S]tate's case." The State's motion alleged the unavailability of a witness, and at the hearing on the State's motion, the prosecutor indicated that this was a "key witness." Because the period of delay sought by the State's motion falls under the period "specifically enumerated" in § 29-1207(4)(c)(i), that section is the applicable section for purposes of our speedy trial analysis.

[5] We next turn our attention to whether the facts in the record and the prosecutor's statement at the May 9, 2007, hearing were sufficient to satisfy the elements of § 29-1207(4)(c)(i). At the hearing, the prosecutor indicated that one of its key witnesses was out of state, in Washington, D.C., and was unavailable for trial. Upon questioning by the district court, the prosecutor indicated that the unavailable witness was an Investigator Martins, who had conducted an interrogation of Shipler together with an Investigator Teuscher, and that Shipler had confessed to both investigators. The prosecutor did nothing to explain why Martins' testimony was material in light of the confession to both Martins and Teuscher. Nor did the prosecutor make any showing that the State had exercised due diligence to obtain Martins' presence for the trial which had been scheduled for May 9 since March 9. The prosecutor gave no indication of why Martins was unavailable other than stating that he was in Washington, D.C., and gave no explanation of steps the State had taken to obtain Martins' presence on

May 9. Finally, the record does nothing to provide reasonable grounds to believe that Martins would be available at the later date. The prosecutor did not indicate how long Martins was to be in Washington, D.C., or when he might be expected to return. In short, the State did not put forth evidence supporting these factors and failed to meet its burden at the hearing on the motion for discharge to demonstrate that the time attributable to its motion for continuance should be excluded from the speedy trial calculation. The burden of proof is upon the State to show that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months. See *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007). Accordingly, the district court's finding that this period of delay is excludable was clearly erroneous.

Speedy Trial Calculation.

[6,7] Section 29-1207 requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005). To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. *State v. Sommer, supra*.

Before calculating the time for speedy trial purposes, we note that the State argues that the record before us reflects that the speedy trial clock had not expired before Shipler filed his motion to discharge. The State alleges that according to docket notes, Shipler made a motion for discovery and review of videotapes at a pretrial hearing on July 25, 2006, and that the motion was never ruled upon, therefore resulting in 468 excludable days. However, a review of the docket notes, together with the State's objection to the motion to discharge and the court's order denying the motion to discharge, make it clear that the court treated the July 25 motion for discovery and review of videotapes as a motion to continue the pretrial hearing, which motion was ruled upon on July 25, whereby the pretrial hearing

was continued until August 23. Therefore, the record demonstrates that the matter was ruled upon and the State's argument in this regard is without merit.

The original information was filed on May 24, 2006. Excluding the day of the filing of the information, counting forward 6 calendar months and backing up 1 day, the last day that the State had to bring Shipler to trial was November 24.

The first excludable time period began the day after Shipler filed a motion to quash on June 9, 2006, which was ruled on by the district court on June 19, resulting in 10 excludable days. See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004) (excludable period under § 29-1207(4)(a) commences on day immediately after filing of defendant's pretrial motion). There are 29 excludable days attributable to Shipler's motion to continue the pretrial hearing from July 25 to August 23 (counting from July 26, the day immediately following Shipler's motion, through August 23, the date of the rescheduled hearing). On August 23, Shipler filed a motion to suppress and a motion in limine, which motions were denied by the court on November 21. This resulted in a total of 90 excludable days (counting from August 24 through November 21).

On February 7, 2007, Shipler orally sought a continuance, and the trial date was continued to March 14. We note that Shipler filed a written motion to continue on February 9 and that in his own calculations, Shipler began calculating the time attributable to this continuance from February 10 rather than from February 8. We have excluded 35 days in connection with this continuance (counting from February 8 through March 14). An additional 56 days are excludable based on Shipler's motion to continue made on March 9 (counting from March 15, the day after the end of the previously excluded period, through May 9, the rescheduled trial date). Finally, there are 25 excludable days attributable to the motion in limine filed on July 2 by Shipler and ruled on by the court on July 27 (counting from July 3 through 27). Accordingly, there are a total of 245 excludable days.

Adding the 245 excludable days to November 24, 2006, brings us to July 27, 2007. Shipler filed his motion to discharge on speedy trial grounds on September 4. Accordingly, the

district court was clearly erroneous in denying Shipler's motion for discharge.

CONCLUSION

The district court was clearly erroneous in finding that Shipler's statutory right to a speedy trial was not violated. We reverse the court's order denying Shipler's motion for absolute discharge and remand the matter to the court with directions to dismiss the information against Shipler.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CAMP CLARKE RANCH, L.L.C., ET AL., APPELLEES, AND DWAYNE NOLTE, APPELLANT, V. MORRILL COUNTY BOARD OF COMMISSIONERS, APPELLEE.

758 N.W.2d 653

Filed September 30, 2008. No. A-08-198.

1. **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.
2. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Administrative Law: Appeal and Error.** It is only when an inferior board or tribunal acts judicially that a review by error proceedings is allowed.
4. ____: ____. A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.
5. **Evidence: Proof: Words and Phrases.** Adjudicative facts are facts which relate to a specific party and are adduced from formal proof.
6. ____: ____: ____. Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. They are roughly the kind of facts which would go to a jury in a jury case.

Appeal from the District Court for Morrill County: BRIAN C. SILVERMAN, Judge. Affirmed.

Thomas D. Oliver for appellant.

Jean Rhodes for appellee Morrill County Board of Commissioners.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Dwayne Nolte appeals from the order of the district court for Morrill County which dismissed the petition in error filed by Nolte and the other plaintiffs, following the decision of the Morrill County Board of Commissioners (the Board) to vacate a portion of a public road. Because we find that the action by the Board was not judicial in nature, we agree that the district court was without jurisdiction to hear the petition in error and we affirm. Pursuant to the authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument.

BACKGROUND

On December 12, 2006, the Board held a public hearing to "receive comments and objections relative to vacating" a portion of "public road RD98E." The hearing consisted of several local property owners giving their views on why the road should not be vacated. On January 23, 2007, the Board voted to vacate the portion of the public road in question. Nolte and other plaintiffs filed a petition in error on February 22, 2007 (incorrectly file stamped as "2006"), challenging the decision and resolution by the Board. The Board filed a motion to dismiss, which was granted by the district court in an order entered January 25, 2008. The district court found that the action of the Board was neither judicial nor quasi-judicial, citing to *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil.*, 9 Neb. App. 552, 615 N.W.2d 490 (2000). Nolte filed a timely appeal.

ASSIGNMENTS OF ERROR

Nolte assigns several errors with respect to the granting of the motion to dismiss and the failure to reverse the decision of the Board to vacate the road due to insufficiency of the evidence.

STANDARD OF REVIEW

[1,2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has

jurisdiction over the matter before it. *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Id.*

ANALYSIS

The district court determined that it did not have jurisdiction over the petition in error because the Board was not exercising a judicial or quasi-judicial function in vacating the road.

A petition in error is a statutory creation which is limited to a review of a "judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court." Neb. Rev. Stat. § 25-1901 (Supp. 2007).

The Board has been granted the power to alter or discontinue any road running through the county. See Neb. Rev. Stat. § 23-108 (Reissue 2007). The Board is vested with general supervision and control of public roads in the county, which includes abandonment of public roads. See Neb. Rev. Stat. § 39-1402 (Reissue 2004). Neb. Rev. Stat. § 39-1722 (Reissue 2004) provides the procedure when a board "deems the public interest may require vacation or abandonment of a public road," which procedure includes a study and report by the county highway superintendent or person designated to perform such a study. Neb. Rev. Stat. § 39-1725 (Reissue 2004) then provides that after a public hearing, the board shall by resolution "vacate or abandon or refuse vacation or abandonment, as in the judgment of the board the public good may require."

The issue in the present case is whether the Board is acting in a judicial capacity. Nolte argues that §§ 39-1722 and 39-1725 require the Board to make findings of "public interest" and "public good," which he contends are adjudicative findings of fact, thereby rendering the action a judicial or quasi-judicial action.

In *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil., supra*, this court determined that the decision of the Sarpy County Land Reutilization Commission to sell a piece of property to a city rather than giving it to a governmental agency for public use or to open a bidding process was not an exercise of

judicial function and therefore not subject to judicial review by a petition in error. Of significance in the *Sarpy Cty. Bd. of Comrs.* case was the fact that the statute in question allowed the commission to manage and sell property under its jurisdiction using its sole discretion.

[3-6] It is only when an inferior board or tribunal acts judicially that a review by error proceedings is allowed. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Id.* See, *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994); *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil.*, 9 Neb. App. 552, 615 N.W.2d 490 (2000). "Adjudicative facts" are facts which relate to a specific party and are adduced from formal proof. *Hawkins v. City of Omaha, supra*. Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. They are roughly the kind of facts which would go to a jury in a jury case. *Id.*

We conclude that in the present case, the Board did not decide a dispute of adjudicative fact, nor do the statutes require it to act in a judicial manner. As in the *Sarpy Cty. Bd. of Comrs.* case, while the Board in the instant case may need to look into facts to perform its duties in good faith, the discretion it exercises is not judicial in nature. Rather, the statutes in question allow the Board to act, in its discretion, using its judgment as to the public interest and public good.

This conclusion is supported by case law which, although rendered approximately a century ago, is still good law. See, *Stone v. Nebraska City*, 84 Neb. 789, 122 N.W. 63 (1909) (decision of necessity or expediency of establishing, maintaining, or vacating public road is committed exclusively to county boards and other like legislative and governmental agencies and is not subject to judicial review); *Otto v. Conroy*, 76 Neb. 517, 107 N.W. 752 (1906).

The action of the Board in vacating a portion of a public road within the county was not the exercise of a judicial function. As such, the district court did not have jurisdiction to hear the petition in error.

CONCLUSION

Because the Board was not exercising a judicial function in its determination to vacate the road in question, the district court properly dismissed the petition in error. We affirm.

AFFIRMED.

DAN SCHIEFELBEIN, APPELLANT, V. SCHOOL DISTRICT NO. 0013 OF THURSTON COUNTY, NEBRASKA, ALSO KNOWN AS WALTHILL PUBLIC SCHOOL, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

758 N.W.2d 645

Filed September 30, 2008. No. A-08-283.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
4. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
5. **Schools and School Districts: Employment Contracts: Termination of Employment.** The contract of a probationary certificated employee shall be deemed renewed and remain in full force and effect unless amended or not renewed in accordance with Neb. Rev. Stat. §§ 79-824 to 79-842 (Reissue 2003 & Cum. Supp. 2006).
6. ____: ____: ____. Neb. Rev. Stat. § 79-827 (Reissue 2003) authorizes cancellation of a superintendent's contract during the school year for cause.
7. **Schools and School Districts: Employment Contracts: Termination of Employment: Notice.** Neb. Rev. Stat. § 79-827(2) (Reissue 2003) requires a written notice and specifies only two requirements for its content: (1) The notice must state the alleged grounds for cancellation of the contract, and (2) it must notify the employee that his or her contract may be canceled.
8. **Schools and School Districts: Employment Contracts: Termination of Employment: Notice: Time.** Under Neb. Rev. Stat. § 79-827(2) (Reissue 2003), upon receiving notice of possible cancellation of his or her contract, an employee has 7 calendar days to request a hearing.

9. **Schools and School Districts: Employment Contracts: Termination of Employment: Time.** If a hearing on cancellation of an employee's contract is not requested within the time provided for in Neb. Rev. Stat. §§ 79-824 to 79-842 (Reissue 2003 & Cum. Supp. 2006), the school board shall make a final determination.
10. **Schools and School Districts: Employment Contracts.** A superintendent remains a probationary employee regardless of length of service.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

Scott J. Norby, of McGuire & Norby, for appellant.

Jeanelle R. Lust, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Dan Schiefelbein appeals from a declaratory judgment that his employment contract as superintendent of School District No. 0013 of Thurston County was validly canceled and validly not renewed. Because we conclude that (1) the district's board of education gave sufficient notice of cancellation of the contract, (2) Schiefelbein did not request a hearing, and (3) the board thereafter took action to cancel the contract, we affirm.

BACKGROUND

The district is a Class III school district under Nebraska law. The district employed Schiefelbein as superintendant pursuant to a written contract the parties signed on April 13, 2006. The contract stated, in relevant part:

> 1. TERM. [The district] hereby employs [Schiefelbein] for a period of one (1) year, beginning on the first day of July, 2006 and terminating on the 30th day of June, 2007. . . .
>
> . . . .
>
> 12. TERMINATION OF EMPLOYMENT CONTRACT. Except as provided herein, this contract may be canceled, not renewed, terminated, or amended by a vote of a

> majority of [the board] pursuant to procedures described by applicable state statute . . . .
>
> . . . .
>
> 13. RENEWAL OF EMPLOYMENT CONTRACT. [The board] will review this Agreement at their regularly scheduled February meeting, and [the board] will provide any notice of its intention to not renew the contract to [Schiefelbein] on or before February 15th. If no notices are given by either party on or before said date, the contract shall, by its own terms, automatically renew for one additional school year.
>
> . . . .
>
> 19. NOTICES: Any notices that are required under the terms of this Agreement shall be first class mailed or hand-delivered to the parties at the following addresses . . . .

In January 2007, the board considered but took no action upon Schiefelbein's contract. At the board's meeting on January 8, 2007, the board considered a motion to "offer a one[-]year Superintendent Contract to . . . Schiefelbein for school year 2007-2008." Of the board's six members, two voted in favor of the motion and three voted against. One member abstained. The minutes of the meeting then recite that the motion failed. Schiefelbein was present at this vote. No other motions on the subject were made or considered at the January 8 meeting.

In a letter dated March 10, 2007, Schiefelbein notified the board that because he had not received notice of nonrenewal of his contract on or before February 15, his contract had been automatically renewed for an additional year commencing on July 1.

On March 26, 2007, the board passed a resolution to "give notice to . . . Schiefelbein of [the board's] intention to consider non-renewal or cancellation of his employment contract." On the same day, the board delivered Schiefelbein a letter that informed him of this action. It also provided reasons for the nonrenewal or cancellation and set forth Schiefelbein's right to a hearing. We describe the content of the notice in more detail in the analysis section below.

Schiefelbein did not request a hearing. On April 9, 2007, the board passed a resolution stating that Schiefelbein "shall have his contract cancelled and not renewed for the 2007-2008 school year." The board notified Schiefelbein of this decision in a letter dated April 10, 2007.

On June 11, 2007, Schiefelbein filed a complaint for a declaratory judgment in the district court. He sought a judgment that his contract had automatically renewed. The district counterclaimed for a declaratory judgment that the contract had been "cancelled and/or non-renewed." On January 10, 2008, the court held a bench trial upon stipulated evidence, and on February 25, the court entered judgment in favor of the district based upon the court's determination that the district had both validly canceled and validly nonrenewed Schiefelbein's employment contract.

Schiefelbein timely appeals.

ASSIGNMENTS OF ERROR

Schiefelbein assigns that the district court erred in (1) finding that the district validly canceled and nonrenewed his employment contract and (2) failing to find that his employment contract continued under the terms of the contract and by operation of law.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

[2,3] A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002). In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002).

[4] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008).

ANALYSIS

We begin by observing that Schiefelbein's declaratory judgment action constituted a collateral attack on the board's action to not renew and to cancel his employment contract. See *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998). In *Bentley*, the Nebraska Supreme Court held that where the applicable statute required notice of nonrenewal to be given by April 15, a notice given on April 16 was untimely, constituted no notice at all, and was a nullity. In that circumstance, there was no valid action that the school board could have taken on the recommendation contained in the notice. As such, the school board did not exercise any judicial function in regard to that notice and a petition in error would not have been appropriate. We now turn to the issues raised in the instant appeal.

Nonrenewal.

[5] Schiefelbein contends that the notice on March 26, 2007, was untimely as a notice of possible nonrenewal, because his contract required that any such notice be given on or before February 15. Under Nebraska's continuing-contract law, the contract of a probationary certificated employee "shall be deemed renewed and remain in full force and effect unless amended or not renewed in accordance with sections 79-824 to 79-842." Neb. Rev. Stat. § 79-828(1) (Reissue 2003). Neb. Rev. Stat. § 79-831 (Reissue 2003) requires that any probationary or permanent certificated employee whose contract of employment may be amended, terminated, or not renewed for the next school year shall be notified in writing on or before April 15 of each year of such possible action on the contract. Schiefelbein argues that because paragraph 13 of his contract, quoted in the background section above, advanced the date for any notice of nonrenewal to February 15, the March 26 notice of nonrenewal was untimely.

We assume, without deciding, that the contractual provision had the effect that Schiefelbein claims. It would then follow that upon the board's failure to give notice of nonrenewal by February 15, 2007, Schiefelbein's contract automatically renewed. The board's attempt to give later notice of nonrenewal would have been ineffective, and the subsequent action of the board could not have constituted a valid final determination of nonrenewal under § 79-831. However, because the board also followed statutory procedures to cancel Schiefelbein's contract, which procedures derive from statutes not relying upon timely notice by April 15 (or some earlier contractual date), we address the parties' arguments regarding cancellation.

Cancellation.

[6] Unlike the statutory provisions concerning nonrenewal, Neb. Rev. Stat. § 79-827 (Reissue 2003) authorizes cancellation of a superintendent's contract "during the school year" for cause. Such cause includes both statutory reasons (loss of certificate, incompetence, neglect of duty, unprofessional conduct, insubordination, immorality, or physical or mental incapacity) and other reasons set forth in the employment contract, as well as any breach of material provisions of the contract. See *id*.

[7] A school board must provide a superintendent with a written notice prior to considering cancellation of the employment contract, and statutory law prescribes the content of such notice. Section 79-827(2) requires a written notice and specifies only two requirements for its content: (1) The notice must state "the alleged grounds for cancellation of the contract," and (2) it must notify the employee that his or her contract "may be canceled." Because such notice may be given at any time, it is not subject to the notice deadline specified by § 79-831, which pertains only to amendment, termination, or nonrenewal of covered employment contracts.

We now set forth the content of the board's letter of March 26, 2007, which notified Schiefelbein of the possible cancellation. We omit the extensive allegations of cause, because their specific content is not essential to our decision. We emphasize the provisions pertinent to Schiefelbein's argument. The letter began as follows:

> This will inform you that [the board] is considering non-renewal and/or *cancellation of your contract effective June 30, 2007*, as reflected in the motion "we give notice to . . . Schiefelbein of [the board's] intention to consider non-renewal or cancellation of his employment contract" as voted upon at the March 26, 2007[,] Special Board Meeting.

(Emphasis supplied.) Following this introductory paragraph, the letter set forth five numbered paragraphs making allegations of cause, including specific factual allegations which we need not detail in this opinion. The letter then continued as follows:

> It is for these reasons, and for information which will be provided in greater detail should you request a hearing, that causes [the board] to consider the non-renewal/cancellation of your contract.
>
> Pursuant to statute, you are entitled, as a probationary employee, to have a hearing on the matter by requesting such a hearing in writing within seven (7) days. Your request should be given to me, the Secretary of [the board]. *If you request such a hearing, it will not be a due process hearing, but rather will be conducted pursuant to § 79-834.* You will be entitled to be represented by the representative of your choice and you will be afforded an opportunity to discuss and explain to [the board] your position with regard to continued employment, to present information, and to ask questions of those appearing on behalf of [the district].
>
> [The board] intends to have a hearing officer and a court reporter to record the proceeding. This matter will remain a confidential employment matter until a hearing is requested and scheduled and the information in this letter will not be released to the public or any news media. Any time prior to the hearing, you have an absolute statutory right to resign if you wish to do so. Additionally, should you request a hearing, the names of any witnesses expected to be called, a summary of their testimony and any documents that may be used will be presented to you along with notice of the time, date and place of the

> hearing, all which will occur at least five (5) days prior to the hearing.

(Emphasis supplied.)

The notice given to Schiefelbein complied with both requirements of § 79-827(2). First, the letter stated the grounds for the possible cancellation. Schiefelbein does not claim that the letter failed to comply with this requirement. Second, the letter advised Schiefelbein that the board was considering possible cancellation of his contract. Schiefelbein's arguments focus on this requirement.

[8,9] Schiefelbein's failure to timely request a hearing on the possible cancellation relieved the board of its duty to provide a due process hearing. Upon receiving notice, an employee has 7 calendar days to request a hearing. *Id.* Schiefelbein did not request a hearing. "If a hearing on . . . cancellation . . . is not requested within the time provided for in sections 79-824 to 79-842, the school board shall make a final determination." § 79-831. After Schiefelbein failed to make a timely request for hearing, the board took final action canceling Schiefelbein's contract effective on June 30, 2007.

To avoid the conclusion that Schiefelbein's contract was canceled, he first argues that "the written notice . . . makes clear that it was exclusively a nonrenewal notice." Brief for appellant at 14. In making this argument, he relies upon the two emphasized portions of the letter that (1) advise that cancellation would become effective on June 30, 2007, and (2) state that the hearing would not be a due process hearing and would be conducted using the informal procedures of Neb. Rev. Stat. § 79-834 (Reissue 2003), which relate only to hearings on nonrenewal of probationary employees.

The district responds that nothing in the statutes precludes it from proposing a cancellation as of a particular date, that the statutes do not require that a notice of possible cancellation of contract address the hearing procedures, and that any ambiguity arising from the reference to § 79-834 was dispelled by other specific references to all of the protections afforded by a due process hearing. We agree. Clearly, as a superintendent, Schiefelbein possessed a working knowledge of the continuing-contract law and was familiar with the

applicable statutes. The notice clearly stated that the district was considering both a nonrenewal and a cancellation. The district melded language applicable only to one or the other procedure into a single notice. But we find no indication in the record that Schiefelbein was not aware that cancellation was being proposed.

Section 79-827 imposes no barrier to a school district's making a cancellation effective at a specified date. Section 79-827(1) states that the contract "may be canceled or amended by a majority of the members of the school board during the school year" for any of a number of specified reasons. Section 79-827(2) empowers the board to notify the employee of possible cancellation if it "determines that it is appropriate to consider cancellation of a . . . contract during the school year for the reasons set forth in subsection (1)." Both the contemplated effective date of June 30, 2007, and the notice given on March 26 fell within the same school year under Schiefelbein's contract. While the board also had the power to make a cancellation at an earlier date—assuming that it complied with the statutory procedures and the final action of the board took place prior to June 30—nothing in the statute precluded specification of an effective date. Notably, Schiefelbein provides no authority for his argument other than the language of § 79-827 discussed above.

Section 79-827 does not require that a notice of cancellation set forth the required procedures relating to a hearing. As we noted above, the initial notice required by § 79-827(2) imposes only two requirements, both of which were satisfied by the March 26, 2007, letter. Neb. Rev. Stat. § 79-832 (Cum. Supp. 2006), which defines and imposes requirements for a "formal due process hearing," clearly contemplates that after the employee responds to the initial notice and requests a hearing, the district will provide additional notification to the employee. Where the employee elects not to request a hearing, such additional notification never becomes necessary.

While the letter does contain the sentence disclaiming a due process hearing and referring to the informal hearing contemplated by § 79-834, when the letter is read in its entirety, it is clear that the particular sentence related only to the board's

attempt to simultaneously give notice of possible nonrenewal. The letter also specifies that Schiefelbein would be provided with all of the due process rights enumerated in § 79-832. These arguments may demonstrate that it would have been simpler and more straightforward for the district to have provided two separate notices, one addressing possible nonrenewal and the other pertaining to possible cancellation. However, we find no evidence that Schiefelbein was not aware that cancellation was being proposed in addition to nonrenewal.

Schiefelbein's second argument to avoid cancellation asserts that the board "did not in fact cancel Schiefelbein's contract but merely nonrenewed it." Brief for appellant at 14. This contention primarily relies upon the same arguments we have already rejected. Schiefelbein also argues that the board did not actually take action to cancel the contract. The evidence clearly shows that by majority vote of all members, the board "resolved that . . . Schiefelbein shall have his contract cancelled and not renewed for the 2007-2008 school year in accordance with the recommendation of the [b]oard [s]ecretary." While we have assumed that this action could not be valid as a nonrenewal, no legal reason defeats its effectiveness as a cancellation. Although the resolution does not explicitly make the cancellation effective on June 30, 2007, it does so by incorporating the recommendation of the board's secretary, which proposed cancellation effective on June 30.

[10] We reject Schiefelbein's argument that the district's attempt to not renew the contract—which we have assumed to be ineffective—precluded the district from proceeding to cancel the contract. A superintendent remains a probationary employee regardless of length of service. Neb. Rev. Stat. § 79-824(3) (Reissue 2003). For a probationary employee, nonrenewal differs from cancellation in several important respects. While nonrenewal of a probationary employee's employment contract is constrained by mandatory time limits, see § 79-831, cancellation can be undertaken at any time during the school year, see § 79-827. A school board may elect to not renew the contract for any reason it deems sufficient, so long as the reason is not constitutionally impermissible or inconsistent with the continuing-contract statutes. See § 79-828(4). In contrast,

the contract can be canceled only for cause. See § 79-827. If a hearing is requested, nonrenewal requires only an informal hearing, see § 79-834, while cancellation mandates a formal due process hearing, see §§ 79-827 and 79-832. In the case before us, the board's notice specified the grounds which it claimed constituted cause for cancellation. Had Schiefelbein requested a hearing on cancellation, the board would have been required to present sufficient evidence to support a cancellation of his contract and judicial review would have been available from an adverse decision. Because he did not request a hearing on cancellation, the board was empowered to make a final determination without presenting such proof.

CONCLUSION

We assume without deciding that a provision of Schiefelbein's contract required any notice of nonrenewal to be given by February 15, 2007, that the board failed to timely do so, that the notice given on March 26 was ineffective as a notice of nonrenewal, and that the contract was automatically renewed for the ensuing year by operation of law. We conclude that on March 26, the board simultaneously gave notice of possible cancellation of the contract, that the notice complied with the statutory requirements, that Schiefelbein failed to timely request a hearing on cancellation, and that the board took the necessary action to cancel the contract. We affirm the judgment determining that Schiefelbein's contract was validly canceled.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RAYMOND C. WALLS, APPELLANT.
756 N.W.2d 542

Filed October 7, 2008. No. A-07-1376.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **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.

3. **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.
4. **Effectiveness of Counsel: Records: 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 the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
5. **Criminal Law: Words and Phrases.** The test for recklessness as statutorily defined in Neb. Rev. Stat. § 28-109(19) (Cum. Supp. 2006) is purely objective.
6. **Courts.** Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system.
7. ____. Pursuant to the doctrine of stare decisis, the Nebraska Court of Appeals is compelled to follow the law as it has been pronounced by the Nebraska Supreme Court.
8. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
9. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same lawyers, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
10. **Effectiveness of Counsel: Time: Appeal and Error.** Claims of ineffective assistance of counsel raised on direct appeal by the same counsel that represented the defendant at trial are premature.

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

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Raymond C. Walls appeals his conviction of third degree assault on an officer, contending that the district court erred in giving its jury instruction defining "reckless" and in refusing

to give his proposed jury instruction defining "recklessly." He also contends that he received ineffective assistance of trial counsel. For the reasons set forth herein, we affirm Walls' conviction and sentence.

STATEMENT OF FACTS

On September 26, 2006, Lincoln police officer Conan Schafer was working as a bicycle patrol officer in the downtown area of Lincoln, Nebraska. At approximately 2:50 p.m., he contacted an individual after observing him drinking alcohol in public in an alcove just to the west of 1421 P Street. While Shafer was attempting to arrest the individual for that offense, the individual swore at Schafer and called him a racist. Walls, who had been uninvolved in the incident, approached Schafer, inquiring about the situation because he had overheard the individual call Schafer a racist. Schafer directed Walls to back up, as Walls was about 5 feet away from Schafer. According to Schafer, he did not want someone behind him while he was making the arrest, due to the dangerousness of such a situation. Walls did not comply with Schafer's repeated requests to step back.

At this time, Lincoln police officer Sid Yardley arrived to assist Schafer, and the aforementioned individual was arrested and placed in the back seat of Yardley's cruiser. Schafer pointed at Walls and said to Yardley, "[H]e's getting a ticket." As Schafer began walking toward Walls, Walls turned and headed inside the building located at 1421 P Street. When Schafer got inside the door, Walls ran up the stairs. Although Schafer yelled at Walls to stop and to inform him that he was under arrest, Walls did not stop and continued to his apartment door. Schafer caught up with Walls just as Walls was putting a key in his apartment door. Schafer grabbed Walls' arm and told him that he was under arrest. A struggle ensued, with Walls forcing Schafer to the floor with Walls' hands around Schafer's neck. Yardley heard a scuffle and assisted Schafer by placing Walls in a lateral vascular neck restraint and pulling Walls off of Schafer. As a result of the incident, Schafer suffered scratches on his Adam's apple area, on the right side of his neck, directly under his chin, and on the right side of his chin. He also had

an abrasion on his knee, and his "right shoulder area was sore for a couple of days."

Walls was charged with third degree assault on an officer, in violation of Neb. Rev. Stat. § 28-931 (Cum. Supp. 2006). A jury trial was held in September 2007. Schafer and Yardley testified to the facts as previously set forth. Walls testified that he grabbed onto Schafer to prevent himself from tripping and that he had no intention of fighting with Schafer.

During the jury instruction conference, Walls objected to the district court's proposed jury instruction defining "reckless" as "the disregarding of a substantial and unjustifiable risk that . . . Schafer [would] be injured in the circumstances in which disregarding this risk was a gross deviation from what a reasonable, law-abiding person would have done." Walls proposed the following jury instruction defining "recklessly":

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The district court overruled Walls' objection to the court's instruction, denied Walls' proposed jury instruction, and gave its original instruction to the jury. The jury convicted Walls of the charged offense, and thereafter, Walls was sentenced to 2 years' probation with a term of 120 days' jail as a condition of that probation. Walls has timely appealed to this court.

ASSIGNMENTS OF ERROR

Walls contends that the district court erred in giving its jury instruction defining "reckless" and in refusing to give his proposed jury instruction defining "recklessly." He also contends that he received ineffective assistance of trial counsel.

STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Anderson*, 269 Neb. 365, 693

N.W.2d 267 (2005). 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. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006).

[3] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

[4] 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 the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007).

ANALYSIS

Jury Instructions.

Walls' first two assignments of error are that the district court erred in giving its jury instruction defining "reckless" and in refusing to give his proposed jury instruction defining "recklessly."

Walls' proposed jury instruction mirrored the statutory language of Neb. Rev. Stat. § 28-109(19) (Cum. Supp. 2006), which defines "recklessly" as follows:

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

In contrast, the district court's jury instruction, based on the definition of "reckless" contained in NJI2d Crim. 4.0E, defined

"reckless" as "the disregarding of a substantial and unjustifiable risk that . . . Schafer [would] be injured in the circumstances in which disregarding this risk was a gross deviation from what a reasonable, law-abiding person would have done."

[5] Walls argues that the statutory definition of "recklessly" required the jury to take into consideration the defendant's purpose and the circumstances known to him, i.e., a subjective element; that the jury instruction given by the district court did not do so; and that his proposed jury instruction did do so. However, the Nebraska Supreme Court has specifically rejected the position that the statutory definition of "recklessly" contains a subjective element in *State v. Kistenmacher*, 231 Neb. 318, 323, 436 N.W.2d 168, 171 (1989), in which the court held that "the test for recklessness as statutorily defined in § 28-109(19) is purely objective." Although Walls recognizes, and cites to, the *Kistenmacher* decision in his brief, he argues that *Kistenmacher* was wrongly decided.

[6,7] Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system. *Sanford v. Clear Channel Broadcasting*, 14 Neb. App. 908, 719 N.W.2d 312 (2006). Pursuant to the doctrine of stare decisis, this court is compelled to follow the law as it has been pronounced by the Nebraska Supreme Court. As such, the jury instruction given by the district court, which contains a purely objective test of recklessness, was proper.

[8] Furthermore, as Walls admits in his brief, the jury instruction given by the district court followed the pattern jury instruction of NJI2d Crim. 4.0E. Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Thus, the jury instruction given by the district court was a correct statement of the law, and by giving the pattern jury instruction definition of "reckless," the district court avoided using "the horrendously complicated definition of the term 'recklessly' contained in § 28-109(19)." See *State v. Pribil*, 224 Neb. 28, 32, 395 N.W.2d 543, 547 (1986). But see *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002) (Nebraska

Supreme Court noted that trial court's instructing jury using statutory definition of "recklessly" was proper). Consequently, we find Walls' claims that the district court erred in giving its jury instruction defining "reckless" and in refusing to give his proposed jury instruction defining "recklessly" to be without merit.

Ineffective Assistance of Counsel.

Walls also contends that he received ineffective assistance of trial counsel on the following basis:

> 1) Trial counsel did not prepare to defend him in this case;
>
> 2) Trial counsel told defendant he did not have time to prepare his case for trial;
>
> 3) Trial counsel told defendant that he would call the prosecutor to ask him to put the case behind because the defendant was not going to turn out to be who the officers indicated he was;
>
> 4) Defendant was dragged into an all white jury trial against his will;
>
> 5) Defendant wanted a bench trial because he thought he would have a better chance;
>
> 6) Trial counsel likes jury trials and left defendant without a choice, and violated his constitutional rights;
>
> 7) Defendant was the only black person in the court and felt like he was being lynched by a white mob;
>
> 8) Trial counsel neglected to use the information defendant presented to him to prepare for trial; and
>
> 9) Because trial counsel neglected to use the information provided by defendant, defendant had to spend 120 days in jail and 2 years on probation, which is causing him to lose out on a cleaning contract with the University of Nebraska, not complete his psychology degree on time and not start his on-line bachelor of science in management degree.

Brief for appellant at 22-23.

[9,10] We note that Walls was represented by the same attorneys at trial and on direct appeal. When a defendant was represented both at trial and on direct appeal by the same lawyers,

the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008). Therefore, claims of ineffective assistance of counsel raised on direct appeal by the same counsel that represented the defendant at trial are premature and we decline to address them.

CONCLUSION

In sum, we find that Walls' claimed errors regarding jury instructions are without merit and that his claims of ineffective assistance of counsel are premature. Therefore, Walls' conviction and sentence are affirmed.

AFFIRMED.

KIMBERLY K. BANDY, APPELLANT, V.
FINIS SCOTT BANDY, APPELLEE.
756 N.W.2d 751

Filed October 14, 2008. No. A-07-1306.

1. **Divorce: Property Division: Pensions.** A determination of whether a disability pension or disability benefits should be included in the marital estate should be based on the relevant facts and circumstances of the case at issue.
2. ____: ____: ____. A trial court's determination that a former spouse's disability pension should not be included in the marital estate is not an abuse of discretion where the former spouse was unable to work as a result of injuries, his or her only income was from disability payments, and his or her disability pension was distinct from retirement benefits.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Patrick R. Runge, of Runge Law Office, for appellant.

John H. Kellogg, Jr., of Kellogg & Palzer, P.C., for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral

argument. Kimberly K. Bandy appeals from a decree of dissolution entered by the district court, which decree dissolved her marriage to Finis Scott Bandy, divided the parties' marital assets and debts, awarded Kimberly custody of the parties' minor child, and ordered Finis to pay child support and a nominal amount of alimony. On appeal, Kimberly asserts that the district court erred in finding that Finis' disability pension was not marital property, in ordering her to pay the entirety of a bill from a jewelry store, in not including Finis' earning capacity in its calculations of his monthly income, and in overruling her motion for new trial. For the reasons set forth below, we affirm the decision of the district court.

II. BACKGROUND

Kimberly and Finis were married on May 26, 1984. There were two children born of the marriage. At the time of trial, the older child was 19 years old and the younger child was 15 years old. As such, the older child was not a subject of the proceedings.

During the parties' marriage, Finis' employment required Finis, Kimberly, and their children to move often. Over the years, the parties lived in the eastern U.S. and in San Diego and two smaller cities in California. The family's constant relocation made it difficult for Kimberly to retain employment. While there were times when Kimberly was able to find temporary employment, there were significant points in time when Kimberly was a stay-at-home mother because (1) there was not enough time to obtain a job because of an impending transfer or (2) Kimberly and Finis determined it would make more sense economically for Kimberly to stay home.

In approximately 1999 or 2000, the parties moved to Nebraska. Shortly thereafter, Finis became employed with the city of Omaha in the public works department and Kimberly began working part time for a travel business. In 2003, Finis was injured while on the job. As a result of this injury, Finis was unable to continue with his current employment. He qualified for disability pension benefits through the city of Omaha and workers' compensation benefits. In addition to these benefits, Finis also began receiving disability payments from the

Department of Veterans Affairs as a result of a separate injury which occurred during the time he spent in the military. Since his injury in 2003, Finis has sought employment; however, because of his physical limitations, he has found it difficult to find and retain a job.

On January 11, 2006, Kimberly filed a complaint for dissolution of marriage. Kimberly specifically asked that the parties' marriage be dissolved; that she be awarded the care, custody, and control of the younger child; and that the court award her temporary and permanent child support and alimony. On February 17, Finis filed a response to the complaint for dissolution of marriage wherein he asked that the parties be awarded joint custody of the younger child.

On March 16, 2006, the court entered a temporary order. This order is not included in the record; however, there is some evidence that the order awarded temporary custody of the younger child to Kimberly and ordered Finis to pay temporary child support and one-half of the monthly mortgage payments for the parties' home.

On August 1, 2006, a hearing was held. At the hearing, Kimberly presented evidence that Finis owed $2,981.01 in temporary child support arrearages and approximately $2,130 in arrearages on the mortgage payments. Finis testified that he had been looking for a job, but that his injuries hindered his ability to gain employment. He testified that he was "making [his] best efforts" to pay the child support and mortgage payments.

After the hearing, the court found Finis to be in contempt of the temporary order. The court stated, "[A]lthough, obviously, there is not enough money to go around in this case, there is — it seems to me that [Finis] could have not only gotten the child support paid on time but paid the extra [$]355 [toward the monthly mortgage payments]." The court went on to suggest that Finis could acquire a part-time job to help pay the debt if he wanted to: "[I]f you really wanted to make this a priority, you could get that taken care of because you have got the arrangement made on the child support now. It is the mortgage."

On August 21, 2007, a trial was held. At the close of the evidence, the court entered a decree of dissolution. The court awarded custody of the younger child to Kimberly, ordered Finis to pay child support in the amount of $621.81 per month, awarded Kimberly $4,000 in attorney fees, and distributed the parties' marital assets and debts. In addition, the court ordered Finis to pay Kimberly a nominal amount of alimony:

> [Finis] shall pay . . . alimony for the support and maintenance of [Kimberly] in the amount of $1.00 per year, for the next five years. Said payments shall commence upon the first day of October, 2007, and shall continue to be due and payable on the first day of the month thereafter until the final payment on October 01, 2012. If circumstances around [Finis'] income substantially change, [Kimberly] may seek modification.

On September 27, 2007, Kimberly filed a motion for new trial alleging that the trial court erred in (1) finding Finis' pension was in the form of a disability pension and not part of the marital estate, (2) finding Finis' earning capacity outside of his pension checks was equal to $0, (3) awarding Kimberly only $1 per year in alimony, and (4) ordering Kimberly to pay a bill for jewelry purchased by Finis. After a hearing, the court entered an order overruling Kimberly's motion in all respects.

Kimberly appeals here.

III. ASSIGNMENTS OF ERROR

In her appellate brief, Kimberly assigns five errors. She alleges, renumbered and consolidated, that the district court erred in (1) finding that Finis' disability pension was not a marital asset, (2) ordering Kimberly to pay the entirety of a marital debt owed to a jewelry store, (3) not including Finis' earning capacity in a calculation of his income for purposes of child support and alimony, and (4) overruling her motion for new trial.

IV. ANALYSIS

1. Standard of Review

An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there

has been an abuse of discretion by the trial judge. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). This standard of review applies to the trial court's determinations regarding child support, division of property, and alimony. See *id.* An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005).

2. Distribution of Marital Property

Kimberly's first assignments of error allege that the district court erred in distributing the marital assets and debts. Specifically, Kimberly argues that the court erred in finding that Finis' disability pension from the city of Omaha was not marital property and in ordering her to pay a particular debt in its entirety. Upon our review of the record, we cannot say that the court abused its discretion in distributing the marital assets or debts.

Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gress v. Gress, supra*. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Id.*

(a) Finis' Disability Pension

Kimberly argues that the district court erred in finding that Finis' disability pension was not a part of the marital estate and in failing to award her a portion of the pension. Kimberly asserts that the disability pension constituted a portion of the retirement benefits Finis earned as a result of his employment with the city of Omaha. She asserts that "because

[Finis'] employment was during the marriage of the parties, the benefits of that employment should be subject to a reasonable division by the District Court." Brief for appellant at 14. Upon our review of the record, and considering the equities of the parties' circumstances, we cannot say that the district court abused its discretion in finding that Finis' disability pension was not a part of the marital estate.

Neb. Rev. Stat. § 42-366(8) (Reissue 2004) provides, in part, that "[t]he court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." The marital estate includes only that portion of pensions or retirement accounts earned during the marriage. See *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996).

It is clear from the language of § 42-366(8) that retirement benefits, including retirement pension plans, are to be considered as part of the marital estate. Kimberly contends that Finis' disability pension constitutes a retirement benefit. She asserts that evidence in the record demonstrates that the disability pension was actually a "'disability retirement pension.'" Brief for appellant at 12. Finis argues that the pension is a disability pension unrelated to his retirement benefits through the city. In tentative findings made before entry of the decree, the district court found that "the pension [Finis] now receives from the City of Omaha is in the nature of a disability pension," and the court reiterated that finding in the decree.

Upon our de novo review of the record, we do not find that the district court abused its discretion in determining that Finis' pension was a disability pension unrelated to his retirement benefits. The record reveals that after Finis was injured on the job, he applied for a "service-connected disability" benefit. Documentation from the city of Omaha informed Finis that "[a]t age 65, disability pensions convert to service retirement pensions with service credit incurred up to 30 years." (Emphasis omitted.) In addition, the terms of the disability pension require a recipient to "apply for Social Security Disability," and they explain, "Social Security Disability is <u>not</u> the same as old age

Social Security." (Emphasis omitted.) (Emphasis in original.) The terms of the disability pension also permit the city to offset disability payments by the amount of any workers' compensation benefit awarded as a result of the disabling injury.

Based on the language contained in documentation from the city of Omaha, it is clear that the city distinguished Finis' disability pension from his retirement benefits. In fact, the Omaha City Code provides that while Finis is receiving payments from his disability pension, his retirement pension is still accruing value. See Omaha Mun. Code § 22-35(a) (2008). The code provides that upon Finis' reaching the age of 65, Finis' period of work credits coupled with his period of disability shall be utilized to determine a retirement pension which will begin at that time. See *id.*

The majority of the evidence presented at trial established that although Finis' disability benefits were labeled a "pension," the benefits were more analogous to a workers' compensation award than to a retirement benefit in that the disability pension appears to be compensation for Finis' loss of earning power due to a work-related injury, rather than compensation for past services.

Because we affirm the district court's finding that Finis' disability pension was not a retirement benefit, we turn to the question of whether disability payments which are labeled a "disability pension" are to be considered part of the marital estate under the language of § 42-366(8) or current case law.

This court has previously examined whether a "disability pension" should be included in the marital estate. In *John v. John*, 1 Neb. App. 947, 511 N.W.2d 544 (1993), the plaintiff had applied for and been granted a disability pension through the city of Omaha 15 years prior to the parties' dissolution proceedings. After beginning to receive disability payments, the plaintiff began working at a bank as a personal banking center manager. *Id.* At trial, the plaintiff did not present any evidence regarding the nature of his disability; nor did he present evidence to demonstrate that his earning capacity had been in any way affected by his disability. *Id.* As a part of the decree of dissolution, the court awarded the defendant approximately $300 per month of the plaintiff's disability pension. *Id.*

The defendant appealed to this court and argued, among other things, that the district court erred in not awarding her one-half of the marital estate, including one-half of the defendant's disability pension. *Id.* On appeal, the plaintiff conceded that the disability pension was a marital asset, but argued that it was deserving of some type of "special treatment." *Id.* at 951, 511 N.W.2d at 547.

In analyzing whether to include the proceeds from the disability pension in the marital estate, we first analogized disability payments to personal injury claims, which the Nebraska Supreme Court had previously held could be included in the marital estate. See *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985), *overruled on other grounds, Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999). We then determined, "based on the facts as presented by the record, that it [was] proper in [*John*] to include [the plaintiff's] disability pension in the marital estate." *John*, 1 Neb. App. at 951-52, 511 N.W.2d at 548. In finding that the plaintiff's disability pension should be included in the marital estate, we noted that there was nothing in the record to reveal the nature of the plaintiff's disability or any effect that this disability had on his ability to earn additional income. *Id*. However, we stated: "We can imagine situations where in fact a person's earning capacity or medical expenses may be greatly impacted by a disability and result in a different outcome than what we hold in this case." *Id.* at 952, 511 N.W.2d at 548.

We note that our holding in *John* could be read to suggest that because disability pensions or disability benefits are analogous to personal injury claims, at least a portion of the benefits should always be included in the marital estate. However, the crux of our decision to include the disability pension in that marital estate was not our determination that the disability pension was akin to a personal injury claim, but our analysis of the relevant facts, circumstances, and resulting equities of the case. In *John*, the plaintiff conceded that the disability pension should be a part of the marital estate, the plaintiff was able to resume working after being injured, and there was no evidence that the disability had affected his earning capacity whatsoever.

[1] Accordingly, we clarify our holding in *John v. John*, 1 Neb. App. 947, 511 N.W.2d 544 (1993), to provide that a determination of whether a disability pension or disability benefits should be included in the marital estate should be based on the relevant facts and circumstances of the case at issue.

In the instant case, the evidence at trial revealed that Finis was injured while on the job in 2003. He has been unable to maintain work since that time. It is clear that his disability greatly impacted his ability to earn additional income. Finis testified that he had tried to work at other jobs, but that he was unable to perform the responsibilities associated with the jobs and that he experienced a great deal of pain while working. At the time of trial, Finis' only income was from his disability payments. As such, his disability pension from the city of Omaha, together with his workers' compensation award and his pension from the Department of Veterans Affairs, constituted his entire stream of income. Finis' disability pension is distinct from any retirement benefits he may receive from the city; rather, the pension appears to be compensation for his loss of earning capacity.

[2] A trial court's determination that a former spouse's disability pension should not be included in the marital estate is not an abuse of discretion where the former spouse was unable to work as a result of injuries, his or her only income was from disability payments, and his or her disability pension was distinct from retirement benefits. Based on Finis' inability to earn additional income and the circumstances of the parties, we do not find that the court abused its discretion in failing to include any part of Finis' disability pension in the marital estate. We affirm.

(b) Jewelry Bill

Kimberly also contends that the district court erred in ordering her to pay a bill for jewelry purchased by Finis. Kimberly argues that she is not in possession of all of the jewelry listed on the bill and that as such, "it would be inequitable and unreasonable to require [her] to be responsible" for the debt. Brief for appellant at 19. Upon our review of the record, we do not find that the court abused its discretion in ordering Kimberly to pay the jewelry bill.

At trial, the parties testified that there were two unpaid marital debts. Testimony and exhibits showed the parties owed $1,605.69 to an automobile repair shop for repairs made to a vehicle driven by the parties' older son. The parties also owed approximately $702 to a jewelry store for certain items purchased in May 2005, including earrings, a pendant, and "additional items." In the decree, the court assigned the debt from the automobile repair shop to Finis and assigned the debt from the jewelry store to Kimberly. Specifically, the court stated: "[Finis] shall pay and hold [Kimberly] harmless for the debt to [the automobile repair shop] in the amount of $1,605.89 [sic]. [Kimberly] shall pay and hold [Finis] harmless for $702.00 of the [jewelry store] debt."

In her brief to this court, Kimberly asserts that this division of the parties' debts was inequitable because she did not receive all of the items of jewelry listed on the jewelry store bill. She opines that some of the jewelry was retained by Finis or given to someone else. When questioned by counsel at trial, Kimberly agreed that there were items of jewelry listed on the receipt that she did not receive as a gift from Finis at any point in time. Kimberly did not provide any further testimony regarding which items she had received and which she had not received.

Contrary to Kimberly's testimony, Finis testified that the items listed on the receipt were gifts for Kimberly which were given to her on the last anniversary the parties celebrated together.

In light of the conflicting evidence regarding possession of the jewelry, and viewing the property distribution as a whole, we cannot say the district court abused its discretion in ordering Kimberly to pay the jewelry store debt in its entirety. We find Kimberly's contention to be without merit.

3. Calculation of Finis' Monthly Income

In her next assignments of error, Kimberly asserts that the district court erred in calculating Finis' monthly income for the purpose of determining his child support and alimony obligations. Kimberly alleges that the court should have imputed additional income to Finis because, despite Finis' disability, he

is capable of working and earning additional income. Kimberly further alleges that at the contempt hearing in August 2006, the court found Finis to be capable of working, and that the court should be bound by that prior determination. Upon our review of the record, we find that the district court did not abuse its discretion in calculating Finis' income using only his monthly disability payments.

At trial, Finis testified that his current income was based entirely on his disability payments. He testified that he receives monthly payments from his disability pension through the city of Omaha, from his disability pension through the Department of Veterans Affairs, and from a workers' compensation award. He estimated that his monthly earnings from these three benefits totaled $2,262. The trial court calculated Finis' monthly income to be $2,291.18, an amount very close to Finis' estimated monthly earnings. The court did not impute any additional income to Finis and noted in a letter to the parties dated September 12, 2007, "[A]t this point in time, [Finis'] only income is disability."

We now examine the court's calculation of Finis' income as it relates to a determination of Finis' child support and alimony obligations.

(a) Child Support

In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). Under the Nebraska Child Support Guidelines,

> [i]f applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources.

Neb. Ct. R. § 4-204. Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children. *Claborn, supra*. Earning

capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where evidence is presented that the parent is capable of realizing such capacity through reasonable effort. *Id.*

In the instant case, the district court based its calculation of Finis' income solely on Finis' monthly disability payments. The court did not impute any additional income to Finis.

The evidence presented at trial revealed that Finis had worked for the city of Omaha for approximately 3 years when he was injured on the job in 2003. Finis sought treatment for his injuries from various physicians; however, after he reached "maximum medical improvement," he was still limited in his ability to perform certain activities, including his ability to sit or stand for long periods of time and his ability to lift more than 15 pounds. In March 2005, his doctors informed the city that Finis was not "capable of performing all the essential functions" of his previous position. The city later determined that it could not accommodate Finis in any other position based on his medical restrictions and his lack of education and experience in other areas. As a result of the city's inability to accommodate him, Finis filed an application requesting a disability pension through the city. The city approved the application.

The terms of the disability pension do not preclude Finis from obtaining other employment. However, Finis testified at trial that his physical limitations and the amount of pain he experiences do limit his ability to obtain other employment. Finis testified that after being put on disability, he attempted to work at other locations. Finis said that he obtained a job with a foods company in 2005. He testified he remained at the job for only 6 or 7 months because he was incapable of performing all of his duties as a result of his disability. Finis also testified that he worked for another company for approximately 1 month. Finis testified that his current medical condition is "unchangeable" and that he has not been able to find a suitable job in light of his injuries.

In her motion for new trial and in her brief to this court, Kimberly argued that this evidence is insufficient to support the court's implicit finding that Finis is not capable of earning

additional income through reasonable efforts. Kimberly bases her argument on the district court's previous findings at the contempt hearing in August 2006. At the hearing, the court found Finis to be in contempt of court as a result of his failure to pay his temporary child support obligation and one-half of the parties' monthly mortgage payments. The court stated:

> And it just seems to me if you worked a part-time job for 15 hours a week at $6 an hour, you could pay that [$]355 a month. And it seems to me that as I look at the local job market and I look at what other people have done who are in similar circumstances to you, that if you really wanted to make this a priority, you could get that taken care of . . . .

Kimberly seems to argue that the district court is bound by its previous decision that Finis is "capable of working" and that as such, the court erred in not imputing any additional income to Finis. See brief for appellant at 16. At the hearing on Kimberly's motion for new trial, the district court addressed Kimberly's argument and explained the rationale for finding differently at the contempt hearing than it did at trial: "And as far as earning capacity or ability to work, I think the evidence was somewhat different at trial than it was at previous hearings, and so I am going to overrule the motion for new trial . . . ."

At the contempt hearing, Finis testified that he was looking for suitable employment, that he had enrolled in a vocational rehabilitation program, and that he was making his "best efforts" to keep up with his child support obligation and his part of the mortgage payment. There was no evidence to suggest that Finis was incapable of working at any job as a result of his injury. There was no evidence which demonstrated that Finis had obtained employment, but had to leave that employment because of his inability to complete his routine responsibilities.

In contrast, at trial, Finis testified that his injury prohibited him from working. He testified that he had tried, unsuccessfully, to earn additional income, but that he experienced too much pain to be able to work at jobs for which he was otherwise qualified.

In light of the evidence at trial which demonstrated that Finis could not work because of his disability, we do not find that the court abused its discretion in calculating Finis' income for the purpose of determining his child support obligation. Upon our de novo review of the record, we find sufficient evidence to establish that Finis is not voluntarily choosing to remain unemployed. Rather, the evidence reveals that Finis is currently incapable of finding employment through "reasonable efforts." Accordingly, we affirm the decision of the district court to calculate Finis' income based solely on his monthly disability payments.

(b) Alimony

We next address Kimberly's assertion that the court erred in calculating Finis' income for the purpose of determining his alimony obligation. Kimberly again argues that the district court should have imputed additional income to Finis because he is capable of working despite his disability and that this imputed income should have been considered in determining the amount of alimony awarded to Kimberly.

In awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). The criteria in § 42-365 include

> the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's

award is untenable such as to deprive a party of a substantial right or just result. *Id.* In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.* The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id.*

In the instant case, the district court ordered Finis to pay Kimberly alimony in the amount of $1 per year for the next 5 years. In providing Kimberly with a nominal award of alimony, the court stated:

> [Kimberly] introduced evidence which would support some award of alimony. The evidence demonstrated that her career has been interrupted numerous times by transfers which occurred due to [Finis'] employment and that, at other times, she stayed at home with the minor children. However, at this point in time, [Finis'] only income is disability. . . . [I]t would appear that under these circumstances a substantial award of alimony is not warranted. However, there was some evidence that [Finis], since his disability findings, has worked at times and could possibly work in the future. Therefore, the Court orders $1.00 per year in alimony be paid by [Finis] to [Kimberly] for the next five years. If circumstances surrounding [Finis'] income substantially change, [Kimberly] may seek modification.

As we discussed more thoroughly above, evidence at trial established that Finis is currently incapable of working and that his income is made up entirely from his disability benefits. Based on our analysis of the district court's computation of Finis' income and our review of other evidence in the record, including the duration of the parties' marriage, Kimberly's work history, and the contributions each party made to the marriage, we do not find that the court abused its discretion in calculating Finis' income or in awarding Kimberly a nominal amount of alimony for the next 5 years. We affirm.

4. Motion for New Trial

After the district court filed the decree of dissolution, Kimberly timely filed a motion for new trial in which she

alleged the district court erred for the same reasons she argues in her appellate brief to this court. The trial court subsequently overruled Kimberly's motion, and she now alleges such denial constituted an abuse of discretion. 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. *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007). In light of our analysis of Kimberly's other assignments of error, we conclude that the district court did not abuse its discretion in overruling Kimberly's motion for new trial. We find Kimberly's contention to be without merit.

V. CONCLUSION

Upon our de novo review of the record, we find that the district court did not abuse its discretion in determining that Finis' disability pension was not marital property, in ordering Kimberly to pay the jewelry store bill in its entirety, in calculating Finis' monthly income, or in overruling Kimberly's motion for new trial in all respects. Accordingly, we affirm.

AFFIRMED.

TRACY BROADCASTING CORPORATION, A NEBRASKA CORPORATION, APPELLEE, V. TELEMETRIX, INC., A DELAWARE CORPORATION, APPELLANT.

756 N.W.2d 742

Filed October 14, 2008. No. A-07-1327.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Arbitration and Award: Final Orders.** Denial of a motion to compel arbitration is a final, appealable order under Nebraska law because it affects a substantial right and is made in a special proceeding.
4. **Arbitration and Award: Contracts.** Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.
5. **Constitutional Law: Waiver: Intent.** A party has a constitutional right to adjudication of a justiciable dispute, and the law will not find a waiver of that right

absent direct and explicit evidence of actual intent of a party's agreement to do so.

6. **Federal Acts: Arbitration and Award: Courts.** The Federal Arbitration Act prohibits a court from compelling arbitration unless the court first satisfies itself that the issue is referable to arbitration under such an arbitration clause.
7. **Arbitration and Award: Contracts: Intent.** Whether an issue is to be decided by arbitration is a matter of the parties' contractual intent.
8. **Federal Acts: Arbitration and Award: Contracts.** The Federal Arbitration Act applies to a contract evidencing a transaction involving commerce.
9. **Federal Acts: Arbitration and Award: Contracts: Words and Phrases.** The phrase "involving commerce" requires a broad interpretation in order to give effect to the Federal Arbitration Act's basic purpose, which is to put arbitration provisions on the same footing as a contract's other terms.

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

Richard A. Douglas, of Douglas, Kelly, Ostdiek & Bartels, P.C., for appellant.

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

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

Tracy Broadcasting Corporation (TBC) filed suit in the Scotts Bluff County District Court against Telemetrix, Inc., claiming that Telemetrix was indebted to it in the amount of $467,000 together with interest at 10 percent per annum from December 31, 2004. Telemetrix filed a motion to compel arbitration, alleging that a series of promissory notes, supposedly the basis for TBC's lawsuit, contained a provision that all disputes concerning such would be settled by submitting the same to binding arbitration. The district court concluded that the document underlying TBC's claim did not contain an arbitration clause and therefore denied Telemetrix's motion to compel arbitration. Telemetrix now appeals that decision.

FACTUAL BACKGROUND

Telemetrix was and is what could be called a "high-tech startup." It had a line of business involving pagers, where people could receive messages through a pager they purchased,

and it is undisputed that the associated data transmissions crossed multiple state lines. Telemetrix's second line of business involved the attempt to develop hardware and software to engage in nationwide utility meter reading and billing services. The apparent centerpiece of this business was the development of a wireless telemetry device known as the T3000, but that device was never successfully implemented, manufactured, or deployed. Instead, in August 2002, Telemetrix moved away from the development of the T3000 to focus on providing services for the growing number of devices in service, such as pagers and remote monitoring hardware. However, the efforts concerning the T3000 required financing, a portion of which was provided by loans from TBC and its sole stockholder and president, Michael J. Tracy. Tracy served as the president of Telemetrix from early 2000 until November 2004. Telemetrix needed venture capital for the development of the T3000. TBC loaned money to Telemetrix and continued to do so periodically.

The operative first amended complaint contains a listing of 13 promissory notes designated by exhibit letter, date, and amount. The total listed in this complaint for the promissory notes is $347,201.36. Eleven of the thirteen promissory notes are attached to the operative complaint found in our record. The terms of the notes show that the noteholder was given the option to convert the note into Telemetrix stock. The complaint recites that none of the notes have been so converted. Each note contains a paragraph providing, "All disputes concerning this Note will be submitted to binding arbitration in Denver, Colorado, in accordance with the Expedited Procedures of the American Arbitration Association's Commercial Arbitration Rules." Although the complaint asserts the principal balance due is $467,000, the total of the itemized promissory notes is almost $120,000 less than the recovery sought by the lawsuit.

That discrepancy is perhaps explained by paragraph 5 of the complaint, in which TBC asserts that shareholders of Telemetrix entered into an agreement of November 30, 2004, in evidence as exhibit 24, entitled "Binding agreement between the undersigned shareholders of Telemetrix, Inc." (Binding Agreement). In the definitions portion of the Binding Agreement, Tracy is

identified as "MT," followed by another term, "MT and MT entities owning shares," which was then designated as "MT Ents." The key provision of the Binding Agreement is the following paragraph found in section 1.4, entitled "Historic Conversions," which provides:

> All MT Ents interests, except his $467,000 loan note, shall aggregate to no more than 42,594,678 common shares. MT Ents will be given a new note for $467,000 which will provide that the maturity date shall be for twenty four (24) months from December 31, 2004 and that if the loan note is not repaid by such date, at the option of the holder it may be converted into equity at $0.02 per share. The loan note shall bear simple interest at 10% per annum from December 31, 2004.

Additionally, we note that in section 2.1, "Management Team and Employees," the Binding Agreement further provides:

> MT Ents agree that, other than in respect of theft or fraud, all current claims against Nyssen, [TowerGate], [Telemetrix] and its subsidiaries (other than the $467,000 note and the $55,850 expenses due to MT from [Telemetrix] as set out above in Section 1.4) are dropped and all claims relating to actions prior to the date of this agreement which may be considered in the future against the above or Becker Ents are waived in full and will not be prosecuted.

The Binding Agreement makes no reference whatsoever to submission of any dispute involving the parties thereto to arbitration.

Telemetrix filed an answer to TBC's first amended complaint and alleged that exhibits A through M, the promissory notes listed in TBC's first amended complaint, require disputes to be submitted to binding arbitration and that thus, the court had no jurisdiction over the subject matter under Neb. Ct. R. Pldg. § 6-1112(b)(1). Telemetrix also set forth a number of affirmative defenses, including that all indebtedness from Telemetrix to Tracy has been paid, but at this point in the proceedings, we need not discuss such defenses, because the sole issue is whether this dispute must be submitted to binding arbitration.

DISTRICT COURT PROCEEDINGS AND DECISIONS

On August 3, 2007, the district court held a hearing on Telemetrix's motions to compel arbitration. We use the plural because the decisions of the district court before us reveal that there were actually two cases filed against Telemetrix: the instant case brought by TBC, docketed in the trial court as case No. CI07-37, and another suit brought by Tracy individually and docketed as case No. CI06-291. We mention this fact although only the TBC versus Telemetrix case is before us, because the trial court's orders we discuss apply to both cases and resolve the matter of arbitration in each case.

In any event, on August 23, 2007, the district court entered its memorandum order with a comprehensive and concise analysis of the two cases and the applicable state and federal law concerning arbitration. The court concluded that the Federal Arbitration Act would preempt Nebraska's Uniform Arbitration Act if the notes and agreement upon which liability was allegedly premised were "transactions involving commerce." On the other hand, the court cited our decision in *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 716 N.W.2d 749 (2006), for the proposition that if commerce was not involved, the Nebraska act would not be preempted. We shall later discuss our decision in *Kramer* in some detail, because what we said in that opinion may well be misleading to the bench and bar. In any event, the trial court decided that an evidentiary hearing was needed to determine whether the instant case (as well as the case brought by Tracy individually) had to be submitted to arbitration. That evidentiary hearing was held October 11, and after briefing, the district court entered its memorandum order determining that the instant case brought by TBC was not subject to arbitration and that the claims brought by Tracy individually were subject to arbitration, although the latter decision is not implicated in this appeal. It is important to note that the record before us does not contain the pleadings or the promissory notes upon which recovery was sought in the suit that Tracy individually brought against Telemetrix, and as a result, we do not know anything about what documents that lawsuit was premised upon.

ASSIGNMENTS OF ERROR

Telemetrix claims, restated, that the district court erred in denying its motion to compel arbitration; in not finding that the Federal Arbitration Act, see 9 U.S.C. § 1 et seq. (2006), compels arbitration; and in not determining initially that Nebraska's Uniform Arbitration Act, see Neb. Rev. Stat. § 25-2601 et seq. (Reissue 1995 & Cum. Supp. 2006), was applicable and required arbitration.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Introduction.

[3] We begin by noting that denial of a motion to compel arbitration is a final, appealable order under Nebraska law because it affects a substantial right and is made in a special proceeding. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). Next, we outline the fundamental disagreement between the parties, which we take from their briefing.

Telemetrix contends that this lawsuit is to recover on promissory notes, identified as exhibits A through M and attached to the operative complaint, and that such notes contain a mandatory arbitration clause. Telemetrix argues that such clauses must be enforced by granting its motion to compel arbitration and that thus, the trial court's decision is in error. In contrast, TBC contends that the lawsuit does not seek recovery on the attached promissory notes, but, rather, upon the Binding Agreement, in which Telemetrix agreed to issue its promissory note for $467,000 payable by December 31, 2006, to TBC. Thus, the crucial question is which document(s) the lawsuit is premised upon.

[4-7] Telemetrix asserts that "[w]hether a claim falls within the scope of an arbitration agreement turns on the factual

allegation in the complaint rather than the legal causes of action asserted." Brief for appellant at 19. We disagree because, as held in *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002), arbitration is purely a matter of contract. The correct statement of applicable law is as follows:

> The U.S. Supreme Court has held that arbitration "'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). A party has a constitutional right to adjudication of a justiciable dispute, and the law will not find a waiver of that right absent "'direct and explicit evidence of actual intent'" of a party's agreement to do so. *McCarthy v. Azure*, 22 F.3d 351, 358 n.9 (1st Cir. 1994). The arbitration act prohibits a court from compelling arbitration unless the court first satisfies itself that the issue is referable to arbitration under such an arbitration clause. 9 U.S.C. § 3. Thus, whether an issue is to be decided by arbitration is a matter of the parties' contractual intent. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

Smith Barney, Inc. v. Painters Local Union No. 109, 254 Neb. 758, 762-63, 579 N.W.2d 518, 521-22 (1998).

Did District Court Err in Denying Motion to Compel Arbitration?

Despite the need for and the importance of a contractual agreement to arbitrate, this case requires close examination of the operative complaint and the promissory notes attached thereto, all of which unquestionably have an arbitration clause. TBC's present counsel suggests that the attachment of and reference to this series of promissory notes from Telemetrix to TBC are superfluous, given that such are not the basis for the claimed recovery.

The operative complaint begins by alleging that TBC loaned money to Telemetrix via a series of promissory notes and that the principal balance due is $467,000. The complaint says that

this amount was allegedly "accumulated over a period of time based on the Promissory Notes attached hereto to [TBC]." The complaint contains the list of 13 promissory notes, but the only factual conclusion alleged after setting forth the list of the 13 notes is that TBC has not converted any of such debt to Telemetrix stock, which could have been done under the terms of the notes. The complaint then suddenly "shifts gears" and alleges the existence of the Binding Agreement of November 30, 2004, and that such agreement provides for a $467,000 promissory note from Telemetrix to TBC. The operative complaint alleges that this note was not delivered in accordance with the agreement, nor has any part of the debt it evidenced been paid. The complaint then alleges that such debt is due and owing and prays for judgment accordingly. The complaint does not allege that the Binding Agreement or the $467,000 promissory note provided for therein replaced, was substituted for, or is the equivalent of the 13 promissory notes. And, as said earlier, the sum of the 13 promissory notes is almost $120,000 less than $467,000.

Thus, we must admit that we do not comprehend why the complaint even mentions the 13 promissory notes or attaches the majority of them to the complaint. We have closely examined the Binding Agreement and found no reference whatsoever to the 13 promissory notes referenced in the operative complaint. Such fact leads to the inescapable conclusion that the Binding Agreement, at least insofar as its written terms provide, was a separate and distinct obligation of Telemetrix from the 13 promissory notes.

The evidence does not include an actual signed promissory note, and Tracy admits that he never received such. However, there is an unsigned "draft" of such a note in evidence in the amount of $467,000 payable by Telemetrix to TBC dated December 31, 2004, drawn for the signature of William W. Becker, chairman of the board of Telemetrix. This unsigned note does not contain any language providing or even implying that the note is a replacement for any previous promissory note(s), such as those attached to the complaint.

Exactly how the Binding Agreement and the draft promissory note referenced above in the amount of $467,000 came

into existence is illuminated by exhibit 27, a U.S. Securities and Exchange Commission (SEC) "Form 10-KSB," for the fiscal year ending December 31, 2004. This required filing with the SEC provides public information as to the operation and status of publicly held corporations, such as Telemetrix. On page 17 of that document, a section entitled "ITEM 3. LEGAL PROCEEDINGS" is found. In this section, Telemetrix indicates that it filed suit in the U.S. District Court for the Southern District of New York against Tracy, Becker, and Michael L. Glaser for compensatory damages and an injunction against those three individuals for breach of fiduciary duty and against Tracy for conversion. The Form 10-KSB further recounts the filing of suit in the U.S. District Court for the District of Nebraska against two other organizations ("TowerGate" and "Nyssen"), apparently investors in or lenders to Telemetrix, alleging breach of fiduciary duty and other claims. It is then recited that on December 10, Telemetrix, Tracy, Becker, and Glaser and other majority stockholders, as well as TowerGate and Nyssen (defendants in the Nebraska case referenced above), entered into a "binding agreement dated as of November 30, 2004," in which the parties agreed to dismiss the above-described lawsuits and settle the disputes between Telemetrix and TowerGate and Nyssen and between Telemetrix and Tracy, Becker, and Glaser. Certain provisions not pertinent to this case that address the governance of the corporation are then set forth. The Telemetrix Form 10-KSB then provides as follows:

> Under the agreement we agreed to issue a new promissory note to . . . Tracy or his affiliate for a loan he made to us of $467,000. The note will be due and payable in 24 months from December 31, 2004, and will bear simple interest at 10% per annum from December 31, 2004, until maturity. At maturity, . . . Tracy or his affiliate may convert this note at his option into our common voting stock at $.02 per share.

The Telemetrix Form 10-KSB filed with the SEC further provides that "we issued [TBC] a promissory note for $467,000 for the $467,000 loan made to us."

It is important to note that there is no reference whatsoever in this SEC filing that the $467,000 promissory note replaces, substitutes for, or is the equivalent of the promissory notes listed and referenced in the operative complaint in this lawsuit as exhibits A through M. Nor was any other evidence to such effect introduced by Telemetrix. The district court's order with respect to the instant lawsuit notes that arbitration is a matter of consent and that a court may not thrust a party into arbitration who has not agreed to such. The district court finds that the November 30, 2004, Binding Agreement does not contain an arbitration clause and that thus, the Telemetrix motion to compel arbitration is denied.

Our review of the record shows that the instant lawsuit is a suit upon the Binding Agreement of November 30, 2004, and that such agreement contains no provision whatsoever for arbitration of disputes arising from that document. The scope of this appeal is simply whether the trial court erred in denying the motion to compel arbitration—at this stage, the merits of TBC's claim for judgment in the amount of $467,000 plus interest are not involved. There is no provision for arbitration in the document upon which TBC premises its claim against Telemetrix. Therefore, the trial court's ruling denying arbitration is correct and is hereby affirmed.

Is Nebraska's Uniform Arbitration Act Applicable?

Telemetrix argues that Nebraska's Uniform Arbitration Act applies. See § 25-2601 et seq. We disagree and take this opportunity to do some remedial work. We note that the trial court discussed this court's decision in *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 716 N.W.2d 749 (2006). In the *Kramer* opinion, we said: "However, Nebraska's Uniform Arbitration Act, discussed below, does not mention 'commerce' at all. Additionally, there is no authority cited that [Nebraska's] Uniform Arbitration Act is somehow preempted by the federal Arbitration Act, necessitating a showing of an effect on interstate commerce." 14 Neb. App. at 705, 716 N.W.2d at 763. First, the above-quoted statement is hardly a model of clarity. Moreover, to the extent that such statement says that the Federal Arbitration Act does not preempt Nebraska's Uniform

Arbitration Act when "commerce" is involved in the transaction at issue, the statement from *Kramer* is incorrect.

[8,9] In *Webb v. American Employers Group*, 268 Neb. 473, 478-79, 684 N.W.2d 33, 39 (2004), the court said:

> The [Federal Arbitration Act (FAA)] applies to "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. "Commerce" as defined by the Act includes "commerce among the several States." 9 U.S.C[.] § 1. The U.S. Supreme Court has given the FAA an expansive scope by broadly construing the phrase "'a contract evidencing a transaction involving commerce.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (cited in *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996)). The Court has held that the phrase "'involving commerce'" requires a broad interpretation in order to give effect to the FAA's basic purpose, which is to put arbitration provisions on the same footing as a contract's other terms. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 277. The Court has further noted that "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." *Id.* The statutory phrase "'evidencing a transaction'" has been construed by the Court to include transactions involving interstate commerce even where the parties did not contemplate an interstate commerce connection. *Id.*

(Emphasis omitted.)

Therefore, it is clear that where the transaction involves commerce, the federal act governs. Given the business that Telemetrix was engaged in, there can be no real dispute that the Binding Agreement settling litigation in New York and Nebraska, as well as defining the future management of a publicly held company that is in the business of transmitting data across state lines, as well as the Mexican and Canadian borders, is a transaction "affecting commerce." See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996) (Montana arbitration statute was preempted by Federal Arbitration Act because involved transaction affected interstate commerce). Both counsel at oral argument admitted

that commerce is affected. The Federal Arbitration Act would preempt Nebraska's Uniform Arbitration Act if there were an arbitration clause in the Binding Agreement. It is appropriate that we take note of the fact that the trial judge's opinion in the instant case discerned the flaw in the *Kramer* opinion.

CONCLUSION

Because TBC's lawsuit is premised upon a contract, the Binding Agreement of November 30, 2004, and such contract does not contain an agreement to arbitrate disputes, the trial court properly denied Telemetrix's motion to compel arbitration.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JESSE LANKFORD, APPELLANT.
756 N.W.2d 739

Filed October 14, 2008. No. A-08-460.

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 of the court below.
2. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
3. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Administrative Law: Licenses and Permits: Revocation: Time.** A license revocation pursuant to Neb. Rev. Stat. § 60-6,197.03 (Cum. Supp. 2006) begins at the time appointed in the court's order.
6. **Criminal Law: Statutes: Legislature: Intent.** Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Eric J. Williams, York County Public Defender, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Jesse Lankford was convicted of driving under the influence (DUI), fourth offense, and his sentence included imprisonment, a fine, and a 15-year license revocation. The court ordered that the revocation commence upon Lankford's release from imprisonment. Lankford appeals, arguing that the term of imprisonment was excessive and that Neb. Rev. Stat. § 60-6,197.03 (Cum. Supp. 2006), which version was in effect at the time of Lankford's arrest, required that the period of license revocation run from the date of sentencing. Because we find § 60-6,197.03 is clear and unambiguous, we reject the latter argument, and because we also find no merit in his first argument, we affirm the judgment of the district court.

BACKGROUND

On June 1, 2007, Lankford was arrested for DUI after the vehicle he was driving hit a parked vehicle and Lankford was seen exiting his vehicle with open containers of alcohol. When Lankford was later apprehended, he failed a preliminary breath test and refused to submit to a blood test. The arresting officer believed that Lankford was too intoxicated to complete field sobriety tests. Lankford was then charged in district court with fourth-offense DUI, refusal to test, and failure to stop and furnish information.

Pursuant to a plea bargain, Lankford pled guilty to fourth-offense DUI and the other two charges were dismissed. The district court sentenced Lankford to 4 to 5 years' imprisonment, ordered him to pay a $1,000 fine, and revoked his license for

15 years. The court ordered that the license revocation begin upon Lankford's release from imprisonment.

Lankford timely appeals. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a), no oral argument was allowed.

ASSIGNMENTS OF ERROR

Lankford assigns that the district court's sentence was excessive and an abuse of discretion. Lankford also assigns that the district court erred in ordering the license revocation to commence upon his release from imprisonment.

STANDARD 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 of the court below. *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

[2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Antoniak*, 16 Neb. App. 445, 744 N.W.2d 508 (2008).

ANALYSIS

License Revocation.

Lankford argues that Nebraska law prohibited the district court from ordering the 15-year license revocation to begin upon his release from imprisonment. Lankford argues that the language of § 60-6,197.03 requires that the period of revocation run from the day on which he was sentenced in district court.

Section 6,197.03(7) provides as follows:

> [T]he court shall, as part of the judgment of conviction [for a fourth-offense DUI], *order that the operator's license of such person be revoked for a period of fifteen years from the date ordered by the court* . . . . Such orders shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

(Emphasis supplied.) The Nebraska appellate courts have not previously addressed the interpretation of this version of § 60-6,197.03.

[3,4] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

[5] The grammatical construction of § 60-6,197.03 mandates that a license revocation pursuant to this statute begin at the time appointed in the court's order. The phrase "ordered by the court" directly follows and modifies the word "date." This means that the date on which the revocation is to begin is the date that is "ordered by the court."

Lankford's argument assumes that the term "order" appearing early in the section must refer to the same thing as the term "ordered" appearing later in the section and that both terms refer to the date of sentencing. We note that the first time the term "order" is mentioned in § 60-6,197.03, the section directs the court to order a 15-year license revocation. Here, the term "order" is synonymous with the phrase "impose a sentence" and is used as a verb that functions as a command to the court. However, when the section uses the phrase "date ordered by the court," the term "ordered" has an entirely different meaning. In this context, "ordered" is technically a verb but is used as a past participle and thus modifies the word "date." Because the terms "order" and "ordered" were used in two entirely different grammatical contexts, we reject Lankford's assumption that both terms referred to the same thing.

[6] Lankford urges that § 60-6,197.03 is ambiguous and concludes that it should be interpreted in his favor. Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity

in order to defeat that intent. *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008). We will not construe this statute in Lankford's favor, because it is not ambiguous. Lankford cannot manufacture ambiguity by merely stating that he reads the statute in a different way.

Excessive Sentence.

Lankford also argues that the court imposed an excessive sentence. The factors to be considered by a sentencing court are well known, and we need not recite them here. See *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed. *Id.* The sentence imposed was within statutory limits, and we have examined the record concerning all relevant factors and applicable legal principles. We find no abuse of discretion by the district court in its determination of the sentence.

CONCLUSION

We find that the district court did not err in sentencing Lankford. The district court did not err in ordering that the 15-year license revocation prescribed in § 60-6,197.03 commence upon Lankford's release from imprisonment. The district court did not abuse its discretion in sentencing Lankford to 4 to 5 years' imprisonment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID J. CRAVEN, APPELLANT.
757 N.W.2d 132

Filed October 21, 2008. No. A-07-1155.

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. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
3. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.
4. ____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.
5. **Speedy Trial: Proof.** To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
6. **Records: Proof: Appeal and Error.** In appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity.
7. **Speedy Trial: Motions for Continuance.** The terminology chosen by the defendant or defense counsel does not dictate whether or not a delay resulting from a continuance is excludable for the purposes of speedy trial calculation.
8. ____: ____. When a nonlawyer makes a motion for continuance made on behalf of a defendant in a criminal case, such motion constitutes a nullity and cannot form the basis for an exclusion from the speedy trial calculation under Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1995).

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Christopher J. Lathrop for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

David J. Craven appeals the order of the Douglas County District Court denying his motion to discharge, on the ground that his statutory right to a speedy trial was violated. Craven contends that the district court erred in finding that certain periods of time were excludable from the speedy trial calculation. This case also highlights some of the problems that can arise when courts do not compel parties to follow the statutes

requiring motions to continue to be made by written motion and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of the proceedings. See, Neb. Rev. Stat. § 25-1148 (Reissue 1995); Neb. Rev. Stat. § 29-1206 (Reissue 1995). For the reasons set forth herein, we affirm in part, reverse in part, and remand for further proceedings.

STATEMENT OF FACTS

On April 2, 2007, Craven was charged in Douglas County District Court with first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Cum. Supp. 2006), a Class II felony. The charge was later amended to first degree sexual assault of a child, in violation of Neb. Rev. Stat. § 28-319.01 (Cum. Supp. 2006), a Class IB felony. On April 4, Craven filed a motion for mutual and reciprocal discovery, which was granted by the court on April 13.

On October 29, 2007, Craven filed a motion to discharge on the ground that his statutory right to a speedy trial was violated. A hearing was held on that same day, during which Craven's counsel, Lawrence Whelan, was allowed to withdraw, because he was going to be called as a witness at the hearing on the motion to discharge. The hearing on the motion to discharge then took place with Craven represented by new counsel. Three witnesses testified at the hearing: Michelle Lanouette, the judge's bailiff; Whelan, Craven's previous attorney; and Daniel Curnyn, a legal assistant in Whelan's law office. One exhibit was received at this hearing, a copy of the trial docket in this case, which set forth, in relevant part: On June 12, "[p]retrial conference continued on defendant's motion to 6/27/07 9:30 a.m."; on June 27, "[p]retrial conference continued on defendant's motion. Signed order re: audio/vide[o]tapes. Motions (if any) to be heard 8/3/07 9:00 a.m. Jury trial 10/29/07 9:00 a.m."; and on August 3, 2007, "[o]n defense counsel's motion, motions continued until trial date of 10/29/07 9:00 a.m."

Lanouette testified that a pretrial conference was scheduled for June 12, 2007, and that the conference was continued to June 27 on defendant's motion. Lanouette testified that on June 12, when neither Craven nor Whelan appeared, she called

Whelan's office and spoke to a member of Whelan's office staff who indicated that Whelan was not available to be present at the hearing and requested that the hearing be continued.

According to Lanouette, the June 27, 2007, pretrial conference was continued on defendant's motion after Whelan again did not appear for the hearing. Lanouette testified that on June 27, she called Whelan's office, and that Whelan or his staff stated the defense might want to file pretrial motions, so the hearing date was set for August 3. Lanouette also testified that either Whelan or his staff asked to continue the pretrial conference. However, Lanouette testified that no motions were filed and that the defense did not appear at the August 3 hearing.

Lanouette testified that upon Whelan's failure to appear at the August 3, 2007, hearing, she and the prosecutor called Whelan's office and spoke to either Whelan or his staff, who requested that the hearing be canceled and continued until the date of trial should the defense file any motions. Lanouette specifically testified that Whelan or his staff requested that the matter be continued on defense's motion.

Whelan testified that around April 8, 2007, he had been retained to represent Craven. Whelan admitted that he had received a notice of the pretrial conference scheduled for June 12. According to Whelan, he knew that he had a conflict with that date, because he and his wife had an out-of-state trip planned from June 10 through June 20, so he directed Curnyn to contact the court and the prosecutor to let them know that he was unavailable and to get the hearing date reset. Whelan acknowledges that the June 12 hearing was reset at his direction, that he gave his staff authority to reset the date, and that the individual who reset the date, Curnyn, works as his representative to the court at times. However, Whelan testified that he did not authorize a request for a continuance of the June 12 hearing, but merely authorized that the hearing be reset.

Regarding the June 27, 2007, hearing, Whelan testified that he did attend but arrived late for the hearing and that he knew the prosecutor had already left the courtroom, because he met her as he was getting off the elevator. According to Whelan, he took an order to Lanouette for the judge's signature and he and Lanouette had a conversation about continuing the

pretrial conference. Whelan denied asking to continue or reset the pretrial conference. Whelan admits that he told Lanouette he might want to file some pretrial motions, but states that Lanouette said she would set the pretrial motion date for August 3 because trial was scheduled for October 29 and there was not sufficient time to have any more pretrial hearings. Whelan testified that the docket entry from June 27 stating the defendant made a motion to continue the pretrial is inaccurate. Whelan further stated that he did not have any contact with the court on or before August 3, but he could not recall whether he instructed his staff to notify the court that the August 3 hearing date was not necessary because the defense was not filing any pretrial motions. Whelan did not attend court on August 3.

Curnyn testified that he is employed as Whelan's legal assistant. He stated that he talked with Lanouette about needing a new date for the June 12, 2007, hearing because Whelan was going to be out of town. According to Curnyn, Lanouette asked when Whelan was going to get back and the hearing was set for June 27 based on the judge's schedule and Whelan's schedule. Curnyn denied asking to continue the pretrial conference; he stated that he asked to have it "reset" or "changed." Curnyn further testified that on August 3, at Whelan's direction, he informed the court that Whelan would not be filing any pretrial motions on Craven's behalf and would not need the motion date. Curnyn did not ask to continue the motion date at that time and did not indicate to the court that Whelan might be filing motions at some later date.

In overruling Craven's motion for discharge, the district court specifically stated:

> The Court accords to a docket entry, which is an order of the Court, a presumption of regularity.
>
> The Court determines that the time period from April 4th to April 13 is excludable time. The time between June 12th and June 27th is excludable time. The time between June 27th and August 3rd is excludable time. And the time between August 3rd and today's date is excludable time.

Craven has timely appealed to this court.

ASSIGNMENT OF ERROR

On appeal, Craven's assigned errors can be consolidated into the following issue: The district court erred in denying his motion to discharge.

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. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007); *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008).

ANALYSIS

Craven contends that the district court erred in denying his motion to discharge based upon a violation of his statutory right to a speedy trial. He contends that the court erred in finding that certain periods of time were excludable from the speedy trial calculation.

[2-4] Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Sommer, supra*; *State v. Vasquez, supra*. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged. *State v. Sommer, supra*; *State v. Vasquez, supra*. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. *State v. Sommer, supra*; *State v. Vasquez, supra*.

[5,6] To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *State v. Sommer, supra*. 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. *Id*. Moreover, in Nebraska, the controlling rule is that in appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity. *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

In the instant case, with respect to each such time period, the district court generally found the time to be excludable regarding a presumption of regularity to its own docket entries. Thus, the issue presented to this court is whether the district court was clearly erroneous in according the presumption of regularity to the docket entries relating to each of the contested periods.

Since the information was filed in the district court on April 2, 2007, absent any excludable calculations, the last day to bring Craven to trial was October 2. However, there are four periods of time which the district court found to be excludable in calculating Craven's statutory right to a speedy trial: (1) April 4 to 13—the time from the filing of Craven's motion for discovery to the court's ruling thereon, (2) June 12 to 27—the date of the first scheduled pretrial hearing to the date of the rescheduled pretrial hearing, (3) June 27 to August 3—the date of the rescheduled pretrial hearing to the date set for the handling of pretrial motions, and (4) August 3 to October 29—the date set for trial and the date that Craven filed his motion for discharge. We address each of the time periods in turn.

April 4 to 13, 2007.

The first potentially excludable time period is from April 4 to 13, 2007. Craven filed a motion for discovery on April 4, which motion was granted by the district court on April 13. Thus, Craven's motion for discovery was pending for a total of 9 days. Craven admits that this time is excludable. See, § 29-1207(4)(a) (time from filing until final disposition of pretrial motions of defendant is excludable); *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005) (motion for discovery filed by defendant is pretrial motion, and time period during which it is pending should be excluded for speedy trial calculation purposes). Thus, the 9 days that Craven's discovery motion

was pending must be excluded from the speedy trial calculation in this case.

June 12 to 27, 2007.

The next time period at issue is the rescheduling of the pretrial conference from June 12 to June 27, 2007. The district court found that the presumption of regularity of the June 12 docket entry, setting forth "[p]retrial conference continued on defendant's motion to 6/27/07 [at] 9:30 a.m.," had not been rebutted and that the time period from June 12 to 27 was excludable from the speedy trial calculation.

Section 29-1207(4)(b) provides that a period of delay resulting from a continuance granted at the request or with the consent of the defendant or the defendant's counsel shall be excluded in computing the time for speedy trial. However, Craven contends that because Curnyn and Whelan requested that the hearing be "reset" or "changed" rather than "continued," the time period from June 12 to 27 should not be excluded for the purposes of speedy trial calculation. We disagree.

[7] The terminology chosen by the defendant or defense counsel does not dictate whether or not a delay resulting from a continuance is excludable for the purposes of speedy trial calculation. Basically, if it looks like a continuance and sounds like a continuance, it is a continuance, and if it is made at the defendant's request or with the defendant's consent, it is excludable for the purposes of speedy trial calculation. Regardless of the terminology chosen by defense counsel, the result is the same. If we were to accept Craven's argument that exclusion for speedy trial purposes depends upon the verbiage chosen by defense counsel, this would allow manipulation of the system and would lead to absurd results. However, we still must consider whether the particular request in this case was made at the request of Craven's counsel.

As we previously noted, the June 12, 2007, docket entry set forth "[p]retrial conference continued on defendant's motion to 6/27/07 [at] 9:30 a.m." Further, the evidence unmistakably shows that Curnyn, Whelan's legal assistant, talked to Lanouette about resetting the June 12 pretrial hearing because Whelan was unavailable on the June 12 date, as he was out

of state at the time. This constitutes an oral request for a continuance. However, Neb. Rev. Stat. § 7-101 (Reissue 2007) prohibits any person from practicing as an attorney or counselor at law in any action or proceeding to which he or she is not a party, in any court of record of this state, unless he or she has been previously admitted to the bar by order of the Nebraska Supreme Court. Section 7-101 further proclaims, "It is hereby made the duty of the judges of such courts to enforce this prohibition." See, also, Neb. Ct. R. §§ 3-1001 to 3-1005 (defining "practice of law," prohibiting unauthorized practice of law, and specifying exceptions). It has long been held that such actions taken by nonbar members are a nullity. See *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957) (proceedings in suit by person not entitled to practice are nullity).

Although this court is aware that there are some instances where the general rule that the motion made by a nonlawyer constitutes a nullity does not apply, see *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008) (filing of statement of claim in probate proceeding does not constitute practice of law), § 29-1207(4)(b) clearly requires the request for or consent to a continuance to be made by the defendant or the defendant's counsel. In a slightly different context, in *State v. Roundtree*, 11 Neb. App. 628, 637, 658 N.W.2d 308, 316 (2003), this court observed that "[o]ral or other informal statements are obviously a poor procedure when speedy trial rights are involved." Clearly, if the motion had been made in writing, Curnyn could not have signed the pleading. See Neb. Ct. R. Pldg. § 6-1111(a)(1) (every pleading, written motion, and other paper shall be signed by at least one attorney of record in attorney's individual name or, if party is not represented by attorney, shall be signed by party). Similarly, the notion that Curnyn would have been permitted to appear in court and make an oral motion is untenable. The prohibition does not disappear merely because the action occurs by telephone.

[8] Since the evidence unmistakably shows that Curnyn, a legal assistant employed by Craven's then counsel of record, and not Craven's counsel, made the oral request for continuance, the request was a nullity and cannot form the basis for

a period of exclusion under § 29-1207(4)(b). This is so, even though Whelan admits that he gave Curnyn the authority to reset the hearing and that it was done at Whelan's direction. When a nonlawyer makes a motion for continuance made on behalf of a defendant in a criminal case, such motion constitutes a nullity and cannot form the basis for an exclusion from the speedy trial calculation under § 29-1207(4)(b). Thus, neither Craven nor his attorney requested a continuance of the June 12, 2007, hearing, the district court erred in affording the presumption of regularity of the June 12 docket entry, and the 15 days from June 12 to 27 are not excludable for the purposes of the speedy trial calculation.

June 27 to August 3, 2007.

The third potentially excludable time period is from June 27 to August 3, 2007, which was the date of the hearing for Craven's pretrial motions. The district court found that the presumption of regularity of the June 27 docket entry, setting forth "[p]retrial conference continued on defendant's motion," had not been rebutted and that the time period from June 27 to August 3 was excludable from the speedy trial calculation.

Lanouette's testimony supported the journal entry, in that, on June 27, 2007, either Whelan or his staff stated that the defense might want to file pretrial motions, so the hearing date was set for August 3. Whelan admitted that he appeared in the judge's chambers and engaged in a discussion with Lanouette about continuing the pretrial conference. In this instance, the evidence permits (but certainly does not compel) the conclusion that Whelan made an oral request for a continuance. Therefore, the district court did not clearly err in determining that the 37 days between June 27 and August 3 are attributable to Craven as periods of delay resulting from proceedings related to pretrial motions pursuant to § 29-1207(4)(a).

August 3 to October 29, 2007.

The fourth potentially excludable time period is from August 3 to October 29, 2007. The district court found that the presumption of regularity of the August 3 docket entry, setting forth "[o]n defense counsel's motion, motions continued until

trial date of 10/29/07 [at] 9:00 a.m.," had not been rebutted and that this time period was excludable from the speedy trial calculation.

Lanouette testified that upon Whelan's failure to appear at the August 3, 2007, hearing, she and the prosecutor called Whelan's office and spoke to either Whelan or his staff, who requested that the hearing be canceled and continued until the date of trial should the defense file any motions. Whelan testified that he did not have any contact with the court on August 3. Curnyn testified that at Whelan's direction, on August 3, he made a call to the judge's bailiff to inform the court that no pretrial motions would be filed on Craven's behalf and that the motion date would not be needed.

This evidence clearly establishes that Whelan did not make a motion for continuance of the August 3, 2007, hearing and that if such a motion was made, it was made by a nonlawyer and constitutes a nullity. Therefore, the district court's contrary factual finding was clearly erroneous and the time period from August 3 to October 29 is not excludable for the purposes of the speedy trial calculation.

CONCLUSION

In sum, although we found that two of the time periods were not excludable in the speedy trial calculation, the two remaining time periods had excludable periods totaling 46 days, which extended that last date upon which Craven's trial could be started beyond October 29, 2007, which was the date he filed his motion to dismiss on speedy trial grounds. Thus, the district court's denial of Craven's motion to discharge based upon the alleged violation of his statutory right to a speedy trial was not clearly erroneous. However, by our calculations, there remain only 19 days to timely commence Craven's trial upon remand. Therefore, the district court's order is affirmed in part and reversed in part, and the matter is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KENNETH ROSS METCALF, APPELLANT, V.
RITA JO METCALF, APPELLEE.
757 N.W.2d 124

Filed October 21, 2008. No. A-07-1346.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Modification of Decree: Alimony: Good Cause: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2004), alimony orders may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends on the circumstances of each case.
4. **Modification of Decree.** To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought.
5. **Modification of Decree: Alimony: Proof.** The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.
6. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Paul E. Galter, of Butler, Galter, O'Brien & Boehm, for appellant.

Kristina M. Teague and Donald H. Bowman, of Bowman & Krieger, for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Kenneth Ross Metcalf and Rita Jo Metcalf were divorced in 1999. Kenneth appeals from an order of the district court for

Lancaster County which dismissed his complaint to modify the alimony award found in the decree of dissolution. Because we find no abuse of discretion by the district court, we affirm. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument.

BACKGROUND

The district court entered a decree dissolving Kenneth and Rita's marriage on March 18, 1999. Among other things, the court ordered Kenneth to make alimony payments to Rita of $2,000 per month for a period of 120 months starting April 1.

On March 31, 2005, Kenneth filed a complaint seeking to modify the decree. Specifically, Kenneth requested that his alimony obligation be terminated or reduced because of his reduced income and Rita's increased income. Following a hearing on December 20, the district court entered an order on January 26, 2006, dismissing the complaint and finding that Kenneth "has failed to prove by the greater weight of evidence that a material and substantial change in circumstances sufficient to modify or revoke alimony occurred." Kenneth did not appeal the January 26 order.

On March 15, 2006, Kenneth filed another complaint seeking to terminate or reduce his alimony obligation. Shortly thereafter, Kenneth filed a motion seeking the recusal of the trial judge who heard his previous modification complaint because of the "'[c]ourt's previous involvement with [Kenneth] in criminal or contempt proceedings.'" The judge who heard the original modification recused himself, and the case was assigned to another district court judge.

An evidentiary hearing was held before the district court in the current modification proceedings on October 15, 2007. The record shows that Kenneth has worked as a chiropractic physician for 23 years. Kenneth is currently married, and his wife is employed as a nurse. Kenneth testified with respect to his current health, indicating that he has issues with "arthritic changes" in his knees and hands that limit him to a degree in his work as a chiropractor and that he has recently experienced

problems with dizziness. While Kenneth had health insurance at the time of the divorce in 1999, he did not have health insurance at the time of the second modification hearing because he does not have funds to pay for insurance.

Before becoming a chiropractor, Kenneth was a licensed funeral director and embalmer. At the time of the hearing, Kenneth had investigated employment with three local funeral firms because of the diminishing income in his current profession. Kenneth had hoped to be able to find employment within the limitations of his current physical issues, but he was unable to find employment with a funeral firm that would eliminate the need for lifting and carrying associated with that business.

The district court took judicial notice of the divorce decree, which showed that the divorce judge attributed to Kenneth a total annual income of $98,532 for child support purposes. The district court also took judicial notice of certain exhibits which were received into evidence at the previous modification hearing. One of these exhibits shows that Kenneth's average yearly income for 1996 through 2004 was $112,703 ($114,918 in 1996, $98,533 in 1997, $95,000 in 1998, $99,787 in 1999, $140,981 in 2001, $159,091 in 2002, $44,070 in 2003, and $149,244 in 2004; no income for 2000 was shown on the exhibit). Also judicially noticed were Kenneth's 2004 income tax return, showing income of $149,244, and a financial statement submitted by Kenneth to his bank dated May 24, 2005, wherein Kenneth stated that his income was $80,000.

Kenneth's 2005 and 2006 income tax returns show that his net income from self-employment was $50,047 in 2005 and $50,293 in 2006. Kenneth testified that he incurred approximately $20,000 in unpaid business debts as part of his 2005 expenses, that he did not have the money to pay the debts, and that had he been able to pay those debts, he would have shown less income for that tax year. The debts were ultimately discharged in bankruptcy. Kenneth also discovered that an employee made billing errors in both 2004 and 2005. Kenneth's computer showed that the billings were sent when they were not; so, his 2006 income includes money that was actually earned in 2004 and 2005 as a result of finally sending

out proper billings. Kenneth estimated that half of his earned income shown for 2006 was earned in 2004 and 2005. Kenneth discovered the billing problem around the time he commenced the present modification action. Kenneth testified that his net income at the time of the second modification hearing was about $3,000 a month.

Kenneth testified about certain events which have occurred since the December 20, 2005, hearing. Kenneth has filed a chapter 7 bankruptcy petition and received a discharge in bankruptcy. However, Kenneth has debt to the Internal Revenue Service, which debt was not discharged in the bankruptcy. Kenneth owes the Internal Revenue Service $21,000 and is making monthly payments of $250 on that debt. Because the lending institution holding a mortgage against Kenneth's home initiated foreclosure proceedings, Kenneth deeded the home back to the lender in lieu of foreclosure. Kenneth had a full-time employee beginning in 2004, but he had to eliminate the position in February 2006. Kenneth testified that he has continued to experience a gradual decline in new patients and services rendered and that while the percentage of his collections has stayed about the same, the total dollar amount of collections has continued to decrease. Kenneth previously had a retirement account of approximately $35,000, but he cashed it in incrementally starting in 2003 in an attempt to prevent the bankruptcy. At the time of the second modification hearing, Kenneth did not have any stocks, bonds, or other investments.

Rita owned a beauty salon at the time the parties were divorced in 1999. Subsequent to the divorce, Rita became the owner of a drycleaning business. In 2005, Rita and her son also opened a coffee shop, and they have since opened a second coffee shop. Since the parties' divorce, Rita and her son acquired some real estate for investment purposes. The cost of the land was $195,000. Rita refinanced her home a few years before the second modification hearing to obtain part of the money for the land purchase, borrowing $110,000 against her house at that time.

The divorce decree attributed a total annual income of $16,044 to Rita for child support purposes. Exhibits received

into evidence at the prior modification hearing and judicially noticed by the court in the present proceeding included Rita's income tax returns for 2003 and 2004, which show income of $39,267 and $64,708, respectively, excluding the $24,000 in alimony received by Rita in each of those years. Rita's net income in 2005 was $9,408. In 2006, Rita suffered a net loss of $37,867, and in the first 8 months of 2007, her net income was $10,708. To meet her monthly living expenses of $3,633, Rita cashed in her IRA in the amount of $23,800.

On November 28, 2007, the district court entered an order dismissing Kenneth's complaint to modify the decree. The court determined that since Kenneth had failed to appeal from the January 26, 2006, order denying his previous request for modification, Kenneth was required to show that a material change of circumstances had occurred subsequent to January 26. The court noted that the evidence showed that Kenneth's income was about the same as at the time of the previous modification. The court found it "interesting that the claim of a change of circumstances occurred in about a two or three month period." The court observed that Kenneth's evidence was "substantially his own testimony with a lack of substantive evidence to corroborate his opinions" and found the evidence insufficient to show a material change in circumstances. Kenneth subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Kenneth asserts that the district court erred in (1) concluding that any material change in circumstances must have occurred since the date of the last modification hearing and (2) failing to reduce or terminate his alimony obligation.

STANDARD OF REVIEW

[1,2] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a

substantial right and denying just results in matters submitted for disposition. *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008).

ANALYSIS

[3-5] Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2004), alimony orders may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends on the circumstances of each case. *Simpson v. Simpson, supra*. To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought. *Id.* The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award. *Id.*

In this case, we must first determine whether the district court reviewed the correct time period in making its determination that no material change in circumstances occurred. Second, if the court applied the correct time period in its review, we must determine whether the court was correct in finding that no material change in circumstances occurred.

Correct Time Period Reviewed.

The district court found that Kenneth's change in circumstances, if any, must have occurred since the January 26, 2006, order entered in the previous modification proceedings. Kenneth argues that where a prior attempt to modify resulted in a denial, the court should look to the original decree and not the last order of denial in determining whether there has been a material change in circumstances sufficient to justify modification. Kenneth cites to no case law to support this proposition, and in fact, we believe that the practice in Nebraska is contrary to Kenneth's argument.

The Nebraska Supreme Court has held that to determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial

court should compare the financial circumstances of the parties at the time of the divorce decree, *or last modification of the decree*, with the circumstances at the time the modification at issue was sought. See, e.g., *Simpson v. Simpson, supra*; *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007). In *Simpson v. Simpson, supra*, the former wife sought, on two occasions, to increase her former husband's alimony from that ordered in the decree. The first modification proceeding resulted in a denial of the requested increase in alimony. In the second modification proceeding, the Supreme Court analyzed whether a substantial change in circumstances occurred since the last modification proceeding and ultimately affirmed the denial of the request for an increase in alimony.

[6] We believe that limiting the review to evidence occurring since the last modification proceeding, even if said proceeding resulted in a finding that no material change in circumstances had occurred since the entry of the decree, is sound judicial policy and consistent with the principles of collateral estoppel. Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation. *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). As applied in this case, the issue of whether a change in circumstances occurred between the time of the entry of the decree and the modification proceeding which resulted in the January 26, 2006, order has been fully litigated between the same parties. This order was a final judgment on the issue of a change in circumstances up to the time of the hearing resulting in the January 26 order, which judgment was not appealed.

We conclude that the district court did not err in limiting its review to whether a material change in circumstances had occurred since the last modification proceeding which culminated in the January 26, 2006, order.

No Material Change in Circumstances.

We have examined the evidence presented at the second modification hearing and have compared the financial circumstances of the parties at the time of the first modification

proceedings with their circumstances at the time of the current modification proceedings. We agree with the district court's conclusion that Kenneth's income is about the same as it was at the time of the prior modification proceedings and that Kenneth did not meet his burden of proving a material change of circumstances in the requisite time period. Because the district court did not abuse its discretion in finding no material change in circumstances, we affirm the court's determination in that regard.

CONCLUSION

The district court did not err in concluding that any material change in circumstances must have occurred since the date of the last modification hearing and did not abuse its discretion in failing to reduce or terminate Kenneth's alimony obligation.

AFFIRMED.

IRWIN, Judge, dissenting.

I dissent from the majority's conclusion that any alleged material change in circumstances for modifying Kenneth's alimony obligation has to have occurred after a previous unsuccessful attempt to modify the original dissolution decree. I believe the more reasoned and defensible reading of Nebraska jurisprudence is that the material change in circumstances must have occurred since the time of the original decree or the most recent *successful* modification of the decree.

Initially, I note that this appears to be an issue of first impression in Nebraska. The parties have cited to no authority, and the majority provides none, where the issue of whether a prior unsuccessful application to modify "starts the clock over" was specifically raised by the parties and addressed by the court. Such was not the case in either of the two published opinions in Nebraska that contain the statement that

> [t]o determine whether there has been a material and substantial change in circumstances warranting a modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought.

Simpson v. Simpson, 275 Neb. 152, 158, 744 N.W.2d 710, 715 (2008). Accord *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007).

I believe that the majority is misreading and misapplying the relevant proposition of law to the facts of the present case, because the plain language of the proposition suggests an outcome contrary to that set forth by the majority, because the authority cited by the majority in support of its application does not support such an outcome, and because the majority's application sets an untenable precedent for future cases. Additionally, I do not believe that collateral estoppel has bearing on this issue or supports the majority's conclusion.

First, as noted above, the relevant proposition of law, first espoused in this form by the Nebraska Supreme Court in 2007, indicates that the relevant time period for consideration is the time since the divorce decree, "or last modification of the decree." See, *Simpson v. Simpson, supra*; *Finney v. Finney, supra*. A plain reading of this proposition indicates that, to "start the clock" over in terms of a material change in circumstances, there must actually be a "last modification of the decree." In the present case, there was no prior modification, because Kenneth's prior application was denied. The plain meaning of "last modification" suggests that only a prior *successful* modification should be relevant.

The issue in a modification proceeding is whether the present circumstances are substantially and materially different than they were when the order sought to be modified was entered. Kenneth is currently paying alimony based upon the circumstances as they existed in 1999, and the focus should be on whether the present circumstances are substantially and materially different than they were when the court established Kenneth's alimony obligation, not whether Kenneth made the unfortunate mistake of seeking modification "too soon" and thus has to establish an even greater change in circumstances.

Second, the authority cited by the majority in support of its conclusion that a prior unsuccessful modification should have the effect of starting the clock over on the applicable time period does not support such an outcome. Although the majority accurately notes that the applicant in *Simpson v. Simpson,*

supra, had twice sought to modify her husband's alimony obligation and had been unsuccessful in the first attempt, and although the Nebraska Supreme Court did state the above proposition of law and analyze whether there had been a material change in circumstances since the previous "attempt," the application and conclusion in *Simpson* is not as easily made to the present case as the majority suggests.

In *Simpson v. Simpson, supra*, the Nebraska Supreme Court never specifically discussed or analyzed whether the proposed material change in circumstances should be limited only to the time since the previous modification proceeding. In fact, in the previous modification proceeding, the court actually did modify the husband's child support obligation so there was, in a sense, a successful previous modification, albeit not on the alimony issue. More importantly, the Supreme Court's conclusion that a material change in circumstances had not been shown was not premised upon any problem with the "timing" of the alleged material change but upon the fact that the alleged material change was due to the fault or voluntary wastage or dissipation of the applicant's talents or assets. This was true regardless of whether the time period was actually to be limited to the time since the prior unsuccessful attempt to modify alimony.

Finney v. Finney, 273 Neb. 436, 730 N.W.2d 351 (2007), is even more starkly distinguishable and inapposite to the majority's application in the present case. In *Finney*, there had not even been a prior attempt to modify, successful or unsuccessful. Rather, the only intervening proceeding from the time of the original decree was the direct appeal from the original decree and the appellate decision thereon. *Finney* does not, explicitly or implicitly, support the outcome reached by the majority in the present case.

The outcome reached by the majority in the present case sets a dangerous and untenable precedent. By making the focus be the time since a previous *attempted* modification, the majority has essentially indicated that parties will be penalized for filing applications to modify that prove to be unsuccessful. For example, assume that Kenneth's decrease in income since the time of the dissolution decree and Rita's increase in income since that time would otherwise be a sufficient substantial and

material change in circumstances to warrant modification. By focusing on the time since a previous unsuccessful attempt to modify, the majority has penalized Kenneth by forcing him to continue paying alimony based on circumstances that are admittedly substantially different, while a litigant in another case who had experienced the exact same change in circumstances but not filed an intervening application to modify would be afforded relief. And, in addition, Kenneth's clock will again start over now; before Kenneth will be entitled to any relief, he will have to demonstrate a substantial and material change in circumstances something akin to thrice over what the litigant who was not unfortunate enough to have asked "too early" would be required to show.

In addition, because the majority has read the term "prior modification" to not actually require a modification but only to require a request for modification, it is arguable that even an application that is filed but dismissed before a ruling on the merits would have the effect of starting the applicant's clock over again.

Finally, I believe the majority's reliance on the doctrine of collateral estoppel to justify its outcome in the present case is misplaced. The doctrine of collateral estoppel, or issue preclusion, applies when an ultimate fact has been determined by a final judgment with the result that the issue cannot be litigated again between the same parties in a future lawsuit. See *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). I agree with the majority that the issue of whether a material change in circumstances occurred between the time of the original decree and the modification proceeding which resulted in the January 26, 2006, order has been fully litigated and cannot be litigated again. That issue, however, is not the issue being raised by Kenneth at this time. The issue being raised by Kenneth at this time is whether there has been a material change in circumstances between the time of the original decree and the present action, which is not the issue that was litigated and resolved in 2006.

The majority's use of collateral estoppel in this fashion would lead to absurd results in a variety of cases. For example, assume a case in which a party claims title through adverse

possession, which requires the adverse possessor to have been in adverse possession for a statutory period of 10 years. See *Madson v. TBT Ltd. Liability Co.*, 12 Neb. App. 773, 686 N.W.2d 85 (2004). Under the majority's application of collateral estoppel, a party who filed his adverse possession claim after only 9 years and was unsuccessful would have to start all over on his 10 years and wait until he had adversely possessed for a total of 19 years before again requesting title to the land.

Kenneth previously sought a modification of his alimony obligation and was unsuccessful. In the present action, the question should be whether the present circumstances are substantially and materially different than they were at the time the present alimony obligation was entered. Such is consistent with the proposition that we should look to the original decree or prior modification as a basis for comparing the present circumstances, such is not inconsistent with existing Nebraska case law, and such is a more defensible and tenable precedent for future cases. Accordingly, I dissent from the majority's conclusion in this case.

CHARLES L. CURTIS AND SANDRA S. CURTIS, HUSBAND AND WIFE, APPELLEES, V. MEGAN GIFF (MARITAL STATUS UNKNOWN), DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND CHASE HOME FINANCE, LLC, THIRD-PARTY DEFENDANT, APPELLEE.

757 N.W.2d 139

Filed October 28, 2008. No. A-07-870.

1. **Quiet Title: Equity.** An action to quiet title is one in equity.
2. **Equity: Appeal and Error.** In appeals of equitable actions, the appellate court tries factual questions de novo on the record to reach a conclusion independent of the trial court.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those

motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.

4. **Foreclosure: Taxes: Liens: Parties: Notice.** A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of the land and who were not made parties defendant in the action and had no notice or knowledge thereof.
5. **Collateral Attack: Quiet Title: Sales: Service of Process: Notice: Jurisdiction.** A collateral attack upon an order confirming a sale by way of a quiet title action is allowed where, due to improper service and lack of actual notice, a court fails to obtain personal jurisdiction over the party in possession of or owning the property being sold.
6. **Collateral Attack: Tax Sale: Service of Process: Jurisdiction.** Absent service on a party in possession of property being sold for foreclosure of a tax lien, the trial court obtains no jurisdiction over the person and the order is totally void and may be subject to collateral attack.
7. **Property: Words and Phrases.** Actual possession is defined as actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession.
8. **Tax Sale: Service of Process: Deeds: Presumptions: Statutes.** There is no presumption of valid service contained in the statutes governing sheriff's deeds that follow a tax foreclosure sale.
9. **Judgments: Title.** A void judgment is not binding upon the person against whom it is rendered, gives no new rights or better position to a person in whose favor it professes to be, and cannot be a source of title.
10. **Judgments: Jurisdiction.** A void judgment may be entirely disregarded upon having its jurisdictional infirmity exposed.
11. **Judgments: Jurisdiction: Equity: Notice.** Proceedings in equity are peculiarly appropriate for the exposure of jurisdictional infirmity, and after full opportunity has been given to those who seek to sustain as well as to those who seek to avoid the judgment, if it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains.
12. **Judgments.** It is not necessary to take any steps to have a void judgment reversed, vacated, or set aside.
13. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

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

Aimee J. Haley, of Fullenkamp, Doyle & Jobeun, for appellant.

Douglas S. Lash, of Brown & Brown, P.C., L.L.O., for appellees Charles L. Curtis and Sandra S. Curtis.

Tyler P. McLeod, of Abrahams, Kaslow & Cashman, L.L.P., and Timothy M. Kelley, of Leonard, Street & Deinard, P.A., for appellee Chase Home Finance.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

Charles L. Curtis and Sandra S. Curtis brought an action in the district court for Douglas County, Nebraska, to quiet title to their backyard, which, unbeknownst to them, was in Nebraska rather than Iowa, where their house was located. The district court sustained their motion for summary judgment and quieted title in them. Megan Giff, who claimed to own the disputed property pursuant to a sheriff's deed after the property was sold in tax foreclosure proceedings in 2002, appeals.

FACTUAL AND PROCEDURAL BACKGROUND

The Curtises purchased property located on Sand Point Drive in Carter Lake, Iowa, on November 21, 1994, from Chase Home Finance, LLC (Chase), which acquired the property from the prior owner of the property, Troy & Nichols, Inc. The property is actually made up of land in Pottawattamie County, Iowa, which contains the house and front yard, and Douglas County, Nebraska, which contains the backyard and lakefront. The Curtises received a deed to the Iowa parcel from Chase on December 5, 1994, but did not receive a deed to the Nebraska parcel at that time. The Curtises are the legal owners of the Iowa parcel, and that parcel is not in dispute. The Nebraska parcel is in dispute and has the following legal description:

> The East Eighty Feet (80′) of the West Two Hundred Thirty-Five Feet (235′) of the South Two Hundred Feet (200′) of Tax Lot 16 in the Northwest Quarter (NW ¼) of the Southwest Quarter (SW ¼) of the Northwest Quarter (NW ¼) of Section 1, Township 15, Range 13 East of the 6th P.M., in the city of Omaha, Douglas County, Nebraska.

The Nebraska parcel lies directly north of the Iowa parcel and borders Carter Lake. The house and garage are located on the Iowa parcel, and a portion of the backyard, a boathouse, and

a seawall are on the Nebraska parcel. There is a chain link fence on the north, east, and west sides of the backyard. This fence is on both the Iowa and Nebraska parcels. From 1994 until the present, the Curtises have maintained both the Iowa and Nebraska parcels and made repairs to the improvements on each.

At the time the Curtises purchased the Sand Point Drive property, it was under an Iowa listing agreement between Chase and Steve Amos, a real estate broker in Omaha. The listing agreement between Chase and Amos, the uniform purchase agreement signed by the Curtises, and all other forms associated with the Curtises' purchase of the property describe the property by the street address only. None of these forms include a legal description. Amos and the Curtises were unaware that the Nebraska-Iowa state line bisected the property at the time of the Curtises' purchase or that any part of the property was located in Nebraska. In fact, the property was described as "lakefront" property in Carter Lake, Iowa, in the uniform purchase agreement and on other forms associated with the Curtises' purchase. Property taxes paid by the Curtises to Pottawattamie County included the improvements on the Iowa parcel and the boathouse. The Curtises did not pay any property taxes on the Nebraska parcel to Douglas County before 2005.

The property on Sand Point Drive was conveyed to Troy & Nichols, now Chase, from the Secretary of Veterans Affairs in 1993. At that time, Troy & Nichols received two quitclaim deeds, one for each parcel. The Secretary of Veterans Affairs foreclosed on the property in 1992 and had received a special warranty deed for each parcel. Likewise, prior owners of the property received two deeds when they purchased the property in 1977 and 1986, respectively. The Curtises, however, received a deed to only the Iowa parcel upon their purchase in 1994.

An attorney involved in the transfer from the Secretary of Veterans Affairs to Troy & Nichols stated in her affidavit that the property, even though there were two deeds, was generally conveyed as one parcel. She also stated that it is prudent

to consider the two parcels together because the Nebraska parcel can be accessed only through the Iowa parcel or from Carter Lake.

Sometime in 1999 or 2000, Sandra learned from a neighbor that part of the property may be in Nebraska, because a former owner had paid some Nebraska property taxes. Sandra contacted the Douglas County register of deeds and the assessor, but was unable to obtain any information. Sandra stated in her affidavit that she and Charles were never visited by Douglas County assessors, but were visited by Pottawattamie County assessors at least three times during the years they owned the property.

Apparently no one had been paying the property taxes on the Nebraska parcel between 1993 and 1998, because in November 2001, Douglas County instituted proceedings for a tax foreclosure sale. Notice of the tax foreclosure was mailed in December 2001 to Troy & Nichols, which was listed as the owner of record at that time. In addition, notice of the tax foreclosure sale was published in an Omaha legal newspaper for 3 consecutive weeks in December 2001 and again in February and March 2002. The notice was published a total of seven times.

The tax sale occurred on March 20, 2002, and Giff's father purchased the Nebraska parcel for $335.64 as an investment property for Giff, who was under the age of majority at the time of the sale. Notice of a hearing to confirm the sale was sent to Troy & Nichols. The sale was confirmed by the district court for Douglas County on May 13, 2004. Subsequently, a sheriff's deed was issued for the parcel on June 17, and Giff recorded the sheriff's deed on June 28. Giff's father paid the property taxes due on the Nebraska parcel from 1999 to 2004 on Giff's behalf.

On January 31, 2005, Giff's father sent a letter to the owner of a commercial marina next to the Curtises, asking him whether he was interested in purchasing the Nebraska parcel. The owner of the marina showed the letter to Sandra, who then called Giff's father. Through subsequent telephone calls between Sandra and Giff's father, Giff's father offered

to sell the Nebraska parcel to Sandra for $20,000, an offer Sandra refused. Sandra then contacted Amos, the real estate broker for the original sale to the Curtises, and Amos then contacted Chase. Many e-mails and faxes were sent between Amos, Chase, and the Curtises' attorney. The Curtises' attorney and Amos provided documentation to Chase, alleging that the Curtises needed a deed to the Nebraska parcel because that deed was inadvertently left out in the 1994 sale. The Curtises' attorney and Amos represented that a deed would address some problems the Curtises were having in regard to a holder of tax title. Pursuant to their request, Chase issued a quitclaim deed conveying the Nebraska parcel to the Curtises on November 18, 2005. This deed was recorded on November 21. Also on November 21, the Curtises filed a real estate transfer statement to change the address to which Douglas County property tax statements were sent. From 2005, the Curtises have paid the property taxes on the Nebraska parcel.

On January 24, 2006, the Curtises filed suit against Giff to quiet title to the Nebraska parcel. The Curtises allege that they had adversely possessed the Nebraska parcel; that the tax foreclosure sale and subsequent sheriff's deed are not binding upon them, because they were not served with notice of the tax foreclosure action; and that they intended to purchase the Nebraska parcel along with the Iowa parcel in 1994. Giff counterclaimed to quiet title against the Curtises, to eject the Curtises from the Nebraska parcel, and for slander of title. Giff also filed suit against Chase to quiet title and for slander of title. Each party filed a motion for summary judgment. Finding no genuine issues of material fact, the district court for Douglas County sustained the summary judgment motions of the Curtises and Chase and denied that of Giff. The court further found that the tax foreclosure sale was void ab initio because the Curtises did not receive notice of the sale and were entitled to such notice because they were in possession of the property; that Giff had no property interest in the Nebraska parcel because the sheriff's deed was void ab initio and that therefore she could not maintain quiet title, ejectment, or slander of title claims; and that because Giff has no property interest, Chase is entitled to judgment as a matter of law. The

Curtises then made a motion for default judgment quieting their title in the Nebraska parcel, which motion was granted by the district court. Giff timely appeals this ruling.

ASSIGNMENTS OF ERROR

Giff's assignments of error, consolidated and renumbered, are as follows: (1) The district court erred in finding that the Curtises were entitled to judgment as a matter of law because they did not receive actual notice of the tax foreclosure sale and were entitled to such notice because of their possession of the Nebraska parcel, making the tax foreclosure sale and sheriff's deed void ab initio; (2) the district court erred in finding that Chase was entitled to judgment as a matter of law; (3) the district court erred in failing to find that Giff was entitled to a judgment as a matter of law; and (4) the district court erred in failing to find the Curtises' claims were barred by equitable defenses.

STANDARD OF REVIEW

[1,2] An action to quiet title is one in equity. See *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). In appeals of equitable actions, the appellate court tries factual questions de novo on the record to reach a conclusion independent of the trial court. See *id.*

[3] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002).

ANALYSIS

[4-6] A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of the land and who were not made parties defendant in the action and had no notice or knowledge thereof. See *Harris v. Heeter*, 137 Neb. 905, 291 N.W. 721 (1940). See, also, *Winkle*

v. Mitera, 195 Neb. 821, 241 N.W.2d 329 (1976); *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W.2d 618 (1959). "[A] collateral attack upon an order confirming a sale by way of a quiet title action is allowed where, due to improper service and lack of actual notice, a court fails to obtain personal jurisdiction over the party in possession of or owning the property being sold." *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 482-83, 550 N.W.2d 27, 33 (1996) (emphasis omitted). Absent service on a party in possession, the trial court obtains no jurisdiction over the person and the order is totally void and may be subject to collateral attack. *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983). See *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982).

Giff argues that under Nebraska law, one must have title to the disputed property to challenge a tax foreclosure sale, and that because the Curtises did not have title via a deed or adverse possession at the time of the tax foreclosure in 2002, the Curtises cannot challenge the tax foreclosure sale whereby Giff purchased the Nebraska parcel. This is an incorrect statement of the law. Giff is correct in her assertion that the Curtises were not the record owners of the property in 2002, because they clearly had not received a deed for the Nebraska parcel. Similarly, Giff is correct in claiming the Curtises had not acquired title through adverse possession in 2002. At that time, the Curtises had been on the property for only slightly more than 7 years, not 10 years as required. See, Neb. Rev. Stat. § 25-202 (Reissue 1995); *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998) (stating that party claiming title through adverse possession must prove by preponderance of evidence that adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under claim of ownership for statutory period of 10 years). The Curtises also cannot tack their predecessors in interest's time of possession to their own, because Troy & Nichols did not possess the property at any point. The property had been vacant for 2 years prior to the Curtises' purchase. See *Bryan v. Reifschneider*, 181 Neb. 787, 150 N.W.2d 900 (1967) (stating that tacking for purposes of adverse possession requires privity of possession).

Nonetheless, the Curtises were still entitled to notice of the tax sale, because possession is sufficient to be entitled to notice of tax foreclosure proceedings. In *Harris, supra*, title based on adverse possession had not yet ripened when foreclosure proceedings were instituted. The Nebraska Supreme Court focused solely on actual possession, not title, at the time of the tax sale and held that possession was sufficient to be entitled to notice. Giff also argues that *Harris, supra*, and *Durfee, supra*, are inconsistent in their requirements. We disagree. Both cases apply the same rule, but, because of varying facts, come to different results on the issue of actual possession. The key inquiry is whether the Curtises were in possession in 2002 when the tax foreclosure sale took place, thereby entitling them to actual notice of the proceedings. Therefore, we turn now to whether the Curtises were in possession of the Nebraska parcel in 2002 and whether the Curtises received or had notice of the tax foreclosure proceedings.

[7] Actual possession, defined by the Nebraska Supreme Court, means "'actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession.'" *Durfee v. Keiffer*, 168 Neb. 272, 284, 95 N.W.2d 618, 626 (1959). Giff argues that the Curtises were not in possession of the Nebraska parcel. Giff claims that the Curtises are nonresident trespassers because they did not occupy, improve, or reside on the Nebraska parcel. However, Giff adduced no evidence to support this argument. Giff's father, in an affidavit, stated that he entered the property on one undefined occasion and was not excluded and that he observed a fence on the state line, which, even if true, hardly conclusively disproves possession.

The Curtises, on the other hand, adduced evidence that they were in possession at the time of the tax sale. Pictures offered by the Curtises of the Nebraska and Iowa parcels date from 2000 and 2001. Remembering that the two parcels form a single residential lakefront lot, irrespective of the legal nuances, these pictures show that the properties were being maintained and that a chain link fence is common to both parcels. From these pictures, the fence does not appear to be on the state line, but, rather, on the edges of the yard. The northern side of the

fence appears very near the water line of Carter Lake. Sandra stated in her affidavit that she and Charles

> have also occupied, kept, maintained and improved the property north of the house all the way to the lake, including putting a new roof, decking, and door panels on the boat house, repairing the boat lift, repairing and rebuilding the railroad tie retaining wall on the west side of the property which extends into the lake.

This is certainly actual possession. The way that the backyard is fenced and the repairs done to improvements on the Nebraska parcel clearly make the Curtises' possession open and visible to any reasonable person as well. We therefore find the Curtises were in actual possession of the Nebraska parcel at the time of the tax foreclosure sale.

[8] We now turn to whether the Curtises had notice of the tax foreclosure proceedings. The law is well settled that there is no presumption of valid service contained in the statutes governing sheriff's deeds that follow a tax foreclosure sale. *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996); *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983). See Neb. Rev. Stat. §§ 77-1901 through 77-1941 (Reissue 2003). Giff did not introduce any evidence to dispute in any way the evidence adduced by the Curtises that they did not have actual notice.

Giff argues that constructive notice by publication is sufficient because the Curtises were nonresidents of the State of Nebraska and, therefore, could not have been served in Nebraska. Giff cites *Durfee, supra*, as support for this contention. However, in that case, there was little evidence of possession, and the person claiming entitlement to notice was a landlord who was found to have only constructive possession. This case can easily be distinguished from *Durfee*, because the Nebraska parcel here is directly adjacent to the Curtises' house and in reality becomes part of where they live. There is clear evidence that anyone, upon inquiry, could have discovered the Curtises had an interest in the Nebraska parcel because of the close proximity of their house and the appearance of the yard and fence. Here, service could have been made in Nebraska;

the Curtises were clearly in possession of their backyard, which is in Nebraska.

[9] Because the Curtises were in actual possession of the Nebraska parcel, they were entitled to actual notice of the tax foreclosure proceedings. Because they did not receive notice, the tax sale and subsequent sheriff's deed to Giff are void. See, *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983); *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982). As a result, Giff never acquired valid title to the Nebraska parcel. A void judgment is not binding upon the person against whom it is rendered, gives no new rights or better position to a person in whose favor it professes to be, and cannot be a source of title. See *Hassett v. Durbin*, 132 Neb. 315, 271 N.W. 867 (1937). As such, Giff cannot maintain an action for quiet title or ejectment or slander of title against the Curtises or Chase, and such parties are entitled to judgment as a matter of law. See, Neb. Rev. Stat. § 25-2124 (Cum. Supp. 2006); *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991) (stating that to maintain ejectment action, plaintiff must show legal interest in property, entitlement to possession therein, and that defendant unlawfully keeps plaintiff out of possession). See, also, *Norton v. Kanouff*, 165 Neb. 435, 86 N.W.2d 72 (1957) (stating action for slander of title is based upon false and malicious statement, oral or written, made in disparagement of person's title to real or personal property, resulting in special damage).

[10-12] Giff further attacks the method in which the Curtises void the tax sale by arguing that the Curtises should have reopened the judgment and defended the foreclosure action pursuant to Neb. Rev. Stat. § 25-525 (Cum. Supp. 2006) or pursuant to an action for redemption. However, this argument has no merit. See, *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959) (stating that owner or occupant may redeem from tax sale prior to issuance of valid tax deed); *Hassett v. Durbin, supra* (stating § 25-525 has no reference to void judgment). An action to quiet title in equity is an appropriate method of attacking a tax foreclosure sale.

> A void judgment may be entirely disregarded upon having its jurisdictional infirmity exposed. Proceedings in equity are peculiarly appropriate for the exposure of this infirmity, and after full opportunity has been given to those who seek to sustain as well as to those who seek to avoid the judgment, if it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains. 3 Freeman, Judgments (5th ed.) sec. 1228.

Hassett v. Durbin, 132 Neb. at 318, 271 N.W. at 869. It is not necessary to take any steps to have a void judgment reversed, vacated, or set aside. *Id.*

Giff also argues that the Curtises are barred from asserting their claims because they failed to meet the requirements of Neb. Rev. Stat. § 77-1844 (Reissue 2003). However, this argument is also without merit. See *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 9, 144 N.W. 1072 (1914) (stating this section does not apply if taxes not due and owing on date of suit).

[13] Giff's remaining assignment of error relates to the applicability of equitable defenses. Giff claims the equitable doctrines of unclean hands, laches, waiver, or collateral estoppel bar the Curtises' claims. However, to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008). Giff did not specifically argue any of these defenses, and they will not be considered here.

CONCLUSION

The district court properly granted the Curtises' motion to quiet title in them because they had actual possession of the Nebraska parcel and did not receive notice of the tax foreclosure proceedings. The quitclaim deed, recorded on November 21, 2005, effectively transferred title from Chase to the Curtises; Giff's sheriff's deed is void and unenforceable, and such cloud upon the Curtises' title should be, and is hereby, removed.

AFFIRMED.

Gary G. Nerison, appellant, v. National Fire Insurance Company of Hartford, also known as NFIC of Hartford, also known as CNA Financial Corporation, et al., appellees.

757 N.W.2d 21

Filed October 28, 2008. No. A-08-118.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no 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. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: 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.
5. **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.
6. **Workers' Compensation.** A basic principle underlying the Nebraska Workers' Compensation Act is that only employees are entitled to workers' compensation benefits.
7. **Workers' Compensation: Jurisdiction: Equity.** The Workers' Compensation Court does not have general equitable jurisdiction.
8. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
9. **Pleadings: Evidence.** Formal acts that may operate as judicial admissions include statements made in pleadings, and the rule of evidence is that matters contained in pleadings are judicial admissions insofar as the adversary is concerned.
10. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Reissue 2004) precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.

Appeal from the Workers' Compensation Court. Affirmed.

John C. Fowles, of The Fowles Law Office, P.C., L.L.O., for appellant.

Joseph F. Gross, Jr., of Timmermier, Gross & Prentiss, for appellees.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

I. INTRODUCTION

Gary G. Nerison filed a petition with the Nebraska Workers' Compensation Court against National Fire Insurance Company of Hartford (National Fire), also known as NFIC of Hartford, also known as CNA Financial Corporation (collectively CNA); Associated Contract Truckmen, Inc. (ACT); and AMS Staff Leasing, Inc.; AMS Staff Leasing, N.A., Inc.; AMS Staff Leasing, N.A., Ltd.; AMS Construction Company, Inc.; and E.A.W., Inc. (collectively AMS). Nerison, a self-employed truckdriver, sought benefits in connection with his work-related accident and injury. After the court dismissed Nerison's petition, Nerison appealed to the three-judge review panel of the compensation court, which entered an order of affirmance on review. Nerison then appealed to this court. Because we find no error, we affirm.

II. BACKGROUND

Because of the rather tangled web of contractual relationships between the defendants in this case, we first provide some general information about the nature of those relationships before providing more detailed information concerning Nerison's relationship to the various defendants and the accident and injury which prompted this action.

1. RELATIONSHIP BETWEEN AMS AND CNA

AMS is a professional employer organization headquartered in Dallas, Texas. AMS enters into contracts with client companies to provide services including preparation of payroll, tax withholding, and workers' compensation insurance coverage. Under the staff leasing agreements entered into between AMS and a client company, the employees of the

client company would be considered coemployees of AMS and the client company.

National Fire is part of a group of insurance companies with a service mark of "CNA," headquartered in Chicago, Illinois, and organized under the laws of the State of Connecticut. Throughout this opinion, we have referred to National Fire and CNA collectively as "CNA," except where necessary to distinguish between the two names.

AMS negotiated with CNA for the issuance of a workers' compensation insurance policy, and a policy was issued for the period of September 1, 2000, through September 1, 2001. A new policy providing workers' compensation insurance coverage was issued for the period September 1, 2001, through September 1, 2002. The 2001-02 CNA policy listed National Fire as the insurance company and AMS as the named insured. From September 1, 2001, through at least the date of Nerison's accident in June 2002, coemployees of AMS were covered by this workers' compensation policy with CNA.

2. Relationship Between AMS and ACT

ACT is a corporation with its principal place of business in Oklahoma City, Oklahoma. ACT obtained permission under Missouri law to form a group of truckdrivers so that the group of truckdrivers could obtain workers' compensation insurance coverage. The truckdrivers were primarily independent owner-operators who leased their trucks to various trucking companies. Some trucking companies require that workers' compensation insurance coverage be purchased by independent owner-operators. The trucking company would deduct monthly premiums from settlements with owner-operators and then forward the premiums to ACT.

In November 2000, David Brandert, the president of ACT, commenced negotiations with Chris Polk of AMS. ACT needed to find insurance for independent truckdrivers. A proposed staff leasing agreement was sent to ACT. On November 15, Brandert wrote Polk:

> Thank you for faxing the [proposed staff leasing agreement]. After reading it, I feel I should document the fact that ACT is a group of self employed individuals who

> have combined to purchase insurance on a group basis, and as such are eligible to elect workers compensation under the sole proprietor election rules of a state with jurisdiction.

AMS and ACT entered into a staff leasing agreement beginning December 1, 2000. Another staff leasing agreement was signed, which is dated December 1, 2001. ACT was to send a list of owner-operators each month together with a monthly payment due under the staff leasing agreements. Under the staff leasing agreements, the rates for a self-employed person are based upon payroll but the amount of the payroll is fixed by each state.

3. Relationship Between ACT and TSA

Truckers Service Association (TSA) is a nonprofit association formed to provide insurance brokerage services for independent truckers. True North Companies, L.L.C. (True North), a group of insurance agencies, provides products to members of TSA including various kinds of insurance. In August 2000, True North agreed to purchase workers' compensation insurance coverage through ACT for members of TSA. A member of TSA would pay the workers' compensation insurance premium to TSA, and TSA would then send a list of owner-operator members to ACT with the monthly premium. ACT would then forward a list to AMS with the premium. AMS would then pay a monthly premium to CNA.

4. Nerison Needs Insurance

Nerison is a self-employed semi-tractor truck owner who leases the tractor and his services as a truckdriver to various trucking companies. Nerison has lived in Nebraska City, Nebraska, since February or March 2001.

In February 2002, Nerison began leasing his tractor and services to a company that required him to have his own "physical damage, bobtail," and workers' compensation insurance coverage. "Bobtail" insurance provides accident coverage when an owner-operator is driving a tractor but is not pulling a trailer. Prior to leasing to that company, Nerison had obtained physical damage or collision insurance and bobtail insurance, but not workers' compensation insurance, through TSA.

When Nerison needed to obtain his own workers' compensation insurance coverage, he again contacted TSA and requested workers' compensation insurance. TSA sent various forms to Nerison's residence in Nebraska City, which forms Nerison completed and sent back. One of the forms allowed monthly withdrawals or charges against his credit card for workers' compensation insurance premiums, and another contained a statement indicating that Nerison was a "self employer" who elected to be covered by workers' compensation insurance, was a member of ACT, and appointed Brandert as his agent to execute and deliver all instruments necessary or required in order to obtain or cancel a program of group workers' compensation coverage. Deposition testimony from Brandert shows that although a copy of the election form was maintained by ACT, it was not forwarded to AMS or CNA.

Nerison received a document titled "CERTIFICATE OF INSURANCE" with an issue date of January 24, 2002. The certificate named Nerison as the insured party and showed workers' compensation coverage effective November 1, 2001, with the insurer "NFIC of Hartford" under the same policy number as that of the workers' compensation policy issued to AMS by CNA. Nerison testified that once TSA sent back a certificate showing that he had workers' compensation insurance, the company he was leasing to was satisfied and he assumed that TSA had done everything necessary to provide him with coverage. Nerison subsequently received an updated certificate from TSA indicating a different workers' compensation insurer effective August 1, 2002.

Nerison did not read any of the documents he received from TSA, simply completing them and returning them to TSA. Nerison testified that TSA did not explain to him the means by which it would provide him with workers' compensation insurance. Nerison was not told that he was a member of ACT, and nothing was mentioned about his being a coemployee under a staff leasing agreement. From Nerison's point of view, he was just buying insurance from TSA to cover himself.

Nerison paid workers' compensation premiums to TSA through January 2003, when he began leasing to a trucking

company that provided its own workers' compensation insurance coverage to its drivers.

5. Things Fall Apart

In February 2002, CNA decided to get out of the business of insuring professional employer organizations and advised AMS that the CNA policy would not be renewed on September 1. AMS did not notify any of its clients, including ACT, that the CNA policy would expire. Problems arose between CNA and AMS, including the fact that AMS did not send CNA a complete list of all its clients. For example, although AMS reported ACT as a client company for the period of September 1, 2000, to September 1, 2001, AMS did not list ACT as a client on the monthly reports sent to CNA beginning September 2001. Apparently, AMS stopped providing lists of its clients to CNA altogether in February 2002.

On March 1, 2002, CNA wrote to AMS canceling the CNA policy effective May 10. Although AMS received the March 1 letter, it did not give notice of the cancellation to its clients. Litigation ensued between AMS and CNA. A settlement agreement was reached under which CNA was to withdraw its cancellation of the CNA policy and AMS was to formally cancel all policies with CNA as of June 20. The required cancellation letter was written by AMS to CNA on May 1.

Again, AMS did not notify its client companies that workers' compensation insurance coverage under the CNA policy would end as of June 20, 2002. AMS sought other insurance coverage, but on June 20, AMS had no workers' compensation insurance. The owner of AMS later purchased a Texas insurance company, which issued a policy providing workers' compensation insurance coverage to AMS. The policy from this company was issued in August 2002 but was backdated so as to provide coverage beginning June 20.

On June 27, 2002, AMS wrote a letter informing ACT of CNA's decision to cancel the workers' compensation program. The letter stated, in relevant part:

> Your workers' compensation insurance program was issued through CNA. CNA decided to cancel your workers[']compensation program. The cancellation notice will

> be effective July 1, 2002. The cancellation of the program will be effective July 31, 2002. Based on CNA's unfortunate action, we must cancel our [staff leasing] contract with you. This letter shall serve as our 60-day notice of cancellation.

The letter also noted that AMS was attempting to finalize an alternative to the CNA program. ACT did not receive the letter until July 19 because the letter was sent to an old address. In the meantime, on June 19, ACT sent AMS a check in payment of the May amount due under the December 2001 staff leasing agreement, and ACT submitted a list of owner-operators with the check. On July 19, 2002, Brandert at ACT was in the process of writing a similar check for June. Upon receiving the June 27 letter, Brandert destroyed the June check and did not send AMS a list of employees. ACT attempted to contact AMS after receiving the letter but was unable to speak with anyone at AMS.

Although TSA or True North sent the premium for the month of June 2002 to ACT, ACT did not send the June payment, due on July 20, to AMS. ACT notified True North and TSA that there was no insurance coverage, and True North was able to obtain alternate insurance coverage for TSA members beginning August 1.

AMS sent ACT a letter dated August 9, 2002, indicating that if ACT wished to have AMS coverage for June and July, AMS had to receive payment within 48 hours from the date of the letter, and stating that coverage in all cases concluded on July 31. ACT did not remit payments due under the December 2001 staff leasing agreement for June and July 2002.

6. Nerison's Accident

On June 14, 2002, Nerison was driving his truck from Chicago to Houston, Texas, when he had mechanical problems. Nerison contacted a towing company to bring him and his truck to a repair facility in Morgan, Illinois. En route to Morgan, the tow truck was in an accident with another truck, and Nerison suffered injuries for which he claims workers' compensation benefits.

Nerison reported his injury to ACT. ACT authorized medical treatment and paid indemnity benefits. In approximately January 2004, ACT stopped paying benefits to Nerison and refused to pay further benefits, including outstanding medical expenses.

7. Nerison Files Suit

Nerison filed a petition for benefits in the compensation court in May 2004 and an amended petition on September 7, 2005. In the amended petition, Nerison set forth general allegations about the relationships between the parties and the details of his accident and injury before outlining four theories of liability.

Under the first theory of liability, Nerison alleged that through at least June 19, 2002, he was a coemployee of ACT and consequently of AMS, which had a workers' compensation insurance policy with CNA. Nerison alleged that he was therefore entitled to workers' compensation benefits from ACT, AMS, and CNA by virtue of this employment relationship.

Nerison next alleged, as his second theory of liability, that he was a self-employed individual who was essentially paying his own workers' compensation insurance premiums. Nerison stated that he received a certificate evidencing insurance coverage with CNA. Nerison alleged that CNA, AMS, and ACT knew, or should have known, Nerison would rely on the insurance certificate and payment of his premiums and believe he had workers' compensation coverage through CNA and that he was thus entitled to benefits from ACT, AMS, and CNA.

Under his third theory of liability, Nerison alleged that he was a beneficiary to the agreement between ACT and AMS which made independent owner-operators employees of ACT and coemployees of AMS for purposes of workers' compensation coverage. Nerison alleged that AMS breached that agreement in various specified ways and that he was entitled to all contractual remedies that ACT would have had against AMS, including continuation of the coemployment relationship and the right to workers' compensation insurance and benefits from AMS and its insurer, CNA.

Finally, Nerison alleged under his fourth theory of liability that he entrusted and paid premiums to ACT to maintain

workers' compensation coverage on his behalf for the time period in which he was paying premiums. Nerison asserted that in the event the court found that CNA and AMS were not obligated to provide workers' compensation benefits to him, ACT was obligated to provide such benefits because of its fiduciary responsibility to Nerison.

Nerison sought a determination of the rights and liabilities of the parties and of his loss of earning capacity; an award of such benefits as he may be entitled to under the Nebraska workers' compensation law, including payment of past and future medical expenses and temporary total and permanent partial disability benefits; and an award of attorney fees.

8. Trial Court Proceedings and Ruling

Trial was held before a single judge of the compensation court on February 7, 2006, with additional evidence being received on May 30. The trial judge received exhibits which included medical records relating to Nerison's accident and injury, depositions of representatives of the parties, and documentary evidence concerning the relationships between the parties. The judge also heard testimony from Nerison.

The trial judge entered an order of dismissal on January 30, 2007. After outlining the detailed factual background of this case, the judge addressed the question of what jurisdiction, if any, the compensation court had over the various claims set forth in Nerison's amended petition. The judge outlined certain case law and legislative history and concluded that the compensation court in general has jurisdiction to determine the existence of workers' compensation coverage and that accordingly, the court had jurisdiction in this case to decide the claim against CNA.

In considering the merits of Nerison's claim against CNA, the trial judge first reviewed Neb. Rev. Stat. § 48-115(10) (Cum. Supp. 2000). The judge stated:

> The provision [in § 48-115(10)] for a self-employed person to be eligible for workers' compensation benefits or coverage was added to the Nebraska Workers' Compensation Act, § 48-115[,] in 1984 when the [L]egislature adopted LB776. There is little legislative

> history but the introducer's statement shows that the individual would have to be engaged in business on a substantially full-time basis and file a written notice of election with the insurer.
>
> In this case, CNA issued a policy of insurance to AMS. ACT was a client of AMS, although the only purpose of being a client was to obtain workers' compensation coverage through AMS, and then through CNA. AMS did not do any payroll for . . . Nerison or any other truck owner/operator. One wonders how CNA could determine the premiums due when premiums were based upon payroll and the payroll wasn't done by AMS. The statu[t]e is specific and the statement of the introducer of the legislation is specific in that the insurer must have a written notice of election. In this case, CNA had no notice that . . . Nerison was a self-employed truck owner/operator. The appointment of . . . Brandert as an attorney or agent to prepare and file any necessary papers is insufficient, especially when . . . Brandert failed to supply AMS and/or CNA (National Fire Insurance Company of Hartford) with the necessary notice of election. Finally, and more importantly, the premiums for the month of June 2002 . . . were not paid to AMS and/or CNA.
>
> This is an unfortunate case where an individual owner of a business, in this case a truck owner/operator, purchases workers' compensation insurance but due to the failure of so many intermediaries to properly perform their duties[, Nerison] was not covered by CNA for his injuries suffered on June 14, 2002.

The trial judge also addressed whether the court had jurisdiction to decide the claim against AMS or ACT. The judge stated:

> The claims against AMS and/or ACT are the equivalent of . . . claims against an insurance agent for failure to procure insurance. These claims are not within the jurisdiction of the Nebraska Workers' Compensation Court. The claims have nothing to do with insurance coverages but rather are in the nature of a breach of contracts case and/or negligen[ce]. Cases involving a breach of contract

> and/or negligence require a jury trial. The Nebraska Workers' Compensation Act does not provide for jury trials. This Court does not have jurisdiction of any claims against ACT or AMS.

9. Review Panel Proceedings and Ruling

Nerison filed an application for review on February 7, 2007.

The review panel entered an order of affirmance on review on January 8, 2008. The review panel reviewed the trial judge's findings with respect to § 48-115(10) and agreed that the evidence did not support a conclusion that Nerison or any person or entity on his behalf filed an election for coverage on his behalf with any insurance company. The review panel concluded accordingly that Nerison did not comply with a mandatory requirement to elect to bring himself within the provisions of the Nebraska Workers' Compensation Act.

The review panel then reviewed the trial judge's findings with respect to Nerison's claims against AMS and ACT. The review panel agreed with the trial judge that Neb. Rev. Stat. § 48-161 (Reissue 2004) does not confer jurisdiction on the compensation court to determine claims in equity or causes of action based in negligence. The review panel stated:

> The language of § 48-161 regarding "jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits" has been limited to determination of employment status as between two employers or disputes between two insurance companies regarding "aggravation" versus "recurrence" claims. Even within [*Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999)], the Supreme Court restated[,] "A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred by statute, and its power cannot extend beyond that expressed in the statute."

The review panel found that the judgment was based on findings of fact which were not clearly wrong and that no error of law appeared. The review panel affirmed the order of dismissal entered by the trial judge. Nerison subsequently perfected his appeal to this court.

III. ASSIGNMENTS OF ERROR

Nerison asserts, consolidated and restated, that the trial judge erred in (1) failing to find him an employee of AMS or ACT and (2) applying § 48-115(10).

IV. STANDARD OF REVIEW

[1-3] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no 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. *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

V. ANALYSIS

1. Nerison's Second, Third, and Fourth Theories of Liability

The trial judge concluded that the compensation court did not have jurisdiction over Nerison's claims against AMS and ACT. We agree with this conclusion with respect to the second, third, and fourth theories of liability set forth in Nerison's amended petition.

[4] Although, 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, *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007), under § 48-161, the compensation court has "jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits."

(a) Second Theory of Liability

Nerison's second theory of liability essentially sets forth a negligence claim. In addressing the claim set forth in Nerison's

second theory of liability, it will be helpful to review the Nebraska Supreme Court's decision in *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). Rhonda Schweitzer was an emergency health services worker who brought an action in the district court against the American National Red Cross (Red Cross) and the sponsor of a circus. Schweitzer alleged that she was injured while working as a direct employee of the Red Cross when she slipped on stairs while assisting a circus patron. Schweitzer also alleged that she was a statutory employee of the circus sponsor. In her petition, Schweitzer set forth various allegations of negligence, including that the Red Cross and the circus sponsor failed to provide her with workers' compensation insurance coverage. The district court granted summary judgment motions filed by the defendants, finding that Schweitzer's remedies were limited to those available under the Workers' Compensation Act.

On appeal, the Nebraska Supreme Court observed that the act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment and stated that "[a]bsent any other allegations, a determination of employee status under the Act is ordinarily sufficient for the district court to end its analysis and dismiss a purported negligence suit." *Schweitzer v. American Nat. Red Cross*, 256 Neb. at 356, 591 N.W.2d at 529. The *Schweitzer* court noted Neb. Rev. Stat. § 48-145(3) (Reissue 1993), which provided (as does its current version) that employers who failed to comply with conditions regarding the maintenance of workers' compensation coverage were "'required to respond in damages to an employee for personal injuries.'" 256 Neb. at 357, 591 N.W.2d at 529. The court stated that such damages could be sought in district court. The court stated that assuming Schweitzer had employee status, the resolution of the question of whether the defendants maintained proper insurance was determinative of whether Schweitzer could continue to pursue her negligence action in the district court. *Id.* The court determined that although the existence of insurance could be decided in the compensation court, such jurisdiction was not exclusive, and that on the facts of Schweitzer's case, the issue should be determined in the district court where the action was filed. *Id.*

Accordingly, the court reversed the district court's determination that it lacked subject matter jurisdiction with respect to the issue of the existence of insurance. *Id.*

[5,6] The ruling in *Schweitzer* illustrates that if an individual is considered an employee of a particular company and if that company has maintained workers' compensation insurance as required under the act, then any "negligence" claims an employee might have for a work-related accident and injury must be brought in the Workers' Compensation Court. 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. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). The difficulty in the present case with Nerison's bringing any "negligence" claims in the Workers' Compensation Court is the compensation court's finding that Nerison was a self-employed individual. A basic principle underlying the Nebraska Workers' Compensation Act is that only employees are entitled to workers' compensation benefits. *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001). In this case, rather than finding that Nerison's "negligence" claims were those of an employee against an employer for failure to maintain workers' compensation insurance, the compensation court determined that Nerison's claims against AMS and ACT were the equivalent of claims against an insurance agent for failure to procure insurance.

(b) Third Theory of Liability

In his third theory of liability, Nerison alleged various breaches by AMS of the contract between AMS and ACT and alleged that he was entitled to all contractual remedies of ACT against AMS. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003) (Nebraska Workers' Compensation Act does not afford compensation court jurisdiction to resolve contractual disputes between employees and third-party insurers), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

(c) Fourth Theory of Liability

[7] Finally, in his fourth theory of liability, Nerison raised an equitable theory. The Workers' Compensation Court does not have general equitable jurisdiction. *Dawes v. Wittrock Sandblasting & Painting, supra.*

(d) Conclusion

We find that the trial judge did not err in his conclusions with respect to Nerison's second, third, and fourth theories of liability and that the review panel did not err in affirming this portion of the order of dismissal.

2. Nerison's First Theory of Liability

Nerison asserts that the trial judge erred in failing to find him an employee of AMS or ACT and applying § 48-115(10) (concerning self-employed individuals) to bar his claims against CNA. Nerison argues that pursuant to the December 2001 staff leasing agreement, he was considered a coemployee of AMS and ACT for workers' compensation purposes, and, accordingly, that it was error to apply § 48-115(10) to preclude his recovery of benefits.

[8,9] Nerison's petition contains a judicial admission that he was a self-employed truckdriver. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002). Formal acts that may operate as judicial admissions include statements made in pleadings, and the rule of evidence is that matters contained in pleadings are judicial admissions insofar as the adversary is concerned. *Ashland-Greenwood Public Schools v. Thorell*, 15 Neb. App. 114, 723 N.W.2d 506 (2006). Although Nerison also pled that he was a coemployee of AMS for purposes of workers' compensation coverage, this allegation relates to the causes of action which the compensation court correctly determined it had no jurisdiction to decide.

Section 48-115, among other things, defines the terms "employee" and "worker" for purposes of the Nebraska Workers'

Compensation Act. Section 48-115(10) defines those terms to include self-employed people who elect to bring themselves within the provisions of the act and sets forth the requirements for election of coverage under the act by such persons. The version of § 48-115 in effect at the time of Nerison's accident and injury provided as follows:

> For purposes of the act, employee or worker shall be construed to mean:
>
> . . . .
>
> (10) Each individual employer . . . or self-employed person who is actually engaged in the individual employer's . . . or self-employed person's business on a substantially full-time basis who elects to bring himself or herself within the provisions of the Nebraska Workers' Compensation Act. *Such election is made if he or she (a) files with his or her current workers' compensation insurer written notice of election to have the same rights as an employee only for purposes of workers' compensation insurance coverage acquired by and for such individual employer . . . or self-employed person or (b) gives notice of such election and such insurer collects a premium for such coverage acquired by and for such individual employer . . . or self-employed person. This election shall be effective from the date of receipt by the insurer* for the current policy and subsequent policies issued by such insurer until such time as such employer . . . or self-employed person files a written statement withdrawing such election with the current workers' compensation insurer or until such coverage by such insurer is terminated, whichever occurs first.

(Emphasis supplied.)

There are two additional significant facts supporting the trial judge's determination with respect to Nerison's first theory of liability. First, we note the fact that ACT did not make the required payments to AMS under the December 2001 staff leasing agreement for June and July 2002. Accordingly, Nerison's status as a coemployee of AMS and ACT was in question on the date of his accident. We make no determination as to what effect the coemployee provision in the staff

leasing agreement would have had, if any, on the outcome in this case in the event ACT had made the required payments. Second, and perhaps more important, we note that the record shows that the election document signed by Nerison was never forwarded to AMS, let alone CNA, and that by the time of Nerison's accident, AMS was no longer remitting lists of its client companies to CNA. Clearly, from CNA's point of view, there had been no election or other document showing that Nerison was covered as a self-employed individual or as a coemployee of AMS.

[10] The record in this case contains sufficient evidence to support the trial judge's conclusion that Nerison was self-employed and that Nerison did not comply with § 48-115(10). Section 48-185 precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005). Accordingly, we find no error with respect to the trial judge's rulings as to Nerison's first theory of liability or with respect to the review panel's affirmance of that portion of the order of dismissal.

VI. CONCLUSION

The review panel did not err in affirming the order of dismissal.

AFFIRMED.

MARILYN M. BIHUNIAK ET AL., APPELLANTS, V. ROBERTA CORRIGAN FARM, A LIMITED PARTNERSHIP, ET AL., APPELLEES.

757 N.W.2d 725

Filed November 4, 2008. No. A-07-989.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.

2. **Waters: Negligence.** With regard to surface water, one may protect his land from surface water even to the damage of his neighbor and may only be held responsible in case of negligence.
3. ____: ____. The proprietor of lands may, by proper use and improvement thereon, deflect surface water, and will not be liable for consequent damage to his neighbor in the absence of negligence.
4. ____: ____. A landowner, in the absence of negligence, may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor.
5. ____: ____. If the flow of the water into a natural drain is increased over the lower estate, it must be done in a reasonable and careful manner and without negligence.
6. **Waters.** An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and by means of an artificial channel discharge it upon another's land contrary to the natural course of drainage to the latter's damage and detriment.
7. **Waters: Negligence.** The right of the upper proprietor to discharge water is not absolute. The discharge must be done in a reasonable and careful manner and without negligence.
8. **Injunction.** An injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
9. **Injunction: Damages: Proof.** In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Loralea L. Frank and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellants.

Larry W. Beucke and Amy L. Parker, of Parker, Grossart, Bahensky & Beucke, L.L.P., for appellees Roberta Corrigan Farm and Roberta Corrigan.

Jack W. Besse, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellee Menard, Inc.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Marilyn M. Bihuniak; Thomas J. Wilson; E. Ardelle Green, trustee of the Robert L. Green and E. Ardelle Green Family

Revocable Trust dated February 8, 1982; and Thomas H. Pratt, Jr. (collectively appellants), brought an action against Roberta Corrigan Farm, a limited partnership; Roberta Corrigan, trustee of the LeRoy Corrigan Trust; and Menard, Inc., also known as Menard Cashway Lumber, a Wisconsin corporation (collectively appellees), seeking money damages and injunctive relief. The appellants allege that the development of appellees' land has caused an increase in the amount of surface water flowing onto appellants' land from appellees' land, causing damage to appellants' land and crops. The district court for Buffalo County entered judgment in favor of appellees and dismissed appellants' amended complaint. Based on the reasons that follow, we affirm.

BACKGROUND

Bihuniak, Wilson, and the Robert L. Green and E. Ardelle Green Family Revocable Trust own a quarter section of farm ground in Buffalo County. Pratt farmed the quarter section under a crop-share arrangement for 15 years up to and including 2005. Roberta Corrigan Farm and the LeRoy Corrigan Trust (the Corrigans) own real estate immediately south of appellants' quarter section, which real estate they have been in the process of commercially developing. The appellants' property has historically been subservient to the drainage of surface waters from the appellees' property.

On July 16, 2003, Menard, Inc. (hereinafter Menards), purchased a portion of the Corrigans' property for the purpose of constructing a store. Subsequently, the Corrigans and Menards entered into a development agreement which required the Corrigans to make certain improvements to the land. As part of that agreement, the Corrigans hired an engineer to develop plans for the drainage of diffused surface water, which included a detention pond. The agreement also provided that the plans had to be approved by the city of Kearney. The detention pond was constructed in accordance with the plans designed by the engineer and approved by the city. Menards began construction of its store in 2004 and completed it sometime in 2005.

On January 10, 2005, appellants filed an amended complaint against appellees alleging that the "dirt work" performed in

developing appellees' land and the construction of the Menards store has caused greater amounts of diffused surface water to drain onto appellants' land, thereby causing damage to appellants' land and crops. The amended complaint requests an injunction against appellees ordering them to refrain from causing more diffused surface water to be drained onto their land than would have reached the land by natural drainage. The amended complaint also seeks damages for costs to repair appellants' land and damages for crop losses in 2004.

A bench trial was held on April 18 and 19, 2007. Pratt testified that he farmed the appellants' land for 15 years, up to and including 2005. Pratt testified that he was familiar with the flow of surface water across appellees' land and appellants' land before the Menards store was built. He testified that before the store was built, surface water would always flow from appellees' land across appellants' land along a natural drainage path. Pratt testified that the natural drainage path across appellants' property continues to be the same as it was before the store was built. Specifically, Pratt testified that when the water leaves the detention pond, it flows across a portion of appellees' property to the northeast, where it crosses the southeast corner of appellants' property in the same drainageway it always has, and then drains into a large settling pond constructed by the local natural resources district.

Pratt testified that although the surface water drains along the same path, the flow of water across appellants' land covers a wider area. He testified that before the Menards store was built, the drainage path across appellants' property was 2 to 3 feet wide after it rained and that the path is now 25 to 30 feet wide. Pratt testified that the increased waterflow affects approximately 1½ acres in the southeast corner of appellants' property. Photographs taken by Pratt after two rainfalls in May 2005 were entered into evidence showing the water flowing across appellants' land at various points downstream from the detention pond. Pratt did not know how long or how much it rained on either of the two occasions.

Pratt testified that as a result of the increased waterflow across appellants' property, he lost an estimated $618 in crops for 2004. Pratt was not sure whether he had planted corn or

soybeans that year. He testified that he was able to plant and harvest some crops on the southeast corner of the quarter section in 2004 and 2005, but could not always get to the area when he needed to because it was too wet, and that weeds took over the area.

Kent Cordes, a civil engineer, also testified for appellants. Cordes testified that he investigated the drainage system for the Menards store site and the surrounding area, specifically reviewing the design of the detention pond. Cordes testified that the Menards store has created an increase in the flow of surface water across appellants' property. Cordes testified that the increase in surface water was caused by the construction of the store and that the creation of impervious areas, whereby less water infiltrates into the ground and the water has to run off, increased the total amount and volume of water discharged.

Cordes testified that the purpose of a detention pond is to mitigate the increase in the flow of surface water by holding back the water after a rainfall and gradually releasing it to match the flow that existed predevelopment. He testified that in his opinion, appellees' detention pond does not serve that purpose. He testified that it is undersized and that as a result, the water is discharged at a greater rate than the flow of water that naturally occurred before the store was built. Cordes testified that the detention pond does reduce the rate at which the flow of water leaves the site and that the waterflow would be even greater without the detention pond. Cordes testified that the increased flow of water across appellants' property will continue if nothing further is done.

Cordes testified that the city of Kearney requires that the postdevelopment peak discharge from a detention pond not exceed the predevelopment peak discharge of water. Cordes testified that he did not know if this was a city code or a policy. Cordes testified that in his opinion, the detention pond does not meet this goal because of errors in appellees' engineer's calculations and plans. However, on cross-examination, Cordes agreed that the engineer's calculations and plans meet the city's requirements.

Cordes also agreed with Pratt that when the surface water leaves the detention pond, it flows along the same drainage

path across appellants' property as it did predevelopment of the land. He testified that the building of the store did not alter the natural flow of water.

The trial court found that appellants did not adequately prove damages to the land or to the crops and that appellants were not entitled to injunctive relief, because they did not show that appellees acted negligently in causing an increase in surface water across appellants' property. The trial court entered judgment in favor of appellees and against appellants.

ASSIGNMENT OF ERROR

Appellants assign that the trial court erred in rendering judgment in favor of the appellees because such judgment was contrary to the law and the evidence presented at trial.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

ANALYSIS

Appellants argue that they are entitled to an injunction against appellees because the construction of Menards has caused an increase in the flow of surface water over the southeast corner of appellants' property, resulting in damage to appellants' land and crops. Appellants contend that their land and crops will continue to be damaged unless appellees are refrained from causing more surface water to flow onto appellants' land than occurred before the construction of Menards. An examination of the law regarding surface waters is necessary to determine the rights and duties of appellees, as upper landowners, to appellants, as lower landowners.

[2-4] With regard to surface water, it has long been the rule that one may protect his land from surface water even to the damage of his neighbor and may only be held responsible in case of negligence. See *Jorgenson v. Stephens*, 143 Neb. 528, 10 N.W.2d 337 (1943). Also, it has long been the rule that the proprietor of lands may, by proper use and improvement

thereon, deflect surface water, and will not be liable for consequent damage to his neighbor in the absence of negligence. *Id.* It has also been held that a landowner, in the absence of negligence, may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor. *Id.*

[5] If the flow of the water into such natural drain is increased over the lower estate, it must be done in a reasonable and careful manner and without negligence. *Hickman v. Hunkins*, 1 Neb. App. 25, 509 N.W.2d 220 (1992), citing *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950).

[6] An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and by means of an artificial channel discharge it upon another's land contrary to the natural course of drainage to the latter's damage and detriment. *Hickman v. Hunkins, supra*, citing *Todd v. York County*, 72 Neb. 207, 100 N.W. 299 (1904).

In *Jorgenson v. Stephens, supra*, a lower landowner sought injunctive relief and damages against an upper landowner, alleging that the upper landowner's development of his real estate increased the flow of surface water onto the lower landowner's property. The lower landowner argued that the upper landowner should be required to divert the water directly into the city streets and sewers or employ artificial structures to keep the additional water from flowing onto the lower landowner's land. The Nebraska Supreme Court found that the evidence failed to show that the upper landowner had been negligent in the dispersion of his surface waters upon the land of the lower landowner or that he acted unreasonably and, thus, that there was no liability on the part of the upper landowner. The court further found that "the [lower landowner] must be left to her own resources to, reasonably and without negligence, protect her property from the surface water coming from the property of the [upper landowner], if she would have protection therefrom." *Jorgenson v. Stephens*, 143 Neb. at 535, 10 N.W.2d at 340.

Similarly, in *LaPuzza v. Sedlacek*, 218 Neb. 285, 353 N.W.2d 17 (1984), a lower landowner sued an upper landowner because

of water draining from the upper landowner's residence to the lower landowner's residence. The lower landowner had rebuilt a retaining wall in his backyard twice, and after it collapsed a second time, he sued the upper landowner, arguing that the upper landowner had a duty to divert the surface water flowing down from his land. The Nebraska Supreme Court found that no duty to divert existed under Nebraska law and further explained:

> An owner may collect surface water, change its course, pond it, or cast it into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another, except in depressions, draws, swales, or other drainageways through which such water is wont to flow in a state of nature. . . . Once a landowner diverts surface water and upsets the natural flow, he has a duty to do so reasonably and avoid damage to his neighbor. However, there is no affirmative duty to divert the natural flow away from one's neighbor even if it is causing damage in its natural state.

Id. at 287, 353 N.W.2d at 18-19.

[7] Neb. Rev. Stat. § 31-201 (Reissue 2004) states:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

However, the right of the upper proprietor to discharge such water is not absolute. The discharge must be done in a reasonable and careful manner and without negligence. *Hickman v. Hunkins*, 1 Neb. App. 25, 489 N.W.2d 316 (1992).

Based on the law in Nebraska, appellees are not liable to appellants for damages caused by an increase in surface water unless appellees were negligent in discharging the surface water. We conclude that appellants not only failed to plead negligence in their amended complaint, but they also failed to prove any negligence. The evidence shows that there is an increase in the

amount of surface water that flows across appellants' property, but the evidence also shows that the water follows the same natural drainageway that it did before the construction of the Menards store. Both Pratt and Cordes testified that the surface water flows out of the detention pond and across appellants' property in the same natural drainageway that the water flowed before the store was built.

Appellants allege on appeal that appellees are negligent in the dispersion of surface water because the detention pond does not reduce the flow of water to preconstruction rates. Cordes testified that in his opinion, the detention cell is undersized and, accordingly, does not reduce the waterflow to preconstruction rates. However, Cordes also testified that the detention pond does function to slow the flow of water and that without the detention pond, the water would flow onto appellants' property much faster. Further, appellees hired an engineer to design the detention pond and, although Cordes testified that he did not agree with the appellees' expert's calculations, the evidence reflects that appellees' expert followed the city's requirements in developing the detention pond and the city approved the plans. Thus, as previously stated, the evidence does not reflect that appellees acted negligently or unreasonably in the dispersion of surface water upon the land of appellants. Without proof of negligence, there is no basis for an injunction.

[8] In addition to appellants' failure to prove negligence, appellants are not entitled to injunctive relief because they have failed to show irreparable harm. An injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[9] Appellants presented evidence to show that in 2004, they lost crops valued at $618 as a result of the increased surface water. However, there was no evidence of crop loss in 2005 or 2006, nor was there any evidence of damage to the land. Appellants do not challenge the trial court's finding that they failed to adequately prove damages to crops in 2004 or

damages to the land. Cordes testified that the increased flow would continue into the future, but there was no evidence as to whether that would cause damage to the land or crops in the future. Thus, there was no evidence of irreparable damage. In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief. *Muff v. Mahloch Farms Co., Inc.*, 184 Neb. 286, 167 N.W.2d 73 (1969). For this additional reason, an injunction would be inappropriate.

CONCLUSION

We conclude that appellants are not entitled to an injunction against appellees because the evidence does not show that appellees acted negligently or unreasonably in the dispersion of surface water upon the land of appellants, and the evidence does not show irreparable harm to appellants. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

JHK, INC., DOING BUSINESS AS FAST MONEY, ET AL., APPELLANTS, V. NEBRASKA DEPARTMENT OF BANKING AND FINANCE, APPELLEE.

757 N.W.2d 515

Filed November 4, 2008. No. A-07-1317.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Trial: Appeal and Error.** The disposition of procedural motions is left to the discretion of the trial court, and absent a showing of an abuse of that discretion, an appellate court will affirm the trial court's rulings regarding such motions.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.

5. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
6. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2006), the district court's review is de novo on the record of the agency.
7. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
8. ____: ____: ____: ____. Neb. Const. art. V, § 22, is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.
9. **Immunity: Waiver.** Waiver of sovereign immunity will be found only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.
10. **Declaratory Judgments: Immunity: Waiver.** Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity, and a plaintiff who seeks declaratory relief against the State must find authorization for such remedy outside the confines of the Uniform Declaratory Judgments Act.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellants.

Jon Bruning, Attorney General, and Fredrick F. Neid for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

A Nebraska corporation and its officers, agents, and employees filed an action in the district court, seeking review of an adverse decision by the Nebraska Department of Banking and Finance (the Department) and seeking declaratory judgment. We find statutory authority supporting the Department's refusal to transmit the official record of the proceeding before it received payment for the cost of the record from the party seeking judicial review. Because the corporation never paid any money toward the cost of preparing the record and the district court had no record to review, we affirm the court's order upholding the Department's decision. We further conclude that the court correctly determined that it lacked subject matter

jurisdiction over the cause of action for declaratory judgment because the State of Nebraska did not waive its sovereign immunity. Accordingly, we affirm.

BACKGROUND

JHK, Inc., doing business as Fast Money; Jim H. Kyles, its president; William Stephan, its cashier; and all other officers, directors, employees, and agents thereof are the appellants in this matter. (We will refer to the appellants collectively as JHK except as needed to distinguish the parties.) JHK, a Nebraska corporation, was licensed to conduct a business under the Delayed Deposit Services Licensing Act, Neb. Rev. Stat. § 45-901 et seq. (Reissue 2004 & Cum. Supp. 2006) (the Act). The Department began investigating JHK following a customer complaint and ultimately discovered numerous transactions by JHK which violated the Act.

In October 2005, the Department issued an order to cease and desist directed to JHK, Kyles, and other employees. The Department ordered JHK to immediately stop allowing "'rollovers,'" charging customers a fee to extend the date for presentment of a check when the maximum fee allowed by statute had already been charged, accepting checks as repayment, refinancing or any other consolidation of a check or checks, and falsifying documents in an effort to deceive the Department.

In January 2006, JHK and the Department entered into a consent order. Pursuant to the order, JHK paid certain costs and customer reimbursements. JHK also agreed to sell its business, have the prospective new owner file an application for a new license by January 17, and operate its business subject to the provisions of the cease-and-desist order until a transfer of ownership occurred or, if that was denied by the Department, then either find another purchaser or cease operations. In August, the Department issued to JHK a provisional license to extend the expiration date of its license until August 31. The provisional license remained subject to the terms of the cease-and-desist order. In November, the Department issued an order to cease and desist requiring JHK to cease operating a delayed deposit services business without a license.

On April 16, 2007, the Department issued its proposed findings of fact, proposed conclusions of law, and recommended order. It recommended that the November 2006 cease-and-desist order be affirmed; that JHK and Kyles, jointly and severally, pay an administrative fine of $25,000; that Stephan pay an administrative fine of $2,000; that Kyles and Stephan be prohibited from involvement with any delayed deposit services business for 7 years and 2 years, respectively; and that JHK and Kyles, jointly and severally, pay specified amounts for the Department's investigation costs, the costs of the hearing, and the hearing officer's fee. The director of the Department adopted the proposed findings of fact, proposed conclusions of law, and recommended order on April 18.

On May 17, 2007, JHK filed a complaint, titled "Petition," alleging two causes of action. In JHK's first cause of action, it sought review of the Department's final decision in accordance with the Administrative Procedure Act (APA). JHK's second cause of action requested a declaratory judgment declaring the Department's decision to be of no force and effect. JHK alleged that the Department's decision "resulted from the application of one or more standards by the [Department] which were in violation of the due process and equal protection provisions of the constitutions of both the State of Nebraska, and of the United States." In the Department's responsive pleading, it raised sovereign immunity as an affirmative defense to the declaratory judgment cause of action.

On June 20, 2007, the Department moved for an extension of time in which to submit the official record. In a letter dated June 26, 2007, counsel for the Department advised JHK's counsel that under Neb. Rev. Stat. § 84-917(4) (Cum. Supp. 2006), it was billing JHK $8,387.62 as the reasonable direct cost of preparing the official record. The Department enclosed with the letter a bill from a reporting firm pertaining to the cost of preparation of the verbatim record of the agency hearing, which contained itemized charges totaling $12,699. The bill included charges that were incurred for copying nearly 700 pages of the verbatim transcript and nearly 11,000 pages of exhibits. The Department's letter requested JHK to pay for half of the billing from the reporting firm, together with the

expense of preparing the transcript of filings for 1,146 pages of pleadings. The letter advised that payment should be remitted within 10 days and that the Department would transmit the official record to the court upon payment.

On July 5, 2007, the court granted the Department's motion for an extension of time to submit the official record. The court's order noted that JHK did not oppose the motion and that § 84-917(4) expressly authorized the agency to require payment or bond prior to the transmittal of the record. Accordingly, the court extended the time to submit the record by 1 business day after JHK paid the cost of preparation of the official record.

On November 6, 2007, JHK filed a motion for leave to file the following motions out of time: a motion to expand the schedule for submission of JHK's final brief and to expand the time to submit the case for decision, a motion to review the cost of the official record, and a motion to set a trial date and to consolidate JHK's causes of action. Each motion provided notice that the motion would be heard on November 9. During the November 9 hearing, JHK asserted that the cost billed to prepare the record went "far beyond reasonable direct costs." The Department opposed JHK's motions and noted the untimeliness of the motions. The court inquired whether JHK had tendered any money toward the payment of the cost of the record, including the amount that it believed to be reasonable, and JHK's counsel responded that JHK had not tendered any money. The court sustained the Department's objections to the motions as to not being timely filed. The court proceeded with "the appeal hearing" and took judicial notice of the pleadings upon the request of counsel for JHK.

On November 14, 2007, the court entered an order affirming the Department's decision. The court noted that as to the first cause of action, it had no record to review. As to the second cause of action, the court stated that it lacked jurisdiction because the State had not waived its sovereign immunity.

JHK timely appeals.

ASSIGNMENTS OF ERROR

JHK alleges, consolidated and reordered, that the court erred in (1) determining that the Department could withhold

the official record absent payment by JHK, (2) sustaining the Department's objections to each of JHK's motions, (3) determining that the Department's decision should be affirmed, and (4) determining that JHK's action for a declaratory judgment should not be allowed to proceed to trial or that the Department was immune from the action.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] The disposition of procedural motions is left to the discretion of the trial court, and absent a showing of an abuse of that discretion, an appellate court will affirm the trial court's rulings regarding such motions. See *Commercial Fed. Sav. & Loan Assn. v. Matt*, 232 Neb. 26, 439 N.W.2d 463 (1989).

[4] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

[5] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. See *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

ANALYSIS

Withholding Record.

JHK argues that the Department lacked authority to withhold the official record from JHK absent payment. We disagree. Section 84-917(4) provides in relevant part:

> The agency shall charge the petitioner with the reasonable direct cost or require the petitioner to pay the cost for preparing the official record for transmittal to the court in all cases except when the petitioner is not required to pay a filing fee. The agency may require payment or bond prior to the transmittal of the record.

As JHK points out, the statute allows the Department to require "payment or bond." JHK argues that at all material times, it was licensed under § 45-901 et seq., and that "[a]s such, it had provided a bond to [the Department] to insure its performance." Brief for appellants at 15. The bond required by § 45-906(2) is "[a] surety bond . . . conditioned for the faithful performance by the licensee of the duties and obligations pertaining to the delayed deposit services business so licensed and the prompt payment of any judgment recovered against the licensee." The bond required by § 45-906(2) is completely different from the bond contemplated by § 84-917(4), and the two bonds serve different purposes. There is no dispute that JHK did not make any payment toward the cost for preparing the official record or seek to have the Department or the district court set an appropriate bond. Because the statute mandates that the Department charge JHK with costs of preparing the official record and allows the Department to require such payment prior to transmittal of the record, JHK's assignment of error is without merit.

Motions.

JHK alleges that the court erred in denying its motion for leave to file three motions out of time and denying each of the three motions it sought to file out of time: a motion to set trial and consolidate the two causes of action, a motion to review the cost of the official record, and a motion to expand the schedule for submission of the final brief and the case. JHK argues that it was unfairly deprived of a substantial right and a just result and that the Department did not show any prejudice.

First, it appears that the court considered the causes of action together, and on September 13, 2007, the court set the appeal hearing for November 9. The court's final order ruled

on both causes of action. The court did not abuse its discretion in denying JHK's motion to set trial and consolidate the causes of action.

Second, the transcript shows that in a letter to JHK's counsel dated June 26, 2007, the Department advised that it was billing JHK $8,387.62 as the reasonable direct cost of preparing the official record. The Department included a bill from the reporting firm showing charges totaling $12,699, of which only half was included in the Department's billing to JHK. JHK took no action until filing the instant motions on November 6, 3 days before the scheduled appeal hearing. We find no abuse of discretion by the district court in sustaining the Department's objection to JHK's motion to review the cost of the record as being untimely.

Finally, the court's September 13, 2007, order provided that JHK's initial brief should be filed no later than October 4 and that its reply brief should be submitted no later than November 9. JHK filed an initial brief but not a reply brief. Because the case was being submitted to the court on November 9 and JHK did not seek an extension of time until November 6, we find no abuse of discretion by the court in denying the motion. Nor did the court abuse its discretion in denying JHK's motion to file each of the above motions out of time.

Affirming Department's Decision.

[6] JHK next argues that the court erred in affirming the Department's decision. Under § 84-917(5)(a), the district court's review is de novo on the record of the agency. Because the court had no record to review other than the pleadings, we find no error on the record in its affirmance of the Department's decision.

Dismissing Declaratory Judgment Action.

The district court concluded that it lacked jurisdiction to consider JHK's cause of action for declaratory judgment because the State had not waived sovereign immunity, and the court cited to *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997*), disapproved on other grounds, Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999).

[7-9] The Nebraska Constitution provides that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Neb. Const. art. V, § 22. This provision permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007). It is not self-executing, however, but instead requires legislative action for waiver of the State's sovereign immunity. *Id.* Waiver of sovereign immunity will be found only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. *Id.*

[10] JHK's complaint stated that its "second cause of action in [sic] brought pursuant to the Nebraska Declaratory Judgment Act." It alleged that the Department's decision resulted from the application of standards by the Department which were in violation of the due process and equal protection provisions of the state and federal Constitutions. Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity, and a plaintiff who seeks declaratory relief against the State must find authorization for such remedy outside the confines of the Uniform Declaratory Judgments Act. *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998). JHK's second cause of action did not allege that it was being brought under the APA; nor did it cite to an independent statute under which the State has waived sovereign immunity. See *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). Because the State did not waive its immunity, the district court correctly determined that it lacked subject matter jurisdiction over JHK's second cause of action.

CONCLUSION

We conclude that the district court did not abuse its discretion in sustaining the Department's objections to JHK's untimely motions. We further conclude that the court did not err in affirming the Department's decision and that the court correctly determined that it lacked jurisdiction over JHK's

cause of action under the Uniform Declaratory Judgments Act because the State did not waive its sovereign immunity.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ALECIA M. HAUSMANN, APPELLANT.
758 N.W.2d 54

Filed November 10, 2008. No. A-07-1229.

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 of the lower court's decision.
2. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.
3. **Courts: Jurisdiction: Appeal and Error.** Generally, a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court.
4. ____: ____: ____. When a county court acts upon a mandate issued by a district court sitting as an appellate court, the district court loses jurisdiction over the cause except upon a subsequent appeal.
5. **Judgments: Jurisdiction.** A ruling made in the absence of subject matter jurisdiction is a nullity.
6. **Judgments: Jurisdiction: Appeal and Error.** An appellate court lacks jurisdiction to hear an appeal from a ruling that is null.
7. **Courts.** Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system.

Appeal from the District Court for Sarpy County, MAX KELCH, Judge, on appeal thereto from the County Court for Sarpy County, TODD J. HUTTON, Judge. Appeal dismissed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Sarah Mori, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Alecia M. Hausmann appeals from a district court order affirming the judgment of the county court sentencing Hausmann for minor in possession of alcohol. However, before entering the order affirming the county court's decision on the merits, the district court entered an order dismissing the appeal. Hausmann then filed a motion to vacate the order of dismissal, which the district court granted by docket entry. Because a district court, upon making a final order while sitting as an intermediate appellate court, thereafter lacks the power to rehear a case, Hausmann's appeal to this court was untimely and we lack jurisdiction.

BACKGROUND

On June 18, 2006, Hausmann was cited for minor in possession of alcohol. Before trial, Hausmann moved to suppress evidence. The county court overruled this motion and subsequently found Hausmann guilty on February 27, 2007, of being a minor in possession of alcohol. The court sentenced Hausmann on June 21.

On July 2, 2007, Hausmann appealed her conviction to the district court on the grounds that the county court erred in overruling the motion to suppress and convicting Hausmann with insufficient evidence. On September 10, the district court issued an order dismissing Hausmann's appeal, because the record did not include the conviction and sentencing order from county court. Although the district court's order stated that Hausmann had failed to provide a proper record and that "[a]bsent a complete record, the decision of the [county] court must be affirmed," the order also stated that Hausmann's appeal was "dismissed." In addition, the September 10 order directed the district court to "certify a copy of this order to the Sarpy County Court and issue a Mandate upon expiration of the statutory time within which to file an appeal."

On September 28, 2007, Hausmann moved for the district court to vacate the dismissal order and permit Hausmann to file a supplemental transcript. By a docket entry made on October 5, the district court granted this motion. The court later decided Hausmann's appeal on the merits. In an October 22 opinion and order, the district court affirmed the decision of the county court.

On November 21, 2007, Hausmann appealed the district court's decision to this court. Pursuant to Neb. Ct. R. App. P. § 2-107(A)(1), this court initially entered an order summarily affirming the district court's October 22 order. We recognized that the bill of exceptions before us did not contain the trial before the county court, and thus, we could not determine that Hausmann had properly preserved the suppression issue by objecting at trial.

After entering this order, we received an additional volume of the bill of exceptions prepared by the county court—which contained the verbatim proceedings of the trial and had been on file with the district court since July 18, 2007. The additional volume showed that Hausmann had properly preserved the objection. Because the premise for our initial summary affirmance was incorrect, we vacated our summary affirmance and reinstated the appeal.

Because the State's brief on appeal was also premised on the failure to include the trial proceedings in the bill of exceptions—an incorrect premise apparently occasioned by the district court's initial failure to forward the volume of the bill of exceptions—we allowed the State time to file a supplemental brief. The State used this opportunity to raise the jurisdictional issue that we now confront.

ASSIGNMENTS OF ERROR

Although we do not reach Hausmann's assigned errors, we note that Hausmann made three assignments of error, which we would consolidate and restate into two issues. First, Hausmann assigns that the district court erred in affirming the county court's decision to overrule Hausmann's motion to suppress. Second, Hausmann alleges that the district court

erred in finding that there was sufficient evidence to support a conviction.

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 of the lower court's decision. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001).

ANALYSIS

The State argues that we lack jurisdiction because Hausmann did not timely appeal. The State insists that Hausmann's appeal period began to run on September 10, 2007, when the district court entered an order dismissing the appeal, and that the court's October 22 order was a nullity. The State thus concludes that Hausmann's appeal filed on November 21 was untimely. Under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006), a party has 30 days from the entry of judgment to appeal the decision of a district court unless a party has filed a motion which tolls the appeal period. Thus, if the September 10 order was final and appealable and Hausmann's motion to vacate did not toll the time for appeal, her appeal was untimely. We thus consider whether the district court's order entered on October 22 was appealable.

[2] Even if the State is correct that we lack jurisdiction of the merits of Hausmann's appeal, we nonetheless have jurisdiction to determine whether the district court had jurisdiction to enter its order of October 22, 2007. Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999).

[3] In order to determine whether Hausmann could appeal the October 22, 2007, order, we must first determine whether the district court had jurisdiction to enter this order. Specifically,

we examine whether a district court sitting as an intermediate appellate court may make a further disposition of a case when it has already issued a final, appealable order pursuant to Neb. Rev. Stat. § 25-1901 (Supp. 2007). With certain exceptions not pertinent to the case before us, a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court. § 25-1901.

Although the State identifies case law holding that a district court may not rehear a case after entering a final order, we find two lines of authority on this issue.

We first look to *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987), where the Nebraska Supreme Court held that a district court sitting as an appellate court has the power to rehear a case after entering a final order. In *Painter*, the defendant appealed his conviction to the district court and the court affirmed. However, the district court's order inadvertently modified the county court's sentence. The district court then issued a nunc pro tunc order to correct the error. The Supreme Court noted that a nunc pro tunc order to correct a scrivener's error was improper here because the judge, who actually had the power to modify the sentence, and not a scrivener, had erred. The Supreme Court then discussed whether a district court sitting as an intermediate court of appeals had the power to modify its previous final order. The Supreme Court concluded that "just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion." *Id.* at 912, 402 N.W.2d at 681.

The Supreme Court's conclusion in *Painter* is consistent with general principles of law. Commentary in 5 C.J.S. *Appeal and Error* § 677 at 89 (1993) explains that "[b]roadly speaking, the power to grant rehearings is inherent in appellate courts, at least during the term at which the case is decided."

The Supreme Court subsequently decided a similar case without referring to *Painter*. In *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519

(1990), the Supreme Court again decided that a district court exercising appellate jurisdiction had the power to modify a final order to correct a judicial error. In *Interstate Printing Co.*, the district court heard an appeal from an administrative agency. The district court's final order referred to an order that the agency had issued on December 2, 1986, but the agency had actually issued the order on July 9, 1987. The district court then corrected this error pursuant to a motion nunc pro tunc. The Supreme Court determined that the district court's initial order was a nullity because of the mistake, and could not be corrected pursuant to a motion nunc pro tunc. The Supreme Court found that the district court had instead modified its initial order pursuant to its power to modify a judgment during the term rendered. The Supreme Court ultimately concluded that the time for appeal would run from the time that the amended judgment was entered.

[4] Any power that the district court may have to rehear, however, is limited in time. The district court's appellate jurisdiction, including any power it may have to rehear, certainly ends when the county court acts on the district court's mandate. When a county court acts upon a mandate issued by a district court sitting as an appellate court, the district court loses jurisdiction over the cause except upon a subsequent appeal. *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001). Thus, under *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987), the district court had jurisdiction to rehear Hausmann's appeal, because the district court had not yet issued the mandate to county court—nor had the county court had any opportunity to take action on any mandate from the district court—as of September 28, 2007, when Hausmann moved for the district court to vacate its previous order.

The Nebraska Supreme Court has subsequently dealt with district court appellate jurisdiction in a different manner without overruling *Painter*. In *In Re Guardianship and Conservatorship of Sim*, 233 Neb. 825, 448 N.W.2d 406 (1989), the Supreme Court decided that a district court sitting as an intermediate appellate court could not properly hear a motion for a new trial or rehearing. The Supreme Court's discussion of a motion for new trial in *In re Guardianship and Conservatorship of Sim*

has no bearing on the case before us. But the Supreme Court also addressed a motion for rehearing in the district court and found no "authorization for a motion for rehearing in such circumstances." *Id*. at 826, 448 N.W.2d at 407. Thus, the Supreme Court held that the motion for rehearing did not toll the time for further appeal.

[5,6] Subsequently, in *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998), the Supreme Court decided that a district court sitting as an intermediate appellate court lacked subject matter jurisdiction to hear a motion for reconsideration after the entry of a final order. In *Dvorak*, the State appealed the county court's order to district court. The district court initially reversed the county court's order. Subsequently, the defendant filed a "motion to reconsider" and the district court reversed its previous decision and affirmed the county court's order. *Id.* at 89, 574 N.W.2d at 493. The Supreme Court determined that the second order was void and not appealable, because the district court was "divested of jurisdiction" upon issuing the first order. *Id*. at 90, 574 N.W.2d at 494. The Supreme Court explained that "we do not find any statute or court rule which allows for a rehearing in the district court after the district court has made its ruling subject to § 25-1901." 254 Neb. at 90, 574 N.W.2d at 494. Thus, under *Dvorak*, once a district court exercising appellate jurisdiction enters a final order disposing of a matter, it loses subject matter jurisdiction. A ruling made in the absence of subject matter jurisdiction is a nullity. *Id*. We note that an appellate court lacks jurisdiction to hear an appeal from a ruling that is null. See *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999).

Recent decisions of the Nebraska Supreme Court also preclude us from finding appellate jurisdiction by means of treating Hausmann's September 28, 2007, motion as a motion to alter or amend the judgment. In *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007), the Nebraska Supreme Court rejected the contention that where the district court was acting as an intermediate appellate court, a motion to alter or amend the judgment, made pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006), tolled the time for taking an appeal to a higher appellate court. Very recently, the Supreme

Court reaffirmed the *Goodman* decision in *Timmerman v. Neth*, 276 Neb. 585, 755 N.W.2d 798 (2008).

[7] Of course, we must follow the binding precedent of the Nebraska Supreme Court. Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system. *Pogge v. American Family Mut. Ins. Co.*, 13 Neb. App. 63, 688 N.W.2d 634 (2004). In the case before us, however, we confront conflicting authority. We are unable to reconcile *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987), and *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990), with *In re Guardianship and Conservatorship of Sim*, 233 Neb. 825, 448 N.W.2d 406 (1989), and *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998). *Painter* and *Interstate Printing Co.* expressly permit a district court sitting as an intermediate appellate court to modify its earlier decisions, while *In re Guardianship and Conservatorship of Sim* and *Dvorak* expressly prohibit this. While it would seem sensible that the district court, when it acts as an intermediate appellate court, should have the same ability to reconsider its own decisions—at least during the same term of the district court until the county court has acted on the mandate of the district court—as do the higher appellate courts, we cannot disregard the more recent decisions of the Nebraska Supreme Court which state otherwise.

We conclude that we are constrained to follow *In re Guardianship and Conservatorship of Sim* and *Dvorak*, both because they were decided more recently and because the *Goodman* and *Timmerman* decisions suggest that the Supreme Court would adhere to the reasoning in *In re Guardianship and Conservatorship of Sim* and *Dvorak*. Under *In re Guardianship and Conservatorship of Sim* and *Dvorak*, the district court lost subject matter jurisdiction over Hausmann's case once the court entered the September 10, 2007, final order dismissing the appeal. Thus, the October 22 order was a nullity. It necessarily follows that Hausmann did not timely appeal from the September 10 final order and that we cannot hear Hausmann's appeal from the October 22 order because it was a nullity.

CONCLUSION

We dismiss Hausmann's appeal to this court for lack of jurisdiction. The district court lacked subject matter jurisdiction to consider Hausmann's motion for rehearing, and consequently, the October 22, 2007, order from which she attempts to appeal was null and void. Because she did not timely appeal from the district court's final order of September 10, we lack jurisdiction of Hausmann's appeal.

APPEAL DISMISSED.

IN RE INTEREST OF SARAH L. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MITCHELL D., APPELLANT.

758 N.W.2d 48

Filed November 10, 2008. No. A-08-196.

1. **Juvenile Courts.** While Neb. Rev. Stat. § 43-285 (Reissue 2004) grants a juvenile court discretionary power over a recommendation proposed by the Department of Health and Human Services, it also grants preference in favor of such proposal.
2. **Juvenile Courts: Proof.** In order for a court to disapprove of a plan proposed by the Department of Health and Human Services, a party must prove by a preponderance of the evidence that the department's plan is not in the child's best interests.

Appeal from the Juvenile Review Panel, G. GLENN CAMERER, MICHAEL OFFNER, and WADIE THOMAS, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, ROGER J. HEIDEMAN, Judge. Judgment of Juvenile Review Panel affirmed.

John C. Ball, of Pollack & Ball, L.L.C., for appellant.

Gary Lacey, Lancaster County Attorney, and Alicia B. Henderson for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Mitchell D. appeals an order of the juvenile court review panel, which order reversed an order of the separate juvenile court disapproving of the plan proposed by the Department of Health and Human Services (DHHS). On appeal, Mitchell asserts that the review panel erred in reversing the juvenile court's disapproval of the proposed plan. Mitchell failed to present any evidence to rebut the preference given to DHHS' proposed plan. Mitchell failed to prove by a preponderance of the evidence that the proposed plan was not in the best interests of Mitchell's child and stepchildren. The review panel did not err in reversing the juvenile court's order implementing a plan different from that proposed by DHHS. Accordingly, we affirm.

II. BACKGROUND

On October 20, 2006, the separate juvenile court of Lancaster County, Nebraska, entered an adjudication order concerning Mitchell and the minor children, Sarah L., Brandon D., and Caleb L. Mitchell entered an admission to allegations in an amended petition which was not requested or provided in the appellate record. The adjudication order sets forth the following relevant factual background and basis for the adjudication:

> The allegations of the Amended Petition are true by the preponderance of evidence. Sarah L[.], born October 11, 1994, Brandon D[.], born December 1, 1997, and Caleb L[.], born December 24, 1992, are the children of Ms. Janelle D[.] and child and step-children of Mr. Mitchell D[.] Said children are found in Lancaster County, Nebraska, in the custody of Ms. Janelle D[.], and Mr. Mitchell D[.] While in the custody of Ms. Janelle D[.] and Mr. Mitchell D[.], said children are without proper support through no fault of their parents, Mitchell and Janelle D[.], in that: in 1999 Mitchell D[.] attempted to have sexual contact, with his adolescent niece. In 1999, Janelle D[.] was aware of the allegation of attempted sexual contact by Mitchell D[.] on his adolescent niece, and Janelle D[.] placed said

> children out of the home so that Mitchell D[.] could stay at her residence without violating a no-contact provision that was ordered by the county court. On or about June 1, 1999, Janelle D[.] became frustrated and angry about the attempted sexual contact by Mitchell D[.] with his niece, and spanked Caleb L[.], leaving bruises. On or about June 2, 1999, Janelle D[.] contacted [DHHS] and requested that they remove the children from her home. Between June and September of 2006, Sarah L[.] reported that Mitchell D[.] had subjected her to inappropriate sexual contact. On October 5, 2006, Sarah [L.] reported that she had not told the truth about all of the allegations she had made of inappropriate sexual contact, but still reported that she was touched by Mitchell D[.] inappropriately on her inner upper thigh on one occasion. On or about June 28, 2006, Janelle D[.] became aware that Sarah L[.] had alleged that Mitchell D[.] had subjected Sarah L[.] to inappropriate sexual contact. Due to a lack of confidence in Sarah L[.]'s credibility, Janelle D[.] was not supportive of Sarah L[.], and demonstrated that lack of support to Sarah L[.] and others. The fact that Sarah L[.] made these allegations of inappropriate sexual contact by Mitchell D[.], and then recanted most of them, and the fact that Janelle D[.] failed to believe Sarah L[.]'s original allegations of inappropriate sexual contact made the entire family in need of therapeutic intervention to address, among other issues, the truth of the allegations, and to establish appropriate safety plans and appropriate boundaries in the family.

On August 10, 2007, the juvenile court held a review hearing. At that hearing, the court received the court report prepared by DHHS. The court report included DHHS' plan and recommendations toward the permanency plan of reunification, which plan and recommendations included that Mitchell should be ordered to follow the recommendations of an updated risk assessment as arranged by DHHS.

The risk assessment, prepared by Dr. Mary Paine, specifically recommended that Mitchell undergo a penile plethysmograph (PPG). According to Dr. Paine in the risk assessment,

the PPG would be the "single best predictor" of Mitchell's risk to recidivate and would provide solid physiological data regarding the nature and strength of Mitchell's arousal to a variety of visual and auditory sexual stimuli. Dr. Paine further indicated in the risk assessment that the specific PPG machine available to her, the "Monarch 21," is an "FDA approved instrument" which is grounded in research with standardized test procedures and uses "ethical stimuli that are not pornographic."

Mitchell objected to being ordered to undergo the PPG and indicated to the court that he believed he had "a right to a Daubert hearing on that," because it was "a brand new test" and there was not "any scientific, academic, any literature on it at all." Mitchell requested that the court "at the very least . . . withhold its order ordering the PPG until [the court could conduct a] Daubert hearing." At the conclusion of the hearing, the court indicated that it was "not clear on the Daubert issue" and that it also believed that "there are due process issues that may be raised . . . that would require additional evidence . . . regarding . . . the PPG." The court continued the review hearing.

On October 12 and 26, 2007, the juvenile court completed the review hearing and received live testimony from Dr. Paine concerning the PPG. Initially, there was disagreement between the parties regarding who should bear the burden concerning the propriety of the court's ordering of the PPG. The State argued that the PPG was part of the DHHS plan and that therefore Mitchell should bear the burden of proving that the plan is not in the best interests of the children. Mitchell argued that the State was the proponent of "evidence subject to scientific and reliability and . . . general relevance principles" and that the burden should be on the State to prove the evidence admissible. The State noted that it was not actually offering any evidence or results, but was seeking to have a test included in a rehabilitation and treatment plan. The court did not resolve the dispute, but directed the State to call and question Dr. Paine.

Dr. Paine testified that she was recommending the PPG for assessment purposes and as an adjunct to treatment. She

testified that the PPG is the only test involving physiological responses as opposed to psychological responses. With respect to the Monarch 21 PPG machine, Dr. Paine testified that the Monarch 21 had been "very widely researched" and developed to address deficiencies in early PPG machines and that the Monarch 21 is "an empirically based instrument, standardized test, with very explicit scoring instructions that are empirically based." Dr. Paine also testified that she had to complete a weeklong intensive training program and be certified to administer the Monarch 21 and that the standardization of the administration and interpretation of test results should result in the ability of anyone else who has been trained in its use to reach the same conclusions when interpreting the test results. Additionally, she testified that when she performs a test, she sends the test results to the two doctors who developed the test to confirm her findings and offer additional input.

Dr. Paine testified about studies done and technical statistical formulas developed to improve the reliability of the Monarch 21 PPG test. She testified that the Monarch 21 incorporates additional safeguards to minimize false positives and false negatives, including "a respiratory trace and a galvanic skin response."

Dr. Paine explained that the PPG is used to assess what stimuli an individual has a sexual response to based on reactions to images depicting people in various situations. The PPG measures sexual responses and relates them to the age of the subject depicted, the gender of the subject depicted, and the type of situation depicted.

Dr. Paine testified that the PPG can be a useful tool because it provides evidence of subconscious matters and can assist an individual in understanding underlying physiological impulses and in measuring progress, as well as in specifying clinical needs. She stressed that the PPG test cannot be used in isolation, but should be a part of a complete assessment and treatment program. She also testified that she does not believe the PPG should be used as substantive evidence of guilt or innocence in a criminal setting or as substantive evidence in a civil setting, but that it can be a significant factor in determining appropriate treatment.

After the court finished receiving evidence and hearing testimony at the October 26, 2007, hearing, Mitchell objected to the recommendation that he undergo the PPG. Mitchell noted that a number of state and federal courts have refused to allow admission of PPG test results as evidence and argued that "[f]or the absolute liberty interest, the privacy issues, I mean, this test makes a body cavity search look like a Hallmark moment here." Mitchell argued that the State had failed to satisfy the "Schafersman standard" to "get to admissible evidence" and argued that there was not sufficient evidence of general acceptance within the scientific community or standardization. The State, in response, again noted that it was not "asking that this evidence come in to court to prove a fact to — or a non-fact" and noted that the issue was "simply whether or not [Mitchell] should be required to submit to this test as a condition of that sex offender treatment" and "as a tool to aid the Court in determining what is in this child's best interest."

At the conclusion of the hearing, the juvenile court specifically disapproved of the plan of DHHS. The court specifically indicated that it would not order Mitchell to participate in the PPG. On October 29, 2007, the court entered a disposition order that did not include a requirement that Mitchell participate in the PPG.

DHHS appealed the juvenile court's disposition order to the juvenile review panel pursuant to Neb. Rev. Stat. § 43-287.04 (Reissue 2004). On February 6, 2008, the review panel entered an order finding that the juvenile court's order not requiring Mitchell to participate in the PPG was not in the best interests of Sarah. The review panel remanded the case to the juvenile court with directions to order Mitchell to participate in the PPG. This appeal followed.

III. ASSIGNMENT OF ERROR

The only assignment of error is that the review panel erred in overturning the trial court's decision.

IV. ANALYSIS

The issue raised in this appeal is whether the review panel erred in reversing the juvenile court's decision to implement a plan which differed from the plan proposed by DHHS. Our

review of the record indicates that Mitchell presented no evidence to the juvenile court to prove by a preponderance of the evidence that DHHS' plan was not in the children's best interests. We conclude that the review panel did not err in reversing the juvenile court's decision.

The purpose of the juvenile code is to assure the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest. Neb. Rev. Stat. § 43-246(1) (Reissue 2004); *In re Interest of Vincent P.*, 15 Neb. App. 437, 730 N.W.2d 403 (2007). The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who fall within it. *In re Interest of Vincent P., supra*.

[1,2] Neb. Rev. Stat. § 43-285(2) (Reissue 2004) allows the court to order a proposed plan for the care, placement, and services which are to be provided for a juvenile adjudged as being within the ambit of Neb. Rev. Stat. § 43-247(3) (Cum. Supp. 2006). *In re Interest of Vincent P., supra*. While § 43-285 grants a juvenile court discretionary power over a recommendation proposed by DHHS, it also grants preference in favor of such proposal. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). In order for a court to disapprove of DHHS' proposed plan, a party must prove by a preponderance of the evidence that DHHS' plan is not in the child's best interests. *Id.*

In the present case, Mitchell presented no evidence at trial that the proposed plan was not in the best interests of the children. As detailed above in the background section, DHHS presented evidence concerning the plan and why it was in the best interests of the children. Mitchell objected to the PPG portion of the plan, not on the basis of the best interests of the children, but on the basis that the test results might not be admissible as substantive evidence at some future hearing. DHHS was not attempting to offer any test results as substantive evidence, and Mitchell failed to satisfy his burden to demonstrate that the plan proposed by DHHS was not in the best interests of the children and should have been disapproved.

Additionally, the juvenile court made no specific findings to indicate why it was disapproving of the plan.

We express no opinion on the PPG test, its reliability, or the potential admissibility of PPG test results as substantive evidence in a juvenile proceeding. Those issues are not before us, because the issue raised in this appeal is more properly limited to whether Mitchell satisfied his burden to support the juvenile court's disapproval of the plan proposed by DHHS and implementation of a plan differing from that proposed by DHHS. Despite Mitchell's attempts to argue below that the burden should have been on DHHS to prove admissibility of the test results, the burden was on Mitchell to rebut the preference given to the DHHS plan. In this case, Mitchell failed to satisfy his burden and the review panel properly reversed the juvenile court's decision.

Finally, we note that Mitchell's sole assignment of error on appeal is that the review panel erred in reversing the juvenile court's decision. In addition to raising a number of evidentiary objections to the PPG test, Mitchell also raises constitutional objections based on substantive due process and the Fourth Amendment. We conclude that these issues were not sufficiently raised below to necessitate our further discussion on appeal. See *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004) (appellate court will not consider constitutional question on appeal that was not raised and properly presented for disposition by trial court).

V. CONCLUSION

Mitchell failed to present any evidence to rebut the preference given to DHHS' proposed plan. Mitchell failed to prove by a preponderance of the evidence that the proposed plan was not in the best interests of the children. The review panel did not err in reversing the juvenile court's order implementing a plan different from that proposed by DHHS. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN R. SCHNELL, APPELLANT.

757 N.W.2d 732

Filed November 10, 2008. No. A-08-533.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
3. **Rules of the Supreme Court: Dismissal and Nonsuit: Appeal and Error.** Under the rules of appellate procedure prescribed by the Nebraska Supreme Court, generally, an appellant may dismiss his or her appeal.
4. **Criminal Law: Final Orders: Appeal and Error.** The State cannot obtain a review of a trial court's final order in a criminal case by asserting a cross-appeal.
5. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
6. **Dismissal and Nonsuit: Appeal and Error.** An appeal cannot be dismissed except on leave of court, and an appellant cannot do it as a matter of right.
7. **Appeal and Error.** As a general proposition, an appellant does not possess an absolute right to withdraw his appeal.
8. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
9. **Sentences: Weapons.** Neb. Rev. Stat. § 28-1205(3) (Reissue 1995) mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed.
10. **Appeal and Error.** A reply brief cannot be used to raise new matters.
11. **Sentences.** Ordinarily, a trial court is not required to advise a defendant of the effect of the possible imposition of consecutive sentences.
12. **Pleas.** Explaining the possible range of penalties for each crime is adequate to enable a defendant to freely, voluntarily, intelligently, and understandingly plead to each crime with which he or she is charged.
13. ____. Where a defendant was unaware of the penal consequences of his or her guilty plea because he or she had been misinformed by the court, his or her plea is not voluntary.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Reversed and remanded for further proceedings.

Stuart J. Dornan, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This matter is before us on John R. Schnell's motion to withdraw his appeal, the State's objection to the motion, and on the merits of the appeal. We determine that an appellant is not always entitled to dismiss his or her appeal as a matter of right, and we overrule Schnell's motion. Because we find plain error in the sentences imposed by the district court—done consistently with the court's similarly incorrect advisement regarding the penalty consequences of Schnell's pleas—we reverse the judgment of the court and remand the cause for further proceedings.

BACKGROUND

Schnell pled guilty to four crimes: count I, robbery; count II, use of a deadly weapon to commit a felony; count III, robbery; and count IV, use of a deadly weapon to commit a felony. Before accepting the pleas, the district court advised Schnell as follows:

> THE COURT: And do you understand these are all Class II felonies and the maximum possible sentence for a Class II felony is 50 years[']imprisonment, and it can carry a one year minimum sentence, do you understand?
>
> [Schnell]: Yes, ma'am.
>
> THE COURT: And do you understand that if you are sentenced to terms of imprisonment on more than one charge, when it comes to — with the two use charges, [c]ounts II and IV, the [c]ourt must run those sentences consecutive to the charges before, to each of the robbery charges, and that means one after another, do you understand that?
>
> [Schnell]: I understand.
>
> THE COURT: But the [c]ourt does have the discretion, the [c]ourt could run all four of them consecutive,

> one after another, which would add up to a possible total of 200 years, but I also have the discretion, I could run [c]ount II concurrent with [c]ounts III and IV. Do you understand that I have discretion?
>
> [Schnell]: Yes, ma'am.

The district court accepted the pleas and subsequently sentenced Schnell to 8 to 12 years' imprisonment on counts I and III (the two robbery counts) and 4 to 8 years' imprisonment on counts II and IV (the two use of a weapon counts). The court ordered count II (the first use of a weapon count) to be served consecutively to count I (the first robbery count), count IV (the second use of a weapon count) to be served consecutively to count III (the second robbery count), and counts III and IV (the second robbery and use of a weapon counts) to be served concurrently with counts I and II (the first robbery and use of a weapon counts).

Schnell timely appealed and filed an appellate brief, which challenged only the excessiveness of the sentences. The State then filed its appellate brief, arguing that the sentences were not excessive and pointing out potential plain error in the court's failure to make the sentences for use of a weapon consecutive to any other sentence imposed. Schnell thereafter moved to withdraw his appeal, but provided no reason for withdrawal. The State objected, stating that the district court's order was invalid and constituted plain error and that this court has the power to remand the cause for the imposition of a lawful sentence when an erroneous sentence has been pronounced. Schnell filed an objection to the State's objection, asserting that the State did not have standing to object to the dismissal both because the State "failed to appeal the sentence" and because the State "failed to file a cross-appeal." Schnell also filed a reply brief in which he argued that his pleas were not voluntarily made, because the district court advised him that it had the discretion to run one sentence for use of a deadly weapon concurrently with the sentences on other counts.

Pursuant to Neb. Ct. R. App. P. §§ 2-106(E) and 2-111(E)(5)(b), no oral argument was allowed.

ASSIGNMENT OF ERROR

Schnell alleges that the court abused its discretion by rendering an excessive sentence.

STANDARD OF REVIEW

[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

[2] Consideration of plain error occurs at the discretion of an appellate court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

ANALYSIS

Whether Appellant May Dismiss Appeal as Matter of Right.

As set forth above, 6 days after the State filed its appellate brief, Schnell moved to withdraw his appeal. The State promptly objected. Although Schnell purported to object to the State's objection, the rules of appellate practice do not authorize an objection to an objection. See Neb. Ct. R. App. P. §§ 2-107(B)(4) and (5) and 2-108(D). Despite this technical flaw, the issues raised by Schnell's filing are inherent in our consideration of the motion to dismiss the appeal. Schnell's reply brief did not address the State's suggestion of plain error, but by addressing Schnell's pleas, it seems to concede that plain error exists in the sentences for use of a weapon. Before addressing issues of error in the sentences, we first consider Schnell's motion to dismiss his appeal.

[3] Under the rules of appellate procedure prescribed by the Nebraska Supreme Court, generally, an appellant may dismiss his or her appeal. See § 2-108(A). Thus, the Supreme Court has long held that as a general rule, an appellant may dismiss his or her appeal without the consent of the appellee. See *Marvel v. Craft*, 116 Neb. 802, 219 N.W. 242 (1928).

But even though the appellee's consent is not needed, the court rule on dismissal of an appeal shows that an appellant's motion to dismiss does not automatically require dismissal. First, § 2-108(B) requires the party seeking dismissal to file

a motion to dismiss and § 2-108(C) requires the party to serve the motion upon the attorney or attorneys of record for all other parties. Second, the second sentence of § 2-108(D) states, "Appellee's response to the motion must be made within 14 days." This supports the State's right to respond to Schnell's motion to dismiss the appeal and dovetails the general right to respond to a motion afforded under § 2-106(C)(2) ("[a]ny response to the motion must be in writing and filed prior to the submission date"). Third, under the remainder of § 2-108(D), "[a]ny party *having a right of cross-appeal* at the time the motion to dismiss is filed may, within the 14-day period provided in this rule, file a notice of intention to cross-appeal. Upon the filing of such notice, the court shall deny the motion to dismiss . . . ." (Emphasis supplied.) The State has not filed a notice of intention to cross-appeal, but, as discussed below, in the instant case the State has no right to file such a notice as it has no right of cross-appeal.

[4,5] The State cannot obtain a review of a trial court's final order in a criminal case by asserting a cross-appeal. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989). Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Merrill*, 273 Neb. 583, 731 N.W.2d 570 (2007). In the case before us, the State did not assert a cross-appeal and it would not have had a right of cross-appeal, because it did not comply with the statutory prerequisites to docket error proceedings. Accordingly, the portion of § 2-108(D) allowing a party having a right of cross-appeal to file a notice of intention to cross-appeal is not implicated. However, this does not impair the State's right to file a response—a right specifically afforded under the second sentence of § 2-108(D) and generally provided by § 2-106(C)(2).

Thus, the question becomes, Does an appellant have the absolute right to dismiss his or her appeal, or is dismissal upon an appellant's motion a matter of judicial discretion? Because our research has not uncovered any Nebraska law or rule on the specific issue, we turn to other sources.

[6] "An appeal cannot be dismissed except on leave of court, and an appellant cannot do it as a matter of right." 5 C.J.S.

Appeal and Error § 751 at 20-21 (2007). In *In re Estate of Tucci*, 104 N.C. App. 142, 408 S.E.2d 859 (1991), the Court of Appeals of North Carolina determined that a party's attempt to withdraw its appeal was ineffective. The court stated it was well established that "'[w]hen an appeal has been perfected, [an] appellant cannot withdraw it without first obtaining the consent of the appellate court. That court may allow or deny the motion in the exercise of its sound discretion.'" *Id.* at 149, 408 S.E.2d at 864, quoting *Davidson v. Stough*, 258 N.C. 23, 127 S.E.2d 762 (1962).

[7] As a general proposition, an appellant does not possess an absolute right to withdraw his appeal. *State v. Gaffey*, 92 N.J. 374, 456 A.2d 511 (1983). See, also, *DeGarmo v. Goldman*, 19 Cal. 2d 755, 123 P.2d 1 (1942); *Henderson v. Dreyfus*, 26 N.M. 262, 191 P. 455 (1920). The *Gaffey* court stated that New Jersey court rules do not give appellants the right unilaterally to withdraw their appeals and that New Jersey appellate courts had recognized that an appeal can be withdrawn only with the consent of the court. But, the *Gaffey* court stated that a court will ordinarily permit an appeal to be voluntarily dismissed, unless prejudice to the appellee will result. In *Gaffey*, however, it was the state that was seeking to withdraw the appeal, and the court determined that it could require the state to maintain its appeal when the rights of the defendant may be prejudiced. In *DeGarmo*, the court refused to dismiss the appeal because dismissal may adversely affect a coappellant's rights. In *Henderson*, the Supreme Court of New Mexico stated, "The authorities are uniform to the effect that an appeal cannot be dismissed except on leave of court, and that an appellant cannot, as a matter of right, dismiss an appeal." 26 N.M. at 266, 191 P. at 457. The *Henderson* court further stated, "The court has . . . undoubted control over the right of dismissal and discretion to grant or refuse the right, which of course is a judicial discretion, and the right to refuse the dismissal should not be exercised save upon justifiable grounds." *Id.*

The timing of the filing of the motion also appears to be a consideration. In *Henderson*, the parties had stipulated to dismiss the appeal, but the stipulation was filed after an opinion

affirming the judgment of the trial court had been filed. In *Sims v. Sims*, 228 La. 622, 83 So. 2d 650 (1955), the appellant filed a motion to dismiss the appeal after the appeal had been set for hearing. The appellee refused to join in the motion to dismiss, and the court, citing the state's code of practice, stated that the appellant was not entitled to have the appeal dismissed. In *Robertson v. Land*, 519 S.W.2d 227, 229 (Tex. Civ. App. 1975), a Texas appellate court determined that where an appeal had been set for submission but had not been heard or determined, "there [was] no question of appellants' right to have their appeal dismissed." In the case before us, Schnell filed the motion prior to submission of the case but after the State had already filed its appellate brief suggesting the existence of plain error in sentencing.

We conclude that the granting of an appellant's motion to dismiss his or her appeal is left to the discretion of the appellate court. Generally, such a motion will be granted. And generally, an appellee who has not asserted a cross-appeal will have no reason to oppose such a motion. But here, the appellee—the State—has objected to the motion and has directed this court's attention to the possibility of plain error in sentencing. The Legislature defines crimes and establishes the range of penalties, and the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature. See *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 738 N.W.2d 850 (2007). Because the public has an interest in seeing criminals be properly sentenced under the statutes enacted by the Legislature, we conclude that Schnell's motion to withdraw his appeal should be denied.

Plain Error.

Schnell complains that the court abused its discretion by imposing excessive sentences. In the State's appellate brief, it argues that the sentences are not excessive but that they "pose an issue of potential plain error because the sentences imposed for use of a deadly weapon are not in compliance with . . . § 28-1205." Brief for appellee at 4. Schnell's reply brief implicitly concedes that the sentences amounted to plain error.

[8] Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007). The district court sentenced Schnell to 8 to 12 years' imprisonment for each robbery conviction and 4 to 8 years' imprisonment for each use of a deadly weapon conviction. Each individual sentence is near the low end of the statutory limits. See Neb. Rev. Stat. §§ 28-105(1) (Cum. Supp. 2006) and 28-324(2) and 28-1205(3)(b) (Reissue 1995). The court ordered that each sentence for use of a deadly weapon conviction be served consecutively to the corresponding robbery conviction and that the second robbery and use of a deadly weapon sentences be served concurrently with the first sentences for robbery and use of a deadly weapon.

We find plain error in the sentencing court's failure to fully implement § 28-1205(3), which provides that the sentence for use of a weapon to commit a felony must be served consecutively to any other sentence imposed. In *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995), the Nebraska Supreme Court stated that the trial court's failure to impose the sentence for use of a firearm consecutively to the defendant's life imprisonment sentence violated § 28-1205(3) and was plain error. Similarly, this court recently found plain error in a sentencing court's failure to impose consecutive sentences for convictions involving use of a deadly weapon to commit a felony. See *State v. Wilson*, 16 Neb. App. 878, 754 N.W.2d 780 (2008). See, also, *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008) (where trial court ordered two sentences for second degree murder to be served concurrently to one another and two sentences for use of firearm counts to be served consecutively to one another and to sentences for second degree murder; on appeal, Supreme Court found sentences were excessively lenient but implicitly approved sentences on use of firearm running consecutively to each other and to concurrent sentences for second degree murder).

[9] In the instant case, the district court properly ordered each sentence for use of a deadly weapon to be served consecutively to the corresponding robbery conviction. But the court erred in

ordering that the second robbery and use of a deadly weapon sentences be served concurrently with the first sentences for robbery and use of a deadly weapon. That sentencing arrangement had the effect of making one of the sentences for use of a deadly weapon run concurrently with the other sentence for use of a deadly weapon. Section 28-1205(3) mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed. See, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995); *State v. Wilson, supra*.

[10] In Schnell's reply brief, he argues that his pleas were not voluntary because the court advised him that it had the discretion to run one sentence for use of a deadly weapon concurrently with the sentences on other counts. A reply brief cannot be used to raise new matters. *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992). However, because in this instance we have found plain error in the sentences imposed by the court and the court's advisement may have affected Schnell's decision to plead guilty, we will consider the issue.

[11,12] We recognize that, ordinarily, a trial court is not required to advise a defendant of the effect of the possible imposition of consecutive sentences. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Explaining the possible range of penalties for each crime is adequate to enable a defendant to freely, voluntarily, intelligently, and understandingly plead to each crime with which he or she is charged. *Id.*

[13] However, in the case before us, the district court's incorrect advisement is inextricably intertwined with the court's plain error in imposing the sentences. The court advised Schnell that it had the discretion to run one use of a deadly weapon sentence concurrent with sentences for robbery and another use of a deadly weapon charge. The court sentenced Schnell consistent with the advisement, which we above found to be plain error. In general, under Nebraska law, a defendant must be informed of those consequences which affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of a sentence. *State v. Schneider*, 263 Neb. 318,

640 N.W.2d 8 (2002). In *State v. Golden*, 226 Neb. 863, 415 N.W.2d 469 (1987), the Nebraska Supreme Court determined that a defendant's guilty pleas to assaulting an officer in the third degree and using a firearm to commit a felony were not voluntarily entered because the trial court explained that the sentences could be imposed concurrently or consecutively and did not inform the defendant that § 28-1205(3) mandated a consecutive sentence. Where a defendant was unaware of the penal consequences of his or her guilty plea because he or she had been misinformed by the court, his or her plea is not voluntary. *Id.* See, also, *State v. Van Ackeren*, 234 Neb. 535, 451 N.W.2d 707 (1990) (defendant must be allowed to withdraw pleas because trial court failed to properly advise defendant concerning penalty consequence of use of firearm conviction). Because the court plainly erred in sentencing Schnell and the sentences were imposed consistent with the court's erroneous advisement, we conclude in this instance that Schnell must be permitted to withdraw his pleas. We emphasize that in the case before us, we do not address a situation where the sentencing court gave no specific advisement regarding the possibility of a consecutive sentence; here, rather, the court gave an incorrect advisement stating, in effect, that the two use charges could be made concurrent.

CONCLUSION

We determine that an appellant is not always entitled to have his or her appeal dismissed as a matter of right. Under the circumstances presented in this case, we deny Schnell's motion to withdraw his appeal. We find plain error in the district court's sentences to the extent that the court allowed one of the sentences for use of a deadly weapon to run concurrently with the other sentence for use of a deadly weapon. Because the erroneous sentences were imposed consistent with the court's advisement to Schnell at the time he entered his guilty pleas, we conclude that he should be allowed to withdraw his pleas to all charges. Thereafter, the court may proceed with a rearraignment upon all of the charges.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MICHAEL R. ZABAWA, APPELLANT, V. DOUGLAS COUNTY BOARD OF EQUALIZATION, APPELLEE.

757 N.W.2d 522

Filed November 18, 2008. No. A-08-069.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by an appellate court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Taxation: Valuation: Presumptions: Proof.** To rebut the presumption that a board of equalization properly performed its official duties, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed upon other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty.
5. **Constitutional Law: Taxation: Valuation.** Neb. Const. art. VIII, § 1, provides that taxes shall be levied by valuation uniformly and proportionately upon all real property.
6. **Taxation: Valuation.** Neb. Rev. Stat. § 77-1501 (Cum. Supp. 2006) mandates that the county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately.
7. **Taxation: Valuation: Words and Phrases.** Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.
8. **Taxation: Valuation.** If a taxpayer's property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief.
9. **Taxation: Valuation: Counties.** Neb. Rev. Stat. § 77-1502.01 (Reissue 2003) reposes broad power in a county board of equalization to carry out its duty to equalize.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded with directions.

Richard L. Anderson and John M. Prososki, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellant.

Donald W. Kleine, Douglas County Attorney, and Thomas S. Barrett for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Michael R. Zabawa appeals the order of the Nebraska Tax Equalization and Review Commission (TERC) which upheld the decision of the Douglas County Board of Equalization (the Board) denying his property tax protest. Despite finding Zabawa's property "highly comparable" to one afforded a substantial reduction in value through the protest process, TERC concluded that the Board had no duty to equalize the valuations of comparable properties where both valuations were protested. This resulted in Zabawa's property's being taxed at market value even though TERC determined the comparable property was taxed at only 75.8 percent of market value. We find both a constitutional and a statutory duty to equalize such valuations. We therefore reverse, and remand with directions to reduce Zabawa's value accordingly.

BACKGROUND

Zabawa owns the property at issue, 668 Dillon Drive, which is located in Omaha, Douglas County, Nebraska. It includes a one-story, brick, ranch-style house that was built in 1963 and has 2,871 square feet. The house has four bedrooms and three bathrooms and sits on a .35-acre lot. It also has an attached garage and a partially finished basement. The Douglas County assessor valued the property at $396,000 in 2006. The property was previously valued at $263,800 in 2005.

Zabawa filed a protest of the 2006 valuation with the Board. A referee then recommended that the property's valuation be reduced to $360,000 because he believed that Zabawa's house, assessed at $137.94 per square foot, was most similar to a comparable property that had been assessed at $113.97 per square foot. Subsequently, the referee coordinator recommended that the original valuation stand and noted that Zabawa's property value was in line with that of 676 Dillon Drive, a neighboring property valued at $133 per square foot and $363,100 total. The Board adopted this recommendation.

During the same period, the owner of 676 Dillon Drive protested the valuation of his property with the Board. A different referee heard his initial protest. Zabawa testified that he and the owner of 676 Dillon Drive both made the same argument—that the property valuation should be decreased because the property on the other side of Zabawa, 660 Dillon Drive, was comparable and because there had been a sanitary sewer backup in 2004 in that area. The taxable value of 676 Dillon Drive was reduced to a "reconciled" value of $275,000, but the "market" value was $362,547.

Zabawa then appealed the Board's decision to TERC. On December 3, 2007, TERC heard Zabawa's appeal. Zabawa introduced evidence regarding the comparability of 660 Dillon Drive and 676 Dillon Drive, the comparability of 11 other properties in the neighborhood, and the differing valuations of his property and 676 Dillon Drive subsequent to similar valuation protests. TERC upheld the Board's valuation. However, in doing so, TERC also determined that Zabawa's property and 676 Dillon Drive were "highly comparable" and noted that the Board had ultimately assessed the similar properties at "greatly disparate taxable values." TERC noted that the "reconciled" postprotest value of 676 Dillon Drive was 75.8 percent of its total listed market value in the county records. TERC also considered "whether the . . . Board has a duty to review and reconcile the results in all protests" and determined that the Board had no such duty. TERC also found that the valuation of Zabawa's property was not the result of "intentional ill will."

Zabawa timely appeals.

ASSIGNMENTS OF ERROR

Zabawa alleges 13 assignments of error, which we restate and consolidate as follows: First, Zabawa alleges that TERC used an incorrect standard to review the Board's decision. Zabawa also asserts that TERC applied the standard of review improperly. Finally, Zabawa alleges that TERC improperly upheld the Board's decision when it found that the subject property and 676 Dillon Drive were "highly comparable" but had "greatly disparate taxable values."

STANDARD OF REVIEW

[1-3] Decisions rendered by TERC shall be reviewed by an appellate court for errors appearing on the record of the commission. *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Id*.

ANALYSIS

Standard of Review.

[4] Zabawa asserts that TERC used an incorrect standard of review in deciding his case. Under Neb. Rev. Stat. § 77-5016(8) (Supp. 2007), TERC's standard of review in an appeal from the Board is as follows:

> In all appeals, excepting those arising under section 77-1606, if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, the commission shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.

The Nebraska Supreme Court has construed this statutory standard of review to mean that

> "[t]here is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing

> such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board."

Brenner, 276 Neb. at 283-84, 753 N.W.2d at 811 (quoting *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989)). The court further explained that to rebut the presumption that the board of equalization properly performed its official duties,

> "the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed upon other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty . . . ."

Brenner, 276 Neb. at 284, 753 N.W.2d at 812 (quoting *Bumgarner v. County of Valley*, 208 Neb. 361, 303 N.W.2d 307 (1981)).

For the most part, TERC's decision set forth this standard of review in the correct language. However, in the analysis portion of TERC's decision, it erred when it changed the words "intentional will" to "intentional ill will." Webster's Encyclopedic Unabridged Dictionary of the English Language 711 (1989) defines "ill will" as a "hostile feeling; antipathy; enmity." The taxpayer does not have to show that the Board's actions were the result of its antipathy or a hostile feeling toward the taxpayer—a showing of intentional error suffices. We agree that the Board did not intentionally commit the error, but this does not end the analysis. Where the taxpayer succeeds in establishing that the Board's valuation is grossly excessive to that of comparable properties, the standard of review contemplates two reasons sufficient to rebut the statutory presumption favoring the Board's decision. Systematic exercise of intentional will constitutes one reason, but the standard also specifies failure of plain duty as an equally sufficient basis.

Plain Duty.

Zabawa argues that TERC defined the "plain duty" portion of the standard of review incorrectly. TERC concluded that the

Board had no plain duty to equalize the disparate valuations of comparable real properties provided that the differences were the result of separate valuation protests. We disagree. Nebraska law requires that comparable properties be valued similarly and does not provide an exception merely because both owners exercised their right to contest the valuations.

Before turning to a discussion of the controlling law, we observe that TERC found Zabawa's property and 676 Dillon Drive to be highly comparable. In the instant appeal, Zabawa relies on this determination, which finds substantial support in the evidence. The properties were constructed at about the same time—1963 and 1961, respectively. They are roughly the same size—2,871 square feet compared to 2,728 square feet. Both were one-story, ranch-style homes constructed from similar materials. The Douglas County assessor rated both properties as being of "good" quality. From 1994 to 2005, Zabawa's property had been valued at 107 to 110 percent of the taxable value of 676 Dillon Drive. While the finished portion of the basement of 676 Dillon Drive was 400 square feet larger than Zabawa's basement, this would suggest a lower rather than a higher valuation for the Zabawa property. The assessor's records do differentiate the "condition" of the properties—rating Zabawa's property as "good" condition while 676 Dillon Drive was "average." However, neither party suggests that this difference undermines TERC's finding of comparability. There was no evidence in the record that suggested that either property had undergone significant changes tending to affect property values. Zabawa testified that subsequent to purchasing the property in 1998, he had only maintained its condition. Zabawa had repainted the wood portion of the exterior of the house, replaced carpet, done some minor interior painting, and replaced a backwater device. Despite all these similarities between the two properties, after the tax protests were concluded in 2006, Zabawa's property was valued at 144 percent of the taxable value of 676 Dillon Drive.

[5,6] TERC's conclusion that these comparable properties need not be valued similarly directly contradicts Nebraska law. The Nebraska Constitution provides that "[t]axes shall be levied by valuation uniformly and proportionately upon all

real property . . . .” Neb. Const. art. VIII, § 1. Neb. Rev. Stat. § 77-1501 (Cum. Supp. 2006) mandates that “[t]he county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately.”

[7,8] Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *Scribante v. Douglas Cty. Bd. of Equal.*, 8 Neb. App. 25, 588 N.W.2d 190 (1999). If a taxpayer’s property is assessed in excess of the value at which others are taxed, then the taxpayer has a right to relief. *Cabela’s, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

Even if the properties were not comparable, the Board could not value Zabawa’s real property at its market value but value 676 Dillon Drive at 75.8 percent of its market value. In *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988), the taxpayer rebutted the presumption that the county board of equalization’s decision was correct by showing that the assessor had undervalued other land in the county by 43 to 53 percent but had valued the taxpayer’s dissimilar land at its full value. The court explained that “[t]he right of a taxpayer whose property alone is taxed at 100 percent of its true value is to have its assessment reduced to the percentage of that value at which others are taxed.” *Id.* at 286, 422 N.W.2d at 331. See, also, *Konicek v. Board of Equalization*, 212 Neb. 648, 324 N.W.2d 815 (1982).

Nebraska law also makes it clear that when properties are comparable to the extent that Zabawa’s property was comparable with 676 Dillon Drive, the Board has the plain duty to value them similarly. The Board’s failure to do so is sufficient to rebut the presumption that its decision was correct. In *Scribante, supra*, a real property owner rebutted the presumption that the county board of equalization was correct when all parties agreed that the subject property was comparable to a property which had a much lower per-square-foot valuation. In *Scribante*, the subject property was valued at $162.02 per square foot and the comparable property was valued at $88.14 per square foot.

Because TERC found that Zabawa's property was highly comparable to 676 Dillon Drive, and because TERC found that the properties had "greatly disparate taxable values," TERC was incorrect to conclude that Zabawa had not rebutted the presumption that the Board's decision was correct. The Board had the plain duty under § 77-1501 to value these comparable properties at similar amounts. By adjudicating tax protests in greatly disparate amounts—676 Dillon Drive at 75.8 percent of its market value and Zabawa's comparable property at full market value—the Board failed to fulfill its "plain duty" to equalize property valuations. Zabawa rebutted the presumption that the Board's decision was correct.

[9] TERC stated that the Board had no duty to equalize in this context, because Nebraska statutes do not expressly provide for a procedure to rectify dissimilar protest results for comparable real properties. We disagree. Section 77-1501 implements the constitutional mandate to value all real property uniformly and proportionately. Moreover, Neb. Rev. Stat. § 77-1502.01 (Reissue 2003) reposes broad power in the Board to carry out its duty to equalize.

> The county board of equalization, after considering all papers relating to the protest and the findings and recommendations of the referee, may make the order recommended by the referee or any other order in the judgment of the board of equalization required by the findings of the referee, or may hear additional testimony, or may set aside such findings and hear the protest anew.

Id. Thus, the statutes empower the Board to carry out its duty to equalize property tax values as required by § 77-1501 and provide the means to do so. The ultimate responsibility to equalize valuations rests upon the Board, and it cannot avoid this duty by using the power to appoint referees.

Section 77-5016(8) then required TERC to determine whether the valuation of Zabawa's property was unreasonable and arbitrary. To set the valuation of similarly situated property, i.e., comparables, at materially different levels, i.e., value per square foot, is by definition unreasonable and arbitrary, under the Nebraska Constitution. *Scribante v. Douglas Cty. Bd. of Equal.*, 8 Neb. App. 25, 588 N.W.2d 190 (1999). We note that

TERC ultimately valued Zabawa's property at its full market value but found that 676 Dillon Drive was "highly comparable" and valued at 75.8 percent of its market value. As a matter of law, the Board's valuation of Zabawa's property was unreasonable and arbitrary because it assigned substantially different values to comparable properties. Thus, TERC erred in failing to reduce the taxable value of Zabawa's property.

Pursuant to *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988), Zabawa is entitled to have his property taxed at the same percentage of market value as are other properties. Therefore, Zabawa is entitled to relief as a matter of law. Zabawa requested a valuation of $290,000 before TERC. In this case, Zabawa is entitled to have his property taxed at the same rate as 676 Dillon Drive, or 75.8 percent of market value. Thus, in order to value Zabawa's property at a rate that is not unreasonable or arbitrary, TERC must reduce the tax valuation of Zabawa's property to $300,168.

CONCLUSION

We conclude that TERC incorrectly applied the standard of review. We reverse TERC's determination that Zabawa failed to overcome the presumption that the Board faithfully performed its official duties. In light of TERC's factual findings that Zabawa's property was "highly comparable" to the other property and that the properties had ultimately been assessed at "greatly disparate taxable values," we determine as a matter of law that the Board failed to perform a plain duty when it failed to equalize Zabawa's property valuation and that its valuation of Zabawa's property was unreasonable and arbitrary. We find that Zabawa is entitled to relief as a matter of law and remand this matter to TERC with directions to reduce the tax valuation of Zabawa's property to $300,168.

REVERSED AND REMANDED WITH DIRECTIONS.

RYONEE S. CURTIS, APPELLEE, V. RYAN M. CURTIS, APPELLANT.

759 N.W.2d 269

Filed November 18, 2008. No. A-08-126.

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 exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. 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.
4. **Child Custody: Proof.** Under Nebraska law, the burden to satisfy the test applied when a custodial parent seeks to remove a child out of state has been placed on the custodial parent to satisfy this test.
5. **Child Custody.** The threshold question in removal cases is whether the parent wishing to remove the child from the state has a legitimate reason for leaving.
6. ____. Career advancement and remarriage are commonly found legitimate reasons for a move in removal cases, but they do not compose the exclusive list of legitimate reasons.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Richardson County: CURTIS L. MASCHMAN, County Judge. Affirmed in part, and in part reversed.

Angelo M. Ligouri, of Ligouri Law Office, for appellant.

Michael R. Dunn, Richard L. Halbert, and Christopher C. Halbert, of Halbert, Dunn & Halbert, L.L.C., for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Ryan M. Curtis appeals from an order of the district court for Richardson County, which granted Ryonee S. Curtis'

application to remove their child from Nebraska to Missouri. Because Ryonee has failed to show that she has a legitimate reason to move, we reverse the district court's order granting removal.

BACKGROUND

On December 20, 2006, the district court entered a decree dissolving the parties' marriage. The parties were granted joint legal custody of their minor child, Jordyn Ashley Curtis, born June 22, 2001, with Ryonee being granted primary physical custody of Jordyn, subject to Ryan's reasonable visitation rights. At the time of the divorce, Ryonee and Jordyn were living in the marital home in Falls City, Nebraska. The home was awarded to Ryan in the decree. Consequently, in January 2007, Ryonee and Jordyn moved in with Ryonee's boyfriend, Scott McCann (Scott). Scott owned the house, located in Falls City, and lived there with his three children.

On October 4, 2007, Ryonee filed an application to remove Jordyn from the State of Nebraska, alleging that her "present partner" has sold the home where he and Ryonee and Jordyn have been residing since the entry of the decree and has purchased property at Big Lake, Missouri, where he and Ryonee intend to build a home and reside permanently. Ryan filed a response and cross-complaint, in which he opposed Ryonee's application to remove and sought sole physical custody of Jordyn.

A hearing on Ryonee's application to remove and Ryan's cross-complaint was held on December 14, 2007, before a county court judge acting as a district court judge. Ryonee testified that Big Lake is 17.6 miles from Falls City. She testified that Scott owns property at Big Lake and that he plans to build a house on that property. She testified that she wants the court to allow her to relocate with Jordyn to Big Lake so they can continue to live with Scott and his children. She testified that Scott's current house has three bedrooms and one bathroom and that the house he plans to build will have three bedrooms and two bathrooms. Ryonee admitted that she will have no legal interest in Scott's new house. She stated that

Scott's present house was in the process of being sold and that the sale closing was to take place soon after the hearing. She testified that she and Scott have made arrangements to rent a home in Missouri for $400 per month until the new house is built. Ryonee testified that if she is allowed to move, she will continue in her same employment, Jordyn will continue to go to the same school, and Ryan's visitation schedule will not change. Ryonee also indicated that she would provide transportation for Ryan's visitation so Ryan would not have to drive to Missouri.

Ryonee testified that Ryan was awarded the marital home in the divorce and was ordered to hold her harmless against the mortgage on the home. She testified that the home has since been foreclosed and that as a result, she has been unable to obtain credit. Ryonee testified that given her current financial situation, she believed it would be difficult for her to obtain housing in Falls City similar to the house Scott is going to build. She estimated that she could only afford $200 for rent. Ryonee testified that she works full time at a grocery store, but there was no evidence of Ryonee's income. Ryonee testified that she receives $1,500 a year from Ryan, presumably as part of the division of the marital estate. She also testified that Ryan pays $460 per month in child support and pays 60 percent of daycare expenses for Jordyn.

Ryan testified that he rents a house in Falls City for $200 per month. Ryan testified that his family, as well as Ryonee's family, lives in Falls City and that Jordyn has always lived in Falls City. He testified that Jordyn has been involved in sports in Falls City and that she has developed a group of friends by playing sports, as well as having a group of friends in school. Ryan testified that he does not want Jordyn to move to Missouri because all her family and friends are in Falls City, as well as her school, and because Falls City is where she was born and has always lived.

Following the hearing, the trial court entered an order granting Ryonee's application to remove Jordyn from the State of Nebraska to Missouri and denied Ryan's cross-complaint for change of physical custody to him.

ASSIGNMENTS OF ERROR

Ryan assigns that the trial court erred in (1) determining that Ryonee's desire to continue to live with her boyfriend was a legitimate reason to remove Jordyn from Nebraska, (2) applying the best interests factors for removal to determine if there was a legitimate reason for removing Jordyn from Nebraska, (3) determining that the factors weighing against removing Jordyn from Nebraska were not applicable in the court's best interests analysis, (4) granting Ryonee's request to remove Jordyn from Nebraska without making a determination that it was in the best interests of the minor child to continue living with Ryonee, and (5) entering a decision and order contrary to the evidence and the law, constituting an abuse of discretion.

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. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

ANALYSIS

[3,4] Ryan first assigns that the trial court erred in determining that Ryonee's desire to continue to live with her boyfriend was a legitimate reason to remove Jordyn from Nebraska. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. 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. *Wild v. Wild, supra.* Under

Nebraska law, the burden has been placed on the custodial parent to satisfy this test. *Id.*

[5] The threshold question in removal cases is whether the parent wishing to remove the child from the state has a legitimate reason for leaving. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Ryonee's sole reason for moving is to allow her to continue living with her current boyfriend, Scott. The trial court found that this was a legitimate reason for removal, and in doing so, it focused on the fact that the move to Missouri is less than 20 miles from Falls City. The short distance does present a unique removal case in that most removal cases involve the custodial parent asking to move hundreds or thousands of miles away from his or her current location. However, no matter the distance involved, we still must apply the well-established case law and determine if Ryonee met her burden to demonstrate a legitimate reason for removing Jordyn from Nebraska.

[6] Under the circumstances revealed by the evidence in this case, we conclude that Ryonee's desire to continue living with her current boyfriend is not a legitimate reason to remove Jordyn from Nebraska. Career advancement and remarriage are commonly found legitimate reasons for a move in removal cases, but they do not compose the exclusive list of legitimate reasons. See *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). Clearly, Ryonee's desire to move from Nebraska is not based on an employment opportunity for her or Scott and is not based on remarriage. Ryonee's sole reason for wanting to move is her desire to continue living with Scott as she has been doing since moving out of the marital home. Because Scott is selling his house in Falls City where Ryonee and Jordyn have been living, Ryonee and Jordan have to find someplace else to live. However, Ryonee has not demonstrated a legitimate reason as to why their new home has to be with Scott in Missouri.

Ryonee testified that given her financial situation, it would be difficult for her to obtain housing in Falls City similar to the house Scott is going to build in Missouri. While it could be true that Scott's new house might provide newer or more spacious housing for Ryonee and Jordyn than Ryonee would

be able to afford on her own, there is no evidence that Ryonee cannot find or cannot afford suitable housing in Falls City. Ryonee testified that she could only afford $200 a month in rent. There is no evidence in the record regarding her income or her expenses. We do know, however, that she receives $1,500 a year from Ryan, as well as $460 per month in child support. We also know that Ryan is renting a house in Falls City for $200 per month. She does not allege that she is unable to find suitable housing for $200 per month in Falls City or that she even looked into whether housing for $200 per month was available, and if so, whether such housing was suitable for her and Jordyn. Thus, she has not shown that she cannot afford housing on her own or that living with Scott in Missouri is her only available housing option.

[7] Because Ryonee has failed to satisfy the initial threshold of showing a legitimate reason to move, it is not necessary for this court to determine if it is in Jordyn's best interests to move to Missouri with Ryonee, nor is it necessary to address Ryan's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it. *Templeton v. Templeton*, 9 Neb. App. 937, 622 N.W.2d 424 (2001).

CONCLUSION

We find that the district court abused its discretion in granting Ryonee's request to remove Jordyn from Nebraska because Ryonee failed to meet her burden of proof to demonstrate that her reason for leaving Nebraska constituted a legitimate reason for removal. Accordingly, we reverse the district court's order granting Ryonee's application for removal. The district court's ruling with respect to Ryan's request for a change of custody is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER A. HESLEP, APPELLANT.

757 N.W.2d 386

Filed November 18, 2008. No. A-08-197.

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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
3. **Judgments: Appeal and Error.** When deciding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court.
4. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Criminal Law: Photographs: Minors.** A determination of whether a defendant possessed photographs for the purpose of real or simulated overt sexual gratification or sexual stimulation should include consideration of (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.
6. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
7. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Christopher A. Heslep appeals his conviction of possession of child pornography, contending that the evidence was insufficient to support his conviction and that he received ineffective assistance of counsel. For the reasons set forth herein, we affirm.

II. STATEMENT OF FACTS

While at a hotel in Sarpy County, Nebraska, Heslep allowed a 17-year-old hotel guest and a hotel employee, Kurt Voorhees, into his hotel room. During that time, Voorhees and the hotel guest observed a picture, saved as Heslep's "wallpaper" on his computer screen, of three young girls, approximately 9 or 10 years of age, dressed in very tight swimsuits, in sexually explicit poses. Additionally, Voorhees observed several "thumbnail drives" that were popping up on the screen and saw what appeared to be an approximately 10-year-old female, whom he believed to be either naked or dressed in a nude-colored swimsuit. Voorhees contacted law enforcement about the photographs he observed on Heslep's computer. Voorhees told officers that Heslep had talked sexually about the girls in the pictures and that Heslep had admitted to him that Heslep was attracted to young girls.

Vorhees informed officers that Heslep had been giving two young girls (under 10 years old), who were patrons of the hotel, pizza and stuffed animals. The hotel guest stated that he had observed Heslep playing peekaboo in the hallway with

a girl who was approximately 8 or 9 years old. According to the hotel guest, as the girl left the hallway, Heslep commented that the girl "had very beautiful legs." The hotel guest also told officers that he thought the age of the girls in the photographs he viewed on Heslep's computer, and the way they were posing, was inappropriate. The hotel guest, who was 17 years old, told officers that during the time he was in Heslep's motel room, Heslep gave him a beer, which he drank.

Heslep was arrested and charged with possession of child pornography in violation of Neb. Rev. Stat. § 28-813.01(1) (Cum. Supp. 2006), a Class IV felony, and procuring alcohol for a minor, in violation of Neb. Rev. Stat. § 53-180 (Reissue 2004), a Class I misdemeanor.

A stipulated trial was held to the court at which four exhibits were admitted into evidence: exhibit 1—police reports, including witness statements, from the Sarpy County sheriff's office; exhibit 2—a CD containing the forensic report of the Douglas County sheriff's office cybercrimes unit, as well as items removed from the hard drive of Heslep's computer, including the subject photograph which is the basis for the child pornography conviction (report contained on CD notes that forensic examiner of Heslep's computer found "10 pictures of underage females" saved to hard drive); exhibit 3—a DVD video recording of a portion of an interview conducted with Heslep by a deputy of the Sarpy County sheriff's office; and exhibit 4—a written stipulation entered into by the parties setting forth that the date of the offense was July 15, 2007, the court shall receive into evidence the aforementioned exhibits, Heslep's date of birth is December 23, 1956, and the hotel guest's date of birth is January 16, 1990.

On November 19, 2007, the district court rendered its written opinion and verdict wherein the court found Heslep guilty of the two charged offenses. Regarding the sufficiency of the evidence to convict Heslep of possession of child pornography, the district court stated that "in argument the parties stipulated, or at least [Heslep] did not contest, that the girls depicted in the photographs qualified as being children as defined by Sec. 28-1463.02(1)."

Further, the district court found that in Heslep's interview with law enforcement and his statements to a hotel worker, there was sufficient evidence to establish that he was viewing the photographs for the purpose of sexual gratification or sexual stimulation. The court stated:

> During the course of his interview, [Heslep] was asked upon numerous occasions whether he received sexual gratification from viewing the photographs. [Heslep] would not answer the question in a yes-or-no fashion, but simply stated that the girls are "extremely attractive", "inviting", "pretty", "gorgeous young ladies", that they have "puffy little breasts and butts", but he says he will not "go there" regarding sexual attraction.

Finally, the court determined that at least one of the photographs, labeled "'Future Playmate Models,'" contained "sexually explicit conduct," that being "erotic nudity" as defined by statute. The court noted that in this photograph,

> two young girls are on their hands and knees with their buttocks pointed toward the camera. Both girls are wearing thong-type underwear which goes down the crack of their buttocks and partially covers their crotch. Both young girls are looking back at the camera; one girl has a bikini-type top on, the other has a lingerie-type top. Neither of the girls' breasts are visible due to the clothing worn and the nature of the pose. . . . The focal point of the depiction is clearly the genitalia and pubic areas of the girls portrayed. While the setting is benign, the pose is clearly associated with sexual activity. The children in the photograph are clearly depicted in an unnatural pose and are in inappropriate attire considering their age. While the children are partially clothed, little is covered. In addition, the visual depiction based on pose and expressions of the children demonstrates a sexual coyness and willingness to engage in sexual activity. Finally, the visual depiction is clearly intended to elicit a sexual response in the viewer.

Heslep was sentenced to 3 years' probation on each count, with the sentences ordered to run concurrently. Heslep has timely appealed to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Heslep contends that the evidence was insufficient to support his conviction of possession of child pornography, because the State failed to prove (a) that the females depicted in the photograph at issue were children as defined by statute and (b) that the photograph used to convict him met the statutory definition of "erotic nudity" or that he possessed the photograph for the purpose of sexual gratification or sexual stimulation.

Heslep also contends that his trial counsel was ineffective for (1) failing to file a motion to suppress physical evidence and Heslep's statements to law enforcement, (2) failing to file a motion for discovery, (3) failing to require the State to produce the purported rights advisory forms connected to Heslep's statements to law enforcement, (4) failing to obtain an expert witness to conduct a forensic examination of the laptop computer, (5) failing to confront and cross-examine the State's witnesses by waiving a jury trial and agreeing to a stipulated bench trial, (6) failing to file a motion in limine to exclude irrelevant and prejudicial hearsay evidence, and (7) failing to raise the defense of intoxication.

IV. STANDARD 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007); *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

[2,3] On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only

where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008). When deciding questions of law, this court is obligated to reach conclusions independent of those reached by the trial court. *Id.*

V. ANALYSIS

1. Insufficiency of Evidence

Heslep contends that the evidence adduced by the State was insufficient to support his conviction of possession of child pornography. Specifically, he contends the State failed to prove (a) that the females depicted in the photograph at issue were children as defined by statute and (b) that the photograph met the statutory definition of "erotic nudity" or that he possessed the photograph for the purpose of sexual gratification or sexual stimulation.

[4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Spidel*, 10 Neb. App. 605, 634 N.W.2d 825 (2001).

Section 28-813.01(1) provides: "It shall be unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct, as defined in section 28-1463.02, which has a child, as defined in such section, as one of its participants or portrayed observers." The definition of "sexually explicit conduct," contained in Neb. Rev. Stat. § 28-1463.02(5) (Reissue 1995), includes "erotic nudity," which is further defined as "the display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved," § 28-1463.02(3). The definition of "child" states: "Child, in the case of a participant, shall mean any person under the age of eighteen years and, in the case of

a portrayed observer, shall mean any person under the age of sixteen years." § 28-1463.02(1).

(a) Age of Children

Heslep contends that the evidence is insufficient to establish that the females depicted in the photograph at issue were children as defined by statute, because the State did not establish the age of the girls depicted in the photograph. The district court noted that "in argument the parties stipulated, or at least [Heslep] did not contest, that the girls depicted in the photographs qualified as being children as defined by Sec. 28-1463.02(1)."

In its brief, the State notes that Voorhees and the hotel guest told law enforcement that they observed photographs of young girls, approximately 9 or 10 years of age, posing in a sexually provocative manner. However, the State did not establish that Voorhees and the hotel guest ever viewed the photograph which served as the basis of Heslep's conviction. Further, we disagree with the district court's characterization of the parties' stipulation. Although the parties stipulated to the evidence adduced at trial, we have found nothing in the record which indicates Heslep agreed to stipulate to an element of the offense, i.e., that the girls in the photographs were under the age of 18. Further, regarding the trial court's statements that Heslep did not contest the girls' ages, Heslep does not bear the burden of proof at trial.

However, as the State further notes in its brief, the forensic examiner of Heslep's computer found "10 pictures of underage females" saved to the hard drive of Heslep's computer. Viewing this evidence in the light most favorable to the State, as we are required to do, there is sufficient evidence to establish that the girls in the photograph were under the age of 18 years. Thus, we reject Heslep's claim that the State failed to prove the age of the females in the photograph.

(b) "Erotic Nudity"

Heslep also contends the State did not prove that the photograph used to convict him met the statutory definition of "erotic nudity" or that he possessed the photograph for the purpose of

"real or simulated overt sexual gratification or sexual stimulation" as required by § 28-1463.02(3).

As we previously set forth, "erotic nudity" is defined as "the display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved." § 28-1463.02(3).

Although the Nebraska Supreme Court has not set forth factors to consider when determining whether a defendant *possessed* photographs for the purpose of real or simulated overt sexual gratification, the court has made this determination in the context of whether a defendant *took* pictures for that purpose. In *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993), the Nebraska Supreme Court held that a determination of whether a defendant took photographs for the purpose of real or simulated overt sexual gratification or sexual stimulation should include consideration of (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. See, also, *State v. Spidel*, 10 Neb. App. 605, 634 N.W.2d 825 (2001).

[5] In our opinion, these considerations are equally applicable when considering whether a defendant possessed photographs for the purpose of real or simulated overt sexual gratification or sexual stimulation. Therefore, in this case and future cases, a determination of whether a defendant possessed photographs for the purpose of real or simulated overt sexual gratification or sexual stimulation should include consideration of (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose

generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

As applied to the instant case, in the photograph at issue, we agree with the assessment of the district court that

> [t]he focal point of the depiction is clearly the genitalia and pubic areas of the girls portrayed. While the setting is benign, the pose is clearly associated with sexual activity. The children in the photograph are clearly depicted in an unnatural pose and are in inappropriate attire considering their age. While the children are partially clothed, little is covered. In addition, the visual depiction based on pose and expressions of the children demonstrates a sexual coyness and willingness to engage in sexual activity. Finally, the visual depiction is clearly intended to elicit a sexual response in the viewer.

When these factors are considered in conjunction with Heslep's statements that he was attracted to young girls, there is little doubt that Heslep possessed the photograph for the purpose of real or simulated overt sexual gratification or sexual stimulation. Because the photograph in question displayed the female genital and pubic area as its focal point and we have found that the State proved that Heslep possessed the photograph for sexual gratification or stimulation, we reject Heslep's claim that the State failed to meet the statutory definition of "erotic nudity."

2. Ineffective Assistance of Counsel

Next, Heslep contends that his trial counsel was ineffective for (1) failing to file a motion to suppress physical evidence and Heslep's statements to law enforcement, (2) failing to file a motion for discovery, (3) failing to require the State to produce the purported rights advisory forms connected to Heslep's statements to law enforcement, (4) failing to obtain an expert witness to conduct a forensic examination of the laptop

computer, (5) failing to confront and cross-examine the State's witnesses by waiving a jury trial and agreeing to a stipulated bench trial, (6) failing to file a motion in limine to exclude irrelevant and prejudicial hearsay evidence, and (7) failing to raise the defense of intoxication.

[6,7] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. McCulloch, supra*; *State v. Walker, supra*.

We find that since all of Heslep's allegations concern his trial counsel's failure to act, the record on direct appeal is not sufficient for review of this assignment of error at this time.

VI. CONCLUSION

In sum, having rejected Heslep's claim that the evidence was insufficient to support his conviction and finding that the record on direct appeal is not sufficient for adequate review of Heslep's claims of ineffective assistance of counsel, the decision of the district court is affirmed.

AFFIRMED.

CHRYSTAL ELAINE MARANVILLE, FORMERLY KNOWN AS CHRYSTAL ELAINE DWORAK, APPELLEE AND CROSS-APPELLANT, V. JUSTIN TYLER DWORAK, APPELLANT AND CROSS-APPELLEE.

758 N.W.2d 70

Filed November 25, 2008. No. A-08-103.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.

3. **Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a material change in circumstances.
4. **Child Custody.** Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody.
5. **Child Custody: Modification of Decree.** Removal of a child from the state, when considered in conjunction with other evidence, may result in a change of circumstances that would warrant a modification of a divorce decree.
6. **Child Custody: Proof.** In order to prevail on a motion to remove a minor child to another jurisdiction, a custodial parent has the burden to prove that he or she has a legitimate reason for leaving the state and that it is in the best interests of the child to continue living with him or her.
7. **Child Custody.** The standard for approval of a motion to remove a child to another jurisdiction applies both when a custodial parent seeks to move a child from Nebraska to a different state and in considering a subsequent move to yet another state.
8. **Child Custody: Marriage.** A career enhancement for a custodial parent's spouse is a legitimate reason for removal of a child to another jurisdiction when the career change occurs after remarriage.
9. **Child Custody.** In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child.
10. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.
11. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
12. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating 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 children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties.
13. ____. The list of factors to consider regarding removal of a child to another jurisdiction does not set forth a hierarchy of factors; instead, depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.

14. ____. The factors to consider regarding removal of a child to another jurisdiction were intended to help courts assess the potential the move has to enhance the quality of life of the custodial parent and of the children.
15. ____. In order for the eight factors a court considers regarding removal of a child to another jurisdiction to weigh in a custodial parent's favor, he or she must show that the relocation has the potential to enhance or improve the quality of life for the children and custodial parent when all eight factors are considered as a whole.
16. ____. While custody is not to be interpreted as a sentence to immobility, it is important, in contemplating removal of children to another jurisdiction, to give due consideration to whether such move indeed will improve the children's lives, or merely maintain the status quo, only in a new location.
17. ____. A custodial parent's income can be enhanced because of a new spouse's career opportunities, for purposes of determining the potential that removal of children to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children.
18. ____. In considering removal of a child to another jurisdiction, the existence of educational advantages receives little or no weight when the custodial parent fails to prove that the new schools are superior.
19. **Child Custody: Visitation.** Consideration of the impact of removal of children to another jurisdiction on the contact between the children and the noncustodial parent, when viewed in light of reasonable visitation arrangements, focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship.
20. ____: ____. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.
21. **Visitation.** The frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining the reasonableness of a visitation schedule.
22. **Child Custody: Visitation.** Indications of the custodial parent's willingness to comply with a modified visitation schedule have a place in analyzing the reasonableness of a visitation schedule.
23. **Visitation.** The trial court has discretion to set a reasonable visitation schedule.
24. **Parent and Child: Visitation.** Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.
25. **Visitation.** The determination of reasonableness of a visitation schedule is to be made on a case-by-case basis.
26. **Visitation: Appeal and Error.** The matter of travel expenses associated with visitation is within the trial court's discretion, and although reviewed de novo on the record, its determination will normally be affirmed absent abuse of that discretion.
27. **Visitation.** There is no immutable standard for the allocation of travel expenses associated with visitation; instead, the determination of reasonableness is made on a case-by-case basis.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Terrance A. Poppe and Nicholas M. Froeschl, of Morrow, Poppe, Watermeier & Lonowski, P.C., for appellant.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

I. INTRODUCTION

Chrystal Elaine Maranville, formerly known as Chrystal Elaine Dworak, sought to modify a decree and subsequent order to allow her to move the parties' four minor children from Illinois to Ohio and to modify parenting time. Justin Tyler Dworak cross-claimed, requesting that custody of the four children be awarded to him, his child support obligations abate, and Chrystal be ordered to pay child support. The Lancaster County District Court granted Chrystal permission to move to Ohio with the three youngest children, awarded custody of the oldest child to Justin, and modified the parties' parenting time. Justin appeals from that order, and Chrystal cross-appeals.

II. BACKGROUND

Justin and Chrystal were divorced on March 18, 2003. Four children were born of the marriage: Cole in 1994, Lauren in 1995, Summer in 1997, and Joseph in 2000. The Lancaster County District Court ordered joint legal custody of the children and awarded primary physical custody to Chrystal, subject to Justin's specific parenting time. Following the divorce, Justin had parenting time with the children approximately 6 out of every 14 days and did not miss any of that parenting time.

Following the divorce, Chrystal married Jeffrey Maranville (Jeff), and together they have a daughter born in 2005. They were expecting a second child in June 2008. Chrystal does not work outside of the home and continues to be a very involved

caretaker for the Dworak children. Jeff worked for Goodyear in Lincoln, Nebraska, from 1998 until December 2004. In the summer of 2004, Jeff was offered a position as a Midwest regional sales manager in the Chicago, Illinois, area. Chrystal moved the court for an order granting her permission to move the children to Illinois.

On November 5, 2004, the district court granted Chrystal permission to move the four Dworak children from Lincoln to Geneva, Illinois, which decision this court affirmed by memorandum opinion. *Dworak v. Dworak*, 13 Neb. App. xix (No. A-04-1337, July 12, 2005). The district court's order provided for Justin's parenting from 6 p.m. Friday through 6 p.m. Sunday every other weekend in the Geneva area as well as specific holiday and summer parenting time. Justin exercised all of that parenting time, which was approximately 150 days per year. Justin also made special trips to Illinois to attend extracurricular activities and visit the children on occasions such as the first day of school.

In December 2005, Jeff learned that the sales management group at Goodyear was going to be reorganized and that his position would be relocated to Akron, Ohio. Jeff and Chrystal declined to move, and Jeff was demoted to a sales representative for Goodyear in the Chicago area.

In 2007, Veyance Technologies (Veyance) purchased the Goodyear division within which Jeff worked. In the fall of 2007, Veyance offered Jeff a position as a "distributor channel specialist." Jeff's accepting this position would require Jeff and Chrystal to move their family to the Akron area, where the company's headquarters are based. The position may require Jeff to travel within the U.S. and Canada approximately 25 percent of the time; however, Jeff understands the position to require minimal travel.

The position in Akron would pay Jeff less than his current pay. In 2005, Jeff's earnings were $147,808; in 2006, they were $163,355; and in 2007, Jeff earned approximately $140,000. Jeff's base pay as a sales representative is $103,000, and the additional compensation is earned through commission. The new position in Ohio would pay approximately $124,000 and would not allow for commission opportunities.

Jeff has been with Goodyear for 14 years, and the move to Akron would be his fifth move within that time. Akron is approximately 950 miles from Lincoln. Geneva is approximately 500 miles from Lincoln. The education and housing opportunities in Akron are similar to those in Geneva; however, the cost of living in Ohio is less.

Following his divorce from Chrystal, Justin remarried. Justin and his current wife have no children together; however, she is the custodial parent of her two sons. Justin is a dentist practicing in Lincoln, earning approximately $295,000 per year.

The custody modification hearing in the present case was held on December 17, 2007. Dr. George Williams, a clinical psychologist; James Hill, the director of marketing for North America at Veyance; Chrystal; and Jeff testified on Chrystal's behalf. Justin, his current wife, and Dr. Thomas Gilligan, a clinical psychologist, testified on behalf of Justin. Additional evidence adduced from these sources will be set forth as needed in the analysis section below.

The court granted Chrystal permission to move the three youngest Dworak children, Lauren, Summer, and Joseph, to Ohio; awarded custody of the oldest child, Cole, to Justin (pursuant to the agreement of the parties); modified parenting time; and allocated visitation expenses. Justin appeals, and Chrystal cross-appeals.

III. ASSIGNMENTS OF ERROR

Justin alleges that the court erred and abused its discretion by (1) failing to award custody of the three youngest Dworak children to him and (2) granting Chrystal permission to remove those minor children from Illinois to Ohio.

Chrystal alleges, restated, that the court erred in (1) granting her insufficient regular and summer visitation with the Dworak children, (2) its determination of visitation transportation, (3) ordering her to pay the transportation expenses for all four of the Dworak children, and (4) its determination of child support.

IV. STANDARD OF REVIEW

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. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

As with other visitation determinations, the matter of travel expenses associated with visitation is initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

V. ANALYSIS

1. Denial of Justin's Request for Custody of All Four Dworak Children

[1] Justin asserts that the district court erred in refusing to award him custody of all four of the minor children. However, Justin does not separately argue this assigned error in his brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Kumke v. Kumke*, 11 Neb. App. 304, 648 N.W.2d 797 (2002).

[2-5] To the extent that Justin's argument for custody is part and parcel of his argument against removal to Ohio, we are governed by the principle that ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Vogel v. Vogel, supra*. The party seeking modification of child custody bears the burden of showing such a change in circumstances. *Id.* Removal of a child from the state, without more,

does not amount to a change of circumstances warranting a change of custody. *Id*. Nevertheless, such a move, when considered in conjunction with other evidence, may result in a change of circumstances that would warrant a modification of the decree. *Id*.

In *Vogel v. Vogel*, the Nebraska Supreme Court addressed a similar issue and determined that resolution of both the mother's motion to remove the children and the father's motion for a change of custody depended upon consideration of whether the best interests of the children were served by allowing them to remain in the mother's custody and move with her or by transferring their custody to the father and allowing them to stay in Nebraska. The father asserted that modification was required not because the mother was unfit, but, rather, because the mother indicated her intention to move. *Id*. Essentially, the court found, the father contended that it would be in the best interests of the children to remain in Nebraska rather than move. *Id*.

The present case differs somewhat because Chrystal has already been granted permission to remove the children from Nebraska to Illinois and now seeks to move them again, from Illinois to Ohio. Justin argues in his brief that Chrystal's proposed move with the children to Ohio would create even more of a burden on his visitation with the children. However, Justin argues only against the move to Ohio and does not provide any evidence that it would be in the children's best interests to live with him in Nebraska.

Justin cites our decision in *Carraher v. Carraher*, 9 Neb. App. 23, 607 N.W.2d 547 (2000), in which we determined that a mother who had moved a child from Nebraska without permission from the father or the court must return to Nebraska or risk losing custody of the child. We find that *Carraher* is distinguishable from the present case, as Chrystal did not attempt to move the children without the court's permission and Justin points to nothing in the record to support his claim that Chrystal has failed to follow the court's previous orders.

We find that Justin failed to meet his burden of proof that the best interests of the Dworak children (except for Cole)

required a change in custody. The record supports the district court's findings that Chrystal is meeting the needs of those children. For these reasons, the trial court did not abuse its discretion in failing to award Justin custody of Lauren, Summer, and Joseph.

2. Grant of Permission to Move to Ohio

[6,7] In order to prevail on a motion to remove a minor child to another jurisdiction, a custodial parent has the burden to prove that he or she has a legitimate reason for leaving the state and that it is in the best interests of the child to continue living with him or her. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). Although this appears to be an issue of first impression in Nebraska, we think this standard applies both when a custodial parent seeks to move a child from Nebraska to a different state and in considering a subsequent move to yet another state.

(a) Legitimate Reason to Leave State

[8] Justin asserts that Chrystal did not prove a legitimate reason for leaving the state because Jeff will essentially receive less pay by accepting the position in Ohio than were he to remain in his current position in Illinois. The Nebraska Supreme Court has previously determined that a career enhancement for a custodial parent's spouse is a legitimate reason for removal when the career change occurs after remarriage. See *id*. Jeff and Hill testified that while the position in Ohio would initially yield a decrease in pay, the potential for promotion within Veyance was more likely than if Jeff were to remain in Illinois as a sales representative, where there was no opportunity to be promoted. Also, due to Veyance's restructuring of sales representative compensation, Jeff's potential to retain his current income, which is based significantly on commissions, was uncertain. Finally, Jeff testified that due to the lower cost of living in Ohio, his annual income in Ohio would effectively equal his $140,000 annual earnings in the Chicago community. For these reasons, we find the court did not abuse its discretion in finding that Chrystal had proved a legitimate reason for the move to Ohio.

(b) Best Interests Determination

[9,10] In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *McLaughlin v. McLaughlin, supra*.

(i) Each Parent's Motives

[11] The ultimate question in evaluating the parties' motives is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. *Id*. The trial court found that neither party's motives were improper in this case.

Chrystal's motive in seeking to relocate with the children to another state was to allow Jeff to accept a new position in Ohio which would provide Jeff with better job stability and increased promotional opportunities. Hill testified that the Maranvilles were required to move to the Akron area in order for Jeff to begin and remain working for Veyance in the position he was offered.

Justin's motive in opposing the move was to be able to maintain more frequent and regular contact with the parties' children without the additional time and expense which would be necessary if the three youngest Dworak children moved an additional 450 miles away.

We find that Chrystal's and Jeff's motives are not efforts to frustrate or manipulate each other. This factor weighs neither in favor of nor against the move.

(ii) Enhancing Quality of Life

[12,13] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should

consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating 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 children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). This list does not set forth a hierarchy of factors; instead, depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. See *id.*

[14-16] We note that these factors were intended to help courts assess the potential the move has to *enhance* the quality of life of the custodial parent and of the children. As such, in order for the factors to weigh in a custodial parent's favor, he or she must show that the relocation has the potential to enhance or improve the quality of life for the children and custodial parent when all eight factors are considered as a whole. While custody is not to be interpreted as a sentence to immobility, we think it is important in contemplating a move such as the one at issue to give due consideration to whether such move indeed will improve the children's lives, or merely maintain the status quo, only in a new location. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

We turn to an analysis of the quality of life factors.

a. Children's Emotional, Physical, and Developmental Needs

To determine the extent to which the move has the potential to enhance the quality of life of Chrystal, Lauren, Summer, and Joseph, we must first consider the impact the move may have on emotional, physical, and developmental needs of the children. The record shows that both Chrystal and Justin are caring and devoted parents and provide for their children's emotional, physical, and developmental needs.

Drs. Williams and Gilligan, both clinical psychologists, testified in this regard. Both doctors met only with the two older children, Cole and Lauren, not with Summer and Joseph, who were respectively ages 10 and 6 at the time of the modification hearing.

Dr. Williams recommended that Cole be allowed to live with Justin in Lincoln due to Cole's stated wishes. Dr. Williams testified that the separation of the siblings due to Cole's living with Justin in Nebraska would not cause any significant harm, at least to Lauren and Cole, whom he interviewed. Chrystal did not oppose this recommendation, and the parties agreed that Cole's custody would be changed to Justin.

Dr. Williams supported the move to Ohio and indicated that in his opinion, the move would not be harmful to the children psychologically. Dr. Williams also testified that frequent, regular contact with a noncustodial parent is beneficial to children, especially to younger children.

Dr. Gilligan testified to the many ways children benefit from frequent contact with their parents, including in their personal development, personalities, self-esteem, and self-awareness, and that they generally do better in social relationships and their academic achievements are higher. Dr. Gilligan did not express an opinion regarding whether the move to Ohio would have a negative impact on the Dworak children.

The trial court made no specific findings as to the potential the move to Ohio had to impact the emotional, physical, and developmental needs of the children. Based upon the testimony of experts; the visitation schedule fashioned by the trial court, which we discuss in further detail below; and both parties' proven desire to provide for the needs of the children, we conclude that the emotional, physical, and developmental needs of the Dworak children will not be negatively impacted by the move. On the other hand, the evidence does not show that these needs will be met in any better fashion as a result of the move to Ohio. As such, this factor weighs neither in favor of nor against the move to Ohio.

b. Children's Preference

We next consider the children's opinion or preference as to where to live. Lauren expressed to Dr. Williams that she

preferred to remain with Chrystal. There is nothing in the record regarding Summer's or Joseph's preference. Cole preferred to live with Justin, and the parties stipulated that Cole would live with Justin. The record does not indicate whether Lauren, Summer, or Joseph preferred to live in Illinois or Ohio. We find that due weight should be given to Lauren's preference to remain with Chrystal, but that this factor does not weigh either in favor of or against the move to Ohio.

c. Chrystal's Enhanced Income or Employment

[17] Next, we consider the extent to which Chrystal's income or employment will be enhanced. A custodial parent's income can be enhanced because of a new spouse's career opportunities, for purposes of determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). In the present case, Chrystal does not work outside the home; therefore, her income is completely dependent upon Jeff. Hill testified that if the family were to remain in Illinois, Jeff would remain in his current position, where his income was increasingly affected by commissions and he would have no opportunity for promotion. While Jeff's income in Illinois has been higher than his starting base salary in Ohio would be, Jeff would have the opportunity for promotions if he accepts the position in Ohio. Jeff's income would also not be dependent upon uncertain commissions. Additionally, the cost of living in Ohio is significantly less than that of living in Illinois. For these reasons, we find that this factor weighs in favor of the move.

d. Improved Housing or Living Conditions

We next consider the degree to which the Maranvilles' housing or living conditions would be improved.

The trial court found that the family's housing conditions in Ohio would be better than what the children enjoyed in Illinois because Jeff and Chrystal intend to build a seven-bedroom home in Ohio, whereas they have a four-bedroom home in Illinois. The court stated that the Ohio home would be at a "significantly decreased cost." Chrystal testified that

the Maranvilles had "somewhat" looked into building a house in Ohio, although they had made no commitments, and that it "[m]ost likely" would be a seven-bedroom home. Jeff testified that they would look for a home of the same size and with the same amenities as in Illinois. According to Jeff, their home in Illinois was worth approximately "high 600's to low seven" and in Ohio a comparable home would cost "from the high 200s to the high 300s." Real estate taxes in Ohio would be approximately half of those in Illinois. However, Chrystal testified that they would live in a community in Ohio similar to that they live in now. Finally, the cost of living is lower in Ohio than in the Chicago area.

The children's living conditions may be somewhat improved with the move to Ohio. We find that this factor weighs slightly in favor of the move.

e. Existence of Educational Advantages

[18] We also consider the existence of educational advantages available in Ohio. This factor receives little or no weight when the custodial parent fails to prove that the new schools are superior. See, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). There is little evidence regarding the educational advantages in Ohio versus Illinois. Because Chrystal has not proved that the Ohio schools are superior to those in Illinois, this factor weighs neither in favor of nor against the move.

f. Relationship Between Children and Each Parent

We next consider the quality of the relationship between the children and each parent. It is clear that in this case, each parent has a very strong bond and relationship with each child. As such, we must give due weight to the effect that the move to Ohio may have on the quality of Lauren's, Summer's, and Joseph's relationships with both Justin and Chrystal.

We have already determined that Chrystal will retain custody of the three youngest Dworak children. As such, her relationship with them will be largely unaffected by a move to Ohio.

On the other hand, Justin will see the parties' three youngest children less if they move to Ohio, and he testified that the move would adversely impact his relationship with those children. In *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000), the Nebraska Supreme Court concluded that because of the close relationship and extensive contacts between father and children, this factor weighed against a long-distance relocation with the mother. In the present case, although the children were separated from Justin by a considerable distance by living in Illinois, should they move to Ohio, that distance would nearly double. Justin has made every effort to see the parties' children as much as possible, missing none of the allowed visitation in Illinois despite the distance. However, Justin testified that for several reasons, if the children were to move to Ohio, it would not be as easy for him to make incidental visits and he would likely see the children less.

While the move to Ohio will certainly affect the quantity of time that Justin will spend with the children, given the visitation schedule fashioned by the trial court, together with Justin's proven efforts and success in maintaining a close relationship with the children, we conclude that the quality of Justin's relationship with the children will not be negatively impacted by a move from Illinois to Ohio. This factor does not prevent or favor the move.

g. Children's Ties to Each Community

Next, we consider the children's ties to the present community, Geneva, as well as their ties to the potential new community in Akron. Jeff testified that while there are no family ties to Illinois, Jeff does have extended family, including his parents, grandparents, siblings, and nieces or nephews—step-relatives of the Dworak children—in the Akron area. Conversely, the children were established in school in Illinois and had developed friendships there. As such, this factor weighs neither in favor of nor against the move.

h. Likelihood of Antagonizing Hostilities

Finally, we consider the likelihood that allowing or denying the move would antagonize hostilities between Justin and

Chrystal. The trial court found that regardless of whether there is a move in this case, there will be no increase or decrease in hostilities between the parties, and that it was not likely that the hostility and dissention between the adults would change in the future. We agree that the parties are already quite hostile toward one another. The record shows that the parties have had significant difficulties with visitation issues while the children were located in Illinois. Given the additional distance to Ohio and corresponding travel issues, it is possible that these difficulties could increase. In any event, we find that the likelihood the move has to antagonize the hostilities between Justin and Chrystal does not weigh either in favor of or against the move.

i. Conclusion Regarding Quality of Life

The trial court found that the quality of life of Chrystal and the children in her custody would be "negatively impacted" if Chrystal were not allowed to relocate, due to the possible decrease in Jeff's earning capacity and actual earnings which would create a financial hardship if she were not allowed to relocate with Jeff. The district court also found that the quality of life would be improved if Chrystal and the children were allowed to move.

In our de novo review and in consideration of all eight of the quality of life factors listed above, we determine that two factors, the extent to which the relocating parent's income or employment will be enhanced and the possible improvement in housing and living conditions, weigh in favor of the move. The remaining factors weigh neither in favor of nor against the move.

(iii) Impact of Move on Contact Between Justin and Children

[19-22] The third factor in the best interests determination is the impact of the move on the contact between the children and the noncustodial parent, when viewed in light of reasonable visitation arrangements. This consideration focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship. See *Farnsworth v. Farnsworth*,

257 Neb. 242, 597 N.W.2d 592 (1999). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. See *Carraher v. Carraher*, 9 Neb. App. 23, 607 N.W.2d 547 (2000). 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. *Id.* Indications of the custodial parent's willingness to comply with a modified visitation schedule also have a place in this analysis. *Id.*

In the present case, we give careful consideration to the fact that this is not the first time Chrystal has been before the court asking to move the Dworak children a significant distance away from their father. The first move, in 2004 from Nebraska to Illinois, reduced Justin's parenting time from about 6 out of every 14 days to every other weekend and certain holidays, approximately 150 days per year. While that contact has allowed Justin to maintain a meaningful relationship with the parties' children, Chrystal now seeks to move again, this time to Ohio, an even greater distance away from Justin.

Justin's visitation with the three younger Dworak children would consist of holiday visits in Lincoln as previously ordered in 2004, one "protracted" weekend each month during the school year (Thursday evening through Monday morning) in Ohio, spring break in Lincoln in alternating years, and summers in Lincoln from 14 days after school is dismissed in Ohio until 7 days prior to the commencement of school in Ohio.

Airfare to Ohio would be more expensive than airfare to Chicago. According to Justin, airfare to Chicago costs approximately $200, while airfare to Ohio could cost between $500 and $1,000. Additionally, traveling to Chicago takes Justin approximately 3 hours total because it is a direct flight. There are no direct flights from Lincoln or Omaha, Nebraska, to the Akron area; therefore, it could generally take about 8 hours to travel there. Justin further testified that because of the increased distance, he would not be able to drive to see the children in Ohio as he had in Chicago. Also, Justin testified

that because of the increased distance and time, there may be weekends in which it would not be possible for him to get to Ohio.

The court did attempt to fashion a reasonable visitation schedule in light of the distance involved between the two households, approximately 950 miles, and the split custody arrangement. The primary difference in Justin's visitation in Ohio compared to Illinois would be that the weekend visitation decreases from every other weekend to one protracted weekend a month. The holiday, school break, and summer visitations remain roughly the same. There certainly would be increased traveltime, expense, and inconvenience to Justin in traveling to Ohio and, to a lesser extent, the children when they travel to Lincoln. We conclude that the court's order allows Justin to maintain reasonable visitation with the three younger Dworak children. Although there is an impact on Justin and the children due to the increased distance apart, we conclude that it does not prevent the removal of the children to Ohio.

In taking their respective positions in this case, each parent seems sincerely motivated to do what he or she genuinely believes is in the best interests of the children. Weighing all of the factors in order to determine whether to permit Chrystal to relocate with Lauren, Summer, and Joseph is a difficult task. Where there are no clearly right or clearly wrong answers, it is particularly important to bear in mind that our standard of review allows us to give deference to the discretion of the trial judge, who observed the demeanor of the witnesses as he heard their testimony. To reverse would require us to find that the trial court's decision is untenable and unfairly deprives Justin of a substantial right or just result. After reviewing each factor in detail, we conclude that the district court did not abuse its discretion in granting Chrystal permission to relocate with the children to Ohio.

3. Visitation Schedule

Chrystal asserts that the court erred in setting her parenting time with Cole during the school year and further that the court's order was not specific in setting this parenting time. She also alleges that the court allowed her "extremely limited"

summer parenting time with all four of the Dworak children. Brief for appellee on cross-appeal at 24.

Chrystal was awarded protracted weekend visitation with Cole once a month in Lincoln, holiday visitation as previously ordered, spring break in Ohio in alternating years, and summer visitation in Ohio from the day school is dismissed in Lincoln until 14 days after school is dismissed in Ohio. We note that the summer visitation for both parents will result in the four Dworak children's being together for all but 1 week of the summer.

[23-25] The trial court has discretion to set a reasonable visitation schedule. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). The determination of reasonableness is to be made on a case-by-case basis. *Id.*

We note at the outset that Dr. Williams testified to the increased visitation scheduling issues which can occur as children get older and become involved in extracurricular activities. No doubt in a long-distance, split-custody arrangement such as this one, scheduling parenting time is difficult and neither parent is likely to view the amount of visitation he or she receives as ideal. Nonetheless, the court must fashion an arrangement which maximizes time for both parents yet allows the children as little interruption in their daily lives as possible.

The court's order setting Chrystal's monthly parenting time with Cole mirrors its order for Justin's monthly parenting time with Lauren, Summer, and Joseph. With regard to summer visitation, Chrystal will have substantially less time with the children than Justin. However, it is Chrystal's desire to move to Ohio that precipitated Cole's change of custody and the need to fashion a reasonable visitation schedule between Justin and the remaining children in order to preserve their relationship. Chrystal's parenting time with the three younger children actually increases during the school year as a result of the change in Justin's monthly visitation. Chrystal's summer parenting time with the three younger children is essentially

the same as in the previous order, with the exception that the court did not specifically provide for the two weekend visits in Lincoln during the summer. Finally, we are mindful of the court's interest in keeping all four Dworak children together when possible.

Given the facts of this case, we find that the district court did not abuse its discretion in setting Chrystal's parenting time.

4. Visitation Transportation Provisions

Chrystal alleges that the trial court erred in ordering the terms of visitation transportation for effecting the parties' parenting time. The court's order provides:

> 26. **VISITATION TRANSPORTATION**.
>
> A. In regards to transportation for visitation all reasonable airfare transportation costs incurred for Cole traveling from Lincoln to Geneva, Illinois or Lincoln to the Akron, Ohio area and back shall be borne by [Chrystal], as will all reasonable airfare costs for transportation regarding the Court-ordered visitation for the minor children, Lauren, Summer and [Joseph], to travel to Lincoln from either Chicago or the Akron, Ohio area and back. All costs of transportation referred to herein apply only to costs for the children, not for costs to [Justin] or [Justin's] family.
>
> B. When it is [Chrystal's] holiday [Chrystal] shall provide for the transportation of Cole to [Chrystal's] home for visitation, whether it be Chicago, Illinois or Akron, Ohio, as stated above and if it is [Justin's] holiday [Chrystal] will provide the transportation for the minor children, Lauren, Summer and [Joseph], from her home to [Justin].
>
> C. Each party is to provide roundtrip transportation which would include transportation to and from airports within a reasonable proximity from the respective party's home.

Chrystal first asserts that the order is unclear, particularly in light of paragraph 26C. Our reading of paragraph 26 as a whole indicates that Chrystal is to provide all of the transportation, including costs and roundtrip transportation to and

from airports within a reasonable proximity from both her and Justin's homes, for all of the children, regardless of who is exercising visitation. Considering the visitation schedule ordered by the court, this transportation responsibility relates to when the three youngest Dworak children travel to Lincoln for holiday, spring break, and summer visitations, as well as when Cole travels to Ohio for holiday, spring break, and summer visitations. Justin then would be responsible for transporting himself and any family members, including Cole, to Illinois or Ohio to exercise his monthly visitation with Summer, Lauren, and Joseph. Likewise, Chrystal would be responsible for transporting herself and any family members, including the children, to Nebraska to exercise her visitation with Cole in Nebraska.

[26,27] Chrystal also argues that requiring her to pay all of the airfare costs is unreasonable, particularly given the deviation in child support the court allowed to Justin for transportation costs. The matter of travel expenses is within the trial court's discretion, and although reviewed de novo on the record, its determination will normally be affirmed absent abuse of that discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). There is no immutable standard for the allocation of travel expenses; instead, the determination of reasonableness is made on a case-by-case basis. *Id.* Justin will clearly incur greater costs in traveling to Ohio for his monthly visits with the children as a result of the move. We cannot say that the district court abused its discretion in the allocation of transportation expenses.

5. Child Support

Chrystal alleges that the district court erred in ordering child support. She specifically alleges that the order is "conflicting, confusing and not based on the correct information as to 'current' child support obligations." Brief for appellee on cross-appeal at 29. Prior to the January 11, 2008, order, the court ordered Justin to pay $2,375 per month in child support for the four Dworak children. The court's January 11 order with respect to child support, which order is accompanied by worksheets, provides:

> 24. **CHILD SUPPORT.**
>
> A. Child support should not be changed. The calculation submitted by [Chrystal] as Exhibit #83 would indicate that child support should be $2,898 per month when there are three minor children in [Chrystal's] custody and one minor child in [Justin's] custody. The Court does deviate downward, however, because of the travel expenses that [Justin] is likely to have and does order that child support remain at $2,375 per month when there are three minor children in [Chrystal's] custody and one minor child in [Justin's] custody.
>
> B. When there are three minor children, Lauren, Summer and [Joseph], in the custody of [Chrystal] child support would be in the normal amount of $3,295 per month based upon the parties' current earnings. The Court does deviate 18% as done above for transportation costs to be incurred by [Justin]. Child support will thus be set for three minor children at $2,702 per month, for two minor children at $2,433 per month, and for one minor child at $1,805 per month.

We find that the child support is sufficiently clear and that Chrystal has not shown the order to be an abuse of discretion. The order provides a reason for deviation from the guidelines and provides for the split custody arrangement. The order requires Justin to pay child support of $2,375 per month until Cole is no longer receiving support, at which time Justin's child support obligation will be $2,702 per month for three minor children, $2,433 per month for two minor children, and $1,805 per month for one minor child.

Chrystal finally alleges that the child support calculation does not take into account the expenses Chrystal will incur in traveling to see Cole in Nebraska and the cost of bringing siblings along to see him. However, at the modification hearing, Chrystal did not produce evidence as to what her travel expenses would be from Ohio to Nebraska; nor did she indicate that she would exercise every monthly visitation. Further, since Chrystal is not paying child support and Justin's child support is calculated using zero income for Chrystal, there is no rationale for deviating from the child support guidelines

concerning Chrystal's travel expenses. We find that the court did not abuse its discretion in not considering Chrystal's travel expenses in setting child support.

For the reasons set forth herein, we find that the court did not abuse its discretion in setting child support.

VI. CONCLUSION

We conclude that the trial court did not abuse its discretion in refusing to award custody of Lauren, Summer, and Joseph to Justin; in allowing Chrystal to relocate with the children to Ohio; in determining visitation and allocating visitation expenses; or in setting child support.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DOUGLAS E. DRAGOO, APPELLANT.
758 N.W.2d 60

Filed November 25, 2008. No. A-08-113.

1. **Statutes.** Matters of statutory construction present questions of law.
2. **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.
3. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution 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.
4. ____: ____. The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
5. **Double Jeopardy.** While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution.
6. **Criminal Law: Convictions: Statutes: Legislature: Intent.** Whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses.
7. **Double Jeopardy: Legislature: Intent.** When the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the court imposes the cumulative punishments in a single proceeding.

8. **Double Jeopardy: Statutes: Proof.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.
9. **Double Jeopardy.** The *Blockburger* test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), applies equally to multiple punishment and multiple prosecution cases.
10. ____. The *Blockburger*, or "same elements," test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), asks whether each offense contains an element not contained in the other. If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution.
11. **Criminal Law: Drunk Driving: Blood, Breath, and Urine Tests.** Allegations of a defendant's prior driving under the influence offenses and a blood alcohol concentration of .15 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood are sentencing enhancement provisions under Neb. Rev. Stat. § 60-6,197.03 (Cum. Supp. 2006), and not elements of a driving under the influence offense.
12. **Criminal Law: Drunk Driving: Proximate Cause.** The material elements of the crime of driving under the influence causing serious bodily injury are (1) the defendant must have been operating a motor vehicle; (2) the defendant must have been operating the vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004) (driving under the influence); and (3) the defendant's act of driving under the influence, in violation of § 60-6,196, must proximately cause serious bodily injury.
13. **Constitutional Law: Double Jeopardy: Sentences.** Consecutive sentences for driving under the influence and driving under the influence causing serious bodily injury are cumulative sentences for the same offense and constitute separate and multiple punishments for the same offense, a denial of the protection against double jeopardy, afforded by both the state and federal Constitutions.
14. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
15. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
16. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

17. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
18. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life.

Appeal from the District Court for Antelope County: PATRICK G. ROGERS, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Patrick P. Carney and Jonathan R. Brandt, of Carney Law, P.C., for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. Douglas E. Dragoo appeals from his convictions and sentences in the district court for Antelope County for count I, driving under the influence of alcoholic liquor (DUI), fourth offense (with a blood alcohol concentration of .15 of 1 gram or more), and count II, DUI causing serious bodily injury. Based on the reasons that follow, we reverse the judgment of conviction and sentence for count I and remand the matter to the district court to dismiss count I. We affirm the judgment of conviction and sentence for count II.

BACKGROUND

On December 15, 2006, at approximately 10:20 p.m., Dragoo was involved in a motor vehicle accident with another vehicle. Just before the accident, Dragoo was driving his pickup truck on 529 Avenue, a county road in Antelope County that runs north and south. Dragoo was traveling north and was approaching the intersection of 529 Avenue and U.S. Highway 275, which runs east and west. There are stop signs at the intersection for traffic going north and south on 529 Avenue. Amanda

Thies and Kaylin Plugge were traveling east on Highway 275 in Thies' car. As they approached the intersection, they noticed Dragoo's truck coming from the south. Thies, who was driving, testified that she could tell that the truck was not going to stop at the stop sign before entering the intersection. Thies testified that the truck pulled out into the intersection in front of her car and that the two vehicles collided.

Deputy Michael Wright of the Antelope County sheriff's office was dispatched to the scene. When Wright arrived, he walked over to the truck involved in the accident, which he recognized as belonging to Dragoo. Wright made contact with Dragoo, who was sitting in the driver's seat. Dragoo's girlfriend was sitting next to him. Wright testified that Dragoo had a large cut on the left side of his head, but stated he did not want medical attention and just wanted to go home. Wright also testified that he saw six unopened cans of beer on the passenger floor of the truck. Wright testified that Dragoo exited the vehicle and that while speaking to Dragoo, Wright could smell the odor of alcoholic beverages coming from Dragoo's person. Wright also testified that Dragoo was unsteady on his feet, could not stand still, and "staggered around a little bit." Wright testified that Dragoo's speech was slow and slurred.

Dragoo eventually agreed to get medical treatment, and he was transported by ambulance to a hospital. Wright spoke to Dragoo again at the hospital. Dragoo admitted that he was the driver of the truck, that he had been at a bar before the accident and was on his way home, and that he had been drinking that evening. Wright asked Dragoo how much he had to drink, to which Dragoo responded, "[E]nough." Wright then placed Dragoo under arrest and read him the postarrest chemical test advisement form, which Dragoo signed. Dragoo submitted to having his blood drawn, and a blood alcohol test was subsequently performed. The result of the test showed that Dragoo's blood alcohol concentration on the night of the accident was .222 of 1 gram of alcohol per 100 milliliters of blood.

Thies and Plugge were also taken to the hospital by ambulance. Thies suffered a broken collarbone as a result of the collision. She wore a brace for 6 weeks after the accident

and was unable to use her left arm at all for 2 weeks. Plugge suffered tendonitis in her left knee and a bump on her head. She had a bruise on her left leg from her knee down to the bottom of her shin. She was on crutches for 3 weeks for the knee injury.

The day after the accident, Wright met with Dragoo in an interview room at the sheriff's office. After being advised of his *Miranda* rights, Dragoo agreed to speak with Wright. Dragoo remembered leaving the bar, driving out of town, and coming up to the stop sign. Wright testified that Dragoo initially stated that he did not see Thies' vehicle before the collision, but later stated that he remembered driving up to the stop sign but did not remember anything after that. When asked how much he had to drink prior to the accident, Dragoo told Wright that he had three or four mixed drinks. When Wright asked Dragoo if he thought he was intoxicated the night of the accident, Dragoo responded that he was not intoxicated "beyond his capabilities."

On March 26, 2007, an information was filed in the district court for Antelope County charging Dragoo with DUI, fourth offense, a Class IIIA felony. An arraignment was held, and Dragoo entered a plea of not guilty. On May 11, an amended information was filed charging Dragoo with count I, DUI, fourth offense (with a blood alcohol concentration of .15 or more), a Class III felony, and count II, DUI causing serious bodily injury, a Class IIIA felony.

On October 15, 2007, Dragoo filed a motion to suppress any and all evidence, including statements made by Dragoo, alleging that Dragoo had been arrested without probable cause and/or reasonable suspicion. A hearing was held on the motion, and following the hearing, the trial court overruled the motion to suppress, finding that Wright had probable cause to arrest Dragoo.

The matter proceeded to a jury trial, held on October 15 and 16, 2007. At the conclusion of the trial, the jury found Dragoo guilty of count I, DUI, and found that his blood alcohol concentration equaled or exceeded .15 of 1 gram per 100 milliliters of blood. The jury also found Dragoo guilty of count II, DUI causing serious bodily injury. The trial court entered

judgment on the verdicts. Prior to sentencing, an enhancement hearing was held and the court found that Dragoo had three prior convictions for purposes of enhancement for DUI. Accordingly, the court found the current DUI conviction pursuant to count I to be a fourth offense. The fourth offense and the finding that Dragoo's blood alcohol concentration equaled or exceeded .15 of 1 gram made count I a Class III felony for sentencing purposes. See Neb. Rev. Stat. § 60-6,197.03(8) (Cum. Supp. 2006). The trial court sentenced Dragoo to 24 to 36 months' imprisonment for count I and 12 to 18 months' imprisonment for count II. The court ordered the sentences to be served consecutively. The court also revoked Dragoo's driver's license for a period of 15 years.

ASSIGNMENTS OF ERROR

Dragoo assigns that the trial court erred in (1) sentencing him to multiple punishments for the same offense in violation of the Double Jeopardy Clause, (2) failing to rearraign him on the crimes charged in the amended information, (3) overruling his motion to suppress, and (4) imposing excessive sentences.

ANALYSIS

Violation of Double Jeopardy Clause.

[1,2] Dragoo first assigns that the trial court erred by sentencing him to multiple punishments for the same offense, in violation of the Double Jeopardy Clause. This assignment of error presents matters of statutory construction; as such, it presents questions of law. See *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997). 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. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006).

[3-5] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution 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. Molina, supra*; *State v. Winkler*, 266 Neb. 155, 663 N.W.2d

102 (2003). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Molina, supra*; *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005). While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution. *State v. Mata*, 273 Neb. 474, 730 N.W.2d 396 (2007); *State v. Humbert*, 272 Neb. 428, 722 N.W.2d 71 (2006).

[6,7] Whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses. *State v. Mata, supra*; *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). When the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the court imposes the cumulative punishments in a single proceeding. *State v. Mata, supra*; *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

[8,9] In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the U.S. Supreme Court defined the test to be used in determining whether two statutes penalize the same offense. The Court held that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not. *State v. Molina, supra*; *State v. Winkler, supra*. In *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the Court stressed that the *Blockburger* test applies equally to multiple punishment and multiple prosecution cases.

[10] The *Blockburger*, or "same elements," test asks whether each offense contains an element not contained in the other. *State v. Winkler, supra*; *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996). If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. *Id.*

[11] Applying the *Blockburger* test to this case, we compare the elements of DUI and DUI causing serious bodily injury. DUI as defined by Neb. Rev. Stat. § 60-6,196 (Reissue 2004) requires proof that the defendant was operating or in the actual physical control of a motor vehicle (1) while under the influence of alcoholic liquor or (2) when having a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood. The charge against Dragoo also alleged that this is Dragoo's fourth DUI offense and that he had a blood alcohol concentration of .15 of 1 gram or more by weight of alcohol per 100 milliliters of his blood. These are both penalty enhancement provisions found in § 60-6,197.03 for persons convicted of a violation of § 60-6,196. As this court has previously recognized:

> The plain language of [§ 60-6,196] criminalizes the act of DUI. The fact that the defendant has previously been convicted of DUI is irrelevant to guilt or innocence and is relevant only to the sentence to be meted out. Indeed, the sole difference between a first, second, or third conviction for DUI is the penalty authorized. . . .
>
> . . . [W]e conclude that the offense the Legislature intended to proscribe is DUI. That the defendant has prior DUI convictions merely enhances the sentence.

State v. Werner, 8 Neb. App. 684, 691, 600 N.W.2d 500, 506 (1999). By extension, the amount of a defendant's blood alcohol concentration is not an element of the crime of DUI, but merely enhances the sentence. Accordingly, the allegations that this is Dragoo's fourth DUI offense and that he had a blood alcohol concentration of .15 of 1 gram or more by weight of alcohol per 100 milliliters of his blood are sentencing enhancement provisions under § 60-6,197.03, and not elements of the offense.

[12] The material elements of the crime of DUI causing serious bodily injury are (1) the defendant must have been operating a motor vehicle; (2) the defendant must have been operating the vehicle in violation of § 60-6,196 (DUI); and (3) the defendant's act of DUI, in violation of § 60-6,196, must proximately cause serious bodily injury. *State v. Bartlett*, 3 Neb. App. 218, 525 N.W.2d 237 (1994). Causing serious

bodily injury is an element of DUI causing serious bodily injury, but is not an element of DUI. Therefore, DUI causing serious bodily injury contains an element that DUI does not contain; however, the reverse is not true. DUI does not require proof of an element that DUI causing serious bodily injury does not. Thus, each of the charged offenses does not require proof of an element that the other does not, as the *Blockburger* test requires.

[13] The predicate offense for DUI causing serious bodily injury is DUI in violation of § 60-6,196, making DUI a lesser-included offense of DUI causing serious bodily injury. Consequently, the commission of DUI causing serious bodily injury necessarily includes the offense of DUI. The constitutional protection against double jeopardy, therefore, applies to Dragoo's convictions on counts I and II. The trial court imposed consecutive sentences for DUI and DUI causing serious bodily injury. Such sentences are cumulative sentences for the same offense and constitute separate and multiple punishments for the same offense, a denial of the protection against double jeopardy, afforded by both the state and federal Constitutions. We must, therefore, reverse the district court's judgment for Dragoo's conviction and sentence for DUI (count I) and remand this matter to the district court for dismissal of count I in the amended information.

Arraignment.

Dragoo next assigns that the trial court erred in failing to rearraign him on the crimes charged in the amended information. Neb. Rev. Stat. § 29-1816 (Reissue 1995) provides in part: "If the accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he or she shall be deemed to have waived arraignment and a plea of not guilty shall be deemed to have been made." See, also, *State v. Hernandez*, 268 Neb. 934, 689 N.W.2d 579 (2004).

Dragoo appeared in person, was represented by counsel, and proceeded to trial before a jury on the amended information. Further, during preliminary instructions at trial, the trial court informed the jury of the two counts against Dragoo and stated that Dragoo had pled not guilty to counts I and II. Dragoo did

not object to the court's statement. Accordingly, Dragoo has waived any argument that he should have been arraigned on the amended information.

Motion to Suppress.

[14] Dragoo next assigns that the trial court erred in overruling his motion to suppress. Dragoo argues that the motion to suppress should have been granted because Wright did not have probable cause to arrest Dragoo and obtain a sample of his blood. A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). 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. *Id.*

The trial court's finding that Wright had probable cause to arrest Dragoo is supported by evidence adduced at the suppression hearing. At the hearing, Wright testified that on December 15, 2006, he was dispatched to a motor vehicle accident on Highway 275 in Antelope County. Wright testified that when he arrived at the scene, he walked over to the pickup involved in the accident, which he recognized as belonging to Dragoo. Wright testified that when he looked into the pickup, Dragoo was sitting in the driver's seat of the pickup and his girlfriend was sitting next to him. Wright testified that Dragoo had a large cut on the left side of his head and was bleeding profusely. Wright detected an odor of alcohol in the vehicle. He also observed unopened cans of beer on the pickup's floor on the passenger side.

Wright testified that Dragoo and his girlfriend exited the vehicle and that Dragoo initially indicated he did not want any medical treatment. Wright testified that while talking with Dragoo when he was outside the pickup, Wright noticed a strong odor of alcohol coming from Dragoo's person. Wright

also noticed that Dragoo's speech was slow and slurred and that Dragoo was somewhat unsteady on his feet while Wright was talking to him. Wright testified that Dragoo eventually agreed to go to the hospital and was transported there by ambulance.

Wright testified that he spoke with Dragoo at the hospital. Wright testified that Dragoo told him that just before the accident, he and his girlfriend were driving home after leaving a bar. Wright testified that Dragoo admitted to being the driver of the pickup and admitted to drinking alcohol. When Wright asked Dragoo how much alcohol he drank, Dragoo responded, "[E]nough." Wright testified that there was a strong odor of alcohol coming from Dragoo when Wright spoke to him at the hospital. Wright testified that he tried twice to administer a preliminary breath test to Dragoo, but Dragoo was unable to give a sufficient breath sample both times. At that point, Wright placed Dragoo under arrest and read him the postarrest chemical test advisement form.

Wright testified that he also spoke with Thies and Plugge at the hospital, both of whom told Wright that Dragoo pulled out in front of them without stopping at the intersection.

Based on the evidence presented at the suppression hearing, Wright had probable cause to arrest Dragoo and the trial court did not err in overruling Dragoo's motion to suppress.

Excessive Sentences.

Finally, Dragoo assigns that the trial court erred in imposing excessive sentences. Dragoo argues that the sentences are excessive because the trial court ordered that they run consecutively, thereby constituting multiple punishments for the same crime, in violation of the Double Jeopardy Clause. This argument was addressed above, and we do not address it further here. We will, however, address whether the sentence imposed for DUI causing serious bodily injury is excessive.

[15] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Hernandez*, 273 Neb. 456, 730 N.W.2d 96 (2007); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). DUI causing serious bodily injury is

a Class IIIA felony having no minimum penalty and a maximum punishment of 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2006); Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006). The trial court sentenced Dragoo to 12 to 18 months' imprisonment on the DUI causing serious bodily injury conviction. The sentence imposed by the trial court is within the statutory limits. Accordingly, we need only determine whether the sentence imposed was an abuse of discretion.

[16-18] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Fester*, 274 Neb. 786, 743 N.W.2d 380 (2008); *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). We have further held that, in considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Fester, supra.* Obviously, depending on the circumstances of a particular case, not all factors are placed on a scale and weighed in equal proportion. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life. *Id.*; *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

Dragoo has a criminal history that dates back to 1960. He has been convicted of willful reckless driving, driving during suspension of his license (twice), assault and battery, no valid operator's license (three times), no valid registration, violation of motor carrier's safety regulations (twice), and criminal mischief. In addition to the current offense, Dragoo has been charged with DUI five times, resulting in three convictions. After committing the current offense, Dragoo was charged with assault in the third degree. The charge was amended to disturbing the peace, and he was convicted of that charge. The trial court found that, based on Dragoo's prior criminal history and

on the nature and circumstances of the current offense, incarceration was necessary and that a sentence lesser than incarceration would depreciate the seriousness of the crime or promote disrespect for the law. We conclude that the sentence imposed by the trial court is not an abuse of judicial discretion.

CONCLUSION

We conclude that Dragoo's consecutive sentences for DUI and DUI causing serious bodily injury constitute multiple punishments for the same offense, a denial of the protection against double jeopardy. We therefore reverse the district court's judgment for Dragoo's conviction and sentence for count I, DUI, and remand this matter to the district court with directions to dismiss count I of the amended information. Because there is not error in Dragoo's conviction and sentence for count II, DUI causing serious bodily injury, the judgment of the district court regarding count II is affirmed.

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

CHRISTI MARIE MURPHY, APPELLANT, V.
MATTHEW LARUE MURPHY, APPELLEE.
759 N.W.2d 710

Filed December 2, 2008. No. A-08-007.

1. **Modification of Decree: Child Support.** A request to modify child support will be denied if the change in financial circumstances is due to fault or voluntary wastage or dissipation of one's talents and assets.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Bankruptcy: Words and Phrases.** An adversary proceeding is one where, in bankruptcy court, one party seeks affirmative relief from another. Adversary proceedings include actions to recover money or property, as well as actions objecting to discharge, among others.
4. **Bankruptcy: Debtors and Creditors: Alimony.** Generally, a bankruptcy discharge does not discharge the debtor from any debt for a domestic support obligation.
5. ____: ____: ____. A discharge under 11 U.S.C. § 523(a)(5) (2000) does not discharge an individual debtor from any debt to a former spouse for alimony to,

maintenance for, or support of such spouse in connection with a separation agreement, divorce decree, or other order of a state court of record.

6. **Bankruptcy: Debtors and Creditors: Divorce.** Debts incurred in the course of a marital dissolution proceeding are not dischargeable in bankruptcy unless (1) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor or (2) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.
7. **Bankruptcy: Modification of Decree: Alimony.** A postbankruptcy alimony modification violates the discharge injunction of the Bankruptcy Code when the spouse seeking modification of alimony is merely attempting to reinstate a discharged property settlement obligation rather than being a modification based on changed circumstances.
8. **Bankruptcy: Debtors and Creditors: Divorce.** Nonspousal support obligations or debts incurred in the course of a marital dissolution proceeding are not dischargeable in bankruptcy unless discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and vacated.

Brenda J. Council and Amy L. Mattern, of Whitner Law Firm, P.C., L.L.O., for appellant.

Christopher A. Vacanti, of Cohen, Vacanti, Higgins & Shattuck, for appellee.

INBODY, Chief Judge, and MOORE, Judge.

PER CURIAM.

Christi Marie Murphy and Matthew Larue Murphy were divorced by a decree of the district court for Douglas County, Nebraska, entered August 25, 2006. Two children were born to the Murphys during the marriage: one born December 12, 1997, and the other born August 30, 2000. This appeal involves Matthew's request to modify his child support and alimony obligations because of a 50-percent reduction of earnings stemming from the loss of his employment as a Douglas County sheriff's deputy. The district court reduced Matthew's child support and alimony obligations, but Christi appeals and contends that such reduction was error because Matthew's loss of

employment was the result of his "misconduct." We agree and, therefore, reverse.

PROCEDURAL AND FACTUAL BACKGROUND

At the time of the dissolution, Matthew's employment as a deputy sheriff, together with part-time work as a security officer, provided an income of $70,000 per year. Christi was not then employed, nor has she been employed since the decree. Christi was awarded custody of the children, and Matthew was to pay child support in the sum of $1,209 per month for the support of the two children and $822 per month for one child. Additionally, Matthew was to pay Christi alimony in the amount of $600 per month beginning August 1, 2006, for 3 years; $450 per month from August 1, 2009, for 2 years; and $300 per month from August 1, 2011, for 2 years, for a total of $39,600.

The parties had substantial debt, which was divided between them by the original decree of dissolution. The only debt relevant in this proceeding was a Citibank credit card debt that Christi was ordered to pay in the approximate amount of $7,800. However, after the decree, Christi filed for bankruptcy and the Citibank debt was discharged by the U.S. Bankruptcy Court. Consequently, that creditor pursued Matthew, and he ultimately settled such debt by a payment of $4,300, for which he sought credit against child support via this modification proceeding.

Matthew had a 14-year career with the Douglas County sheriff's office, but in February 2006, an investigation concerning him occurred regarding an unreported accidental discharge of a weapon and K-9 training narcotics being found in his residence. As a result of that investigation, Matthew received a 45-day suspension and he signed an agreement placing him on a 1-year employment probationary status. Matthew admitted that such probationary status meant that further violations of department policies and procedures could lead to his termination. On January 4, 2007, the Douglas County sheriff provided a disciplinary hearing notice to Matthew recounting additional employment problems, including (1) June 2006, a negative personnel advisory for damaging a cruiser; (2) July 2006, two

3-day suspensions for failing to complete a required report and failing to place property into evidence; (3) November 2006, a negative personnel advisory for reporting late for work on more than one Sunday; and (4) January 2007, a negative personnel advisory after failing to report for work on Sunday, December 24, 2006. This notice provided for a disciplinary hearing to be held January 11, 2007, and set forth the details of the various rule violations and how such hearing would be conducted.

Matthew testified that the internal affairs investigation into his employment began shortly after the divorce case was filed, with Christi's calling the internal affairs department and submitting a letter and an affidavit. In her testimony, Christi denied Matthew's statements, and although she admitted that her previous attorney sent affidavits and letters to internal affairs, she testified she could not remember whether that was done with or without her consent.

A letter from the sheriff regarding the foregoing disciplinary investigation indicates that after the hearing, Matthew was "apprised of the options available to [him] in the event that [he was] terminated or if [he] resigned." The document recites that Matthew made the decision to resign his employment effective immediately, and at the bottom of the letter, it states: "I hereby resign my position with the Douglas County Sheriff's Office effective immediately," followed by Matthew's signature. Thereafter, Matthew secured several low-paying jobs, mainly in sales, which were unsuccessful. At the time of the modification hearing on September 26, 2007, Matthew was selling health insurance strictly on a commission basis. Matthew agreed that his earning capacity in that position was $35,000 per year. The record establishes that as a result of no longer being a sheriff's deputy, Matthew lost the opportunity to do part-time security work, and that by June 2007, he was no longer a certified law enforcement officer.

DISTRICT COURT DECISION

After denying Christi's motion to reopen the record to introduce evidence concerning Matthew's allegedly untruthful testimony at the hearing denying that he had withdrawn

approximately $33,000 from the Douglas County employees' retirement trust fund, the district court entered its decision on the request for modification on December 19, 2007. The court modified child support by reducing it to $800 per month for two children and $585 per month for one child. Such reduction was based on an annual income for Matthew of $35,000 and on a 40-hour workweek at minimum wage, $5.85 per hour, for Christi. That reduction was retroactive to February 1, 2007. Additionally, the trial court reduced Matthew's alimony obligation to the sum of $350 per month from February 1, 2007, through August 1, 2013.

With respect to the Citibank bill, the trial court ordered that the alimony obligation was subject to a credit in Matthew's favor in the amount of $4,300, to be repaid by Christi at the rate of $100 per month via a $100-per-month reduction in Matthew's alimony obligation for 43 months. In addition, the court made orders with respect to the parenting plan, but such are not pertinent to this appeal and therefore are not further detailed.

ASSIGNMENTS OF ERROR

Christi assigns to the district court seven errors, which we consolidate into the following four errors: (1) finding a sufficient change in Matthew's circumstances to modify his child support and alimony obligations; (2) finding that Matthew's termination from the Douglas County sheriff's office was at the instance of Christi; (3) finding that Christi was indebted to Matthew in the amount of $4,300 for his payment of the Citibank credit card debt, which would be paid by a credit of $100 per month for 43 months against Matthew's alimony obligation; and (4) denying Christi's motion to reopen the record to introduce evidence that Matthew lied under oath when he denied receiving approximately $33,000 from the Douglas County employees' retirement trust fund, which funds should have been considered as income for purposes of calculating child support.

STANDARD OF REVIEW

An appellate court entrusts the modification of an alimony or child support award to the trial court's discretion and reviews

such decision de novo on the record to determine whether the trial court has abused its discretion. See *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002).

ANALYSIS

Matthew's Change in Job Status as Basis for Modification of Child Support and Alimony.

In our transcript is a letter of the district judge setting forth his findings on the motion to modify and directing Matthew's counsel to prepare a decree "consistent" with these findings. This letter states in part: "The court specifically notes that at the instance of [Christi,] [Matthew] was terminated from his employment as a Deputy Sheriff of Douglas County, Nebraska. [Christi] specifically pointed out to [Matthew's] employer his violation of rules which caused his ultimate dismissal." This reasoning does not find its way into the actual order entered on December 19, 2007, which is the operative final order under *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008). The court's order simply modifies the alimony award without reasoning or rationale beyond a finding that there has been a material change in circumstances. But to the extent that the district court's rationale contained in its letter to counsel was the basis for the modification, we reject it because such rationale is not supported by the evidence, is against well-established precedent, and is untenable.

Although the record has testimony from Matthew that his internal affairs problems began with a telephone call and letter(s) from Christi, she says that it was her former counsel who did these things. But, Matthew did not produce such communications or establish, irrespective of who communicated with internal affairs, when the communications occurred, what was disclosed, and whether Matthew's employer was otherwise aware of the matters supposedly reported. Far more important, however, is the fact that at the time of the decree, Matthew was already on probationary status from the investigation, regardless of how and by whom the original internal affairs investigation was instigated. Matthew readily conceded his awareness that such status meant that further violations of policies and procedures could result in his termination. In

short, at the time of the decree, Matthew was fully employed and earning $70,000 per year, but Matthew knew he was "skating on thin ice" with his employer. The evidence is undisputed that Matthew placed himself in a "resign or be fired" position by four different incidents, cited in the sheriff's disciplinary hearing notice, occurring after the divorce case was filed and while he was on probation, to wit: damaging a cruiser in June 2006, receiving two 3-day suspensions for failing to complete a report and failing to place property into evidence in July 2006, reporting to work late in November 2006, and failing to report to work at all on Christmas Eve 2006. In short, it was Matthew who fumbled his probationary status, not Christi. Therefore, as a factual matter, the district court is clearly wrong in concluding that Christi caused Matthew's loss of employment.

The evidence shows that Matthew's conduct while on probation caused Matthew to be in the position that his choice was to resign or be fired. Thus, from an analytical standpoint, we need not go back to how and why Matthew ended up on probationary status at the time of the divorce; the fact is that such was his status with his employer, he knew it, and all he needed to do for 12 months was to follow the sheriff's rules and procedures—which he, and he alone, failed to do.

[1] We next look at the nature of the acts that caused Matthew's termination of employment. They may be summarized by stating that he could not live up to his employer's performance expectations and requirements, even though he knew his employment was somewhat tenuous because of his probationary status. In other words, Matthew was clearly involved in "employee misconduct," a subject upon which the Nebraska appellate courts have previously spoken when a change in employment status and earnings is alleged as justifying a downward adjustment in the obligor's child support or alimony obligation. In *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997), the court extended the rule from *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985), to alimony reduction requests. In *Ohler*, the rule states that a request to modify child support will be denied if the change in financial circumstances is due to fault or voluntary wastage

or dissipation of one's talents and assets. In *Pope*, the court found that the husband's loss of employment because he was found asleep on the job was not grounds for reduction of his alimony obligation.

In *Lambert v. Lambert*, 9 Neb. App. 661, 617 N.W.2d 645 (2000), the husband was given the option to resign or be fired after failing a drug test, and as a result, he was earning approximately half of his previous salary in his new job. We found, relying on *Pope, supra*, although noting the conduct in *Pope* was of lesser gravity, that the trial court's reduction in the monthly alimony and child support payments was error. In *Grahovac v. Grahovac*, 12 Neb. App. 585, 680 N.W.2d 616 (2004), we found that an ex-husband's resignation or early retirement, which reduced his income, was due to his alcoholism and his refusal to secure effective treatment and that thus, the reduction in the ex-husband's income was not from good cause so as to entitle him to any reduction in his alimony obligation.

[2] Although in a review de novo on the record we reappraise the evidence and reach our own independent conclusion, we also inquire into whether the trial court's decision was an abuse of discretion. See *Pope, supra.* A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.* The district court's decision granting modification in this case is an abuse of discretion, and in reaching our own conclusion on this record, we would deny Matthew's request for a downward modification because of his employment misconduct, which directly caused his earnings to be cut in half. The overwhelming weight of authority in cases of this nature goes against Matthew and does not support the trial court's decision. In the final analysis, placing the blame for Matthew's termination on Christi is factually incorrect and fails to acknowledge that Matthew caused his own termination as a deputy sheriff by his failures while on probationary status. We reverse and vacate the district court's downward modification of Matthew's child support and alimony obligation on the ground of Matthew's reduced earnings.

Effect of Bankruptcy Discharge of Debt Christi Was Ordered to Pay.

In the original decree, Christi was ordered to pay a Citibank credit card debt in the approximate amount of $7,800, but after the divorce, she filed for bankruptcy and listed it as a debt to be discharged—which it was. Citibank then pursued Matthew, and ultimately he negotiated a compromise settlement with Citibank to satisfy the debt for $4,300, which he paid. Therefore, part of the relief Matthew sought by motion was to have Christi reimburse him for that $4,300 by an offset against his child support obligation. The trial court granted Matthew such relief by reducing his alimony obligation to Christi by $100 per month for 43 months. We note that Matthew did not allege any material change in circumstances to justify modification of child support, nor did the trial court make a finding of a material change in circumstances so as to justify this modification of the alimony award. Christi argues that this reduction in her alimony was error because under the U.S. Bankruptcy Code, she is fully relieved of all dischargeable debts, and that such discharge is binding upon Matthew and the district court.

[3] We note that the evidence shows that Matthew was named in Christi's bankruptcy filing as codebtor, yet there is no evidence that he filed an adversary proceeding to contest Christi's discharge from liability for the Citibank debt, which she listed among her unsecured creditors, with the description "Debtor to pay pursuant to Divorce Decree." An adversary proceeding is one where, in bankruptcy court, one party seeks affirmative relief from another. See Fed. R. Bankr. P. 7001. Adversary proceedings include actions to recover money or property, as well as actions objecting to discharge, among others. See *id*. Therefore, Matthew did not take advantage of the opportunity to contest Christi's discharge from the Citibank debt in her bankruptcy case. Neither party provided evidence of how Christi's discharge in bankruptcy affected him or her financially, other than Matthew's testimony that he had to borrow $4,300 from his father to pay the settlement he negotiated with Citibank.

With this background, we now turn to the decision that provides rather comprehensive guidance for us on this issue, *Collett v. Collett*, 270 Neb. 722, 707 N.W.2d 769 (2005). Shan Collett and Kimberly Collett were both veterinarians, and the husband, Shan, borrowed money from a bank to establish a veterinary clinic. The clinic was rather quickly unsuccessful. The wife, Kimberly, had guaranteed the loan. Shan filed a chapter 7 bankruptcy a month before their pending divorce went to trial. The evidence was that both parties expected that the collateral would cover the bank debt—which expectation turned out to be incorrect. The trial court awarded Kimberly $1 a year in alimony in March 2002, but in November 2003, the bank obtained a deficiency judgment against Kimberly for nearly $69,000. That judgment caused Kimberly to seek a modification of her alimony award, alleging a change in circumstances. Kimberly introduced evidence showing that to pay the judgment, she would be required to pay $800 a month for 122 months, that an increase in alimony would increase her tax liability by $161.41 per month, and that her yearly income had decreased from $52,000 to $38,000 since the divorce, whereas Shan's monthly income had increased from $1,400 to $4,000 plus benefits. The district court modified the alimony award from $1 a year to $950 per month for 123 months, and Shan appealed. Shan's main attack on this decision was that it violated the U.S. Bankruptcy Code as well as the Supremacy Clause of the U.S. Constitution. The Nebraska Supreme Court affirmed the trial court's modification of the alimony award.

In *Collett*, as well as in the case before us, the factual pattern is a modification of an alimony obligation to account for a debt, which an obligated party was able to discharge in bankruptcy, with the other party being left with responsibility of the discharged debt. Christi's argument, similar to the husband's argument in *Collett*, is that her discharge prevents the reimposition of this debt on her, in effect, via a reduction in her monthly alimony payment.

[4-6] In our analysis of Christi's argument, we begin by looking at the nature of the obligation that was imposed on Christi via the decree's provision that she pay, and hold Matthew harmless on, the Citibank debt. The court in *Collett,*

supra, held that generally, a bankruptcy discharge does not discharge the debtor from any debt for a domestic support obligation (but a credit card debt is obviously not a domestic support obligation), stating:

> Generally, a bankruptcy discharge does not discharge the debtor from any debt for a domestic support obligation. At the time of Shan's discharge, 11 U.S.C. § 523(a)(5) (2000) provided in relevant part that a discharge under that title did not discharge an individual debtor from any debt to a "former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a separation agreement, divorce decree or other order" of a state court of record. Likewise, other types of debts incurred in the course of a marital dissolution proceeding were not dischargeable in bankruptcy unless: "(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . or (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor." 11 U.S.C. § 523(a)(15). We understand Shan to argue that because Kimberly did not file an adversary proceeding objecting to the dischargeability of Shan's indebtedness to the bank under § 523(a)(15), she cannot now seek a modification of alimony on the basis of the deficiency judgment which is related to the debt.

Collett v. Collett, 270 Neb. 722, 729, 707 N.W.2d 769, 775 (2005). As in *Collett*, Matthew did not contest the discharge of the Citibank debt in an adversary proceeding in Christi's bankruptcy. But, in *Collett*, such fact did not prevent Kimberly from getting the alimony award increased, because, as here, the original divorce decree awarded alimony and because the modification was sought on the basis of a change in circumstances. The court in *Collett* noted the facts that the decree originally included an award of alimony and that the modification was sought on the basis of a change in circumstances, and then said:

> Other courts addressing this scenario have rejected arguments that modification of alimony is merely a "repackaging" of debts discharged in bankruptcy and thus prohibited by federal law, if the party seeking modification is able to demonstrate an actual change in financial circumstances subsequent to the dissolution and bankruptcy of the former spouse. See, *In re Siragusa*, 27 F.3d 406, 407 (9th Cir. 1994); *Smith v. Smith*, 741 So. 2d 420 (Ala. Civ. App. 1999); *In re Marriage of Trickey*, 589 N.W.2d 753 (Iowa App. 1998). The court in *In re Marriage of Trickey* articulated what we believe to be the correct analytical approach: "If the modification is essentially a reinstatement of the property settlement under the guise of alimony, the modification violates section 524 and is not permitted. . . . Mere attempts to 'end run' around a bankruptcy discharge are not allowed. . . . However, if the alimony modification merely takes into account the fact that one spouse would no longer receive the property settlement payments upon which the original support award was premised and the discharge results in changed financial circumstances, then modification will not violate federal bankruptcy law." . . . 589 N.W.2d at 757.

Collett, 270 Neb. at 730-31, 707 N.W.2d at 775-76.

[7,8] A postbankruptcy alimony modification violates the discharge injunction of the Bankruptcy Code when the spouse seeking modification of alimony is merely attempting to reinstate a discharged property settlement obligation, rather than seeking a modification based on changed circumstances. See *In re Siragusa*, 27 F.3d 406 (9th Cir. 1994). Clearly, *Collett* involves uncontemplated and materially changed circumstances, because the parties both anticipated that the collateral would cover the bank debt and that there would be no deficiency, when in fact, there was a substantial shortage after the bank disposed of the collateral. Accordingly, the modification did not violate the discharge injunction of the Bankruptcy Code. In the present case, Matthew did not plead a change of circumstances as the basis for his requested modification, nor did the trial court find such a change in ordering the reduction in alimony, but we need not decide

whether such shortcomings are fatal to the attempted modification, because there was a lack of proof of changed circumstances. The only evidence that remotely resembles any change is that Matthew had to pay $4,300 to Citibank that he did not anticipate paying, but he introduced no evidence of how that impacted his overall financial situation, as was done in *Collett*. Therefore, because of the lack of a material change in circumstances, Matthew's motion concerning the Citibank account is simply an attempt to reinstate the discharged Citibank debt—and he did not avail himself of an adversary proceeding, where he could have contested the discharge of this debt before the bankruptcy court entered its discharge. Nonspousal support obligations or debts incurred in the course of a marital dissolution proceeding are not dischargeable in bankruptcy unless "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor." 11 U.S.C. § 523(a)(15)(B) (2000). This "defense" to discharge can be asserted by a codebtor such as Matthew in an adversary proceeding.

In conclusion, the district court erred in modifying Christi's alimony payments, because Matthew did not prove a material change of circumstances, Matthew did not challenge the discharge of the Citibank debt in an adversary proceeding, and the request for modification is merely an attempt to reinstate a discharged debt and, thus, is an "end run" around the bankruptcy discharge. For these reasons, we vacate the district court's modification of Christi's alimony award.

Reopening of Record.

Christi claims that the trial court should have allowed her to reopen the record so that she could establish that Matthew lied when he testified that he had not withdrawn approximately $33,000 from his Douglas County employees' retirement trust fund. Christi argues that adducing such evidence would have allowed the court to consider such sum as evidence of Matthew's earnings and as a basis for calculating child support—putting his income close to what he earned as a sheriff's deputy and thereby preventing the court from modifying his

child support and alimony downward. However, our decision that the court erred in reducing Matthew's child support and alimony moots this argument. As a result, we need not discuss this assignment of error any further. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

CONCLUSION

Because Matthew's loss of the job upon which his child support was calculated, and his alimony was predicated, was directly caused by his failure to conform to his employer's policies and expectations at a time when he was on probationary status, the blame for the loss of his job cannot be laid at Christi's doorstep. The loss of the job was due to Matthew's employment misconduct, and as a result, he is not entitled to a reduction in his child support or alimony obligations. Thus, we reverse and vacate the trial court's decision granting such modification. Because Matthew failed to overcome the effect of the discharge of the Citibank debt by the U.S. Bankruptcy Court, he was not entitled to a credit of $4,300 by way of a $100 per month reduction in his alimony obligation, and we reverse and vacate the trial court's order extending such credit to him.

REVERSED AND VACATED.

SIEVERS, Judge, participating on briefs.

BILLIE WOLF ET AL., APPELLEES AND CROSS-APPELLANTS, V. GARY GRUBBS ET AL., APPELLANTS AND CROSS-APPELLEES.

759 N.W.2d 499

Filed January 13, 2009. No. A-07-1071.

1. **Actions: Equity: Public Meetings: Appeal and Error.** Actions for relief under the public meetings laws are both tried by the trial court and reviewed by appellate courts as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and

law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.

3. ____: ____. In an equity action, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
4. **Counties.** The powers of the county are exercised by the county board of commissioners as provided by Neb. Rev. Stat. § 23-103 (Reissue 2007).
5. **Counties: Statutes: Taxation: Valuation.** The county board of equalization is given statutory powers, all of which relate to the assessment of value and taxation of property within the county. The county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately.
6. **Counties.** While the county board of commissioners and the county board of equalization have the same membership, they have entirely different functions and duties.
7. ____. The duties and functions of the county board of commissioners and the county board of equalization, rather than their membership, determine whether the boards are the same body or separate and distinct bodies, and because each of the two boards has its own well-defined public duties and functions which do not overlap, they are separate boards.
8. **Public Meetings.** Every meeting of a public body shall be open to the public.
9. **Governmental Subdivisions: Statutes: Words and Phrases.** Included in the definition of a public body are governing bodies of all agencies created by statute, or otherwise pursuant to law, of the executive department of the State of Nebraska, and all independent boards created by statute, or otherwise pursuant to law.
10. **Public Meetings: Notice.** Public bodies are required to give advance publicized notice of their meetings, and the notice requirements are set out in Neb. Rev. Stat. § 84-1411 (Cum. Supp. 2004).
11. ____: ____. Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours.
12. **Public Meetings.** The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public.
13. **Counties: Public Meetings: Notice.** It is not necessary that the county board of commissioners and the county board of equalization post separate meeting notices, when such notice contains only the time and place that the boards meet and directs an interested citizen to where the agendas for each board can be found.
14. ____: ____: ____. A combined agenda for the county board of commissioners and the county board of equalization is permissible under the Open Meetings

Act, provided the agenda makes it clear which items are to be addressed by each board.

15. **Public Meetings.** Neb. Rev. Stat. § 84-1413 (Reissue 1999) provides that each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.
16. **Counties: Public Meetings.** Combined minutes of the county board of commissioners and the county board of equalization are permissible under the Open Meetings Act if it is clear which matters were addressed by each board.
17. **Public Meetings: Actions: Time.** When there has been a violation of the Open Meetings Act, a violation may be void or voidable within 1 year of the violation. If the suit is commenced within 120 days of the meeting at which the violation occurred, the improper action is void; but if the suit is commenced more than 120 days but within 1 year of the meeting at which the violation occurred, the action is voidable, but only if it was a substantial violation of the Open Meetings Act.
18. **Public Meetings.** Voiding an entire meeting is a proper remedy for violations of the Open Meetings Act.
19. ____. Once a meeting has been declared void pursuant to Nebraska's public meetings law, board members are prohibited from considering any information obtained at the illegal meeting.
20. **Public Meetings: Notice.** The purpose of the agenda requirement of the public meetings laws is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters will be considered at the meeting.
21. **Counties: Public Meetings: Presumptions: Proof.** County board meetings are generally presumed to be regular meetings unless the challenging party carries the burden of proving otherwise.
22. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.
23. **Presumptions: Proof.** A presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.
24. **Public Meetings: Notice.** Placing notice of future meetings in minutes of a prior meeting does not comport with the objective of the Open Meetings Act, openness in favor of the public.
25. **Public Meetings: Notice: Statutes.** Where no notice of a particular meeting was ever posted at places previously designated and the only public announcement of the intention of a board to reconvene was a verbal announcement by the chairman of the board to persons present, there was no notice as required by statute, either for a separate meeting or for continuation of the recessed meeting.
26. **Public Meetings: Notice.** Notice of recessed and reconvened meetings must be given in the same fashion as the original meeting.

27. **Counties: Public Meetings: Time: Claims.** Under Neb. Rev. Stat. § 23-122 (Reissue 2007), the county board of all counties having a population of less than 150,000 inhabitants shall cause to be published, within 10 working days after the close of each annual, regular, or special meeting of the board, a brief statement of the proceedings thereof which shall also include the amount of each claim allowed, the purpose of the claim, and the name of the claimant.
28. **Public Meetings: Statutes.** Under Neb. Rev. Stat. § 84-1411(1) (Cum. Supp. 2004), a public body shall have the right to modify the agenda to include items of an emergency nature at public meetings.
29. **Words and Phrases.** An emergency has been defined as any event or occasional combination of circumstances which calls for immediate action or remedy, pressing necessity, exigency, a sudden or unexpected happening, or an unforeseen occurrence or condition.
30. **Rules of the Supreme Court: Pretrial Procedure.** Inasmuch as the Nebraska Rules of Discovery are generally and substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure, Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.
31. **Pretrial Procedure: Parties.** An order for discovery of writings should generally provide that the inspection should be made at the defendant's place of business without removal, and the court will not order writings to be taken from one party and delivered to his adversary.
32. **Pretrial Procedure: Parties: Statutes.** As a general rule, under statutes authorizing discovery, no discovery can be required of documents of public record, because they are equally accessible to all parties.
33. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
34. **Public Meetings: Attorney Fees.** The court may order payment of reasonable attorney fees and court costs to a successful plaintiff in a suit brought under the Open Meetings Act.
35. **Attorney Fees.** The fact that the plaintiffs did not accomplish the full objective of their lawsuit does not prevent them from being successful plaintiffs, but, rather, goes to the extent of an award for attorney fees, because the results obtained are an appropriate consideration on the issue of attorney fees.
36. **Attorney Fees: Appeal and Error.** Discretionary decisions of the trial courts on attorney fees will be upheld on appeal absent a showing of abuse of discretion.
37. **Governmental Subdivisions: Public Meetings.** It is a general principle of law that where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred.
38. **Public Meetings: Notice: Waiver: Time.** Any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person will be held to have waived the right to object on that ground at a later date.

Appeal from the District Court for Banner County: KRISTINE R. CECAVA, Judge. Affirmed in part, reversed in part, and in part vacated and set aside.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellees.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

This lawsuit concerns whether certain meetings of the Banner County Board of Commissioners (BOC) and the Banner County Board of Equalization (BOE) were conducted in violation of Nebraska's Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 1999 & Cum. Supp. 2004). The district court for Banner County, Nebraska, made the following findings: (1) The BOE failed to give adequate notice of any of its meetings from January 6 through August 16, 2005, and all such meetings of the BOE are void; (2) the BOC failed to give adequate notice of its meetings of July 5, 12, and 22, 2005, and such meetings were void; (3) the BOC failed to provide an agenda which gave reasonable notice that changing the posting requirement for meeting notices was an item to be considered at its February 21, 2005, meeting, and because such was a substantial violation, the action taken was void; (4) as a result of a discovery dispute, the defendants were ordered to pay attorney fees for the plaintiffs in the amount of $720 as a sanction; and (5) the plaintiffs were awarded attorney fees and expenses in the amount of $27,457.46.

The defendants are Gary Grubbs, Milo Sandberg, and Robert Gifford, Jr., who are members of both the BOC and the BOE. The BOC and the BOE are also named as defendants. The plaintiffs are seven married couples, four single individuals, and one corporation, all owning land in Banner County, Nebraska. The common thread among the plaintiffs is the taxation of their land. The defendants (hereinafter the appellants) have timely perfected their appeal to this court, and the plaintiffs (hereinafter the appellees) have filed a cross-appeal.

I. FACTUAL BACKGROUND

Although this voluminous record contains considerable testimony, it is largely composed of numerous exhibits. We have determined that the most efficient format for our decision is to include the appropriate narrative concerning the evidence and exhibits in the discussion of each assignment of error.

II. PROCEDURAL BACKGROUND

The appellees filed their lawsuit on August 30, 2005, and then filed an amended complaint on September 7. The date of the filing of the lawsuit (August 30) becomes important later in our analysis under the provisions of the Open Meetings Act. Trial was held on October 20 and 26 and November 8, 2006, and the district court's order was filed on April 5, 2007.

III. ASSIGNMENTS OF ERROR

The appellants allege, reordered, that the district court erred in (1) concluding that the BOC and the BOE are separate public bodies; (2) concluding that the BOE must comply with the Open Meetings Act in a manner separate and distinct from compliance by the BOC; (3) concluding that it had power to void entire meetings, rather than specific actions; (4) finding that the BOE failed to give adequate notice of its meetings of July 5, 12, and 22, 2005; (5) finding that the BOC failed to give adequate notice of its meetings of July 5, 12, and 22, 2005; (6) finding that the BOC failed to provide an agenda which gave reasonable notice of the matters to be considered at its meeting of February 21, 2005; (7) declaring all BOE meetings occurring between January 6 and August 16, 2005, inclusive, to be void; (8) declaring the February 21, March 5, and July 12 and 19, 2005, meetings of the BOC to be void; (9) awarding attorney fees and expenses on the merits of the case; (10) ordering the appellants to deliver public documents to the appellees' attorney; and (11) awarding attorney fees in the amount of $720 as a discovery sanction.

On cross-appeal, the appellees allege that the district court erred by (1) not automatically voiding all actions by the BOC and the BOE that occurred after May 2, 2005, when in violation of the Open Meetings Act; (2) not finding that the BOC

substantially violated the Open Meetings Act by failing to find all "'emergency items'" added between January 6 and August 30, 2005, were not appropriate emergencies; (3) not finding that the BOC substantially violated the Open Meetings Act by failing to post notice of its meetings at the courthouse and the post office between January 6 and August 30, 2005; (4) not finding that the BOC substantially violated the Open Meetings Act by failing to post notice of its meetings at the Banner County School between January 6 and February 15, 2005; (5) not finding that the BOC substantially violated the Open Meetings Act by failing to post notice of its meetings at the Banner County School between February 16 and August 30, 2005; and (6) finding that posting public notice at only two locations for the BOC and the BOE is sufficient reasonable advance public notice, when the law requires posting at three locations for other public body meetings.

IV. STANDARD OF REVIEW

[1] Actions for relief under the public meetings laws are both tried by the trial court and reviewed by appellate courts as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).

[2,3] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Id.* See, also, *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008). But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another. *Id.*

V. ANALYSIS

1. Same Entity or Distinct Entities?

For efficiency's sake, there are several issues of law that we decide initially before moving on to the factual matters. The first of these issues is whether the BOC and the BOE are

the same body or separate and distinct governmental bodies. This is a question of law, and when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *McLeay v. Bergan Mercy Health Sys.*, 271 Neb. 602, 714 N.W.2d 7 (2006).

In 1943, the Nebraska Supreme Court stated that the two boards are "not one and the same entity," noting that the board of equalization was composed of the county board, the county assessor, and the county clerk. *Speer v. Kratzenstein*, 143 Neb. 300, 304, 9 N.W.2d 306, 309 (1943) (*Speer I*). However, the statute defining the membership of the county board of equalization has been modified since *Speer I* was decided. Since 1953, Neb. Rev. Stat. § 77-1501 has stated that the county board constitutes the board of equalization. Thus, if the *Speer I* court meant to make the boards' membership the sole consideration for whether the board of commissioners and the board of equalization are the same body or separate and distinct bodies, the answer would be simple, because under the applicable statute, the members of the board of commissioners are the members of the board of equalization.

However, both *Speer I* and its modifying opinion of *Speer v. Kratzenstein*, 143 Neb. 310, 12 N.W.2d 360 (1943) (*Speer II*), devoted considerable effort to discussing the different duties and functions of the two boards. And the *Speer I* court found that a county board is without authority in the absence of statutory grant to perform the duties which are a part of the official duties of other officials or boards. Thus, it appears that function and duty played a significant part in determining that the two boards were in fact separate entities. Indeed, *Speer II* reasoned as follows:

> A county is one of the public governmental subdivisions of a state, corporate in character . . . , created and organized for public political purposes connected with the administration of state government and specifically charged by law with the superintendence and administration of local affairs within its lawfully defined territorial boundaries. . . . Unless restrained by the Constitution the legislature may exercise control over county agencies and

> require such public duties and functions to be performed by them as fall within the general scope and objects of the county as a body corporate or politic. . . .
>
> *Both the county board and the board of equalization are such county agencies, required by statute and applicable authorities to perform certain well-defined public duties and functions in perfecting the administration of representative local government. They are separate entities, as is every other agency of the county . . . .*

143 Neb. at 313, 12 N.W.2d at 362 (citations omitted) (emphasis supplied). We now examine the current "well-defined public duties and functions" of both county boards.

[4] The powers of the county in this case are exercised by the BOC as provided by Neb. Rev. Stat. § 23-103 (Reissue 2007), which states:

> The powers of the county as a body corporate or politic, shall be exercised by a county board, to wit: . . . in counties not under township organization by the board of county commissioners. In exercising the powers of the county . . . the board of county commissioners . . . may enter into compacts with the respective board or boards of another county or counties to exercise and carry out jointly any power or powers possessed by or conferred by law upon each board separately.

And each county, through its county board, has the power

> (1) To purchase and hold the real and personal estate necessary for the use of the county; (2) to purchase, lease, lease with option to buy, acquire by gift or devise, and hold for the benefit of the county real estate sold by virtue of judicial proceedings in which the county is plaintiff or is interested; (3) to hold all real estate conveyed by general warranty deed to trustees in which the county is the beneficiary, whether the real estate is situated in the county so interested or in some other county or counties of the state; (4) to sell, convey, exchange, or lease any real or personal estate owned by the county in such manner and upon such terms and conditions as may be deemed in the best interest of the county; (5) to enter into compacts with other counties to exercise and carry

> out powers possessed by or conferred by law upon each county separately; and (6) to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers, except that no lease agreement for the rental of equipment shall be entered into if the consideration for all lease agreements for the fiscal year exceeds one-tenth of one percent of the total taxable value of the taxable property of the county.

Neb. Rev. Stat. § 23-104 (Reissue 2007).

The powers and duties of the county board are more specifically set forth in Neb. Rev. Stat. §§ 23-105 through 23-147 (Reissue 1997 & Cum. Supp. 2004). Included in those specific powers are that the county board has the power to take and have the care and custody of all the real and personal property owned by the county (§ 23-105); the county board has the power to manage the county funds and county business except as otherwise specifically provided (§ 23-106); and the county board shall have power as a board, or as individuals, to perform such other duties as may from time to time be imposed by general law (§ 23-113.03). The county board also has the authority to revise, alter, increase, or decrease general county budget documents. Neb. Rev. Stat. § 23-908 (Reissue 2007).

The board of equalization is an administrative agency of the county. *Speer II*. As stated previously, the county board constitutes the board of equalization; thus the two boards have the same membership. Neb. Rev. Stat. § 77-1501 (Reissue 2003). However, "[t]he board of equalization is simply what its name imports, a board for the equalization of values in certain cases. It possesses no powers save those conferred by statute." *Brown v. Douglas County*, 98 Neb. 299, 303, 152 N.W. 545, 546 (1915).

[5] The county board of equalization is given statutory powers, all of which relate to the assessment of value and taxation of property within the county. The county board of equalization shall fairly and impartially equalize the values of all items of real property in the county so that all real property is assessed uniformly and proportionately. § 77-1501. The county board of equalization has the power to consider and correct

the current year's assessment of any real property which has been undervalued or overvalued. Neb. Rev. Stat. § 77-1504 (Reissue 2003). The county board of equalization has the power to assess any omitted real property that was not reported to the county assessor pursuant to Neb. Rev. Stat. § 77-1318.01 (Reissue 2003) and to correct clerical errors as defined in Neb. Rev. Stat. § 77-128 (Reissue 2003) that result in a change of assessed value. Neb. Rev. Stat. § 77-1507 (Reissue 2003). Each year, the county board of equalization has the power to levy the necessary taxes for the current year if within the limit of the law and may also act to correct a clerical error which has resulted in the calculation of an incorrect levy by any entity otherwise authorized to certify a tax request under Neb. Rev. Stat. § 77-1601.02 (Reissue 2003). Neb. Rev. Stat. § 77-1601 (Reissue 2003).

[6,7] Thus, while the county board of commissioners and the county board of equalization have the same membership, they have entirely different functions and duties, and clearly the powers of the board of commissioners are far more expansive, whereas the powers of the board of equalization are rather strictly limited. We hold that the duties and functions of the boards, rather than their membership, determine whether the board of commissioners and the board of equalization are the same body or separate and distinct bodies. We hold that they are the latter, because each of the two boards has its own "well-defined public duties and functions" which do not overlap between the two boards, and thus the BOC and the BOE are separate.

2. Requirements for Notice, Agenda, and Minutes

[8,9] Every meeting of a public body shall be open to the public. § 84-1408. Included in the definition of a public body are governing bodies of all agencies created by statute, or otherwise pursuant to law, of the executive department of the State of Nebraska, and all independent boards created by statute, or otherwise pursuant to law. § 84-1409(1). As stated previously, the county board of equalization is an administrative agency of the county, see, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *Speer II*. As an

administrative agency, a county board of equalization is itself a public body as defined by § 84-1409.

[10,11] Public bodies are required to give advance publicized notice of their meetings. The notice requirements are set out in § 84-1411, which states in part:

> (1) *Each public body shall give reasonable advance publicized notice of the time and place of each meeting* by a method designated by each public body and recorded in its minutes. . . . Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours.

(Emphasis supplied.)

[12,13] The effect of this statute is that when an agenda is not made part of the notice, the citizen must go look at the agenda to determine if there are matters in which he or she is interested to determine if he or she wants to attend the meeting. On the other hand, a citizen who wishes to attend all meetings regardless of the agenda likely does not care what is on the agenda. "The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public." *State ex rel. Newman v. Columbus Township Bd.*, 15 Neb. App. 656, 660, 735 N.W.2d 399, 404 (2007). We find that it is not necessary that the BOC and the BOE post separate meeting notices, in the sense of two pieces of paper, when such notice contains only the time and place that the boards meet and directs an interested citizen to where the agendas for each board can be found. In this instance, if there is no agenda for the BOE, a procedure that is clearly permissible under § 84-1411, then the citizen is informed that nothing will be taken up by the BOE, absent an emergency matter, a topic we address in some detail later. We need not address the situation of a joint notice when specific agenda items are set forth in the notice, because all of the notices in this case direct citizens to the agenda on file, rather than including the agenda in the notice—as said, a perfectly legal situation. Thus, we limit our holding to the notice issue

presented here, and hold that separate notices are not necessary when the notice states only the time and place that the boards meet and directs a citizen to where the agendas for each board can be found.

[14] That said, we turn to the matter of agendas and conclude that a citizen should be able to discern which items are to be discussed and decided by each board. While a separate agenda for each board seems to be the better practice, we conclude that a "combined" agenda for both boards can pass muster under the Open Meetings Act, provided the agenda makes it clear which items are to be addressed by the BOC and which items are to be addressed by the BOE. We believe this holding is consistent with the objective of the Open Meetings Act, openness in favor of the public, see *State ex rel. Newman v. Columbus Township Bd., supra*, because the citizen can ascertain what each board intends to take up at the meeting.

[15] Section 84-1413 provides in part:

> (1) Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.
>
> . . . .
>
> (4) The minutes of all meetings and evidence and documentation received or disclosed in open session shall be public records and open to public inspection during normal business hours.
>
> (5) Minutes shall be written and available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier.

[16] While having separate minutes for each board seems to be the better practice, like "combined" agendas, "combined" minutes can pass muster if it is clear which matters were addressed by the BOC and which matters were addressed by the BOE. Thus, as long as a citizen can readily discern which matters were taken up by each board, and the content requirements for minutes of § 84-1413(1) are met, "combined" minutes, in the sense of one document, are permissible under the Open Meetings Act. If the foregoing requirements are satisfied, the objective of the Open Meetings Act—openness in favor

of the public—is met. See *State ex rel. Newman v. Columbus Township Bd., supra*.

3. Unlawful Actions Void or Voidable

[17,18] When there has been a violation of the Open Meetings Act, a violation may be void or voidable within 1 year of the violation. § 84-1414. If the suit is commenced within 120 days of the meeting at which the violation occurred, the improper action is void. *Id*. If the suit is commenced more than 120 days but within 1 year of the meeting at which the violation occurred, the action is voidable, but only if it was a substantial violation of the Open Meetings Act. *Id*. In this case, the suit was filed August 30, 2005. Section 84-1414 provides in part:

> (1) Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of the Open Meetings Act shall be declared void by the district court if the suit is commenced within one hundred twenty days of the meeting of the public body at which the alleged violation occurred. Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in substantial violation of the Open Meetings Act shall be voidable by the district court if the suit is commenced more than one hundred twenty days after but within one year of the meeting of the public body in which the alleged violation occurred. A suit to void any final action shall be commenced within one year of the action.

Nebraska case law shows that voiding an entire meeting is a proper remedy for violations of the Open Meetings Act. See, *Steenblock v. Elkhorn Township Bd.*, 245 Neb. 722, 515 N.W.2d 128 (1994) (finding that meeting was void and unlawful and failed to comply with requirements of public meetings law, because meeting was held in closed session, no member of public was allowed to attend, and meeting was held without reasonable advance notice for action which did not constitute emergency); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979) (effect of invalidity of meetings is same as if meetings had never occurred; no action authorized at those

meetings could be sustained by reliance upon proceedings of council at those meetings).

[19] More recently, this court has held that "once a meeting has been declared void pursuant to Nebraska's public meetings law, board members are prohibited from considering any information obtained at the illegal meeting." *Alderman v. County of Antelope*, 11 Neb. App. 412, 422-23, 653 N.W.2d 1, 9-10 (2002). The procedural and factual history of *Alderman* is not crucial to understanding our reasoning and holding, and thus in the interest of trying to author a manageable opinion, we dispense with such. Therefore, we quote the rationale and core holding of *Alderman*:

> It is unthinkable that after a court has voided a board's action after determining that a meeting was held in violation of the public meetings law, the law would still allow members of that board to consider information obtained at that illegal meeting. To do so would completely contradict the stated intent of the public meetings law, which is to ensure that the formation of public policy is public business, not conducted in secret, and to allow citizens to exercise their democratic privilege of attending and speaking at meetings of public bodies. We simply do not know the content and extent of the information that was presented at the illegal meeting. Furthermore, official reports of closed meetings, "'even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action. . . .'" *Grein v. Board of Education*, 216 Neb. 158, 164, 343 N.W.2d 718, 722 (1984).
>
> To allow board members to consider information obtained at a meeting that has been judicially determined to be in violation of the public meetings law would allow those board members to consider information that has not been brought before the public and thus would deprive citizens of both hearing said information and speaking either for or against it. Thus, we hold that once a meeting has been declared void pursuant to Nebraska's public meetings law, board members are

> prohibited from considering any information obtained at the illegal meeting.

11 Neb. App. at 422-23, 653 N.W.2d at 9. Accordingly, we hold that voiding an entire meeting is a proper remedy for violations of the Open Meetings Act, and we reject the appellants' contention to the contrary. With the foregoing holdings on core issues of law in place, we now turn to the specifics of this case.

4. Meeting Agenda for February 15, 2005

The appellants argue that the district court erred in finding that the BOC failed to provide an agenda which gave reasonable notice of the matters to be considered at its meeting of February 21, 2005. After reviewing the appellants' argument in their brief, it is clear that they, and the district court, are actually referring to the meeting of February 15, 2005, and our analysis will relate to the February 15 meeting. Specifically, the appellants argue that the agenda for the February 15 meeting gave sufficient notice to the public that the board wanted to change the method of publicizing meetings.

On September 18, 2001, the BOC, in accordance with § 84-1411, designated its method of public notice as follows: "that the notices of meetings be published in the official newspaper and posted at the Harrisburg Post Office, the Banner County Courthouse, and the Banner County School." On the agenda for the February 15, 2005, meeting, new business item No. 5 stated, "Meeting notice." At the February 15 meeting, the BOC voted to stop posting notices at the school. Such action was recorded in the BOC's minutes, pursuant to § 84-1411. Following the February 15 meeting, notice of BOC and BOE meetings were no longer posted at the school. Thus, the question for us is whether an agenda item stating "Meeting notice" was sufficient to alert a citizen that the BOC would take up the method of providing notice of upcoming meetings and that a different sort of meeting notice could result.

In its current form, Neb. Rev. Stat. § 84-1411 (Reissue 2008) states in part that "[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." However, that sentence was

added to the statute effective July 14, 2006, and does not apply to the present case. Therefore, we look to what the law was in 2005, when the agenda for the February 15, 2005, meeting was made available.

[20] In 2005, the law required that agendas give "some notice" of matters to be considered at the meeting. See *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 578 N.W.2d 476 (1998). In *Hansmeyer*, this court stated:

> The purpose of the agenda requirement of the public meetings laws is to give "some notice of the matter to be considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting." *Pokorny v. City of Schuyler*, 202 Neb. 334, 339-40, 275 N.W.2d 281, 285 (1979). We have little hesitancy in concluding that an agenda item stating only "work order reports," which results in a public body's approving a $47 million, 3-year construction project traversing private land for nearly 100 miles with a major power transmission line, violated the notice requirements for an agenda under the public meetings laws. Whether intentional or not, the seemingly innocuous agenda item, "Work Order Reports," camouflaged the true nature of what would be discussed and voted upon and did not give the public meaningful notice so as to enable the public to observe and participate in the decisionmaking process. It does not even hint of the magnitude or nature of the matter to be taken up.

6 Neb. App. at 895-96, 578 N.W.2d at 481. On further hearing, the Nebraska Supreme Court affirmed "on the published opinion of the Nebraska Court of Appeals." *Hansmeyer v. Nebraska Pub. Power Dist.*, 256 Neb. 1, 588 N.W.2d 589 (1999).

And while the BOC agenda item of "Meeting notice" is not ideal, it does provide "some notice" that the BOC would consider the subject of notice for meetings. In *Hansmeyer*, a matter of major import in terms of cost as well as impact on citizens and landowners was hidden by the nebulous and innocuous term "work order reports." Here, an interested citizen would have some notice of the topic involved, although in hindsight, a more informative description could have easily been written.

But the standard is not "perfect notice," and in any event, the February 15, 2005, meeting occurred more than 120 days before suit was filed. Thus, to void the change in the method of notice, we would have to find the violation "substantial." We find that the agenda item stating "Meeting notice" was marginally sufficient under the Open Meetings Act to describe the action considered and taken—i.e., that notice would no longer be posted at the school—but that if considered a violation, the violation was not substantial. As a result, because the minutes of the February 15 meeting were also proper, the BOC was/is no longer required to publish/post notice of meetings at the school.

5. Posting of Notices

(a) Posting Notice at Two Locations Instead of Three

[21] In their cross-appeal, the appellees argue that Neb. Rev. Stat. § 23-154 (Reissue 2007) sets out the requirements for notice of special sessions, which include "posting up notices in three public places in the county." The appellees then query, "If the board must post at three locations for a special session, why could the board post at only two locations for other regular sessions?" Brief for appellees on cross-appeal at 50. The answer is simply that the Legislature has not required posting at three locations for regular sessions of county boards, but has so required for special meetings. County board meetings are generally presumed to be regular meetings unless the challenging party carries the burden of proving otherwise. See *Green v. Lancaster County*, 61 Neb. 473, 85 N.W. 439 (1901). Clearly, as evidenced by the language of § 23-154, the Legislature knew how to draft a three-location posting requirement, but chose not to impose such a requirement for regular meetings. Therefore, the notice requirement for regular meetings is "by a method designated by each public body and recorded in its minutes." Neb. Rev. Stat. § 84-1411(1) (Cum. Supp. 2004). And following the February 15, 2005, meeting, that method included publishing in the official newspaper and posting at the Harrisburg post office and the Banner County courthouse. The appellees argue that posting at the school

is the best posting because that is where residents of Banner County are most likely to go and see a notice. But the location of a posting is a policy decision for the BOC which we do not second-guess. This assignment of the appellees in their cross-appeal is without merit.

(b) Notice Actually Posted?

[22] In their cross-appeal, the appellees also argue that the district court erred in not finding that the BOC substantially violated the Open Meetings Act by failing to post notice of its meetings at (1) the courthouse and the post office between January 6 and August 30, 2005, and (2) the Banner County School between January 6 and February 15, 2005. The appellees argue that there was no evidence the BOC posted notice of its meetings anywhere. However, "[i]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed." *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 764, 642 N.W.2d 801, 805 (2002).

The appellees argue that there is a general rule that "'what ought to be of record must be proved by the record,'" *Barrett v. Hand*, 158 Neb. 273, 282, 63 N.W.2d 185, 191 (1954), and that "[t]he omission of essential facts may not be supplied by presumptions," brief for appellees on cross-appeal at 49 (citing *Smith v. City of Omaha*, 49 Neb. 883, 69 N.W. 402 (1896), and *City of Scottsbluff v. Kennedy*, 141 Neb. 728, 4 N.W.2d 878 (1942)). The problem with the appellees' argument is that there is no requirement that the location of posted notices for each meeting be made of record by inclusion in the minutes. Section 84-1413 states that the minutes of all meetings must show the time, place, members present and absent, and the substance of all matters discussed—there is no requirement that a public body make a record of where notice was published or posted. Therefore, we can presume that the county clerk properly posted notice in accordance with the method adopted by the BOC—at the courthouse and the post office between January 6 and August 30, 2005, as well as at the

Banner County School prior to the change made on February 15, 2005.

[23] The appellees then argue that "[o]nce [they] presented this testimony and raised the issue that the notices were not posted, the burden shifted to the BOC and BOE to show that notices were, in fact, posted in accordance with the September 2001 [and amended February 2005] adopted method and policy." Brief for appellees on cross-appeal at 48. This is not the law. Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 1995), states in relevant part that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Thus, the burden never shifts and was at all times on the appellees to show that it is more probable that the notices were not posted than probable that they were posted. The district court found that the appellees "did not meet [their] burden of proof concerning the adequacy of posting after February [15], 2005." And even though this is an equity case in which we review factual questions de novo, see *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002), we still give weight to the fact that the trier of fact heard and observed the witnesses and accepted one version of the facts rather than another, see *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

We accept the district court's factual finding regarding the adequacy of the postings of meeting notice after February 15, 2005, and we extend such finding to include the postings beginning January 6, 2005. The testimony from several witnesses that they did not happen to see the posted notices does not overcome the presumption that the county clerk posted the notices as required**.** These assignments of error in the appellees' cross-appeal are without merit.

6. Meetings of July 5, 12, and 22, 2005

The appellants argue that the district court erred in finding that the BOC and the BOE failed to give adequate notice of their meetings of July 5, 12, and 22, 2005. We find that there was not advance publicized notice of the July 12 and 22

meetings as required by § 84-1411, but that there was proper notice for the July 5 meeting.

[24] We first address the July 12, 2005, meeting. The BOC and the BOE claim that the published minutes from the July 5 meeting which state that the next meeting of the BOE will be held on July 12 satisfy the notice requirement. We disagree. First, the minutes of the prior meeting do not meet the technical requirements of § 84-1411 for meeting notice, because they do not give the place and time of the future meeting, nor is there any mention of the agenda for the future meeting. Second, true notice of a meeting is not given by burying such in the minutes of a prior board proceeding, remembering that minutes and notice serve different purposes—the former to memorialize for the citizenry what has happened and the latter to tell them what is going to happen, as well as when and where. Citizens should not be made to sift through every past meeting's minutes relating to the BOC or the BOE to see whether a future meeting is mentioned. Placing notice of future meetings in minutes of a prior meeting does not comport with the objective of the Open Meetings Act, openness in favor of the public. See *State ex rel. Newman v. Columbus Township Bd.*, 15 Neb. App. 656, 735 N.W.2d 399 (2007). Because the meeting occurred within the 120 days prior to the suit's being filed, the entire meeting of July 12 is void and board members are prohibited from considering any information obtained at the illegal meeting of July 12. See, § 84-1414; *Alderman v. County of Antelope, supra*.

[25,26] As for the July 22, 2005, BOE meeting, it was a reconvening or continuation of the BOE meeting of July 19, but it nonetheless was a "meeting." No separate notice for the July 22 meeting was published. And,

> [w]here no notice of particular meeting was ever posted at place designated and only public announcement of intention of board to reconvene was verbal announcement by chairman of board to persons present, there was not giving of notice as required by statute, either for separate meeting or for continuation of recessed meeting.

73 C.J.S. *Public Administrative Law and Procedure* § 34, oral announcement at 214 (2004) (citing *Cooper v. Arizona Western*

College, Etc., 125 Ariz. 463, 610 P.2d 465 (1980)). We note that Arizona has a specific statute dealing with the recessing and resumption of a public meeting within 24 hours, which is permissible, if the notice for the original meeting includes the information about the when and where of a reconvened meeting "and if, prior to recessing, notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given." See Ariz. Rev. Stat. Ann. § 38-431.02(E) (2001). Under this statute, the Arizona Court of Appeals in *Cooper, supra*, held that the mere verbal announcement by the chairman of the board of the time and place that the recessed meeting would reconvene was not sufficient notice, thereby voiding the action taken at the reconvened session. While Nebraska does not have such a statute, § 84-1411 requires notice of "each" meeting, and construing that statute to accomplish openness in public meetings, we are compelled to hold that notice of recessed and reconvened meetings must be given in the same fashion as the original meeting, absent action by the Legislature permitting lesser notice. Thus, the July 22 meeting fails with respect to the notice and agenda requirements of § 84-1411. Because the meeting occurred within the 120 days prior to the suit's being filed, the entire meeting of July 22 is void and board members are prohibited from considering any information obtained at the illegal meeting of July 22. See, § 84-1414; *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).

Finally, we address the July 5, 2005, meeting. The publicized notice of the July 5 meeting was proper. The notice complied with the requirements of § 84-1411, giving the place and time of the meeting, as well as a statement that the agenda is kept current and can be found at the county clerk's office during normal business hours. Nothing more was required.

7. Meetings of June 7, 21, and 29, 2005

[27] In their cross-appeal, the appellees argue that the minutes of June 7, 21, and 29, 2005, were not timely published and that all actions at those meetings should automatically be

voided because they occurred within the 120 days prior to the suit's being filed. The appellees cite § 23-122 in support of their argument. Section 23-122, which is applicable to Banner County, states:

> The county board of all counties having a population of less than one hundred fifty thousand inhabitants shall cause to be published, within ten working days after the close of each annual, regular, or special meeting of the board, a brief statement of the proceedings thereof which shall also include the amount of each claim allowed, the purpose of the claim, and the name of the claimant . . . .

The BOC was required to "publish" minutes within 10 working days, which it did not—minutes for the June 7 meeting were published on June 23, and minutes for the June 21 and 29 meetings were published on July 21. However, § 84-1414 only makes violations of the Open Meetings Act void or voidable. And § 84-1407 states that the Open Meetings Act includes §§ 84-1407 to 84-1414. Thus, a violation of § 23-122 is not a violation of the Open Meetings Act, and is thus not void or voidable under § 84-1414.

The Open Meetings Act does require that minutes be written and available for inspection within 10 working days or prior to the next convened meeting, whichever occurs earlier. § 84-1413(5). Even though it is clear that the minutes to the June 7, 21, and 29, 2005, meetings were not "published" within 10 days as required by § 23-122, we have found no evidence, nor have the appellees cited us to such in the record, that the minutes were not "written and available" within 10 days or prior to the next convened meeting, which is all that the Open Meetings Act requires under § 84-1413(5). And "[i]n the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed." *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 764, 642 N.W.2d 801, 805 (2002). This assignment is without merit.

8. Remainder of Meetings From January 6 to August 16, 2005

Other than the July 12 and 22, 2005, BOC and BOE meetings that we have specifically found void in this opinion, the remainder of BOC and BOE meetings from January 6 to August 16, 2005, were generally conducted in compliance with the Open Meetings Act. We have reviewed the record and determined that such meetings met the notice requirements of § 84-1411 and that there were proper agendas and minutes. Therefore, to the extent that the district court determined that BOC and BOE meetings other than those of July 12 and 22 were void—and we note that the district court specified meetings through August 16, while the cross-appeal uses the date of August 30—we reverse the district court's order voiding BOC and BOE meetings other than those of July 12 and 22.

9. Emergency Items

In their cross-appeal, the appellees argue that the "emergency items" added to meetings without being listed on the agenda between January 6 and August 30, 2005, were not appropriate emergencies and that thus the district court erred in not finding that the BOC substantially violated the Open Meetings Act in this regard by taking up and acting upon nonagenda items under the guise of emergencies.

[28,29] The public body shall have the right to modify the agenda to include items of an "emergency nature" at public meetings. See § 84-1411(1). An emergency has been defined as "'"[a]ny event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition."'" *Steenblock v. Elkhorn Township Bd.*, 245 Neb. 722, 726, 515 N.W.2d 128, 130 (1994). Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed. § 84-1413(1). We now look at each of the eight emergency items challenged by the appellees in their brief on cross-appeal to determine whether such items violated the Open Meetings Act, and if so, whether the violation was

substantial, when the matter was dealt with more than 120 days before the filing of the lawsuit on August 30, 2005.

(a) Personnel Letter

On March 1, 2005, the BOC authorized the county attorney to prepare a letter to employees explaining the complaint system. This item did not appear on the agenda prior to the March 1 meeting. However, in that meeting's minutes, the following entry appears:

> **NB #2 - Personnel** - The admonishments and reprimands placed in personnel files in previous years were discussed. Grubbs made a motion that employees be allowed to review their files with the county attorney and Chairman Sandberg with the right to purge complaints. Grubbs withdrew the motion. The county attorney is to prepare a letter to the employees explaining the complaint system and any possible recourse available to employees.

Reading this entry, the minutes do not contain any explanation as to why this topic was an emergency, nor can we infer why it was an emergency from the minute entry. There is no explanation as to why this action could not wait until the next BOC meeting on March 15, 2005, at which time it could be properly placed on the agenda in advance of the meeting. Because there was no indication, either explicitly or implicitly, as to why this item required immediate action or was of pressing necessity, it was not an "emergency" that could be taken up without first appearing on the agenda. That said, the matter discussed and the action was inconsequential insofar as we can tell. Because the action occurred more than 120 days but within 1 year of this suit's being filed, the action is voidable, but only if it was a substantial violation of the Open Meetings Act. See § 84-1414. We have no hesitancy in concluding that the matter was insubstantial, and thus not voidable.

(b) Homeland Security Resolution

On March 1, 2005, the BOC approved a homeland security resolution. This item did not appear on the agenda prior to the March 1 meeting. However, in that meeting's minutes, the following entry appears:

> **NB #3 - Resolution of Support for Homeland Security Grants** - Sherry Blaha, Emergency Manager, sent a letter describing the grants for Banner County that had been submitted and ask[ed] that the board review the grants and sign a resolution of support. Gifford made a motion that the resolution be approved. Second by Grubbs. Roll call vote: Grubbs, yes; Gifford, yes; M Sandberg, yes. Grubbs made a motion to authorize the chairman to sign. Second by Gifford. Roll call vote: Grubbs, yes; Gifford, yes; M Sandberg, yes.

The minutes do not explicitly state why this item was an emergency, nor can we infer why it was an emergency. Noting that the grants had already been submitted, there is no explanation as to why this action, simply requesting a resolution of support, could not wait until the next BOC meeting on March 15, at which time it could be properly placed on the agenda in advance of the meeting. That said, on the record before us, the matter discussed and the action taken without proper notice on an agenda can hardly be classified as a substantial violation of the Open Meetings Act. This assignment of error from the cross-appeal is without merit.

(c) Transfer of Funds

On March 15, 2005, the BOC approved a resolution transferring $25,000 from the inheritance tax fund to the general fund. This item did not appear on the agenda prior to the March 15 meeting. However, in that meeting's minutes, the following entry appears: "**NB #7 - Transfer of Funds** - Grubbs made a motion to approve the resolution transferring $25,000 from the inheritance tax fund to the general fund. Second by Gifford. Roll call vote: Grubbs, yes; Gifford, yes; M Sandberg, yes."

Reading this entry, the minutes do not explicitly state why this item was an emergency, nor can we infer why it was an emergency. There is no explanation as to why the funds needed to be transferred, nor is there an explanation as to why they needed to be transferred at that time. We cannot discern from this entry as to why the transfer of funds could not wait until the next BOC meeting on April 5, 2005, at which time it could

be properly placed on the agenda in advance of the meeting. Because there was no indication, either explicitly or implicitly, as to why this item required immediate action, it was not an appropriate emergency. Because the action occurred more than 120 days but within 1 year of the suit's being filed, the action is voidable, but only if it was a substantial violation of the Open Meetings Act. See § 84-1414. Because this item involved the handling of public money, a key portion of the BOC duties, we conclude that doing so without prior notice via an agenda is a substantial violation of the Open Meetings Act, and thus the action taken is void. When reaching this conclusion, we cannot help noting the ease of compliance, given that under § 84-1411, the BOC agenda can be amended as late as 24 hours prior to the meeting.

(d) Letter Concerning Wind Energy

On April 5, 2005, the BOC authorized the chairman to sign and send a letter to local energy companies concerning wind energy. This item did not appear on the agenda prior to the April 5 meeting. However, in that meeting's minutes, the following entry appears:

> **NB #6 - Letter concerning wind energy** - Ron Moore has drafted a letter concerning the proposed wind energy project. Grubbs made a motion to authorize the chairman to sign this letter and send it to all local energy companies. Second by Gifford. Roll call vote: Grubbs, yes; Gifford, yes; M Sandberg, yes.

Reading this entry, the minutes do not explicitly state why this item was an emergency, nor can we infer why it was an emergency—and moreover, a reader of the minutes would have no idea what the "wind energy project" is, nor what the chairman's letter would say, and importantly, whether public funds are involved. There is no explanation as to why this action could not wait until the next BOC meeting on April 19, 2005, at which time it could be properly placed on the agenda in advance of the meeting. Thus, this item and action taken was not an appropriate emergency, and such is voidable if it was a substantial violation of the Open Meetings Act. See § 84-1414. We find that such action was a substantial violation

and, thus, void the action, noting that the letter has undoubtedly been sent and that the BOC can hardly "unsend" the letter. Thus, while the assignment of error is well taken, it ultimately serves only to remind the BOC of the requirements of the Open Meetings Act.

(e) Grant for Pagers

On May 3, 2005, the BOC voted to accept a $24,184 grant to purchase pagers for the fire department. This item did not appear on the agenda prior to the May 3 meeting. However, in that meeting's minutes, the following entry appears:

> **NB # 5 - Grant** - Sherry Blaha met with the board to discuss the grant of $ 24,184.00 recently awarded for the purchase of 25 pagers for the fire department. Gifford made a motion to accept this grant and to authorize the chairman to sign the agreement. Second by Grubbs. Roll call vote: Grubbs, yes; Gifford, yes; M Sandberg, yes.

This entry on its face shows the substance of the matter discussed. It is not a stretch to infer that the pagers would be a "pressing necessity," because it would enable the firefighters of Banner County to perform their very important duties more efficiently. This was an appropriate emergency, and it did not involve the expenditure of the Banner County taxpayers' funds.

(f) Waiver of Notification

On May 17, 2005, the BOC voted to grant a waiver of notification of subdivisions where the tax refund was less than $200. This item did not appear on the agenda prior to the May 17 meeting. However, in that meeting's minutes, the following entry appears: "**NB #8 - Waiver of notification of subdivisions of refund less than $200.00** - Gifford made a motion to grant a waiver of notification of subdivisions where the tax refund was less than $200.00. Second by Grubbs. Roll call vote: Grubbs, yes; Gifford, yes, M Sandberg, yes."

Reading this entry, we are not sure what this matter was really about—What notification was being waived? Who was getting the refunds, and how extensive were the refunds? Why is it an emergency? The minutes do not explicitly state why

this item was an emergency, nor can we infer why it was an emergency, as we could with the pagers above. Because there was no indication, either explicitly or implicitly, as to why this item required immediate action, it was not an appropriate emergency. Because the action occurred within the 120 days prior to the suit's being filed, the action is void. See § 84-1414.

(g) Constitution With Cooperative Extension Service

On June 29, 2005, the BOC adopted a constitution with "University of Nebraska Cooperative Extension Service." This item did not appear on the agenda prior to the June 29 meeting. However, in that meeting's minutes, the following entry appears:

> **NB #3 - Approval of change to constitution with University of Nebraska Cooperative Extension Service** - Aaron Berger, Extension Educator, met with the board to explain the proposed changes in combining Cheyenne, Kimball and Banner County extension boards. Gifford made a motion to adopt the constitution with University of Nebraska Cooperative Extension Service. Second by Grubbs. Roll call vote: Grubbs, yes; Gifford, yes; M Sandberg, yes.

Reading this entry, the minutes do not explicitly state why this item was an emergency, nor can we infer why it was an emergency. Because there was no indication, either explicitly or implicitly, as to why this item required immediate action, it was not an appropriate emergency. Because the action occurred within the 120 days prior to the suit's being filed, the action is void. See § 84-1414.

(h) Road Resolution

On June 29, 2005, the BOC signed a road closing that was approved at a prior meeting. This item did not appear on the agenda prior to the June 29 meeting. However, in that meeting's minutes, the following entry appears: "**NB #4 - Signing of road resolution** - The road closing approved at a prior meeting was signed."

Clearly, the information in this entry is short on detail, such as which road, which prior meeting, and how the road would

be closed. But, we do note that at the immediately preceding meeting on June 21, 2005, a road closing was requested by an adjacent landowner because of "vandalism at the old home site." Here, all the board did was agree to administratively effectuate a prior decision, and in that context, we agree the action taken was of pressing necessity. This assignment of error is without merit.

10. Discovery Order and Discovery Sanction

The appellants argue that the district court erred in ordering them to deliver public documents to the appellees' attorney. In its order, the district court said: "The Defendants are in control and responsible for the accuracy and availability of the requested items. As the Defendants are parties to this action it is their responsibility to have the items available to the Plaintiffs at the Plaintiffs' attorneys [sic] office for inspection and reproduction." The question for us is whether this was a proper order.

[30,31] It does not appear that the Nebraska Supreme Court has ruled on the question of the place of inspection of documents. However, "[i]nasmuch as the Nebraska Rules of Discovery are generally and substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure, Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules." *Gernstein v. Lake*, 259 Neb. 479, 480, 610 N.W.2d 714, 716 (2000). And "under [Fed. R. Civ. P.] 34, a responding party need only make requested documents *available* for inspection and copying; it need not pay the copying costs." *Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611, 619-20 (D. Kan. 2005) (emphasis in original). Additionally, an order for discovery of writings "should generally provide that the inspection should be made at defendant's place of business without removal," and "[t]he court will not order writings to be taken from one party and delivered to his adversary." 27 C.J.S. *Discovery* § 108 at 197 (1999).

[32] Applying these concepts, we conclude that the district court's order requiring the appellants to make the requested items available to the appellees at the office of their attorney

for inspection and copying was inconsistent with the operative discovery rules, and therefore an abuse of discretion. Moreover, to the extent that any of the requested documents were public records, "[a]s a general rule, under statutes authorizing discovery no discovery can be required of documents of public record, as they are equally accessible to all parties . . . ." 27 C.J.S., *supra*, § 91 at 177. See, also, *Securities and Exchange Com'n v. Samuel H. Sloan & Co.*, 369 F. Supp. 994 (S.D.N.Y. 1973).

11. Summary of Our Findings

Before we address the issue of attorney fees, we think it appropriate to summarize our conclusions and holdings made in this opinion.

The BOC and the BOE are separate and distinct bodies, and each is required to comply with the Open Meetings Act—although this does not mean separate pieces of paper are required. The BOC and the BOE did not have to post separate notices under the circumstances of this case, because such notices contained only the time and place that the boards met and directed interested citizens to where the agendas for each board could be found. The combined agendas and minutes of the BOC and the BOE were valid because they clearly stated which items and issues each board would or did address.

We find that the agenda for the February 15, 2005, meeting, which removed the requirement that meeting notices be posted at the school, was marginally adequate, but even if considered a violation, the violation was not substantial. Therefore, we reverse the decision of the district court on this issue.

We find that there was not adequate notice of the July 12 and 22, 2005, meetings of the BOC and the BOE. Because the meetings occurred within the 120 days prior to the lawsuit's being filed, the meetings are void in their entirety. Thus, we affirm the district court's findings in this regard.

We find that there was adequate notice of the July 5, 2005, meeting of the BOC and the BOE. Thus, we reverse the district court's findings that the notice was inadequate and that the meeting was void.

We affirm the district court's findings that the appellees did not meet their burden of proving that notices were not posted as required for all BOC and BOE meetings from January through August 2005. We also find that the appellees did not meet their burden in proving that minutes from the BOC and BOE meetings of June 7, 21, and 29, 2005, were not "written and available" within the required time, distinguishing that term from "publishing" the minutes.

We find that other than the July 12 and 22, 2005, meetings that we have specifically found void in this opinion, the remainder of the BOC and BOE meetings from January 6 to August 16, 2005, were generally valid and did not involve voidable actions. We reverse the order of the district court to the extent that it found otherwise.

We find that the following items addressed by the BOC were appropriate emergency items or not substantial violations of the Open Meetings Act: (1) personnel letter of March 1, 2005; (2) homeland security resolution of March 1, 2005; (3) grant for pagers of May 3, 2005; and (4) road resolution of June 29, 2005. Thus, we affirm the district court's findings with regard to these items.

We find that the following were not appropriate emergency items addressed by the BOC: (1) transfer of funds of March 15, 2005; (2) letter concerning wind energy of April 5, 2005; (3) waiver of notification of May 17, 2005; and (4) constitution with cooperative extension service of June 29, 2005. We find that actions taken on these matters are void, and thus we reverse the district court's findings with regard to these items.

We find that the district court's order regarding the production of documents was incorrect and an abuse of discretion. We also find that the district court's award of attorney fees in the amount of $720 as a discovery sanction was unwarranted and improper, and we vacate and set aside such award.

12. Attorney Fees

[33-35] The appellants argue that the district court erred in awarding the appellees attorney fees and expenses in the amount of $27,457.46. "As a general rule, attorney fees and

expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees." *Alderman v. County of Antelope*, 11 Neb. App. 412, 424, 653 N.W.2d 1, 10 (2002). In the instant case, the relevant statutory provision is § 84-1414(3), which declares that citizens of this state may commence actions in district court for the purpose of requiring compliance with or preventing violations of the public meetings laws or for the purpose of declaring an action of a public body void. Section 84-1414(3) also provides that "[t]he court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under this section." "The fact that the [plaintiffs] did not accomplish the full objective of their lawsuit does not prevent them from being 'successful plaintiffs,' but, rather, goes to the extent of an award for attorney fees, as the results obtained are an appropriate consideration on that issue." *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 903, 578 N.W.2d 476, 485 (1998).

[36] Discretionary decisions of the trial courts on attorney fees will be upheld on appeal absent a showing of abuse of discretion. *Alderman v. County of Antelope, supra*. However, in this case, given the substantial change in the district court's decision we have made, the district court's award of fees and costs must be carefully scrutinized. That said, it is worthy of note that the court in *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 863, 353 N.W.2d 727, 734 (1984), in the portion of its opinion dealing with whether attorney fees should be awarded, acknowledged that "success can sometimes be measured in small ways."

[37] As stated above, we found that only the July 12 and 22, 2005, meetings of the Banner County BOC and BOE were void. Insofar as we can discern, the various appellees were personally interested only in the subject of assessments of value of their properties. The following appellees did not have their property assessments addressed at the July 12 and/or 22, 2005, meetings of the BOE: Nile and Roma Gene Greathouse, Robert and Betty Newell, Scott and Lita Delcamp, Don L. Lease II, Joe Singleton, Charles Singleton, and James

C. McGowan. Thus, these appellees were unaffected by the voiding of those meetings, and the outcome of this litigation only tangentially affects them, remembering that "[t]he purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable." *Pokorny v. City of Schuyler*, 202 Neb. 334, 339, 275 N.W.2d 281, 284 (1979). We include this quote from *Pokorny* because the matter of these taxpayers' property valuations is not really public policy, because the Legislature has already determined that their real estate will be taxed based on valuation—that is, the public policy of the State and these meetings did not affect the formulation of that policy. Rather, the meetings at issue dealt with the administration and application of that public policy to individual landowners. And those landowners, despite some imperfections in the way the county government of this sparsely populated rural county operated with respect to notice and agendas of its meetings, were able to participate and be heard on the matters which concerned them. This observation impacts the award of costs and fees, because in our view, it goes to the issue of "results obtained." It is apparent from our summary of what we have affirmed and what we have reversed from the district court's decision that we have substantially altered, and materially lessened, the positive "results obtained." Additionally, it is not insignificant to the question of the award of fees and costs that the governmental body can "repair" action taken at defective meetings. In *Pokorny*, the court said:

> It is a general principle of law that where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred. See 5 McQuillin, Municipal Corporations, § 16.93, p. 299; 56 Am. Jur. 2d, Municipal Corporations, § 508, p. 559, § 510, p. 560; 63 C. J. S., Municipal Corporations, § 1009, p. 597. We think this principle is applicable here.
>
> The effect of the invalidity of the meetings of March 16 and March 25 is the same as if the meetings had never occurred. No action authorized at those meetings could be sustained by reliance upon the proceedings of

> the council at those meetings. This does not mean the council could not authorize the purchase of the land at a subsequent meeting which complied with all statutory requirements.

202 Neb. at 341, 275 N.W.2d at 285. Thus, the result obtained here is not that the appellees whose property assessments were voided escape taxation of their property, assuming the BOE takes up these matters anew with proper notice and agendas. That said, the results obtained affect all Banner County citizens by giving real meaning to the requirement for open and transparent government, which is the overall purpose of the Open Meetings Act, and in that sense, the "results obtained" have a larger benefit than their impact on the various appellees, and thus an award of costs and fees to some extent is appropriate.

The following appellees had their property assessments addressed at the voided meetings: Billie and David Wolf, Lane and Robin Darnall, Gary and Emilie Darnall, Robert and Lisa Brenner, and Darnall Ranch, Inc. Thus, these appellees were affected by the voiding of those meetings and can be considered "successful litigants." We turn to how these appellees were affected by the voiding of the two meetings, so that the results of our decision are clear, and so that the matter of "results obtained" within the context of the appellants' challenge to the award of fees and costs by the district court can be analyzed.

Lane and Robin Darnall presented their protest at the BOE's July 12, 2005, meeting, which we have declared void. And while the BOE's findings were made at the July 19 meeting, which was not a void meeting, the BOE could not make its finding in reliance on any information obtained at the illegal July 12 meeting, see *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002), and we think it is a reasonable inference that there was such reliance.

Gary and Emilie Darnall and Darnall Ranch presented their six protests at the BOE's July 12, 2005, meeting, which we have declared void, and again the board members are prohibited from considering any information obtained at the illegal

meeting. See *id*. The BOE made findings with regard to two of the Darnalls' protests at the July 19 meeting, which, as stated previously, was not a void meeting. However, as stated above, the BOE could not make its July 19 findings in reliance on any information obtained at the illegal July 12 meeting. See *id*. The BOE made findings with regard to the Darnalls' four remaining protests at the meeting on July 22. We have found that the July 22 meeting is void, and thus so are the BOE's findings made that day. Thus, the BOE's actions regarding all six Darnall protests are hereby voided.

Robert and Lisa Brenner presented their protest at the BOE's July 12, 2005, meeting, which we have declared void. Thus, the board members are prohibited from considering any information obtained at the illegal meeting. See *id*. The BOE made findings with regard to the Brenners' protests at the meeting on July 22. We have found that the July 22 meeting is void, and thus so are the BOE's findings made that day. Therefore, the BOE's findings on the Brenner protest are hereby voided.

Billie and David Wolf presented their protest to the BOE at its meeting on July 19, 2005, and the BOE made findings that day—remembering that the July 19 meeting was a valid and proper meeting. However, the BOE voted to amend its findings at the July 22 meeting. We have found that the July 22 meeting is void, and thus, so are the BOE's July 22 amendments regarding the Wolfs' assessment—even though such were favorable to the Wolfs. Therefore, the findings made concerning the Wolf protest on July 19 are valid, but the amendment thereto is not. In summary, it is important to note that despite the flawed notice, all landowners whose assessments are void as a consequence of this litigation did, in fact, appear and present their protests to the assessments.

[38] We are aware of the doctrine that "any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person will be held to have waived the right to object on that ground at a later date." *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 417, 648 N.W.2d 756, 767 (2002). The

district court found that the appellees did not waive their objection, and we find that there is evidence in the record to support such finding. Furthermore, the appellants did not specifically assign as error the failure of the district court to find that the appellees waived their objection on notice grounds. "To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error." *Scurlocke v. Hansen*, 268 Neb. 548, 551, 684 N.W.2d 565, 568 (2004).

In the trial court, counsel for the appellees submitted an accounting of time spent on this case, asserting a fair and reasonable hourly rate of $150 per hour, and $60 per hour for paralegal time, with a total of 210 hours equaling $28,899. Counsel also sought reimbursement of $3,326.46 for expenses—the majority of which was for the copying of documents charged at 25 cents a page. After credit for the award of $720 in fees awarded by the district court and a $4,000 "courtesy discount," counsel sought $27,457.46, which the trial court awarded.

Concerning fees, the appellants argue, citing *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), that if the results obtained at trial are reduced on appeal, then the attorney fees must be likewise reduced. This proposition is sound and logical. The appellees' counsel (who was a plaintiff himself) received an award of all that he requested from the district court. But, on appellate review, we have reversed much of the results obtained at trial. Moreover, the "concrete result" of this case is likely to come to little or nothing, in that it is permissible to "repair" voided actions during new proceedings. Thus, in a very real sense, this extensive and protracted litigation accomplished only a reminder to local government that compliance with the Open Meetings Act is important to the ideal of open and transparent governance, and that to violate the act's provisions carries a substantial cost—certainly in litigation costs. In other words, this litigation is a victory for open and transparent governance, but the victory is not nearly of the magnitude handed down by the district court. And the fee award must reflect these considerations and the outcome on appeal. Therefore, while agreeing that fees

and costs should be awarded at the trial level, we reduce the district court's award by $10,000 and thereby award the sum of $17,457.46.

Counsel for the appellees has filed a motion for fees and costs in this court. Without repeating what we have done, we believe it fair to say that in this appellate proceeding, including the appellees' cross-appeal, the appellees lost far more than was upheld, and their cross-appeal was largely unsuccessful. An award of fees, here as in the trial court, is discretionary. We decline to award fees and costs and, therefore, overrule the appellees' motion for an award of such.

AFFIRMED IN PART, REVERSED IN PART, AND IN PART VACATED AND SET ASIDE.

STATE OF NEBRASKA, APPELLEE, V.
JEFFERY PICKINPAUGH, APPELLANT.
762 N.W.2d 328

Filed January 20, 2009. No. A-08-499.

1. **Courts: Appeal and Error.** Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
5. **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.
6. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** Determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed with a two-stage standard in which the ultimate determinations of reasonable suspicion

and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.

7. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
8. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** A reasonable suspicion to stop a vehicle cannot be found when there is no factual foundation explaining the source of the information being relayed between officers.
9. **Investigative Stops: Probable Cause.** When the information providing the factual basis for an investigatory stop is furnished by another person, it must contain sufficient indicia of reliability.
10. **Criminal Law: Eyewitnesses: Presumptions.** A detailed eyewitness report of a crime by an informant provides its own indicia of reliability because a citizen informant who has personally observed the commission of a crime is presumed to be reliable.
11. **Constitutional Law: Miranda Rights: Self-Incrimination.** The safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), were intended to protect the Fifth Amendment right against self-incrimination by countering the compulsion that inheres in custodial interrogation.
12. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), implicates only statements that are both testimonial in nature and elicited during custodial interrogation.
13. **Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** Field sobriety tests may be justified by a police officer's reasonable suspicion based upon specific articulable facts that the driver is under the influence of alcohol or drugs.
14. **Drunk Driving: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** A police officer has a reasonable suspicion that a driver of a lawfully stopped vehicle is under the influence of alcohol, and therefore an officer can detain the driver after the traffic stop, where the officer observed that the driver's eyes were watery and bloodshot, the officer detected a strong odor of alcohol on the driver's breath, and the driver admitted to consuming alcoholic beverages.
15. **Investigative Stops: Miranda Rights.** The results of field sobriety tests are not testimonial in nature, and *Miranda* warnings are not required before field sobriety tests are administered.
16. **Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 60-6,197 (Reissue 2004) does not require that a person be arrested specifically for driving under the influence prior to being required to submit to a chemical test if the person has already been arrested for another crime or if the investigating officer has reasonable grounds to believe the person was driving a vehicle under the influence of alcohol.

Appeal from the District Court for Wayne County, ROBERT B. ENSZ, Judge, on appeal thereto from the County Court for

Wayne County, DONNA F. TAYLOR, Judge. Judgment of District Court affirmed.

Justin J. Cook, of Lincoln Law, L.L.C., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Jeffery Pickinpaugh was convicted of driving under the influence of alcohol and sentenced to 6 months' probation with several conditions. His driver's license was also revoked for 60 days. The district court affirmed the county court's order, and Pickinpaugh appealed to this court. For the reasons set forth herein, we affirm. Pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1), we have ordered this case submitted for decision without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

On March 16, 2007, Pickinpaugh was pulled over at 4:30 a.m. by Officer Gerald Klinetobe of the Wayne Police Department. Klinetobe had received a call from dispatch saying a citizen, Javon McNeal, witnessed a one-car accident involving a utility pole. McNeal identified Pickinpaugh's vehicle as the vehicle that hit the pole and provided officers with the license plate number of the car. McNeal followed Pickinpaugh's vehicle after such accident and continued to do so until Klinetobe arrived so she could point out the vehicle to the officer. Klinetobe noticed that there was damage to the passenger-side front fender of Pickinpaugh's vehicle and that the license plate on his car matched the one given earlier by McNeal. Klinetobe then signaled Pickinpaugh to pull over, and Pickinpaugh pulled into a church parking lot. Klinetobe asked Pickinpaugh whether he had hit a utility pole, and he answered in the affirmative. Klinetobe noticed Pickinpaugh had bloodshot and watery eyes, slurred speech, and an odor of alcohol. Pickinpaugh admitted that he had "quite a few" drinks that evening. Klinetobe began to administer field sobriety tests, but at that time, there was a group of people

gathering in the parking lot of the church to leave for a trip, and Pickinpaugh refused to do the tests in front of them. Klinetobe arrested Pickinpaugh for leaving the scene of an accident and the "pending investigation" for driving under the influence, handcuffed him, and transported him to the police station to conduct the field sobriety tests. Pickinpaugh failed all three tests Klinetobe had him perform. About 1½ hours after the initial stop, Pickinpaugh submitted to a chemical test, which showed he had .135 of a gram of alcohol per 210 liters of breath.

Pickinpaugh was charged with driving while under the influence of alcohol, a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004) with the penalty prescribed by Neb. Rev. Stat. § 60-6,197.03(1) (Cum. Supp. 2006), a Class W misdemeanor. Pickinpaugh was also charged with failure to stop following an accident involving property damage, a Class II misdemeanor and violation of Neb. Rev. Stat. § 60-696 (Cum. Supp. 2006). Pickinpaugh filed a motion to suppress/motion in limine on July 12, 2007, for suppression of all observations made of and statements by Pickinpaugh, results of his chemical test, and any derivative evidence, because his arrest violated his Fourth and Fifth Amendment rights and the officer lacked reasonable grounds to believe Pickinpaugh was operating a motor vehicle while under the influence of alcohol. The county court for Wayne County overruled this motion. The county court conducted a bench trial on October 1, made findings of fact, and found Pickinpaugh guilty of driving under the influence of alcohol but not guilty of failure to stop following an accident, because the State failed to show damage to the pole as required by the statute. Pickinpaugh was sentenced to 6 months' probation with conditions, a fine, and a driver's license suspension for 60 days. Pickinpaugh appealed to the district court for Wayne County, and the conviction was affirmed on April 16, 2008. Pickinpaugh appeals the district court's ruling to this court.

ASSIGNMENTS OF ERROR

Pickinpaugh assigns as error (1) the county court ruling that allowed the testimony of the arresting officer regarding the

informant to establish reasonable suspicion for the stop, (2) the district court ruling that evidence of the field sobriety tests was admissible for purposes of supporting probable cause for Pickinpaugh's arrest, and (3) the district court ruling that an arrest for driving under the influence was not a prerequisite before requiring Pickinpaugh to submit to a chemical test of his breath under Nebraska's implied consent law.

STANDARD OF REVIEW

[1] Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003).

[2] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, 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. *Id.*

[3] Pickinpaugh moved to suppress all of the evidence resulting from his arrest, including the results of the chemical test, both pretrial and at the start of the October 1, 2007, bench trial. When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress. *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[4,5] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). 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. *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000).

ANALYSIS

Reasonable Suspicion for Investigatory Stop.

[6] Pickinpaugh alleges in his brief that the motion to suppress should not have been denied, because Klinetobe did not have reasonable suspicion to stop his vehicle, in that there was no factual foundation to explain the information Klinetobe received from dispatch. He argues that absent reasonable suspicion for the investigatory stop, such stop was improper, and the motion to suppress was improperly denied. Thus, we must determine whether there was reasonable suspicion using the appropriate standard of review.

> [D]eterminations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search [are reviewed with] a two-stage standard in which the ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.

State v. Soukharith, 253 Neb. 310, 318, 570 N.W.2d 344, 352 (1997).

[7-10] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *State v. Ellingson*, 13 Neb. App. 931, 703 N.W.2d 273 (2005). A reasonable suspicion to stop a vehicle cannot be found when there is no factual foundation explaining the source of the information being relayed between officers. *State v. Mays*, 6 Neb. App. 855, 578 N.W.2d 453 (1998), *overruled on other grounds, State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). Several prior cases have dealt with the adequacy of reports to find such factual foundation for reasonable suspicion from citizen informants, as was the case with the information from McNeal here.

> "An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity." *State v. Ege*, 227 Neb. 824, 826, 420 N.W.2d 305, 308 (1988) (citing *United*

> *States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). The factual basis for the stop need not be the officer's personal observations alone, but may arise from information provided by another person. *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); *State v. Ege, supra*. When the information providing the factual basis for the stop is furnished by another person, it must contain sufficient indicia of reliability. *State v. Ege, supra*. A detailed eyewitness report of a crime by an informant provides its own indicia of reliability because a citizen informant who has personally observed the commission of a crime is presumed to be reliable. *State v. Ege, supra.*

State v. White, 15 Neb. App. 486, 493-94, 732 N.W.2d 677, 684 (2007).

Because we must evaluate all of the facts and circumstances leading to Pickinpaugh's stop, we identify the specific information available to Klinetobe at the time. When Klinetobe signaled Pickinpaugh to pull over, he had the following information: He had a report from dispatch, based on a call from a citizen informant, that there had been a one-car accident involving a utility pole and that the vehicle had left the scene of the accident; he had observed damage to Pickinpaugh's vehicle—the front passenger-side fender was dented and rubbing on the tire; and McNeal was present at the scene to confirm that the car in front of her was the one she had witnessed in the accident. McNeal, properly characterized as a citizen informant, had called the police to report an accident, identified herself, provided identifying information about the vehicle in the accident, followed the vehicle in the accident until police arrived, and pointed out the vehicle to the officer. If not an actual crime, she certainly had witnessed suspicious behavior and was willing to identify herself, provide details of the accident, and follow the vehicle and identify such to the officer. Therefore, based on the circumstances of her report, her actions clearly support the reliability of such report; plus, as a citizen informant, she is presumed to be reliable.

Pickinpaugh relies on *State v. Mays, supra*, where the court found a lack of probable cause when the record failed to

reflect from whom the police officer received the tip leading to the stop of the defendant's vehicle. This case can easily be distinguished from the instant case because, as stated above, McNeal did identify herself to dispatch and to Klinetobe, and thus, there is indicia of reliability, as well as a presumption thereof, that is not present in cases involving anonymous tips to the police. McNeal is clearly a citizen informant who personally witnessed a crime and reported it, and thus she is presumptively reliable. See *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

There was clearly a sufficient factual basis for McNeal's report for Klinetobe to perform an investigatory stop of Pickinpaugh based upon such report. Thus, the investigatory stop was proper because there was reasonable suspicion, and the motion to suppress evidence was properly denied. Pickinpaugh's argument lacks merit.

Admission of Field Sobriety Tests.

[11] Pickinpaugh argues that because he was in custody and not advised of his *Miranda* rights, evidence of the field sobriety tests conducted at the police station should have been suppressed and, thus, inadmissible for purposes of supporting probable cause for his arrest for driving under the influence. Pickinpaugh claims that the failure to advise him of his *Miranda* rights violated his constitutional rights. Klinetobe testified at the suppression hearing that he did not advise Pickinpaugh of his *Miranda* rights until after the field sobriety and chemical tests were administered and he was arrested. Klinetobe also testified that Pickinpaugh was not free to leave and was in a custodial situation, having already been arrested for leaving the scene of the accident and transported to the police station, when the field sobriety and chemical tests were administered. The safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), were intended to protect the Fifth Amendment right against self-incrimination by countering the compulsion that inheres in custodial interrogation. *State v. Relford*, 9 Neb. App. 985, 623 N.W.2d 343 (2001).

[12-14] *Miranda, supra*, implicates only statements that are both testimonial in nature and elicited during custodial

interrogation. *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). Therefore, both elements must be present for *Miranda* warnings to be necessary, and our analysis proceeds on the basis that Pickinpaugh was in custody. Field sobriety tests may be justified by a police officer's reasonable suspicion based upon specific articulable facts that the driver is under the influence of alcohol or drugs. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). A police officer has a reasonable suspicion that a driver of a lawfully stopped vehicle is under the influence of alcohol, and therefore an officer can detain the driver after the traffic stop, where the officer observed that the driver's eyes were watery and bloodshot, the officer detected a strong odor of alcohol on the driver's breath, and the driver admitted to consuming alcoholic beverages. See *id*. Klinetobe's administration of field sobriety tests in this case was clearly warranted and lawful. Klinetobe—after witnessing Pickinpaugh's bloodshot eyes and slurred speech, listening to his admission that he had consumed alcohol that evening, and having the information about his encounter with the light pole—had ample reasonable suspicion to administer the field sobriety tests. Klinetobe properly began to administer such tests as Pickinpaugh was detained in the church parking lot, but was disrupted, through no fault of his own, by the crowd gathering there, and Klinetobe arrested Pickinpaugh for leaving the scene of an accident. Therefore, Pickinpaugh was in a custodial situation at the police station when the field sobriety tests were performed.

[15] Despite the fact that Pickinpaugh was in custody, we hold that the results of his field sobriety tests were not testimonial in nature and that *Miranda* warnings were not required before the field sobriety tests were administered. Evidence obtained from a driver by testing body fluids in the implied consent context is not testimonial or communicative in nature and does not fall within the constitutional right against self-incrimination. *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988). We note that *Miranda* warnings are not required before a law enforcement officer's request that a driver submit to a chemical analysis under Nebraska's implied consent law. *Id*. See, also, *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986). That said, we note that there is no precedent in Nebraska declaring whether

the results of field sobriety tests are testimonial or nontestimonial in nature for purposes of *Miranda, supra*. We found such tests to be nontestimonial, and therefore not subject to *Miranda* safeguards, in *State v. Bowers*, No. A-94-1243, 1995 WL 749709 (Neb. App. Dec. 19, 1995) (not designated for permanent publication). The Nebraska Supreme Court examined our decision on a petition for further review, but said it did not need to decide whether the results were testimonial or not, because the defendant in that case was not in a custodial situation for *Miranda* purposes, making the evidence of the tests admissible in the absence of *Miranda* warnings. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). But here, we have a custodial situation.

Other courts have specifically addressed this issue, and many have determined that the results of field sobriety tests are nontestimonial because they are considered observations of the suspect's physical condition and performance and do not result in communication that revealed subjective knowledge by the defendant. See, *Vanhouton v. Commonwealth*, 424 Mass. 327, 676 N.E.2d 460 (1997); *State v. Zummach*, 467 N.W.2d 745 (N.D. 1991); *State v. Fasching*, 453 N.W.2d 761 (N.D. 1990); *State v. Marks*, 644 N.W.2d 35 (Iowa App. 2002). See, also, *State v. Mellett*, 642 N.W.2d 779 (Minn. App. 2002). These courts have determined that Fifth Amendment protections provided by *Miranda* warnings are inapplicable to the results of field sobriety tests because such are nontestimonial, and we agree.

Furthermore, in *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008), the Nebraska Supreme Court held that for an investigating officer to conduct field sobriety tests, only reasonable suspicion, not probable cause, was required, and we have found that in this case, the officer had ample reasonable suspicion that Pickinpaugh was driving under the influence before the field sobriety tests were given. And because we hold that field sobriety tests are nontestimonial in nature, the fact that Pickinpaugh was in custody when the tests were actually administered does not mean that *Miranda* warnings were a precondition to the admission in evidence of the tests. Accordingly, we find the district court properly affirmed the

county court's overruling of Pickinpaugh's motion to suppress the field sobriety tests, because the *Miranda* warnings were not required even if Pickinpaugh was in custody.

Arrest for Driving Under Influence as Prerequisite for Submission to Chemical Test Under Implied Consent Law.

[16] Pickinpaugh argues that he should have been arrested for driving under the influence before being required to submit to the chemical test and that therefore, the State did not follow the proper procedures under Nebraska's implied consent law. This argument has no merit. Neb. Rev. Stat. § 60-6,197 (Reissue 2004) states in relevant part:

> (4) Any person involved in a motor vehicle accident in this state may be required to submit to a chemical test of his or her blood, breath, or urine by any peace officer if the officer has reasonable grounds to believe that the person was driving or was in actual physical control of a motor vehicle on a public highway in this state while under the influence of alcoholic liquor or drugs at the time of the accident.

As discussed above, Pickinpaugh was clearly being investigated for his role in a one-car accident earlier in the morning. Such accident was reported by a citizen informant to dispatch and Klinetobe. As such, Klinetobe clearly had statutory authority to ask Pickinpaugh to submit to a chemical test.

Furthermore, § 60-6,197(2) states that an officer can require a person arrested for any offense arising out of acts alleged to have been committed while driving under the influence to submit to a chemical test if there are reasonable grounds to believe the person was driving a vehicle under the influence of alcohol. As detailed above, Klinetobe's observations of Pickinpaugh that morning clearly constitute reasonable grounds for Klinetobe to believe that Pickinpaugh was operating a vehicle under the influence of alcohol. In addition, Klinetobe had arrested Pickinpaugh for the offense of failure to stop following an accident involving property damage. Pickinpaugh's claim that he had to have been arrested for driving under the influence is an incorrect statement of the law, and Pickinpaugh

had been arrested for an offense when the chemical test was administered. As such, Pickinpaugh's assignment of error has no merit, and the district court's ruling affirming the county court's order was proper.

CONCLUSION

Finding no merit to Pickinpaugh's assignments of error, we affirm the findings of the district court.

AFFIRMED.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF ISAAC MCDOWELL AND MARIANNA MCDOWELL, MINOR CHILDREN. CAROLYN MCDOWELL ROSENQUIST, APPELLANT, V. RAUL AMBRIZ-PADILLA ET AL., APPELLEES.

762 N.W.2d 615

Filed January 20, 2009. No. A-08-517.

1. **Guardians and Conservators: Appeal and Error.** A proceeding for the appointment of a guardian in a matter arising under the Nebraska Probate Code is reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
4. **Wills: Guardians and Conservators.** Irrespective of the circumstances of the parents' deaths, under Nebraska law, the determination of who shall be guardian and conservator is ultimately dependent upon the best interests of the children, although a testamentary nomination of a guardian or conservator may have statutory priority.
5. ____: ____. The testamentary appointment of a guardian will be upheld unless the best interests of the child require otherwise.

Appeal from the County Court for Dawson County: CARLTON E. CLARK, Judge. Affirmed.

John B. McDermott and Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

D. Brandon Brinegar and Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

On February 18, 2008, Chris McDowell murdered his wife, Erika Ambriz McDowell, and then committed suicide. As a result, their children, Isaac McDowell, born January 4, 2001, and Marianna McDowell, born June 13, 2004, were orphaned. By a last will and testament executed 4 days before the murder and suicide, Chris named his mother, Carolyn McDowell Rosenquist of Phoenix, Arizona, as guardian of his children. This will made no mention of his wife, Erika. Erika's parents, Raul Ambriz-Padilla and Maria Ambriz-Trujillo, were appointed as temporary guardians of the children, and their son and Erika's brother, Jorge Ambriz, was appointed as temporary conservator. Thereafter, Carolyn sought appointment as guardian and conservator, and Raul, Maria, and Jorge sought permanent appointment as guardians and conservator, respectively. After an evidentiary hearing on April 15, 2008, the county court for Dawson County, Nebraska, appointed Raul and Maria as guardians of Isaac and Marianna and appointed Jorge as the conservator to manage their property. Carolyn has timely perfected her appeal from the order of the county court.

ASSIGNMENT OF ERROR

Carolyn asserts that "[t]he trial court abused its discretion by failing to appoint Carolyn as guardian/conservator."

STANDARD OF REVIEW

[1,2] A proceeding for the appointment of a guardian in a matter arising under the Nebraska Probate Code is reviewed for error on the record. See *In re Guardianship of LaVone M.*, 9 Neb. App. 245, 610 N.W.2d 29 (2000). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007).

ANALYSIS

As indicated earlier, the children's father executed a will 4 days before the murder of their mother and his suicide, in which will he named his mother, Carolyn, as guardian of Isaac and Marianna. The county court for Dawson County made the following finding in its journal entry deciding this contested matter:

> 8. The Court finds that the provisions of the Last Will and Testament do not apply as it was prepared four days prior to death and the specific nomination should not be controlling. The Court notes specifically Nebr. Rev. Stat. §30-2608(d), as amended, and notes that this appointment has not been nullified by §30-2607 as to who has priority.

Carolyn argues, summarized, that the journal entry's paragraph 8 is an incorrect construction of the cited statute:

> It is clear that the court misreads *Neb. Rev. Stat.* §30-2608(d) as there was, indeed, a guardian appointed by a will as provided in Section 30-2606 and that appointment was not prevented nor nullified under Section 30-2607 as there were no children over the age of fourteen who objected to this appointment.

Brief for appellant at 8.

It is true that the trial court's reference to Neb. Rev. Stat. § 30-2607 (Reissue 2008) was misplaced, because such statute allows for minor children, age 14 and older, to object to a testamentary appointment of a guardian made under Neb. Rev. Stat. § 30-2606 (Reissue 2008), and neither Isaac nor Marianna was yet age 14.

Neb. Rev. Stat. § 30-2608(d) (Reissue 2008) allows for priority of a testamentary appointment:

> The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by prior or current circumstances or prior court order. A guardian appointed by will as provided in section 30-2606 whose appointment has not been prevented or nullified under section 30-2607 has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary

> guardian has failed to accept the testamentary appointment within thirty days after notice of the guardianship proceeding.

Carolyn reasons that she has priority over any guardian who may be appointed by the court. Carolyn also argues that because she had not failed to accept the appointment, and because § 30-2608(d) does not provide the court with any basis to make an appointment of any person other than Carolyn, the county court erred.

The trial court, after paragraph 8 quoted above, did note that Carolyn had not failed to accept the guardianship, but the trial court's order continued:

> 9. . . . Notwithstanding that, the Court finds:
>
> A. Both grandparents [we assume the court meant Raul, Maria, and Carolyn] are qualified and the Court must look at the best interests of the minor children.
>
> B. The Court notes that [Raul and Maria's] children received a good education and excellent schooling and there is extended family to support the two minor children.
>
> 10. It is in the best interests of both children that Raul Ambriz-Padilla and Maria Ambriz-Trujillo be appointed as guardians for Isaac McDowell and Marianna McDowell.
>
> 11. The Court further finds that it is in the best interests of the children that Jorge Ambriz be appointed conservator.

[3] The trial court's conclusion in its paragraph 8 that the specific nomination of a guardian in Chris' last will and testament was not controlling because it was prepared 4 days prior to his death does not appear to have any legal basis, unless the court intended to base its conclusion on the homicide probate statute, Neb. Rev. Stat. § 30-2354 (Reissue 2008), although the court did not cite the statute. Under § 30-2354(a), "A surviving spouse, heir or devisee who feloniously and intentionally kills or aids and abets the killing of the decedent is not entitled to any benefits under the will or under this article . . . ." See *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002) (county court's removal of husband as personal representative upon finding that husband had intentionally

and feloniously killed wife affirmed). The opinion in *In re Estate of Krumwiede*, through its quotation of the comment to § 2-803 of the Uniform Probate Code, suggests that § 30-2354 is designed to prevent the killer, who is still alive, a circumstance not involved here, from sharing in the estate. But, we need not decide whether the homicide statute voids a killer's nomination of a guardian for his children, because this case is resolved on other grounds. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

[4] We hold that, irrespective of the circumstances of the parents' deaths, under Nebraska law, the determination of who shall be guardian and conservator is ultimately dependent upon the best interests of the children, although a testamentary nomination of a guardian or conservator may have statutory priority. See *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).

[5] *In re Estate of Jeffrey B., supra*, involved a situation in which the parents of the children were both deceased. The father was the last to die, by a heroin overdose. His will appointed George and Catherine Shaner as testamentary guardians and James and Teresa Riggins as successor guardians. The Rigginses filed a motion to be appointed as guardians and to remove the Shaners, who had previously been appointed. The county court granted the motion, and upon the Shaners' appeal, the Nebraska Supreme Court said that the question presented was what presumption, if any, must be overcome to remove a minor's testamentary guardian. The rather complicated factual background in *In re Estate of Jeffrey B.* is fully set forth in the Supreme Court's opinion, and its recitation here is not necessary. That said, the Shaners argued that their testamentary appointment was controlling, citing *Clymer v. La Velle*, 194 Neb. 91, 230 N.W.2d 213 (1975), wherein the Supreme Court stated that the testamentary appointment of the minor's guardian "'cannot be ignored.'" 268 Neb. at 771, 688 N.W.2d at 144. The court in *In re Estate of Jeffrey B.* first pointed out that *La Velle* was decided before the adoption of the current Nebraska Probate Code. The court further said:

> Second, the Shaners fail to note our conclusion in *La Velle* that "[i]t is generally held that [a testamentary appointment of a guardian] will be upheld *unless the best interests of the child require otherwise*." (Emphasis supplied.) 194 Neb. at 93, 230 N.W.2d at 216. As explained above, this standard is consistent with that imposed by current Nebraska law.

In re Estate of Jeffrey B., 268 Neb. at 772, 688 N.W.2d at 144.

The court's ultimate conclusion in *In re Estate of Jeffrey B.* was that where a parent's constitutionally protected relationship with a child is not at issue, both public policy and Nebraska law require that the guardianship at issue be determined by a reference to the paramount concern in child custody disputes—the best interests of the child. In summary, there can be no doubt that the Nebraska Supreme Court has made the best interests of the children the determining factor, irrespective of the testamentary appointment of a guardian. Despite the superfluous language in paragraph 8, it is clear from a complete reading of the county court's order that the rationale for its appointment of Raul and Maria was premised upon the best interests of the children. Therefore, we review that determination for error on the record, which takes us to the facts revealed about Raul and Maria and Carolyn and the respective environments they offer Isaac and Marianna.

Carolyn is 52 years of age and in good health. She moved from Grand Island, Nebraska, to the Phoenix area approximately 3 years ago, where she worked at a title company until her layoff shortly before the hearing. Her current husband, unrelated to Isaac or Marianna except by marriage, is 58 years old and works as a handyman part of the year, and part of the year in organizing a golf tournament in the Phoenix area. Carolyn had two sons—Chris, the children's father who committed suicide after murdering the children's mother, and another son, age 22, who by Carolyn's admission has "mental health issues." Carolyn has returned to Nebraska three or four times to see the children in the 3 years since her move to Phoenix. Carolyn and her husband live in a two-bedroom apartment, which she describes as adequate and appropriate for the children to live with her. Isaac would attend a school

located 2 miles from the apartment, and Carolyn plans to place Marianna in preschool. Carolyn and her husband have siblings in the Phoenix and Tucson, Arizona, areas.

On the day of the murder-suicide, Jorge immediately arranged for the children to be seen by Stacey Hunt-Amos, a licensed mental health practitioner and certified marriage and family therapist. Hunt-Amos saw the children the day after the deaths, the day after the funerals, and weekly thereafter up to the time of trial. Her opinion was that the children should stay in their present placement with Raul and Maria because they need continued stability. She also opined that they are presently doing well and have made improvement since the trauma of the deaths of their parents. Hunt-Amos limited her opinion to the "short term," defined as a year, due to her lack of contact with and knowledge about their paternal grandmother, Carolyn.

Jorge, Erika's brother, testified that he is employed by a manufacturing plant in Omaha, Nebraska, in the human relations department, that he has a dual degree from the University of Nebraska at Kearney, and that he is one class short of his master's degree. Jorge testified that his father, Raul, began coming to the United States from Mexico in 1984 and that the family moved to the United States in 1987. Raul and Maria have been married 40 years and produced four daughters and three sons, including Jorge. Jorge indicated that his oldest sister lives in Lexington, Nebraska. She has three children ranging from 5 to 10 years of age, all of whom are bilingual, as are Isaac and Marianna. Another sister who lives in Lexington owns the house where Raul and Maria reside with her—and where Isaac and Marianna resided at the time of the hearing. Jorge's oldest brother also lives in Lexington. He is married and has two children, ages 3 and 9, who are also bilingual. One of Jorge's sisters lives in California, and his younger brother, Michael Ambriz, attends the University of Nebraska at Kearney. Michael lives in a residence hall in Kearney during the school year, is a senior by credit, and plays on the tennis team. After Erika's death, the family asked him to stay home during the spring semester of 2008, which he did. Jorge indicated that his parents do not speak English, but that they

were extremely diligent in making sure that all of their children did their homework and participated in sports and school activities. Jorge testified that he and two of his sisters graduated from college. And Michael has nearly graduated with a degree in criminal justice. Given that Isaac and Marianna are bilingual, communication is not a concern. Jorge described his family as extremely close-knit, loving, and supportive. Maria is a stay-at-home mother, and Raul works for Wal-Mart. Maria is in her late 50's, and Raul is 61. Jorge testified that both of his parents are in excellent health, other than Maria's having diabetes.

As far as the living arrangements at the time of the hearing, Isaac still did not want to sleep alone, so Michael was sleeping with him in bunk beds, and Marianna did not want to sleep away from Maria. Raul testified that he and Maria were willing to be guardians. Raul has permanent resident status and has taken the citizenship test, but did not pass it, and plans on taking it again. Maria is a U.S. citizen. Raul has Saturdays and Tuesdays off, but wants to change his days off to Saturdays and Sundays to be home with the children more. On the days that Raul does not pick up Isaac from school, Michael picks him up. Raul said that he has talked with the principal at Isaac's school and talks with Isaac's teacher every day. Raul said that he gives Isaac a dollar for every "100" he gets on his school papers and that the last time Isaac brought home papers, Raul had to pay him $7. Raul testified that Jorge and Michael were involved in school and sports and that Michael was a state champion in tennis. Raul said that he intends to introduce Isaac to the same activities and in fact is already doing so. Raul testified to the frequent contact Isaac and Marianna have with their cousins residing in Lexington.

Reviewing the trial court's determination of the appointment of Raul and Maria as guardians and Jorge as conservator, in light of the children's best interests, we cannot ignore the structure, support, love, and nurture provided by Raul and Maria and their family—aunts, uncles, and cousins. This familial relationship obviously provides a great deal of support for two children who have been traumatized by the sudden deaths of their parents. It is abundantly clear to us, as it was

to the county court, that the children's best interests were best served by the appointment of Raul and Maria as their guardians. Raul and Maria, as well as their extended family, are in many ways an exemplary model for these children who have been tragically deprived of their own parents. It is apparent that they will have a loving and supportive environment in Lexington and will unquestionably be well cared for. That said, our conclusion does not denigrate in any way the love and concern Carolyn has for her grandchildren. Finally, Jorge is quite clearly a mature, responsible, and thoughtful young adult who is an appropriate conservator for the children.

CONCLUSION

The decision of the county court for Dawson County is based on the best interests of the children, it conforms to the law, it is supported by competent evidence, and it is neither arbitrary, capricious, nor unreasonable.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOHN A. FENIN, APPELLANT.
760 N.W.2d 358

Filed January 27, 2009. No. A-08-987.

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 made by the court below.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Appeal and Error.** A proper objection, stating the specific grounds therefor, and an adverse ruling thereon must appear on the record to preserve the issue for consideration on appeal.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
5. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Michael D. Nelson and Cathy R. Saathoff, of Nelson Law, L.L.C., for appellant.

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

IRWIN, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

John A. Fenin appeals from the district court's sentence of 45 to 55 years' imprisonment for sexual assault and incest. Fenin claims that the State violated its agreement to remain silent during sentencing and that the court imposed excessive sentences. We find that Fenin failed to preserve an objection to the State's violation and that the district court did not abuse its discretion in sentencing Fenin. We therefore affirm.

BACKGROUND

On March 10, 2008, Fenin pled no contest to the charges of first degree sexual assault, a Class II felony punishable by 1 to 50 years' imprisonment, and incest, a Class III felony punishable by 1 to 20 years' imprisonment and up to a $25,000 fine. The State agreed that if Fenin pled no contest to these charges, it would drop third degree sexual assault of a child and child abuse charges, refrain from filing further charges based on Fenin's alleged assault of the victim's sister, and would remain silent during sentencing.

At sentencing, the State failed to remain silent. After the court heard defense counsel's argument regarding sentencing, the court stated that it would "hear from the State." The State then presented an argument regarding sentencing. As part of the argument, the prosecuting attorney discussed Fenin's alleged abuse of the victim's sister, which was not the basis for the charges. Fenin's counsel then objected during this portion of the State's argument. The exchange went as follows:

> [Prosecutor:] I would also comment her sister has since come forward and there is such evidence the same has occurred to [the victim's sister], the same things perpetrated on [the victim] by the defendant, so I would argue to the Court that this is his third time he has done this to a child.
>
> If you look at the criminal history —
>
> [Defense counsel]: Your Honor, I'm sorry, but I — I don't mean to interrupt, but I would object to that at this point.
>
> THE COURT: I'm not going to consider it because the State has the opportunity to file charges if they wanted to, so I'm not going to consider anything with the sister. That would not be appropriate.
>
> [Prosecutor]: Your Honor, I can argue as my allocution that this is in the PSI, these allegations, so I think it's appropriate that I do make those comments.
>
> THE COURT: It's uncharged misconduct and so — Was that part of the plea agreement, that you wouldn't file on the sister?
>
> [Prosecutor]: Yes.
>
> THE COURT: Is that correct, [defense counsel]?
>
> [Defense counsel]: That's correct, Your Honor.
>
> THE COURT: Okay. Then I do think it's appropriate, [defense counsel]. [The State] can argue it then.

The State subsequently resumed its argument, and Fenin did not make any further objections to the State's argument. Fenin made no attempt to withdraw his plea. The district court sentenced Fenin to 40 to 50 years' imprisonment for the sexual assault conviction and 5 years' imprisonment for the incest conviction. The court ordered that the sentences be served consecutively.

Fenin timely appeals.

ASSIGNMENTS OF ERROR

Fenin makes two assignments of error, which we restate: First, Fenin alleges that the district court erred in overruling his objection to the State's failure to maintain silence during

sentencing. Second, Fenin alleges that the district court erred in imposing excessive sentences.

STANDARD 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 made by the court below. *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

ANALYSIS

Plea Bargain.

Fenin contends that he is entitled to specific performance of the plea bargain agreement. Fenin argues that because the State breached an agreement to remain silent during sentencing, he is entitled to specific enforcement of the plea bargain. We conclude that Fenin is not entitled to such relief because he failed to object to the State's failure to remain silent.

Pursuant to *State v. Birge, supra*, when the State violates a plea bargain which requires the State to remain silent at sentencing, the defendant has the option of either withdrawing his plea or objecting to the State's failure to remain silent at sentencing. Subsequently, when the defendant has objected but has not sought to withdraw his plea, he may seek specific performance of the plea agreement, such as resentencing by a different judge on the terms of the plea bargain. See *id*. However, the *Birge* opinion did not eliminate the requirement that the issue of the breach must be preserved, pursuant to *State v. Shepherd*, 235 Neb. 426, 455 N.W.2d 566 (1990), *disapproved in part on other grounds, State v. Birge, supra*.

[3] Fenin did interpose an objection, but it was insufficient to preserve an error related to the State's failure to maintain silence during sentencing. A proper objection, stating the specific grounds therefor, and an adverse ruling thereon must appear on the record to preserve the issue for consideration on appeal. *State v. Birge*, 215 Neb. 761, 340 N.W.2d 434 (1983).

Defense counsel's statement that he "would object to that at this point" does not set forth any specific ground for the objection. Because Fenin did not object until the State had already completed a significant portion of its argument, the general objection had no apparent relationship to the State's failure to remain silent. Rather, the context of the objection suggested an entirely separate basis for objection. The colloquy that followed the objection evidently and naturally led the district court to believe that Fenin was objecting to the prosecution's statements regarding the victim's sister. The district court's ruling was limited to the issue apparently identified by Fenin's counsel. Because Fenin made no specific objection to the State's failure to remain silent and received no ruling in this matter, he failed to preserve this issue for appeal.

Sentencing.

[4,5] Fenin alleges that the district court's sentences constituted an abuse of discretion. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008). Fenin's sentences fall within statutory guidelines so they may only be overturned for abuse of discretion. When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id.* We have reviewed the record and determined that, considering the above factors, the district court did not abuse discretion in sentencing Fenin. In particular, we note that Fenin had previously been convicted of first degree sexual assault on a child and had an extensive criminal record dating back to his youth.

CONCLUSION

We conclude that Fenin failed to preserve an objection to the State's violation of the plea bargaining agreement that the State would remain silent during sentencing. Fenin made only

a general objection which did not preserve the claim he now raises on appeal. We also conclude that the district court's sentences were not an abuse of discretion. We therefore affirm the sentences imposed by the district court.

AFFIRMED.

DAVID GOODWIN, APPELLANT, V.
MATHIAS M. HOBZA, APPELLEE.
762 N.W.2d 623

Filed February 10, 2009. No. A-08-435.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery.
3. **Actions: Torts: Minors.** Generally, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent. The minor's claim is based on damages caused by the personal or bodily injury sustained by the minor, while the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child.
4. **Attorney and Client.** One who is not an attorney may not represent others in legal proceedings, nor may such a person practice law for others.
5. **Attorney and Client: Actions.** Proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

David Goodwin, pro se.

Rex A. Rezac and Rebecca A. Zawisky, of Fraser Stryker, P.C., L.L.O., for appellee.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

David Goodwin, proceeding pro se, filed a complaint seeking damages for injuries sustained by his minor child, Desmond Goodwin (Desmond). At trial, he offered only medical bills, and the district court sustained Mathias M. Hobza's objections to the exhibit. Goodwin then rested, and the court sustained Hobza's motion for directed verdict. On appeal, Goodwin claims that the rest was intended only to signify an intention not to offer additional exhibits and that the court knew he intended to call witnesses. Because the record does not support Goodwin's claim, we affirm the court's judgment. To the extent Goodwin attempts to prosecute an appeal on behalf of his child, we conclude such an appeal by a nonattorney is a nullity.

BACKGROUND

On June 22, 2007, Goodwin filed a complaint titled "David Goodwin (Desmond Goodwin) v.s. Mathias M. Hobza and his insurance co. State Farm." The complaint alleged in its entirety:

> [O]n 5-23-07 Plaintiff was in the van with his grandfather Billy Tyler when Mathia[s] Hobza rear ended the vehicle Desmond Goodwin was in at [a doctor's] office. Desmond Goodwin has not been the same since. He's had temperatures of 103.7 since the accident with frequent crying spells. As we all know infants can't talk to let me know what[']s the matter! He gets hot and weak due to his personal injuries he's suffered from the accident!
>
> I pray the court awards $100,000,000 on behalf of my son Desmond Goodwin for seen and unseen problems now or in the near and distant future!

Upon State Farm Mutual Automobile Insurance Company's motion, the court dismissed the complaint against the insurer.

On April 23, 2008, the court conducted a trial as to the claim against Hobza. Goodwin appeared pro se. After the parties waived opening statements, the following colloquy occurred:

THE COURT: All right. You can present any evidence that you have then.

[Goodwin]: I just have bills, Your Honor.

THE COURT: You would have to take them up to the court reporter and mark them as an exhibit.

(Exhibit No. 1 was marked for identification.)

THE COURT: All right. This is a group of what you have referred to as bills and they are marked as Exhibit Number 1. And I assume you are offering them for evidence at this time?

[Goodwin]: Yes.

[Hobza's counsel]: I'd object to foundation, relevance.

THE COURT: I am going to sustain that objection. You have to have some foundation for what those bills are.

(Exhibit No. 1 is hereby made a part of this bill of exceptions and may be found at the end of this volume.)

THE COURT: Do you have any other evidence that you wish to offer?

[Goodwin]: Just those doctor bills for Desmond, Your Honor.

THE COURT: I take it you are resting then?

[Goodwin]: Yes.

[Hobza's counsel]: I'd move the Court for a directed verdict.

THE COURT: That motion is sustained. I am going to — the case is out of court because you don't have any evidence to support it.

So would you submit an order?

[Hobza's counsel]: I will.

(9:09 a.m. - adjournment accordingly.)

On April 24, 2008, the district court entered an order dismissing the case. The court's order referred to Goodwin as the plaintiff and did not reference Desmond.

Goodwin timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Goodwin assigns that the court erred in dismissing the case.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005).

ANALYSIS

Entry of Directed Verdict on Goodwin's Complaint.

[2,3] Complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006). The complaint alleged injuries sustained by Goodwin's infant son, Desmond, and liberally construed, it alleged a distinct cause of action on Goodwin's behalf because as the child's parent, he may be liable for the costs of the child's medical care. See, e.g., Neb. Rev. Stat. § 23-3522 (Reissue 2007); Neb. Rev. Stat. § 28-706 (Reissue 2008).

> Generally, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent. The minor's claim is based on damages caused by the personal or bodily injury sustained by the minor, while the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child.

Macku v. Drackett Products Co., 216 Neb. 176, 179, 343 N.W.2d 58, 60 (1984). The cause or right of action of parents is distinct from the cause of action of their child. *Id.* But because Goodwin offered no admissible evidence to support his claim, we conclude that the court did not err in granting Hobza's motion for a directed verdict.

Goodwin argues on appeal that the court "BrowBeat us asking if we 'Rested' knowing we meant we 'Rested' with respect

to 'documentary' proffer" and that the court "clearly knew we wanted to call live witnesses." Brief for appellant at 2. The record simply does not support Goodwin's contention, and we note that he took no action to withdraw his rest or clarify that he wished to call witnesses. This assignment of error lacks merit.

Litigation of Claims on Behalf of Desmond.

[4] Because Desmond is an infant, Goodwin is statutorily authorized to bring an action on Desmond's behalf as his nonlegal representative. See Neb. Rev. Stat. § 25-307 (Reissue 2008). However, one who is not an attorney may not represent others in legal proceedings, nor may such a person practice law for others. *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992). See, also, Neb. Rev. Stat. § 7-101 (Reissue 2007). *Waite* involved an attempt by an estate's personal representative—who was not an attorney—to bring a wrongful death suit for the benefit of the heirs of the estate. This court explained that the rule against nonattorneys practicing law for others is not to perpetuate a professional monopoly, but, rather, to protect citizens from injury caused by the ignorance and lack of skill on the part of those who are untrained and inexperienced in the law, to protect the courts in their administration of justice from interference by those who are unlicensed and are not officers of the court, and to prevent the unscrupulous from using the legal system for their own purposes to the harm of the system and those who may unknowingly rely upon them. See *id.*

We conclude that a parent who is not an attorney should similarly be barred from personally litigating a child's negligence action. Our conclusion is consistent with that reached by the overwhelming majority of jurisdictions to have considered whether a nonattorney parent may provide legal representation on behalf of his or her minor child. See, *Shepherd v. Wellman*, 313 F.3d 963 (6th Cir. 2002); *Wenger v. Canastota Cent. School Dist.*, 146 F.3d 123 (2d Cir. 1998); *Devine v. Indian River County School Bd.*, 121 F.3d 576 (11th Cir. 1997); *Johns v. County of San Diego*, 114 F.3d 874 (9th Cir. 1997); *Meeker v. Kercher*, 782 F.2d 153 (10th Cir. 1986); *Zhu v. Countrywide*

Realty Co., Inc., 160 F. Supp. 2d 1210 (D. Kan. 2001); *Bullock v. Dioguardi*, 847 F. Supp. 553 (N.D. Ill. 1993); *Lawson v. Edwardsburg Public School*, 751 F. Supp. 1257 (W.D. Mich. 1990); *Lowe v. City of Shelton*, 83 Conn. App. 750, 851 A.2d 1183 (2004); *Shields v. Cape Fox Corp.*, 42 P.3d 1083 (Alaska 2002); *Byers-Watts v. Parker*, 199 Ariz. 466, 18 P.3d 1265 (Ariz. App. 2001); *Chisholm v. Rueckhaus*, 124 N.M. 255, 948 P.2d 707 (N.M. App. 1997); *Blue v. People*, 223 Ill. App. 3d 594, 585 N.E.2d 625, 165 Ill. Dec. 894 (1992). Cf. *Harris v. Apfel*, 209 F.3d 413 (5th Cir. 2000) (holding that nonattorney parent could appear pro se on behalf of minor child in Social Security appeal). The rule "helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents." *Devine v. Indian River County School Bd.*, 121 F.3d at 582. It is not in a child's best interests to be represented by a nonattorney.

[5] Proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed. *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996). Goodwin's appellate brief is captioned "David Goodwin OBO his minor child: Desmond Goodwin vs. Mathias M. Hobza." To the extent Goodwin seeks to prosecute this appeal pro se on Desmond's behalf, it is a nullity.

CONCLUSION

We conclude that the court did not err in dismissing Goodwin's complaint.

AFFIRMED.

BILLY TYLER, APPELLANT, V.
JOHN NATVIG, APPELLEE.
762 N.W.2d 621

Filed February 10, 2009. No. A-08-650.

1. **Affidavits: Appeal and Error.** An appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Courts: Affidavits: Statutes.** Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) requires a district court to grant an application to proceed in forma pauperis—

barring an objection based upon the grounds enumerated in the statute and the court's decision to sustain the objection.

3. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is one wholly without merit, that is, without rational argument based on the law or on the evidence.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded for further proceedings.

Billy Tyler, pro se.

No appearance for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Billy Tyler appeals the denial of his application to proceed in forma pauperis. The district court denied Tyler's application, stating that Tyler's complaint was illegible. We find that the district court erred in immediately denying Tyler's application on this basis.

BACKGROUND

On May 15, 2008, Tyler filed a complaint with the district court entitled "Civil Action 4 Defamation/Slander" and an application to proceed in forma pauperis. The complaint was handwritten. On May 27, the court ordered that Tyler's application to proceed in forma pauperis be denied on the grounds that the complaint was illegible, which, the court stated, prevented the court from determining whether the complaint was frivolous or malicious.

Tyler timely appeals.

Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Tyler assigns that the district court erred in denying his application to proceed in forma pauperis.

STANDARD OF REVIEW

[1] An appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court. *Thompson v. Nebraska Dept. of Corr. Servs.*, 263 Neb. 463, 640 N.W.2d 671 (2002).

ANALYSIS

[2] The district court erred in denying Tyler's application to proceed in forma pauperis on the ground that the complaint was illegible. Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) requires a district court to grant an application to proceed in forma pauperis—barring an objection based upon the grounds enumerated in the statute and the court's decision to sustain the objection. The grounds on which a court may deny an application to proceed in forma pauperis are as follows: "(1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious." § 25-2301.02.

[3] The district court denied Tyler's application because the court believed that the complaint was illegible and thus prevented the court from determining whether the complaint was frivolous or malicious. This does not fulfill the requirement of § 25-2301.02 that the court find that the complaint was actually frivolous or malicious as a prerequisite to denying the application. A frivolous legal position pursuant to § 25-2301.02 is one wholly without merit, that is, without rational argument based on the law or on the evidence. *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005).

We note that a district court is not without a remedy when a litigant files an application to proceed in forma pauperis in conjunction with an illegible complaint such that the court cannot determine whether the complaint is frivolous or malicious. Pursuant to Neb. Ct. R. § 6-1503, all pleadings "shall be readable" and a "pleading which does not conform . . . will be subject to a motion to strike from the file or such other action as the court deems proper." This rule provides the district court

with the authority to strike the illegible complaint and hold the application to proceed in forma pauperis in abeyance until the applicant provides the court with a legible complaint. Of course, if an applicant refuses or fails to timely comply, the application would then be subject to dismissal. See Neb. Rev. Stat. § 25-601 (Reissue 2008).

CONCLUSION

We conclude that the district court erred in denying Tyler's application to proceed in forma pauperis without affording Tyler an opportunity to file a legible complaint. We therefore reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. KENNETH W. CLARK, APPELLANT.

762 N.W.2d 64

Filed February 17, 2009. No. A-08-735.

1. **Judgments: Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determination made by the court below.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Sentences: Words and Phrases.** An invalid sentence is one that is not authorized by the permissible statutory penalty for the crime and is beyond the sentencing court's power to pronounce.
4. **Sentences.** Credit to any person sentenced to a city or county jail who is eligible for credit shall be set forth as part of the sentence at the time such sentence is imposed.
5. ____. If the original sentence is invalid, it is of no effect and the court may then impose any sentence which could have been validly imposed in the first place.
6. ____. A sentencing judge is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled.
7. ____. The giving of credit for time served under Neb. Rev. Stat. § 47-503(2) (Reissue 2004) is part of the sentence.
8. ____. A sentence validly imposed takes effect from the time it is pronounced, and when a valid sentence has been put into execution, the trial court cannot modify,

amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.

9. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.
10. **Sentences: Courts.** Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Webb E. Bancroft, and Yohance L. Christie, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

This case presents the question of whether a sentence of imprisonment pronounced by the district court that gives the offender more credit for time served than he actually served before sentencing can be thereafter corrected by the district court to reflect the correct number of days to be credited against his jail term. Kenneth W. Clark appeals the corrected sentence, as well as asserting that the period of incarceration ordered is excessive. Because the sentence results from a no contest plea, under Neb. Ct. R. App. P. § 2-111(E)(5)(a), we do not hear oral argument on this case.

FACTUAL BACKGROUND

Pursuant to an amended information, Clark was charged with third degree sexual assault, a Class I misdemeanor, to which he pled no contest. The victim, C.C., was spending the night with Clark's sister and her children. C.C. awoke early in the morning of August 9, 2006, to find Clark in bed with her and with

his hands under her shirt and bra, fondling her breasts. C.C. attempted to push him away, but he unbuttoned her pants and fondled her vagina. Clark's sister entered the room as C.C. was pushing him away, and C.C. immediately told Clark's sister what had occurred. C.C. was 14 at the time, and she did not consent to the sexual contact. The court accepted Clark's plea and found him guilty.

SENTENCING

The sentencing hearing was held May 19, 2008. At that sentencing hearing, counsel for the State and for Clark made comments. In the defense counsel's comments, he noted that Clark "stand[s] for sentencing today [having] served 61 days in jail." Counsel for the State made no mention before sentencing of time served. The trial court stated on the record: "So it will be the order of the Court, Mr. Clark, you be sentenced to a period of 360 days in the Lancaster County Jail, that you pay the costs of prosecution. You will be given credit for 361 days already served." Clark left the courtroom a "free" man.

Two days later, on May 21, 2008, the trial judge arranged to have counsel and Clark before him again and stated that although the record reflected that Clark had served 61 days, "the Court inadvertently gave him credit for 361 days." The trial court continued the matter until June 12 to give counsel time to submit authority on the issue of correction of the sentence.

On June 12, 2008, with Clark and counsel present, the court received the presentence investigation offered in evidence by the State over Clark's objection, which is not assigned as error. The presentence investigation clearly shows 61 days of time served before sentencing. The court then noted that no written order of sentence or commitment ever issued and that the fixing of credit for time served is not part of the sentence imposed and can be corrected. Thus, the court sentenced Clark to 360 days in the Lancaster County jail, with credit for 61 days already served. The court delayed execution of the sentence pending the appeal that Clark indicated he intended to file. The trial court rendered a written order memorializing such sentence on June 12, which order was file stamped by

the clerk on that date. Clark filed a timely notice of appeal on June 30.

ASSIGNMENTS OF ERROR

Clark asserts that the order of June 12, 2008, resentencing and committing Clark, was done without jurisdiction to modify a lawfully imposed and final sentence pronounced by the court on May 19 and that the sentence imposed by the court was excessive and an abuse of discretion.

STANDARD OF REVIEW

[1] 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. See *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 568 N.W.2d 908 (1997).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

ANALYSIS

Can Trial Court Correct Mistaken Award of Credit for Time Served?

[3] Clark's core argument is that the sentence pronounced on May 19, 2008, was a valid sentence; it cannot be modified, amended, or revised in any manner; any attempt to do so is ineffective; and therefore the original sentence remains in full force, citing *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). A fundamental predicate to this argument is that an invalid sentence is one that is not authorized by the permissible statutory penalty for the crime and is beyond the sentencing court's power to pronounce and, therefore, can be corrected. See *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992). Accordingly, Clark argues that while the amount of credit for time served stated on May 19 may have been incorrect, it did not constitute an invalid sentence, and that therefore, it cannot be later modified.

[4,5] While the State acknowledges the above holding of *Schnabel, supra*, it contends that Clark's original sentence was

invalid because Neb. Rev. Stat. § 47-503(2) (Reissue 2004) provides that "[c]redit to any person sentenced to a city or county jail who is eligible for credit . . . shall be set forth as part of the sentence at the time such sentence is imposed." As a result, the State argues that because Clark had served only 61 days, the credit of 361 days invalidates the sentence and the court may reimpose any sentence that could have been validly imposed in the first place, citing *State v. Blankenship*, 195 Neb. 329, 331, 237 N.W.2d 868, 869 (1976) ("[t]he general rule is that if the original sentence is invalid, it is of no effect and the court may then impose any sentence which could have been validly imposed in the first place").

The record is beyond dispute that prior to sentencing, Clark had been incarcerated for only 61 days, and thus the credit due him under § 47-503 was 61 days, not 361 days. Therefore, the question is simply whether the trial court can correct its mistake, which depends on whether the flawed original sentence was invalid, erroneous, or void. A similar factual pattern is found in *State v. Shelby*, 194 Neb. 445, 232 N.W.2d 23 (1975), where the trial court, in addition to a term of years, sentenced the defendant to the security section of the Lincoln Regional Center (LRC) for such time as was necessary to be determined by the director of the LRC, and the court further ordered that the LRC director would provide such psychiatric, social, and vocational therapy as was needed. At the time, there was a statutory provision for presentence evaluation at the LRC, but no provision for such a term of imprisonment at the LRC as part of the actual sentence. The trial court realized its mistake and recalled counsel and the defendant to appear, as was done here, and resentenced the defendant to the same period of incarceration, but without any reference to the LRC. The Nebraska Supreme Court affirmed the district court's handling of the matter, saying:

> It is settled law that the District Court has the power to impose a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself has invoked appellate jurisdiction for the correction of error.

Shelby, 194 Neb. at 447, 232 N.W.2d at 24.

We turn to the pertinent statute, § 47-503, which provides in relevant part:

> (1) Credit against a jail term *shall be given* to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based. . . .
>
> (2) Credit to any person sentenced to a city or county jail who is eligible for credit pursuant to subsection (1) of this section shall be set forth as part of the sentence at the time such sentence is imposed.

(Emphasis supplied.)

[6] In *State v. Torres*, 256 Neb. 380, 381, 590 N.W.2d 184, 185 (1999), the Nebraska Supreme Court applied this statute in a case where a criminal defendant was sentenced to 90 days, after which his counsel stated, "'He was incarcerated for 26 days prior to bonding out . . . . We're hoping for credit for 26 days.'" The county court said, "'I took that into consideration.'" *Id.* On appeal to the district court, the district judge indicated that it would have been clearer for the county judge to state a sentence of 116 days with credit for 26 days served, and the district court affirmed the sentence. On appeal, the Supreme Court noted its previous cases referencing Neb. Rev. Stat. § 83-1,106 (Reissue 2008) which hold that a sentencing judge "is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled," 256 Neb. at 383, 590 N.W.2d at 185, citing *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). The court noted that § 83-1,106 contains similar language to § 47-503, except that the former statute deals with state correctional facilities, rather than city or county correctional facilities, as is the case with § 47-503. The court in *Torres, supra*, then noted its opinion in *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993), holding that the word "shall" in § 83-1,106 required the sentencing court to separately determine, state, and grant credit for time served. The Supreme Court reversed the judgment and remanded the cause in *Esquivel, supra*, with directions to resentence after granting credit for time served pursuant to § 83-1,106. The

Torres court found that its holding in *Esquivel* extended to § 47-503(2) and that because credit for time served "shall be set forth 'as part of the sentence at the time such sentence is imposed,' . . . the district court sitting as an appellate court cannot remedy a sentence which was not correctly pronounced in the first instance." 256 Neb. at 384, 590 N.W.2d at 186. Thus, in *Torres*, the Supreme Court remanded to the district court for that court to remand to the county court to credit the defendant's sentence for the time served in jail prior to sentencing.

[7] Therefore, based on *Torres*, we find as a matter of law that in the instant case, the trial judge's conclusion that the giving of credit for time served under § 47-503(2) is not part of the sentence is incorrect. Therefore, the district court had to determine the amount of time already served, state such, and give credit against the sentence—and do so as part of the sentence pronounced. While the trial court did that, the credit given was obviously erroneous.

[8,9] The Supreme Court has clearly said that a sentence validly imposed takes effect from the time it is pronounced and that when a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988). *Schnabel, supra*, also holds that the circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court. (Citing *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991).)

Thus, bearing in mind the holdings of *Schnabel, supra*, and *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999), the question for us is whether the trial judge's original sentence

in this case was an "inadvertent mispronouncement of sentence," which, under *Schnabel*, cannot be corrected because Clark had left the courtroom, or whether it is an "invalid sentence," which can be corrected, even though Clark had left the courtroom.

[10] This court has written about the question of when a sentence is invalid in *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005). In *Wayt*, the defendant was convicted of a Class IV felony and placed on probation, which he failed. The district court then sentenced him to a term of 2 to 4 years' imprisonment. The parties apparently filed a "'Stipulation and Consent'" some 3 weeks after the above sentence was pronounced, to correct the minimum term of the indeterminate sentence because it was greater than that allowed by law. *Id.* at 760, 701 N.W.2d at 844. As a result, the trial court entered a "'Nunc Pro Tunc Journal,'" which was identical in all respects to the previous sentence, except that the low end of the sentence was changed to not less than 15 months, as required by the applicable statute, rather than the 2 years previously pronounced. *Id.* In *Wayt*, we relied upon *McElhaney v. Fenton*, 115 Neb. 299, 212 N.W. 612 (1927), and held:

> Like the sentence in *McElhaney*, the 2-year minimum sentence in this case was erroneous but not void. Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978). In *McDermott*, the Nebraska Supreme Court held that the district court was correct in determining that the county court should have modified or revised its original sentence by removing the erroneous portion. We conclude that under the circumstances in the present case, the trial court was empowered to correct its judgment to enter a valid sentence.

Wayt, 13 Neb. App. at 764, 701 N.W.2d at 846.

In the case before us, Clark was indisputably entitled to only 61 days of credit, but in all other respects, his sentence was valid for the crime to which he pled. Accordingly, we find that

the district court had authority to modify and revise the sentence by removing the erroneous portion thereof, making the proper finding of previous time served, and giving Clark credit for such by making the appropriate correction. Just as a criminal defendant would be entitled to have the court correct an invalid credit for 61 days of time served when he had actually served 361 days, the State is entitled to have a valid sentence given to Clark. In other words, the giving of 300 extra days of credit to Clark makes that portion of the sentence invalid and subject to correction, because clearly the court is not empowered to award more credit for time served prior to sentencing than was actually served. Thus, the court can lawfully make the correction to reflect that Clark is entitled to credit against his 360-day sentence for the 61 days served. Accordingly, we find that the trial court did not err in correcting the sentence and that the corrected sentence pronounced and entered on June 12, 2008, is a valid and correct sentence.

Excessive Sentence.

Clark argues that his sentence is excessive because the trial court wrongfully emphasized the nature and circumstance of the crime while neglecting the individual characteristics of Clark. In this regard, Clark cites educational difficulties, his difficulty in reading and comprehension, his diagnosis of oppositional defiant disorder, his previous admission to the LRC for medical treatment, and his depression. On the other hand, the State points us to the significant benefit to Clark from a plea agreement that amended his original charge from a Class IIIA felony, as well as forgoing a number of additional charges stemming from this incident. The State also directs us to Clark's substantial history of criminal behavior, both before his arrest for the instant offense as well as convictions for carrying a concealed weapon and possession of drug paraphernalia thereafter, and the fact that when he was sentenced, he was awaiting trial on charges for third degree domestic assault, refusing to comply with a police officer's directive, and operating a motor vehicle without an operator's license. In summary, Clark's criminal behavior is substantial, the presentence investigation assessment showed him to be at a high risk to reoffend,

and he received an extremely favorable plea bargain. The trial court's sentence is not excessive.

CONCLUSION

Clark's assignments of error are without merit, and therefore we affirm.

AFFIRMED.

IRWIN, Judge, dissenting.

I dissent from the majority's conclusion affirming the trial judge's procedure in sentencing Clark. That procedure entailed first sentencing Clark and allowing Clark to leave the courtroom a "free man." Then the trial judge somehow "arranged" days later for counsel and Clark to appear in court before him again. The judge told Clark that he had "inadvertently" sentenced him before. A month after this, the trial judge imposed a different sentence resulting in Clark's being sentenced to incarceration.

The trial court elucidates its procedure by explaining that no written order of sentence or commitment ever issued and that the fixing of credit for time served is not part of the sentence imposed and can be corrected. The majority expounds on this procedure by characterizing it as an invalid sentence. I disagree and find that the trial court's procedure was incorrect and that this issue should have been presented to an appellate court for correction, if such correction is warranted.

The trial court's misstatement concerning the amount of time previously served is a factual mistake which did not create an invalid sentence. Additionally, I dissent from the majority's decision that the trial court had the authority to modify the sentence to reflect the actual amount of time previously served. The sentencing case law does not support the majority's conclusion. As such, even if the sentence was invalid, a conclusion I do not agree with, the trial court did not have the power to change the sentence and impose a new one.

Mistake of Fact Versus Mistake of Law—Valid or Invalid Sentence in Context of Nebraska Sentencing Jurisprudence.

The first issue presented is whether the trial court's original sentence which mistakenly provided Clark with credit

for 361 days of previous time served rendered the sentence invalid. The majority concludes that the sentence was partially invalid. Specifically, the majority writes, "Clark was indisputably entitled to only 61 days of credit, but in all other respects, his sentence was valid for the crime to which he pled." I do not agree with the characterization of the sentence as "partially invalid."

The Nebraska Supreme Court has long held that a sentence is invalid when a sentencing court lacks statutory authority to impose the sentence. See *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992). Stated another way, a sentence is invalid when the sentencing court makes a mistake of law in the imposition of a sentence. The trial court did not make a mistake of law in sentencing Clark. Rather, the court misstated the amount of time Clark had previously served. This misstatement is a mistake of fact, not a mistake of law.

The majority cites to numerous cases where a sentence was found to be invalid. In each of these cases, the sentencing court made a mistake in applying the relevant law.

For example, in *State v. Shelby*, 194 Neb. 445, 447, 232 N.W.2d 23, 24 (1975), the Nebraska Supreme Court found a sentence to be "unauthorized, not provided for by statute, and either erroneous or void" when the district court sentenced the defendant to the security section of the Lincoln Regional Center for such time as was necessary to be determined by the director. The Supreme Court held that the district court lacked the authority to impose such a sentence, because there was no statutory provision "for treatment or confinement of the defendant in the Lincoln Regional Center under the discretion of the director." *Id.* at 446, 232 N.W.2d at 24.

Most of the cases cited by the majority involve situations where the trial court imposed a sentence that was not authorized by the permissible statutory penalty for the crime.

In *State v. Blankenship*, 195 Neb. 329, 237 N.W.2d 868 (1976), a jury found the defendant guilty of second degree murder. The district court subsequently sentenced the defendant to "an indeterminate period of not less than 25 years nor more than 30 years." *Id.* at 330, 237 N.W.2d at 869. On appeal, the Supreme Court held that this sentence was clearly erroneous

and invalid because under the currently existing statutes, a trial court was not authorized to sentence a defendant to an indeterminate sentence for a conviction of second degree murder.

In *State v. Wilcox, supra*, the district court sentenced the defendant to 6 months' imprisonment upon his conviction for first degree assault. On appeal, the State argued that the sentence was invalid because it was for a term less than the statutory minimum. The Supreme Court noted that first degree assault is a Class III felony, punishable by imprisonment from 1 to 20 years. The court then held that the sentence was invalid because the district court lacked statutory authority to impose less than 1 year's imprisonment for a conviction of first degree assault.

In *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005), this court found a sentence to be partially invalid when the minimum term of an indeterminate sentence exceeded the minimum term permitted by law.

In contrast to the cases cited by the majority, the original sentence imposed by the trial court in this case is clearly within the statutory limits. The majority implicitly concludes that the trial court made a mistake of law when it incorrectly stated the amount of time Clark had previously served. The majority states, "[C]learly the court is not empowered to award more credit for time served prior to sentencing than was actually served."

While the trial court clearly erred in determining that Clark had previously served 361 days in jail, there is no authority to support the proposition that such an error is a mistake of law, rather than a mere misstatement or a mistake of fact.

Pursuant to Neb. Rev. Stat. § 47-503 (Reissue 2004), a court must separately determine the amount of time previously served and grant the requisite amount of credit for that time served as a part of the sentence. Section 47-503 provides in pertinent part:

> (1) Credit against a jail term shall be given to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based. . . .

> (2) Credit to any person sentenced to a city or county jail who is eligible for credit pursuant to subsection (1) of this section shall be set forth as part of the sentence at the time such sentence is imposed.

Here, the court adhered to the requirements of the statute. The trial court did determine the amount of time Clark had previously served and did set forth the amount of credit as a part of its sentence, as is required by § 47-503. However, the court incorrectly stated the time Clark had already served. The majority does not explain how such a misstatement rises to the level of a mistake of law, nor does it provide authority supporting the notion that a mistake of fact in sentencing affects the validity of a sentence.

There is no support for the majority's conclusion that the original sentence imposed by the trial court was invalid because the trial court misstated the amount of time previously served. Based on the case law in this area and the specific circumstances of this case, the court's error was clearly a mistake of fact and the sentence was valid.

Trial Court's Authority to Change Original Sentence After Defendant Has Left Courthouse.

The trial court did not have the authority to correct its mistake of fact. The trial court's mistake in stating the amount of time previously served amounts to an inadvertent mispronouncement of a sentence. A trial court lacks authority to correct or amend such a mispronouncement in its sentencing order after the defendant leaves the courtroom. See *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). Because Clark left not only the courtroom, but in fact left the courthouse, and days passed before the court arranged for Clark to be brought back, the court did not have the authority to later correct Clark's sentence to reflect the actual amount of time Clark had previously served. The original sentence should be reinstated.

I write further to address the majority's reliance on *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005), to support its ultimate conclusion that a partially invalid sentence can be modified or revised by a trial court after a defendant has left the courtroom. I believe *State v. Wayt* to be incorrectly decided

and an inaccurate statement of the controlling law in this area. Accordingly, I believe that even if the original sentence in this case was "partially invalid," the trial court did not have the authority to alter or revise that sentence in any way.

In *State v. Wayt*, the defendant was convicted of a Class IV felony. Subsequently, the district court sentenced the defendant to 2 to 4 years' imprisonment. At that time, the minimum term of a Class IV felony indeterminate sentence could not exceed one-third of the maximum term allowed by law; that is, the minimum term for a Class IV felony could not exceed 20 months' imprisonment. See Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Reissue 2008). After the sentencing hearing, the State and the defendant submitted a stipulation to the court advising it that the minimum sentence exceeded that prescribed by law. In response to the stipulation, the district court entered an order which was identical to the previous sentencing order in every respect except that it purported to change the length of the sentence to 15 months' to 4 years' imprisonment. On appeal, this court found the original sentencing order to be partially invalid.

The *Wayt* court discussed whether the trial court had the authority to alter a partially invalid sentencing order. As a part of this discussion, the court cited the Nebraska Supreme Court's holding in *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978).

In *State v. McDermott*, the trial court sentenced the defendant to "'6 months in jail, subject to review in 30 days.'" 200 Neb. at 338, 263 N.W.2d at 483. Upon appeal, the Supreme Court found that the original sentence pronounced by the trial court "was not a completely valid and authorized sentence." *Id.* at 339, 263 N.W.2d at 484. The court found that the language, "'subject to review in 30 days by the Court,'" was unauthorized and that the sentence as pronounced was therefore partially valid and partially invalid or erroneous. *Id.* The court went on to state:

> The essential part of a sentence is the punishment, including the kind and the amount. . . . The addition of a provision for subsequent review is surplusage. Where a portion of a sentence is valid and a portion is invalid or erroneous,

> the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence.

Id. Essentially, the *McDermott* court held that a trial court can modify or revise a sentence by removing any "surplusage" that is invalid or erroneous, as long as the remaining portion of the sentence is, by itself, a complete valid sentence.

The circumstances in the Supreme Court's *State v. McDermott* are distinguishable from the circumstances in the Court of Appeal's *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005). In *State v. McDermott*, the lower court altered a sentencing order by completely removing an invalid portion, the surplusage, of the order. The remaining portion of the sentencing order remained in place. The court did not alter the sentence in any other manner. In contrast, in *State v. Wayt*, the trial court did not merely remove an invalid portion of the sentence, but, rather, modified the sentence by changing the minimum term of the indeterminate sentence. The trial court changed the essential part of the sentencing order by altering the length of the defendant's sentence. The trial court did not remove mere "surplusage," as in *State v. McDermott*.

Despite this important distinction between *State v. McDermott* and *State v. Wayt*, the *Wayt* court relied solely on the Supreme Court's decision in *State v. McDermott* when it held that a trial court was empowered to correct a sentencing order by altering the minimum term of an indeterminate sentence to fit within the statutory limits. The *Wayt* court did not discuss the difference in the facts of *State v. McDermott*, nor did the court specifically state that it was extending the ruling in *State v. McDermott* to permit such a revision or alteration of a partially invalid sentence. Rather, it seems that the *Wayt* court misconstrued the Supreme Court's narrow holding in *State v. McDermott*. The holding in *State v. McDermott* permits a partially invalid sentence to be altered only by removing invalid "surplusage," as long as the remaining sentence is a complete valid sentence.

State v. Wayt contains no authority, other than *State v. McDermott*, for a trial court's removal of and replacement to

an invalid or erroneous portion of a sentence. Accordingly, I do not believe the holding in *State v. Wayt* to be an accurate statement of the controlling law as laid out by the Supreme Court in *State v. McDermott*. A trial court does not have the authority to modify an invalid portion of a sentence by revising, changing, or amending the terms of the sentence.

The majority herein relies exclusively on the holding in *State v. Wayt* to support its conclusion that the trial court herein had the authority to revise the original sentence to accurately reflect the amount of time previously served. Because *State v. Wayt* was incorrectly decided, the majority's reliance on this case is misplaced. Therefore, even if the original sentence in this case was partially invalid, the trial court did not have the authority to alter the sentence to reflect the correct amount of time previously served.

Ultimately, the original sentence in this case contained a mistake of fact. The trial court mistakenly found that Clark was entitled to 361 days of time served when, in fact, Clark was entitled to only 61 days of time served. Because such a mistake of fact constitutes an inadvertent mispronouncement of the sentence, the trial court did not have the authority to revise, modify, or correct the sentence after Clark left the courtroom. Moreover, even if the court's mistake invalidated the sentence, the majority's reliance on *State v. Wayt* to support its conclusion that the court could modify the sentence by correcting the amount of time previously served is misplaced. This court's decision in *State v. Wayt* incorrectly interpreted the Supreme Court's decision in *State v. McDermott* and does not accurately reflect the state of the law. As such, we should reverse the judgment and remand the matter to the trial court with instructions to reinstate the original sentence.

If allowed to stand, the majority opinion adds to the plethora of permutations of problems that plague the pronouncements of punishments in Nebraska jurisprudence.

IN RE INTEREST OF LUIS G., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
LUIS G., APPELLANT.

IN RE INTEREST OF JOSE G., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
JOSE G., APPELLANT.

764 N.W.2d 648

Filed February 24, 2009. Nos. A-08-770, A-08-777, A-08-778.

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 juvenile court's findings.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
6. **Final Orders: Words and Phrases: Appeal and Error.** For purposes of determining whether an order affects a substantial right, such that an appeal can be taken from the order, a "substantial right" is an essential legal right, not a mere technical right; a substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which an appeal is taken.

Appeals from the County Court for Hall County: DAVID A. BUSH, Judge. Reversed and remanded with directions.

Jerom E. Janulewicz, of Mayer, Burns, Koenig & Janulewicz, for appellants.

No appearance for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

Jose G. and Luis G. appeal consolidated cases Nos. A-08-770, A-08-777, and A-08-778 from an order of the Hall County Court, juvenile division, vacating an order regarding Jose and Luis' eligibility for special immigrant juvenile status. For the following reasons, we reverse, and remand with directions.

STATEMENT OF FACTS

In late 2001 or early 2002, Jose and Luis came from Guatemala to the United States, undocumented, with their mother, and eventually to Grand Island, Nebraska. After coming to the United States, the boys did not have much, if any, contact with their father, who did not travel to the United States with the family. Jose and Luis' older sister and brother also reside in Grand Island.

This appeal arises from three separate juvenile cases in Hall County Court regarding Jose and Luis. In 2005, separate juvenile petitions, each arising from separate incidents involving Jose and Luis, were filed, alleging that each child was within the court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(1) (Reissue 2004).

In case No. A-08-770, in 2005, Luis admitted to one count of shoplifting and was placed in the temporary custody of the Office of Juvenile Services (OJS) for a residential evaluation and was eventually committed to the custody of the Department of Health and Human Services (DHHS), OJS. In case No. A-08-777, in 2005, Jose admitted to two counts of trespassing and was committed to the custody of DHHS, OJS. In 2005, a second petition was filed on Jose, case No. A-08-778, alleging assault in the third degree, resisting arrest, and disturbing the peace. Since the juveniles have been adjudicated, review hearings have been held every 6 months. Throughout the proceedings, Jose's permanency objective has been independent living and Luis' permanency objective has been guardianship.

In approximately 2006, Jose and Luis' mother was deported to Guatemala after being arrested for an unknown offense. At

the time of their mother's deportation, Jose was living in a group home and Luis was living in a foster home after living with his older sister.

On May 11, 2007, DHHS filed motions, in each of the three cases, for an order regarding the minors' eligibility for special immigrant juvenile status,

> for the reason that the juvenile intends to apply to the U.S. Bureau of Citizenship and Immigration Services (CIS) for a Special Immigrant Juvenile Visa and adjustment of status to permanent resident, and as a part of that application process, the juvenile must show that he meets the eligibility requirements, to wit:
>
> 1. The juvenile must have been declared dependent on a U.S. juvenile court or whom the court has committed to or placed under the custody of a state agency or department;
>
> 2. The juvenile must have been deemed eligible for long-term foster care;
>
> 3. The juvenile is so eligible due to abuse, neglect or abandonment;
>
> 4. It must have been determined in judicial or administrative proceedings that it is not in the juvenile's best interest to be returned to his or his parents' country of nationality or last habitual residence;
>
> 5. The juvenile must be under the jurisdiction of the juvenile court;
>
> 6. The juvenile must be unmarried;
>
> 7. The juvenile must be under the age of 21.

At a hearing on July 10, 2007, DHHS argued that Jose and Luis were attempting to submit applications to federal citizenship and immigration services for permanent status and that it was necessary for the court to make findings for special immigrant status in order to complete that process. Specifically, DHHS argued that Jose and Luis had been abandoned as a result of their mother's deportation back to Guatemala.

On July 23, 2007, the court, in an order regarding the minors' eligibility for special immigrant juvenile status, found that the juveniles were committed to DHHS and remained under the court's jurisdiction, eligible for long-term foster

care; that it was not in the best interests of the juveniles to be returned to their parents' country of nationality; and that the findings were made due to the abuse, neglect, or abandonment of the juveniles.

At a review disposition hearing on March 25, 2008, the county court continued the hearing and sua sponte ordered a consolidated hearing to "determine whether the orders entered by this Court in July of 2007 regarding the minors' eligibility for special immigrant juvenile status should be vacated." At the April 22, 2008, hearing, Jose and Luis both testified.

Jose testified that he lives with a foster family and attends high school in Grand Island. Jose testified that he was in the 11th grade and was in the process of "testing out" for a diploma. Jose explained that he would be finished with school in a few weeks but would not receive his diploma until May 2009. Jose's foster mother explained that he was completing his GED program, but would receive a diploma from the high school in 2009. Jose testified that he was employed part time at a fast-food restaurant through a minor's work permit and explained that he planned on eventually enlisting with the Marines or attending community college.

Jose described that he was dealing with depression and posttraumatic stress disorder. Jose stated that the posttraumatic stress disorder stemmed from his dreams recalling his father's abuse of his mother and from witnessing "[m]urders and dead bodies" in Guatemala. Jose participates in weekly therapy and takes medication for those problems. Jose explained that if he were forced back to Guatemala, he does not know how he and Luis would survive. Jose described his two uncles, who live in Guatemala and abuse members of the family, and how he would not feel safe because there is basically "no law" to protect him and Luis. Jose explained that he did not know where in Guatemala his mother was living, because she had been living with his grandmother until the grandmother was placed in the hospital after being beaten by his uncles. When questioned by the court, Jose testified that when his mother was being deported, DHHS thought it was best if he did not return to Guatemala with his mother and he did not know why she left him in the United States.

Jose's foster mother testified that Jose had lived with her family twice, once for about a year in 2005 to 2006 and again since March 2007. She testified that in the past year Jose had been with them, he had had no contact with his mother. Jose's foster mother described how Jose had shared with her details about living in Guatemala, such as surviving amongst gangs, shootings, and death, and how Jose and his siblings were left to fend for themselves. She testified that she would be willing to provide "[l]ong-term foster care, guardianship" to Jose if he were to stay in the United States.

Luis also testified at the hearing. Luis testified that he lives in a foster home in Grand Island and was in the ninth grade at a Grand Island high school. Luis testified that he was involved in track and was getting "A's and B's and some C's" in school. Luis explained that if he stayed in the United States, he wanted to try out for cross-country in high school and then, after high school, to become a welder and enlist in the Army. Luis testified that at the time his mother was involved in deportation proceedings, he was living with a foster family after living with his sister. Luis explained that the immigration judge gave him and his mother the choice for Luis to return to Guatemala or stay in the United States. Luis stated, "It was 50/50. She told me she couldn't take care of me and I — I should stay here. 'Cause she can — she can barely take care of her own stuff." Both juveniles testified that they had had little contact with their mother in the last 2 years, apart from her calling to ask for money. Luis described trying to forget about Guatemala because it was a "bad time." Luis testified that his family "didn't really have a home," because they were always moving from place to place with different relatives. Luis also described being abused by his mother with a belt and the abuse inflicted by his father, in Guatemala, with a belt and/or open hand. Luis testified that he participates in counseling for anger and depression and is taking medication for "ADHD."

Luis' foster parent testified that Luis had been placed with her family for about 1½ years. She testified that when Luis was first placed with her family, he was very restless and depressed, but has since improved and was doing very well in school. She

testified that at first, Luis was very restless because he was worried about being sent back to Guatemala, fearing that he would have to live in the streets or be killed. She described Luis' telling her that he had roamed the streets in Guatemala and that he had seen murders occur and dead bodies. She opined that Luis would be better off living in the United States, because she did not think that there was any family in Guatemala who would be able to protect the boys. She explained that Luis' recent involvement in sports had really helped him and that her family was willing to continue to have Luis in their home, even if it were to include a guardianship.

Carissa Cemper, the DHHS foster care caseworker for both Jose and Luis, testified that Jose and Luis were currently in deportation court with an appeal. Cemper testified that if the county court were to withdraw the special findings for the boys, they would have to start the immigration process over and file for asylum. Cemper further testified that the foster placement of Jose and Luis had been successful and that placement with OJS was still appropriate because of Jose's ongoing problems at school.

In a June 12, 2008, journal entry, the court stated:

> In July of 2007, this Court signed a[n] "order regarding minor's eligibility for special immigrant juvenile status" following a hearing at which no evidence was offered. In each case the Court found it was not in the best interest of the juvenile to be returned to his country of origin because of "abuse, neglect, or abandonment of the juvenile." The purpose of this hearing is to determine whether or not that finding was in error.
>
> At the time of the hearing, the evidence indicated the juveniles were brought into this country illegally by their mother sometime in 2001. From the record, it is apparent the children were here with their mother at least until a review hearing on December 15, 2005. After that date, there is no further record of appearance by their mother. Apparently, at some point, she also ran afoul of the law and was deported back to Guatemala. Luis testified when his mother was deported they were given the opportunity to return to Guatemala with their mother or stay here in

> the United States in the custody of [DHHS]. Both juveniles elected to stay here in the United States.
>
> At the time of the hearing, the juveniles described their living conditions in their home country prior to their arrival in the United States. Both [the juveniles' attorney] and [the attorney representing DHHS] argued persuasively it is in the best interests of the juveniles that they remain in this country. The Court is convinced that is true. However, the Court is equally convinced there are, in all probability, tens if not hundreds of thousands of people who are here illegally or who would like to come to the United States because they would be better off in this country. In addition, the record is devoid of any credible evidence that their mother abused, neglected, or abandoned the juveniles. First of all, the mother brought them here illegally presumably for a better life. Secondly, a conscious decision was made by this family to leave the children in the care and custody of [OJS] when the mother was deported. It is incongruous for the guardian ad litem or [DHHS] to argue the mother abused and neglected these children by leaving them here in the United States and at the same time argue that by doing so, they were being afforded a better life with greater opportunity.
>
> For all the foregoing reasons the Court finds that the orders previously entered by this Court "regarding minor's eligibility for special immigrant juvenile status" should be and the same hereby are vacated.

Jose and Luis have timely appealed, and the appellee has waived submission of a brief and argument in the appeal.

ASSIGNMENT OF ERROR

Jose and Luis assign, rephrased and consolidated, that the county court erred in sua sponte vacating its July 23, 2007, order due to a lack of evidence of abuse, neglect, or abandonment of the juveniles by their mother.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent

of the juvenile court's findings. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008); *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

ANALYSIS

Jurisdiction.

[2,3] In a juvenile case, as in any other appeal, 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. *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Id.*

[4,5] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. Neb. Rev. Stat. § 25-1902 (Reissue 2008). A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

[6] Since this case is a special proceeding, the analysis next requires an inquiry into whether the county court's order vacating the July 23, 2007, order, that Jose and Luis were eligible for special immigrant juvenile status, affects a substantial right. For purposes of determining whether an order affects a substantial right, such that an appeal can be taken from the order, a "substantial right" is an essential legal right, not a mere technical right; a substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which an appeal is taken. *State v. Jackson*, 15 Neb. App. 523, 730 N.W.2d 827 (2007).

The Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2006); 8 C.F.R. § 204.11 (2008),

gives undocumented children, under the jurisdiction of a juvenile court, the ability to petition for special immigrant juvenile status in order to obtain lawful permanent residence in the United States. Prior to the June 12, 2008, order, Jose and Luis were eligible and had applied for a valid federal application for special immigrant juvenile status. In this specific case, without the order of eligibility, including the required findings from the state court, Jose and Luis would be barred from proceeding in the federal system with a valid application for special immigrant juvenile status and would face deportation to Guatemala. The order vacating that eligibility determination effectively terminates the application for legal permanent residence, clearly affecting a substantial right of both Jose and Luis. Therefore, we determine that the June 12, 2008, journal entry vacating the July 23, 2007, order is a final, appealable order properly before this court for appellate review.

June 12, 2008, Special Immigrant Juvenile Status Determination.

Since we have determined that the order vacating the eligibility for special immigrant status is a final, appealable order, we can now turn to Jose and Luis' assignments of error. Jose and Luis assign that the county court erred in sua sponte finding that they were not abused, neglected, or abandoned by their mother and vacating the July 23, 2007, order.

First we address the contention by Jose and Luis that the county court was without power to vacate its July 23, 2007, findings. In accordance with Neb. Rev. Stat. § 43-2,106.02 (Reissue 2008), the juvenile court or county court sitting as the juvenile court "shall have the power to vacate or modify its own judgments or orders during or after the term at which such judgments or orders were made in the same manner as provided for actions filed in the district court." Thus, we find this assignment of error is without merit.

Next, we address Jose and Luis' argument that the county court erred in finding there was no evidence of abuse, neglect, or abandonment. Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion

independent of the juvenile court's findings. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008); *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

In order to qualify for an application for special immigrant juvenile status, a finding by the state court involved is required determining that a special immigrant is:

> an immigrant who is present in the United States—
>
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;
>
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence[.]

8 U.S.C. § 1101(a)(27)(J). The eligibility requirements for special immigrant status for certain aliens declared dependent on a juvenile court are that the alien

> (1) Is under twenty-one years of age;
>
> (2) Is unmarried;
>
> (3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court;
>
> (4) Has been deemed eligible by the juvenile court for long-term foster care;
>
> (5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and
>
> (6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to

> the country of nationality or last habitual residence of the beneficiary or his or her parent or parents[.]

8 C.F.R. § 204.11(c).

As previously discussed, on July 23, 2007, the county court made findings of fact that Jose and Luis met the eligibility requirements necessary for special immigrant juvenile status and, then, in a June 12, 2008, journal entry, the county court determined that "the record is devoid of any credible evidence that their mother abused, neglected, or abandoned the juveniles" and that "a conscious decision was made by this family to leave the children in the care and custody of [OJS] when the mother was deported."

We have carefully undertaken a de novo review of the testimony and the record in this case and are required to reach a conclusion independent of the court's findings. See, *In re Interest of Tyler F., supra*; *In re Interest of Jeffrey K., supra*. We find that the record contains significant evidence that both Jose and Luis met the requirements necessary for a finding of eligibility for special immigrants, specifically, that they had been abused, neglected, and/or abandoned. There was testimony of both Luis and Jose that both parents had inflicted physical abuse, hitting them with a belt and hitting them with an open hand across the back of the head. The boys testified that their mother failed to take care of them and could barely take care of herself. Jose testified that, when he was given a choice to return with his mother to Guatemala or stay in the United States, DHHS thought it was best for him to stay. Luis testified that the choice was "50/50" and that his mother told him to stay because she could not take care of him.

Clearly, there is evidence in the record to substantiate a finding that the boys had been abused, neglected, and/or abandoned for purposes of their eligibility for special immigrant juvenile status, and we find that the county court erred in vacating the July 23, 2007, order. We, therefore, reverse the decision of the county court and remand with directions to reinstate the July 23, 2007, order approving the minors' eligibility for special immigrant juvenile status.

CONCLUSION

Upon our de novo review of the record, we find that the court erred in vacating the order regarding the minors' eligibility for special immigrant juvenile status. As such, we reverse the decision of the county court and remand the cause to the county court with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICKY LEE RICHARDSON, APPELLANT.

763 N.W.2d 420

Filed September 23, 2008. No. A-07-1316.

This opinion has been ordered permanently published by order of the Court of Appeals dated February 19, 2009.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
5. ____: ____: ____. A traffic stop investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants.
6. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence,

pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

7. **Criminal Law: Constitutional Law: Statutes: Sentences: Time.** Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to the defendant. A change which imposes a more burdensome punishment than existed at the time a crime was committed runs afoul of ex post facto principles.
8. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically indicated otherwise.
9. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
10. **Sentences: Appeal and Error.** When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

I. INTRODUCTION

Ricky Lee Richardson appeals from his conviction and sentence in the district court for Lancaster County for one count of driving during revocation, subsequent offense. Because the district court did not err in denying Richardson's motions to suppress or abuse its discretion in sentencing Richardson and because there was sufficient evidence in the record to support Richardson's conviction, we affirm.

II. BACKGROUND

Richardson's appeal arises out of his conviction and sentence following a traffic stop on September 4, 2006, in Lincoln, Nebraska, by Officer Jeremy Wilhelm of the Lincoln Police Department. Wilhelm initiated the traffic stop because he did not observe a front license plate on the vehicle. As Wilhelm was making the stop, he was able to see a license plate in the front window of the vehicle, although he could not see the numbers or letters on the plate. Wilhelm was later able to see that the license plate was on the dashboard, not fully upright, and not securely fastened in place. During the course of the stop, Wilhelm learned that Richardson's operator's license was suspended. Wilhelm then placed Richardson under arrest and drove him to the Lancaster County corrections facility. Wilhelm did not read Richardson his *Miranda* rights at any time during his contact with Richardson.

The State filed an information on October 12, 2006, charging Richardson with one count of driving during revocation, subsequent offense, under Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2006), a Class III felony.

Richardson filed three separate motions to suppress, which were heard by the district court on January 11, 2007. The court received Wilhelm's testimony and heard arguments from counsel. We discuss the relevant portions of Wilhelm's testimony in the analysis section below.

The district court entered an order on January 29, 2007, overruling Richardson's motions to suppress. The court made certain findings of fact and then considered whether Wilhelm had grounds to stop Richardson's vehicle. The court reviewed the statutory requirements for the display of license plates and concluded Nebraska law requires that the front license plate be prominently displayed, securely fixed and upright, and on the front of the vehicle and that the letters and numbers be plainly visible during daylight and under artificial light at night. The court concluded that if the front plate is not displayed in a manner meeting these criteria, a violation occurs. The court found in this case that Richardson's front license plate was in the vehicle, was not securely fixed, and was not upright and that the letters and numbers were not plainly visible to

Wilhelm as he observed Richardson's vehicle travel on the street. The court found that Wilhelm had probable cause to stop Richardson's vehicle as it appeared from the evidence that Richardson was in violation of statutory provisions relating to the display of license plates. Upon concluding that the traffic stop was lawful, the court overruled Richardson's motions to suppress to the extent that they related to any visual or auditory impressions of Wilhelm during his contact with Richardson.

The district court then addressed Richardson's argument that his statements to Wilhelm should be suppressed on the basis that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The court determined that Richardson was not in custody for purposes of *Miranda* during the relevant interaction with Wilhelm. The court also determined that Richardson's statements were freely, voluntarily, knowingly, and intelligently made and were not the product of promises, force, fear, oppression, or coercion.

Trial was held on May 21, 2007. The district court received exhibit 1 (trial stipulation), exhibit 2 (certified driver's abstract record), exhibit 3 (certified copy of prior conviction for third-offense driving under the influence (DUI)), and exhibit 4 (certificate of incarceration), which were exhibits offered by the State. The trial stipulation, in which Richardson preserved his objection to the admission of the evidence targeted in his pretrial motions to suppress, provided that Wilhelm would testify consistent with his testimony at the suppression hearing. The court also received exhibit 5 (certified copy of Lincoln Mun. Code § 10.52.020), which was offered by Richardson.

Because not all of the evidence that the parties wished to present was available on May 21, 2007, trial was continued until July 2 for the presentation of further evidence. On July 2, the district court received exhibits 6 and 7 (certified copies of Lincoln city ordinances relating to DUI offenses), which were offered by the State, and exhibit 8 (bill of exceptions from the suppression hearing), which was offered by Richardson.

The district court entered an order on September 10, 2007, finding Richardson guilty of driving during a period of revocation. The court ordered a presentence investigation and set a date for an enhancement and sentencing hearing. We discuss the relevant provisions of the court's written opinion in the analysis section below.

On November 9, 2007, the district court received exhibits relevant to enhancement of the charge against Richardson and found Richardson guilty of a subsequent offense for driving during revocation.

On November 26, 2007, the district court sentenced Richardson to incarceration for a period of 3 to 6 years, revoked Richardson's operator's license, and suspended his privilege to operate a motor vehicle for a period of 15 years. Richardson subsequently perfected his appeal to this court.

III. ASSIGNMENTS OF ERROR

Richardson asserts that (1) the district court erred in denying his motions to suppress, (2) the evidence was insufficient to support the guilty verdict, and (3) the court abused its discretion by imposing an excessive sentence.

IV. ANALYSIS

1. Motions to Suppress

Richardson asserts that the district court erred in denying his motions to suppress. Richardson argues that there was not a traffic violation in this case warranting the stop and that because the stop itself was illegal, any evidence seized as a result of the stop and any statements made by Richardson during the resulting investigation should have been suppressed.

(a) Standard of Review

[1,2] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). The ultimate determinations of reasonable suspicion to conduct an investigatory stop and

probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

(b) Motions to Suppress Were Properly Denied

At the suppression hearing, Wilhelm testified that he noticed Richardson's vehicle because of the improper display of the front license plate. Wilhelm initially thought there was no front plate on the vehicle. Before the stop, however, Wilhelm observed what appeared to be a license plate in the front window of the vehicle. The front license plate was not on the front bumper; but, rather, it was in the front window of the vehicle, "tucked in" between the glass and the dashboard. Although the front license plate appeared to be stationary in the window, Wilhelm was unable to ascertain the numbers or see the plate clearly. Wilhelm did not observe any license plate numbers for the vehicle until he turned his vehicle around and approached Richardson's vehicle from behind. The rear license plate on the vehicle was displayed properly. Wilhelm immediately conducted a traffic stop of the vehicle. Wilhelm contacted the driver who identified himself as Richardson. Richardson did not have an operator's license on him. Wilhelm then asked Richardson to exit the vehicle and placed Richardson in the rear seat of the police cruiser for further positive identification. Wilhelm positively identified Richardson using the mobile data terminal computer in his vehicle. Wilhelm ran Richardson's name through the "warrant channel" and learned that Richardson's operator's license was suspended.

With respect to the placement of license plates on a vehicle, there are several relevant statutory provisions. Neb. Rev. Stat. § 60-399 (Cum. Supp. 2006) provides:

> (1) Except as otherwise specifically provided, no person shall operate or park or cause to be operated or parked a motor vehicle or tow or park or cause to be towed or parked a trailer on the highways unless

> such motor vehicle or trailer has displayed the proper number of plates as required in the Motor Vehicle Registration Act.
>
> . . . In all cases such license plates shall be securely fastened in an upright position to the motor vehicle or trailer so as to prevent such plates from swinging and at a minimum distance of twelve inches from the ground to the bottom of the license plate. . . .
>
> (2) All letters, numbers, printing, writing, and other identification marks upon such plates and certificate shall be kept clear and distinct and free from grease, dust, or other blurring matter, so that they shall be plainly visible at all times during daylight and under artificial light in the nighttime.

Neb. Rev. Stat. § 60-3,100 (Cum. Supp. 2006) provides in relevant part that "[w]hen two license plates are issued, one shall be prominently displayed at all times on the front and one on the rear of the registered motor vehicle or trailer."

[3] The district court concluded in this case that the manner in which the front license plate on Richardson's vehicle was displayed was in violation of the above provisions relating to the display of license plates in the Motor Vehicle Registration Act. We agree. Although Wilhelm could see that a license plate had been placed against the front windshield, he was unable to read the numbers on the plate. Richardson argues that Wilhelm's inability to read the plate was more attributable to the speed at which the two vehicles were traveling and the fact that the stop occurred at night than to the positioning of the plate itself; however, the district court clearly inferred that Wilhelm was unable to read the numbers on the front license plate due to the manner in which it was displayed. We give due deference to that inference and conclude, as did the district court, that a traffic violation occurred, giving Wilhelm probable cause to stop Richardson's vehicle. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008).

[4,5] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in

scope to the circumstances that justified the traffic stop. *Id.* A traffic stop investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008). Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. *Id.* These were in fact the steps that Wilhelm took upon contacting Richardson and learning that Richardson did not have an operator's license on his person, and which led to the discovery that Richardson's license had been suspended.

Because the traffic stop was lawful and because Wilhelm's subsequent investigation was reasonably related in scope to the circumstances that justified the traffic stop, we conclude that the district court did not err in denying Richardson's motions to suppress.

2. Sufficiency of Evidence

Richardson asserts that the evidence was insufficient to support the guilty verdict in this case of driving during revocation, subsequent offense. Richardson argues that the State did not prove the contents of the municipal ordinance relative to the prior revocation of his operator's license and that the revocation period had expired at the time of the September 4, 2006, stop.

(a) Standard of Review

[6] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is

sufficient to support the conviction. *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

(b) Evidence Was Sufficient

(i) Proof of City DUI Ordinance

In order to prove the charge against Richardson, the State was required to prove that his driver's license had been revoked by a court and that at the time he was stopped on September 4, 2006, he was operating a motor vehicle during a period of court-ordered revocation.

Exhibit 3, a certified copy of Richardson's conviction for DUI, third offense, in violation of Lincoln Mun. Code § 10.52.020, was received at trial without objection by Richardson. Exhibit 3 shows that Richardson's offense occurred on August 30, 1990. The uniform citation and complaint shows that on that date, Richardson "[o]perate[d] or [was] in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs or when he/she had an amount of alcohol in his/her blood, breath, or urine in excess of the amount permitted by law; L.M.C. § 10.52.020." In that case, Richardson entered a guilty plea in February 1991 and was sentenced on May 3 to 5 months in jail and was ordered not to drive a motor vehicle for 15 years with his operator's license and driving privileges being revoked and suspended for a like period of time.

Exhibit 7 was received at trial in this case. The certification on exhibit 7 is dated May 21, 2007, and shows that exhibit 7 is a true and correct copy of city ordinance No. 14918 as the original appears in the office of the city clerk. Ordinance No. 14918 amended §§ 10.52.020 and 10.52.025 of the municipal code to change the penalties for DUI to bring the penalties in conformity with state law. Exhibit 7 shows that § 10.52.020 concerned the offense of DUI. The penalties for DUI found in § 10.52.020, as contained in exhibit 7, provide that if a person had two or more previous DUI convictions, the individual would be sentenced to a jail term of 3 to 6 months, would be fined $500, and would have his or her operator's license revoked for a period of 15 years. The ordinance also provided that the revocation was to be administered upon sentencing and

should not run concurrently with any jail term imposed. Exhibit 7 shows that the ordinance was passed on June 27, 1988, with an operative date of July 9, 1988. Exhibit 7 includes a certificate page from the city clerk, dated July, 1, 1988, wherein the city clerk certified that the ordinance was passed by the city council and approved by the mayor.

Exhibit 6 was also received by the district court. Exhibit 6 is a certified copy of city ordinance No. 15635 and shows that the ordinance enacted chapter 10.16 of the municipal code to revise and renumber certain sections of the code relating to DUI, unlicensed, or uninsured. The certification, dated May 21, 2007, shows that exhibit 6 is a true and correct copy of the ordinance as the original appears in the office of the city clerk. The ordinance was passed on July 9, 1990, with an operative date of December 1, 1990, and among other things, repealed the former § 10.52.020. The relevant municipal code provision for DUI in exhibit 6 is found in § 10.16.030 and contains sentencing provisions essentially identical to those found in the DUI code provision set forth in exhibit 7 with, for the most part, only a few minor grammatical changes from the text of the provision found in exhibit 7. Exhibit 6 includes a certificate page from the city clerk, dated July 16, 1990, certifying that the ordinance was passed by the city council and approved by the mayor.

Richardson offered exhibit 5, a certified copy of a portion of chapter 10.52 of the city ordinances, which has been in effect from its passage on July 9, 1990, and was still in effect on May 15, 2007, the date of the certification. Exhibit 5 shows that § 10.52.020, since July 9, 1990, has prohibited the obstruction of public streets by trains and since that time has not addressed the offense of DUI.

The district court concluded from the above evidence that exhibit 6 shows that the city code provisions regarding DUI offenses were amended and renumbered in July 1990, that the DUI provisions were previously found in § 10.52.020, and that at the time of Richardson's arrest on August 30, 1990, the provisions were actually found in § 10.16.030, which became effective on July 16, 1990. The court concluded that the State had proved beyond a reasonable doubt that Richardson had

previously been convicted of DUI, third offense, on May 3, 1991, and that as a part of that conviction, his driver's license was suspended/revoked for 15 years.

We agree with the district court that the evidence shows that the municipal code DUI provisions were amended and renumbered in July 1990. The record shows, however, that those changes did not go into effect until December 1, 1990. Accordingly, while the changes were not in effect at the time Richardson committed the offense in August 1990, they were in effect at the time of Richardson's plea-based conviction and sentencing in February and May 1991, respectively.

[7,8] We note that the changes to the particular DUI code provision in question were not substantive, but involved a few grammatical changes and a renumbering of the DUI provisions in general. Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to the defendant. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995). A change which imposes a more burdensome punishment than existed at the time a crime was committed runs afoul of ex post facto principles. *Id.* Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically indicated otherwise. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

Viewing and construing the evidence most favorably to the State, we conclude that the State put forth sufficient evidence to prove the contents of the city DUI ordinances in effect both at the time of Richardson's 1990 offense and in effect at the time of his plea and sentencing in 1991. Richardson's arguments relating to this portion of his assignment of error are without merit.

(ii) Revocation Period Not Expired

For his 1990 DUI offense, Richardson was sentenced on May 3, 1991, to 5 months in jail, a $500 fine, and a 15-year license revocation with the sentence to run consecutive to any other sentence then being served by Richardson. Both the old version of § 10.52.020 and the new § 10.16.030 provide that

the 15-year license revocation "shall be administered upon sentencing" and that such revocation "shall not run concurrently with any jail term imposed." Exhibit 4, the certificate of incarceration, shows that at the time Richardson was sentenced on May 3, he was serving another sentence which began on April 30 and concluded on October 1. Exhibit 4 further shows that Richardson commenced serving the DUI, third offense, sentence in question on October 2 and that he finished serving this sentence on January 27, 1992.

The district court reasoned that under the above facts, the 15-year license revocation period did not begin to run until January 28, 1992, and thus did not end until January 28, 2007. The court concluded that Richardson's license was still under revocation at the time of the September 4, 2006, traffic stop. We agree and find no merit to Richardson's arguments to the contrary.

3. Sentencing

Richardson asserts that the district court abused its discretion by imposing an excessive sentence.

(a) Standard of Review

[9,10] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed. *Id.*

(b) Sentence Was Not Excessive

A subsequent offense of operating a motor vehicle during a revocation period is a Class III felony, punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. See,

§ 60-6,197.06; Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006). Because of Richardson's prior convictions for felony driving under suspension, the district court sentenced Richardson to 3 to 6 years' imprisonment, a sentence clearly within the statutory limits. The record shows that the district court did consider other relevant factors besides Richardson's past criminal history. In particular, the court noted Richardson's need for alcohol treatment and his desire to not "be here again." After reviewing the record and the presentence investigation report, which reflects previous driving under suspension convictions and sentences of various lengths, we conclude that the district court's sentence was not an abuse of its discretion.

V. CONCLUSION

The district court did not err in denying Richardson's motions to suppress or abuse its discretion in sentencing Richardson. There was sufficient evidence in the record to support Richardson's conviction.

AFFIRMED.

THOMAS E. BABEL, APPELLANT, V.
JERRY SCHMIDT ET AL., APPELLEES.
765 N.W.2d 227

Filed March 3, 2009. No. A-08-089.

1. **Equity: Boundaries: Appeal and Error.** An action to ascertain and permanently establish corners and boundaries of land under Neb. Rev. Stat. § 34-301 (Reissue 2008) is an equity action.
2. **Equity: Appeal and Error.** In an equity action, an appellate court reviews the record de novo and reaches an independent conclusion without reference to the conclusion reached by the trial court, except that where credible evidence is in conflict, the appellate court will give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.
3. **Waters: Words and Phrases.** Avulsion is a sudden and perceptible loss of or addition to land by the action of water, or a sudden change in the bed or course of a stream.
4. ____: ____. Avulsion is a change in a stream that is violent and visible and arises from a known cause.
5. ____: ____. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made

by contiguous water; reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.

6. **Waters: Boundaries.** Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel.
7. ____: ____. Accretion, regardless of which bank to which it adds ground, leaves the boundary still at the center of the channel.
8. ____: ____. Avulsion has no effect on boundary, but leaves it in the center of the old channel.
9. **Waters.** The applicability of the law of avulsion is not dependent upon the navigability of the waterway.
10. **Waters: Quiet Title: Proof.** A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence.
11. **Pleadings: Evidence: Proof: Waiver.** Generally, admissions made in pleadings are taken as proof of the fact alleged and thereby waive or dispense with the need to produce evidence of that fact.
12. **Trial: Witnesses: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded.
13. **Real Estate: Boundaries: Title.** When asserting a real estate ownership or boundary claim, a party must prevail, if at all, on the strength of his own title, and not on the perceived weakness in the title of others.
14. **Waters: Boundaries: Title.** Title to riparian lands runs to the thread of the contiguous stream.
15. **Waters: Boundaries: Words and Phrases.** The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow.
16. **Waters: Boundaries: Title.** Where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland.

Appeal from the District Court for Merrick County: MICHAEL J. OWENS, Judge. Reversed and remanded with directions.

David A. Domina, of Domina Law Group, P.C., L.L.O., and Patrick J. Nelson, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Jerom E. Janulewicz, of Mayer, Burns, Koenig & Janulewicz, for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

This appeal involves conflicting claims of ownership to riparian land in the form of islands located between the banks of the Platte River in Merrick County, Nebraska. In a sentence, the resolution of the dispute depends upon whether the legally effective boundary is the present "thread of the stream" or whether there was an avulsive event proved, which, while changing the location of the thread of the stream, would not change the legal boundary between the owners from what it was at the time of the avulsive event. Thomas E. Babel, the landowner on the south bank of the Platte River, appeals the decision of the district court for Merrick County that found that the boundary between his property and the property of the north bank landowners (the heirs at law of Arthur Schmidt, hereinafter collectively the Schmidts) was created by avulsion. Consequently, the district court found that the boundary was as alleged by the Schmidts in their counterclaims, filed pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2008), rather than the thread of the stream. We reverse the district court's order, because we find that the Schmidts failed to prove an avulsive event by the requisite proof. As a result, the boundary between the lands of Babel and the Schmidts is determined by the current location of the thread of the stream.

FACTUAL BACKGROUND

Babel and the Schmidts own property on the south bank and the north bank, respectively, of the Platte River near Chapman in Merrick County, and as a result, they own the riparian lands consisting of islands between their respective banks of the Platte River. Who owns what island land is the crux of the lawsuit.

So that our factual recitation is more understandable, we begin by defining the legal concept of the "thread of the stream." In *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 995, 520 N.W.2d 556, 562 (1994), we said:

> The thread or center of a channel, as the term is employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and

> particularly at its lowest flow. *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946). In other words, the thread of the stream is the deepest groove or trench in the bed of a river channel, the last part of the bed to run dry.

We point out at this juncture that the parties have stipulated to the current location of the thread of the stream in the area of this boundary dispute. Babel is the record title owner of "Island No. 5," which is located to the south of the thread of the stream and to the south of "Island No. 3," to which the Schmidts are record title owners. In this litigation, the Schmidts lay claim to a portion of Island No. 5, as set forth in their counterclaims upon which the case was tried. Because the maps, surveys, and photographs which are crucial to the case do not lend themselves to effective narrative, we have attached as appendix A to our opinion a reproduction of exhibit 59 (with orienting labels affixed by Babel for briefing purposes that we have "borrowed" from Babel's brief) in an effort to more effectively orient the reader. Appendix A is an aerial photograph of the river, its various channels, and the two islands in dispute taken near the time of trial.

On March 8, 2006, Babel filed suit against the Schmidts, seeking to establish the boundary for Island No. 3 and Island No. 5. The Schmidts answered and filed counterclaims to establish the western and southern boundaries of their property pursuant to § 34-301. Four days before trial, Babel dismissed his complaint without prejudice, and the case proceeded to trial solely on the Schmidts' counterclaims, filed May 15 and July 10, 2006. In addition to stipulating to the current location of the thread of the stream, the parties stipulated that Babel is the record title owner of that "part of Island 5 in Section 12, Township 12 North, Range 7 West of the 6th P.M., in Merrick County, Nebraska, containing 6 and 26 hundredths acres, more or less, and accretions thereto of Island No. 5." The parties also stipulated that the Schmidts were the record title owners of

> Island No. 3 located [(a)] partially in Section 1, Township 12 North, Range 7 West of the 6th P.M.[;] (b) . . . partially in Section 6, Township 12 North, Range 6 West of the 6th P.M.; and (c) partially in Section 31, Township 13 North,

> Range 6 West of the 6th P.M., all in Merrick County, Nebraska, and all accretion land deriving from and adjacent to such Island No. 3.

Babel alleged that the boundary separating his property from the Schmidts' is located at the current thread of the stream of the main channel of the Platte River. The Schmidts sought to establish that their alleged property line was the original boundary of Island No. 3 and its meanders prior to an avulsive event and that such property line ran along the south side of Island No. 5 at the place where the thread of the stream was previously located, meaning that the Schmidts would own considerably more land than provided for in their legal description—and Babel would own less. The parties agreed that neither would harvest or cut timber on the disputed land during the pendency of the lawsuit, including any appeal, and that any claim for damages resulting from improper cutting of timber would be resolved at a later time.

This boundary dispute arose in late 2005 or early 2006 after Charles Schmidt employed Jim Graves, the Merrick County surveyor, to conduct a survey on Island No. 3 after Arthur died, so as to enable the Schmidt family to settle Arthur's estate. Graves discovered that there were significant discrepancies between the legal descriptions of the islands and the cadastral map that had been prepared in 1988. Original surveys of the area were conducted by the Government Land Office (GLO) in 1858, 1862, 1865, and 1866. Additional surveys had been conducted on the properties, including the islands, in 1921 and 1932. Graves determined that the GLO surveys of Island No. 3 differed considerably from all later surveys as well as from his own 2006 survey.

Prior to Graves' 2006 survey and his discovery of differences from the earlier surveys, neither the Schmidts nor Babel had been aware of a boundary dispute. In 1992, Babel fenced a portion of Island No. 3, including a portion north of the boundary that the Schmidts asserted in this litigation. Until 2006, Babel did not receive any notice from Arthur (or any of his heirs) that the boundary between the two islands or the ownership thereof was in dispute. The part of Island No. 3 that lies to the north of the stipulated thread of the stream, which part is indisputably

owned by the Schmidts, was conveyed by quitclaim deed to Todd and Charlene Vanhousen in 2006. Charles testified that the Vanhousens planned to purchase any additional property from the Schmidts which resulted from this litigation and that the Vanhousens had entered into a written contract with the Schmidts to such effect.

DISTRICT COURT DECISION

A bench trial was held on the Schmidts' counterclaims on September 18, 2007, in the district court for Merrick County. The trial court issued its memorandum opinion and order on December 19. The court stated that the two issues before it concerned (1) the configuration of Island No. 3 on the original GLO surveys and (2) whether the Schmidts presented sufficient evidence for the court to find that the channel to the north of the disputed property was created by a sudden act constituting avulsion—meaning, we would add, that the boundary would not be the stipulated thread of the stream, but, rather, would be the channel flowing along the southern boundary of Island No. 5. The court stated, and neither party disagrees, that the disputed portion is highlighted in yellow on exhibit 47, which can be described as the easternmost tip of Island No. 5, a triangle measuring approximately 4,600 feet in length and 1,400 feet at its widest point. The district court concluded that the change in the main channel to the north resulted from a sudden act constituting avulsion and found generally in favor of the Schmidts, declaring the legal boundary to be that which they alleged in their counterclaims. In its order, the court remarked, "What [the avulsive] act was is in some question, but the nature of the evidence is such that the channel was not changed by accretion." Babel timely appealed the district court's ruling to this court.

STANDARD OF REVIEW

[1,2] An action to ascertain and permanently establish corners and boundaries of land under § 34-301 is an equity action. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). In an equity action, an appellate court reviews the record de novo and reaches an independent conclusion without reference

to the conclusion reached by the trial court, except that where credible evidence is in conflict, the appellate court will give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. See *Sila v. Saunders*, 274 Neb. 809, 743 N.W.2d 641 (2008).

ASSIGNMENTS OF ERROR

Babel assigns as error the following actions of the district court: (1) finding avulsion had been proved, (2) finding that any part of the southern meanders of Island No. 3 are located south of the main channel, and (3) finding the southern and western boundaries of the Schmidts' land as alleged in the Schmidts' counterclaims and failing to find and determine the southern boundary of the Schmidts' land as alleged in Babel's replies and exhibit 43.

ANALYSIS

The core question before us in this appeal, remembering that our review is de novo on the record, is whether there was sufficient evidence adduced by the Schmidts to show that avulsion occurred that altered the course of the river from the channel south of Island No. 5 to the current thread of the stream located between Island No. 3 and Island No. 5 sometime between the 1858 GLO survey and the 1921 survey of Island No. 3, the timeframe asserted during oral argument—although we note that the Schmidts' answers to interrogatories in evidence would extend the time period to 1938. However, in the final analysis, whether the end of the timeframe is 1921 or 1938 is of no consequence. In conjunction with our standard of review, we note that there really are no disputed facts, beyond the ultimate determinate fact of whether there was an avulsive event. We begin with the legal principles that guide our analysis.

[3-5] The law of avulsion and accretion is well settled in Nebraska. Avulsion is a sudden and perceptible loss of or addition to land by the action of water, or a sudden change in the bed or course of a stream. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994). Avulsion is a change in a stream that is violent and visible and arises from a known

cause, such as a freshet or a cut through which a new channel has formed. See *Conkey v. Knudsen*, 141 Neb. 517, 4 N.W.2d 290 (1942), *vacated on other grounds* 143 Neb. 5, 8 N.W.2d 538 (1943). On the other hand, accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made by contiguous water; reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. *Monument Farms, Inc. v. Daggett, supra*. In summary, the changes wrought by accretion versus avulsion involve processes that are markedly different, and each process has a different consequence for the boundary between the landowners on opposite banks of the river.

[6-9] Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957). Accretion, regardless of which bank to which it adds ground, leaves the boundary still at the center of the channel. See, *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000); *Lienmann v. County of Sarpy*, 145 Neb. 382, 16 N.W.2d 725 (1944); *Conkey v. Knudsen, supra*; *Monument Farms, Inc. v. Daggett, supra*. On the other hand, avulsion has no effect on boundary, but leaves it in the center of the old channel. See *Lienmann v. County of Sarpy, supra*. See, also, *O'Connor v. Petty*, 95 Neb. 727, 146 N.W. 947 (1914) (holding that change by avulsion in main channel of Missouri River does not change boundary between states of Iowa and Nebraska). The applicability of the law of avulsion is not dependent upon the navigability of the waterway. *Anderson v. Cumpston, supra*.

[10] A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977). The burden to show that the channel of the river changed by avulsion obviously would be the same. Babel argues that there is a presumption of accretion if avulsion is not shown. However, we disagree that such presumption exists

under Nebraska law and find the reasoning of *United States v. Wilson*, 433 F. Supp. 57 (N.D. Iowa 1977), on this point persuasive where the court applied Nebraska law to land altered by the changing course of the Missouri River.

Past cases have illustrated the sorts of events that constitute avulsion. See, *Anderson v. Cumpston, supra* (party admitted that change in thread of Platte River was brought about suddenly by artificial structures and diversion, thus doctrine of avulsion applied and boundary remained in center of old channel); *Ziemba v. Zeller, supra* (based on photographs and eyewitness reports, construction of diversion dam and riprapped dike some 700 to 800 feet long, which shut off main channel, constituted avulsion); *Ingraham v. Hunt*, 159 Neb. 725, 68 N.W.2d 344 (1955) (flash floods that suddenly, violently, and visibly moved channel of river far toward north of original channel can be considered avulsion); *Conkey v. Knudsen, supra* (evidence was sufficient to show ice gorge created by spring floods in 1910 altered course of Missouri River and constituted avulsion, not accretion). It is noteworthy that no such similar events as described in the foregoing cases are identified in the evidence as the avulsive event allegedly at work in the present case.

We first deal with Babel's argument that the Schmidts conclusively conceded that the channel north of Island No. 5, which is the agreed-upon current thread of the stream, was not changed by avulsion. The Schmidts were served with interrogatories, and in response to a question about the manner, nature, and date of any avulsive act that changed the location of the channel of the Platte River, the Schmidts answered by filing some responses in June and some in August 2006. The response upon which Babel's argument is premised is as follows: "The location of the channels of the Platte River presently carrying water located north of the East Half of Island Number 5 has not changed location by avulsion. It has, however, changed in width over time due to changes both natural and man-made." There can be no question that the above answer is an admission, which cuts against the Schmidts' central premise that the ownership of the contested island land is determined by an avulsive event. When asked on

cross-examination at trial, Charles stated that this statement was accurate to the best of his knowledge and belief at the time it was made. In the supplemental response to interrogatories submitted by Charles on April 26, 2007, he adds the following to his previous response:

> Island No. 3 was bisected by a channel as a result of an avulsive act, of indefinite or unknown origin, that occurred after the GLO surveys of Island No. 3 and prior to July 23, 1938. Since that date, upstream changes in the river, both natural and man-made, have caused this channel and others to change over time such that at the present time this channel now contains the thread of the stream of the Platte River.

[11,12] Babel claims, without citation of authority, that the first interrogatory answer is, in effect, a conclusive admission by the Schmidts that there was no avulsion. Generally, admissions made in pleadings are taken as proof of the fact alleged and thereby waive or dispense with the need to produce evidence of that fact. *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d. 554 (1998). However, we believe a party may introduce evidence in conflict with their prior admission unless doing so runs afoul of the rule from *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), which holds that where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. See, also, *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 202 N.W.2d 188 (1972). From our experience, we believe it is fair to say that while the *Momsen* rule is well known and often asserted, it is actually infrequently applied.

Thus we assume that Babel would have us apply the *Momsen* rule and disregard the Schmidts' evidence of avulsion from Dr. Robert Joeckel, which evidence we discuss in detail later. 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. *Levander v. Benevolent and Protective Order of Elks*, 257 Neb. 283, 596 N.W.2d 705 (1999). We find that there is a rational and sufficient explanation for the change in position from the first interrogatory answer of "no avulsion" to the supplemental response to the interrogatory and evidence at trial from which the Schmidts argue that they had proved avulsion. The interrogatory answer was a layperson's answer, whereas the evidence that arguably proves avulsion is the product of expert investigation done by Joeckel after the first interrogatory answer. We find that there is a reasonable explanation for the change, that the first interrogatory answer is not conclusive, and that the other evidence of avulsion offered by the Schmidts is not discredited as a matter of law under *Momsen v. Nebraska Methodist Hospital, supra*. Consequently, the practical effect is simply that the first interrogatory answer is considered, along with the Schmidts' evidence of avulsion, in our de novo review of the record.

The only evidence as to whether an avulsive act altered the course of the river came from Graves and Joeckel. Graves was asked if he had an opinion, based on his training as a surveyor, as to why there would be a channel currently across Island No. 3 that is not indicated in the GLO survey of 1858. In response, Graves said:

> [T]here must have been a smaller — a small stream that went through there and something has, erosion or whatever, caused through the time since it was surveyed until — even from the time they originally surveyed until 1921, it actually had — must have grown quite a bit. . . .
>
> And there's something — probably was a small island, small channel through there and something made it grow to be a larger one, got more water at that point than it had or stopped going in different directions. Some reason that all of a sudden it became a lot because if it was that big, it should have showed up on the GLO.

Graves also testified that in his personal opinion, not as a surveyor, but, rather, as a person familiar with the river, he did not know exactly what caused the river to change course but suspected a flood or ice jam. Graves' comments about the

possibility that a small stream existed and the occurrence of a flood or ice jam are not based upon personal knowledge, are not expert opinion, and are clearly mere speculation. Graves' unchallenged testimony shows that the location of the thread of the stream has changed, making Babel's Island No. 5 bigger and the Schmidts' Island No. 3 smaller. However, in order for the Schmidts to prevail on their counterclaims—meaning that the boundary is not the thread of the stream—the Schmidts' burden, under the legal principles we have outlined above, is to prove that the change occurred by avulsion. Graves' testimony simply does not prove avulsion, although it does show a change in the course of the river, but at an unknown point in time.

Finally, Graves testified that the thread of the stream was widening over time, from 138.7 feet in 1921 to over 300 feet in 2006. To the extent that this evidence is probative of anything, to us it supports the notion of change in the thread of the stream by a gradual process—the hallmark of accretion, rather than avulsion.

We turn next to the Schmidts' claim that the testimony of Joeckel, an associate professor of soil science and geology at the University of Nebraska-Lincoln, establishes that the change in the course of the river is due to avulsion. Joeckel testified about two soil samples that he took from Island No. 5 by digging holes with a spade and one sample taken from Island No. 3 in the same fashion. The samples were taken from the center of the northeastern portion of Island No. 3 (labeled "A" on the map in exhibit 46), from the northern edge of Island No. 5 near the thread of the stream (labeled "B" on the map in exhibit 46), and from the center of the northeastern part of Island No. 5 (labeled "C" on the map in exhibit 46). Joeckel testified that the soil profile of site A was broadly similar to site B and that both sites had thick "A and C horizons" and relatively no "B horizon." A soil horizon, according to Joeckel's testimony, is a layer within a soil sample that exists because of differences in chemical, physical, and biological processes at different depths below the land surface of the soil, measured from the surface of the land downward. In reference to the soil sample from site B, Joeckel testified:

> These soils are all developed in river sediment. So we kept digging, basically, as deep as we could go by hand with the spade, down to 85 centimeters. So no evidence for there being more than one unit of sediment being deposited on that site, hence, came to the conclusion that the soil was developed in a single episode, single length of time after deposition had ceased at the site.

As to the soil sample from site C, Joeckel stated that it was obviously a different profile from either site A or B. Joeckel testified that site C had much more geomorphic activity and episodes of sedimentation and soil development. He stated that site C had been subject to more regular flooding and sedimentation events than either site A or B, which had been subject to fewer, if any, severe floods. Joeckel did not opine that any particular soil samples resulted from accretion or avulsion. When asked whether the soil profile at site C was consistent with accretion land, Joeckel limited his testimony to discussion of the thickness of the soil horizons at each site and his conclusions that site C had more episodes of sedimentation and soil development than either site A or B.

The Schmidts argue Joeckel's testimony about the three soil samples shows that site C was formed by accretion and that an avulsive event occurred at some point to separate site A from site B, because the two sites are now located on different islands, whereas, according to the Schmidts' argument, they were once part of the same island. The Schmidts further argue that Joeckel's testimony about the soil samples shows the thread of the stream changed in a dramatic fashion so as to have bisected the original island and that as such, they have shown an avulsive event that requires the property boundary to be located along the original thread of the stream. Consequently, according to the Schmidts' argument, the original boundary of Island No. 3 and its southern meanders, which corresponds with the channel south of Island No. 5 as alleged by the Schmidts, is the effective boundary between the lands of Babel and the Schmidts, rather than the current thread of the stream.

The problem is that Joeckel did not testify to the conclusions that the Schmidts argue. While Joeckel did testify to

finding differences in the soil at sites A and B when compared to site C, he did not offer an opinion as to when the soil patterns he found at the three sites were formed—particularly in relation to the surveys in evidence that go back as far as 1858. Joeckel did testify that the soil pattern he observed at sites A and B were likely created in "a single episode, single length of time after deposition had ceased at the site." Whether the land in question was identifiable as having remained intact through the substantial change in the river has been seen as relevant to avulsion. See, *United States v. Wilson*, 433 F. Supp. 57 (N.D. Iowa 1977); *Jeffrey v. Grosvenor*, 261 Iowa 1052, 157 N.W.2d 114 (1968). While we see the evidence regarding the soils at sites A and B as supporting the avulsion theory to a degree, it does not carry the Schmidts' burden of proof by itself. We so conclude because there is no evidence as to when such "single episode" occurred, what caused it, or whether a "single episode" in the language of soil science, the basis upon which Joeckel testified, has the same hallmarks as the legal concept of avulsion, which requires a sudden and violent change in the course of the river. The significance of the passage of time, obviously an important factor in determining whether avulsion occurred because of the requirement of "suddenness," is more equivocal with respect to accretion. For example, in the instance of the Missouri River, accretion has been described as being either rapid or gradual, but avulsion was said to be characteristically sudden and rapid. See, *United States v. Wilson, supra*; *Jeffrey v. Grosvenor, supra*. No evidence was offered which would enable a fact finder to say what the avulsion event was, how and why it occurred, and when it occurred—no particular day, month, year, or even decade being identifiable from the evidence. And, of course, it follows from the foregoing that no one testified to witnessing the event, nor was any historical record proffered—evidence that would clearly help satisfy the "perceptible" requirement for an avulsive event.

[13] We have previously rejected the speculation of the surveyor, Graves, about a "possible ice jam" as simply not probative. Thus, we are left with Joeckel's testimony that sites A and B, now separated from one another by the thread of the

stream, have similar soil composition, but which is different from that found at site C. From this we are to conclude that soil samples from sites A and B evidence avulsion and thereby to infer that an avulsive event changed the course of the river, causing the thread of the stream to now flow between Island No. 3 and Island No. 5 as depicted on appendix A, whereas before such event, the thread of the stream was to the south of its present location. The Schmidts' basic premise seems to be that they disproved accretion at sites A and B, that Babel did not prove accretion there, and that thus the change in course of the river had to have been by avulsion. This seems an apt point to recall that when asserting a real estate ownership or boundary claim, a party must prevail, if at all, on the strength of his own title, and not on the perceived weakness in the title of others. See *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994).

Therefore, the burden is on the Schmidts to show that an avulsive event did occur. It is clear that the law defines such an event as sudden and perceptible. See *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994) (avulsion is sudden and perceptible loss of or addition to land by action of water, or sudden change in bed or course of stream). See, also, *Conkey v. Knudsen*, 141 Neb. 517, 4 N.W.2d 290 (1942) (avulsion is change in stream that is violent and visible and arises from known cause, such as freshet or cut through which new channel has formed), *vacated on other grounds* 143 Neb. 5, 8 N.W.2d 538 (1943).

These various elements that constitute the hallmarks of an avulsive event simply are absent from the evidentiary record. The district court did not make a finding of a sudden, violent, perceptible, and known event that changed the course of the river at the pertinent location, but, rather, relied on Joeckel's characterization of the soil samples to find that avulsion had occurred. This sparse evidence—that, at best, merely suggests the possibility of avulsion, but of an unknown nature, from an unknown cause, and occurring at an unknown time between 1858 and either 1921 or 1938—is simply insufficient to carry the Schmidts' burden of proving that the change in the river's course occurred from avulsion. As a result, we reverse the

trial court's finding in favor of the Schmidts on their counterclaims, as well as reversing its declaration that the boundary between the lands of Babel and the Schmidts is as set forth in exhibit 45.

Finally, we address the Schmidts' claim that *Frank v. Smith*, 138 Neb. 382, 293 N.W.2d 329 (1940), applies as an exception to the law of avulsion and accretion, which exception they assert supports the district court's decision. This exception applies when the river changes its main channel not by excavating, passing over, and then filling the intervening place between the old channel and the new channel, but by flowing around the intervening land where the change to the new channel results from an increase year to year in the amount of water flowing in the new channel. *Id*. The law then requires that the boundary line remain in the old channel rather than the new channel as long as the old channel remains a running stream. *Id*. In *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946), the Nebraska Supreme Court found the exception to the law of accretion and avulsion detailed in *Frank v. Smith, supra*, to apply to a boundary dispute over lands bordering the North Platte River. In *Ecklund*, numerous farmers testified that the north channel had originally carried most of the water, but after dams had been built upstream, the south channel began to have more flow and should be considered the thread of the stream. The court held:

> In view of the evidence in the record, and in the light of the law as set out herein, we have reached the conclusion that, while the change of the main channel of the North Platte River in section 8, from the north side to its present location on the south side, may have been a gradual change throughout a space of at least 40 years, yet the thread of the stream, flowing on the north side when each of the parties hereto secured their land, did not gradually move over the subsequently formed intervening lands that were formed to the south thereof. However, the south branch of the river flowing south of Ware Island did finally become the main channel, but this was subsequent to the formation of the land herein involved, and the true boundary line between the respective riparian owners

> remains the line of the thread of the stream where it formerly ran in the north channel.

State v. Ecklund, 147 Neb. at 523, 23 N.W.2d at 790. A similar holding was reached in *Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976), where the course of the Missouri River was altered by the U.S. Army Corps of Engineers' construction of dikes, which moved the river westward and placed a parcel of land that had been in Burt County, Nebraska, on the Iowa side of the river.

> Whether the facts involve a river cutting a new main channel as in *Valder v. Wallis*, or an existing channel supplanting a parallel channel as the thread of the stream as in *State v. Ecklund*, the more sudden and violent the change in the thread of a stream, the more likely the court has been to override the general rule and find that the riparian boundary remains in the thread of the original main channel, even if water no longer flows in that channel.

Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 996, 520 N.W.2d 556, 563 (1994). However, in cases where this exception has been applied, there was ample evidence that the river did in fact change course in a sudden and violent manner, as well as evidence as to how that change took place. That is not the case here. There is only Graves' speculation of an ice jam as to how and why the river changed course, and this is insufficient. We have no evidence in the record that the change in the river which allegedly bisected Island No. 3, as surveyed in the 1850's and 1860's, was sudden or violent or that the original channel was supplanted by the current thread of the stream. We therefore decline to apply the exception in this case because, based upon the record, we cannot say that the river changed in such a way as to warrant the exception in *Frank v. Smith*, 138 Neb. 382, 293 N.W.2d 329 (1940), to apply.

[14-16] Now that we have determined that the Schmidts have failed to sustain their burden of proof, we must determine the location of the boundary to separate the Schmidts' land from Babel's. The location of the thread of the stream is not in dispute in this case. The parties agreed that the current thread

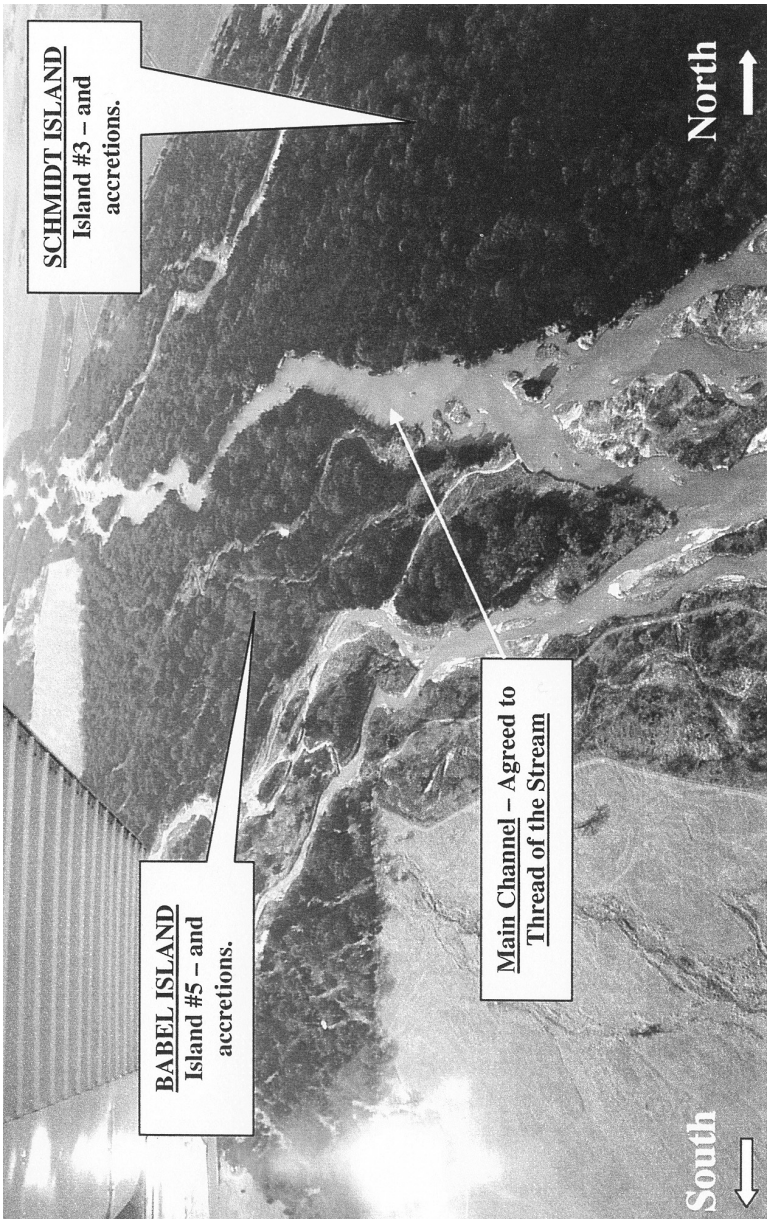
of the stream runs along the north side of Island No. 5. Graves testified that he determined the current thread of the stream to be the channel north of Island No. 5 instead of the channel south of Island No. 5, because it was "a lot deeper and a lot wider, carried a lot more water than the one that [one of the attorneys for the Schmidts] had showed which was the south channel, the clear south channel of the Platte River." And the parties ultimately stipulated to the present location of the thread of the stream. Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Id*. The same principles in setting the boundary at the thread of the stream are applicable to islands within the river. Where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. *Winkle v. Mitera*, 195 Neb. 821, 241 N.W.2d 329 (1976). Because we find the Schmidts have not proved, by a preponderance of the evidence, that the thread of the stream changed by avulsion or that the exception set forth in *Frank v. Smith, supra*, and *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946), applies, the boundary between the riparian lands of Babel and the Schmidts is the stipulated current thread of the stream as alleged in paragraph 7 of exhibit 77. We remand the cause to the district court with directions to make such finding establishing the boundary.

CONCLUSION

The order of the district court is hereby reversed, and the boundary is determined to be as alleged in paragraph 7 of Babel's petition, in evidence as exhibit 77. The cause is remanded to the district court for entry of judgment establishing the boundary as set forth in our opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

(*See page 418 for appendix A.*)


SCHMIDT ISLAND
Island #3 – and
accretions.
North
BABEL ISLAND
Island #5 – and
accretions.
Main Channel – Agreed to
Thread of the Stream
South

APPENDIX A

JOHN R. LOWE, APPELLANT AND CROSS-APPELLEE, V. LANCASTER COUNTY SCHOOL DISTRICT 0001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, AND MICHAEL KACZMARCZYK, APPELLEES AND CROSS-APPELLANTS.

766 N.W.2d 408

Filed March 10, 2009. No. A-08-363.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.
4. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
5. **Political Subdivisions Tort Claims Act: Notice.** The filing requirement of Neb. Rev. Stat. § 13-905 (Reissue 2007) constitutes a "procedural precedent" to the commencement of a judicial action.
6. ____: ____. An appellate court applies a substantial compliance analysis when there is a question about whether the content of the required claim filed under the Political Subdivisions Tort Claims Act meets the requirements of Neb. Rev. Stat. § 13-905 (Reissue 2007); however, if the notice is not filed with the person designated by statute as the authorized recipient, a substantial compliance analysis is not applicable.
7. **Equity: Estoppel.** Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.
8. ____: ____. The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.

9. **Political Subdivisions Tort Claims Act: Notice.** A claimant is entitled to rely on the representations and procedures of a political subdivision to identify the party to whom a claim should be addressed for filing—provided that the plaintiff is diligent in inquiring.
10. **Limitations of Actions: Political Subdivisions.** There is no legal duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuance of the law.
11. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

John M. Guthery and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

John R. Lowe appeals the dismissal of his tort action against Lancaster County School District 0001, also known as Lincoln Public Schools (LPS), and LPS employee Michael Kaczmarczyk, based on the district court's finding that Lowe failed to comply with the filing requirements of the Political Subdivisions Tort Claims Act (Tort Claims Act) and the court's determination that the doctrine of equitable estoppel was not applicable in this case. For the reasons set forth herein, we affirm in part, and in part reverse and remand for further proceedings.

STATEMENT OF FACTS

Lowe filed a negligence action against LPS and Kaczmarczyk, alleging that Lowe was injured on or about March 10, 2005, when the motor vehicle that Lowe was driving was rear-ended by a vehicle owned by LPS and negligently driven by Kaczmarczyk. LPS and Kaczmarczyk filed answers denying

any act of negligence and further asserting, inter alia, the affirmative defenses that Lowe failed to comply with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 2007) of the Tort Claims Act and that Lowe's claims were barred by the applicable statute of limitations.

LPS and Kaczmarczyk moved for summary judgment, and a hearing thereon was held. The facts adduced, when viewed in the light most favorable to Lowe, established the following: After the accident, Lowe hired an attorney to represent him in the personal injury action against LPS and Kaczmarczyk. According to the attorney's deposition testimony contained in exhibit 14, the attorney telephoned the LPS district office, identified himself as an attorney, and asked the person who answered the telephone where to file a political subdivisions tort claim. The person who answered LPS' telephone told the attorney to file the claim with the human resources department and gave him a specific post office box address for that department. During the attorney's deposition, he testified that he made notes contemporaneously with that telephone call, which notes were marked as deposition exhibit 7. The notes stated "Nancy" and "HR Lincoln Public Schools PO Box 82889 Lincoln 68501." Although the attorney could not recall whether "Nancy" was the person whom he talked to or a person who worked for human resources whom he was directed to contact, the attorney testified that he was directed to file his claim with the human resources department at the address which he had been provided and which he wrote down contemporaneously with the telephone call. Each of the women named "Nancy" who worked in the human resources department during the time period in question was deposed and denied speaking with the attorney.

In the attorney's deposition, when asked if the person who answered the telephone was a man or a woman, the attorney responded, "To the best of my recollection, I believe it was a woman. . . . But I — like I said, I can't recall." The attorney did not believe that he asked who the secretary of the governing body was or whose duty it was to maintain the official records of the political subdivision or the governing body. He further testified that he was not claiming this person intentionally

gave him the wrong information and that "they seemed to be acting in good faith . . . when they relayed the information to me, and so I assumed that they were." On September 13, 2005, the attorney mailed a claim to LPS' human resources department at the post office box address which had been provided to him.

When the attorney did not receive an acknowledgment of LPS' receipt of the claim, as requested in the claim letter, the attorney telephoned LPS' district office, identified himself as an attorney who had been told to file a tort claim with the human resources department, and said that he had not received a response on the previously filed claim. The attorney was told that he should speak with "Sue Wright." However, in his deposition testimony, the attorney was not entirely certain whether the second telephone call occurred prior to, or after, his hand delivery of the amended claim. The attorney did not remember whom he talked to during that second call, and he stated, "[C]ould I swear on a stack of bibles? No. But to the best of my recollection that's how — that's how it would have happened." The attorney stated that the telephone call was his primary reliance.

The attorney subsequently decided to amend the claim and drafted an amended claim dated October 26, 2005. The amended claim was not addressed to Wright personally; it was addressed "Dear Sir or Madam." Since there had been no acknowledgment of the initial claim, the attorney hand-delivered the amended claim to the district office on October 31. He then went to the front desk, indicated that he was an attorney who had previously filed a political tort claim with the human resources/risk management department, and asked with whom he should follow up. (Risk management is a department within the human resources division of LPS.) The receptionist identified the appropriate individual as Sue Wright. The attorney proceeded to Wright's office, but was informed that Wright was not in; however, he was able to speak to claims handler Kim Miller, who told him that Wright was "the one that handles" the tort claims. Miller was asked to date stamp a copy of the amended claim for the attorney,

which she did. The attorney testified that after speaking with Miller, he left feeling reassured that his claim had been filed with the right person. Wright, the risk manager for LPS in 2005 and 2006, responded to the attorney by letter dated November 1, 2005, wherein she "acknowledges receipt by the Human Resources Department of your September 13, 2005 and October 26, 2005 letters on the above referenced claim." At her deposition, Wright acknowledged that, at the time she mailed the aforementioned letter, she knew that the superintendent, not the human resources department, was designated to accept tort claims on behalf of LPS. Wright further knew that Lowe's claim had not been delivered to the superintendent, because she had made an inquiry with the superintendent's assistant. Further, when asked in her deposition whether Wright had received input from, or had a conversation with, an LPS attorney prior to drafting the letter, Wright stated, "Possibly," and "I could have been advised. I do not remember."

In Wright's deposition, she testified that when a tort claim is delivered to the superintendent, the claim is forwarded to her. Wright then sends a copy of the claim to legal counsel and LPS' insurance company and opens a file under the claimant's name. In Lowe's case, Wright followed the same process as she did with claims forwarded to her by the superintendent. Wright stated that if, hypothetically, she had known the attorney had been informed by someone from LPS that the human resources department, or Wright herself, was the appropriate place to file a tort claim, Wright would have advised the attorney that neither was the proper place.

LPS is a Class IV public school district as classified under the statutes of the State of Nebraska and is a political subdivision for the purposes of the Tort Claims Act. LPS regulation No. 3500.5 of the LPS Policies and Regulations states, in part, that "[t]ort claims will be received and placed on file with the secretary of the board . . . ." LPS policy No. 2110 states, in part, that "the superintendent serves as executive secretary of the board of education." Dr. E. Susan Gourley was the superintendent of LPS in 2005 and 2006 and served as the executive

secretary of the Lincoln Board of Education. The terms "secretary of the board" and "executive secretary of the board" are the same position with LPS.

The district court granted LPS and Kaczmarczyk's motion for summary judgment, based upon its determination that there were no material facts in dispute regarding Lowe's failure to serve his tort claim upon the appropriate individual under the Tort Claims Act. Further, the district court found that the doctrine of equitable estoppel did not excuse Lowe's failure to comply with the act, because the evidence did not support a finding of false representation or concealment of material facts. The district court determined that, because the statute of limitations had run, LPS and Kaczmarczyk were entitled to judgment as a matter of law. Lowe has timely appealed to this court.

ASSIGNMENTS OF ERROR

Lowe contends that the district court erred in finding that he did not comply with the Tort Claims Act and in failing to apply the doctrine of equitable estoppel to preclude LPS and Kaczmarczyk from raising the affirmative defense that Lowe did not comply with the filing requirements of the Tort Claims Act. LPS and Kaczmarczyk have cross-appealed, claiming that the district court erred in receiving exhibit 14, the attorney's deposition, into evidence over hearsay and foundation objections.

STANDARD OF REVIEW

[1-3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Chebatoris v. Moyer*, 276 Neb. 733, 757 N.W.2d 212 (2008). 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.* When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions. *Id.*

ANALYSIS

Compliance With Tort Claims Act.

[4] Lowe contends that the district court erred in finding that he failed to comply with the filing requirements of § 13-905 of the Tort Claims Act. The Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003); *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003); *Villanueva v. City of South Sioux City*, 16 Neb. App. 288, 743 N.W.2d 771 (2008). See, Neb. Rev. Stat. § 13-919 (Reissue 2007) (claims against political subdivision; limitation of action); Neb. Rev. Stat. § 13-920 (Reissue 2007) (suit against employee of political subdivision for act occurring after May 13, 1987; limitation of action). It is undisputed that LPS is a political subdivision for the purposes of the Tort Claims Act.

[5,6] All tort claims under the Tort Claims Act "shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision." § 13-905. The filing requirement of § 13-905 constitutes a "procedural precedent" to the commencement of a judicial action. See, *id.*; *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008); *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). The Nebraska Supreme Court has applied a substantial compliance analysis when there is a question about whether the content of the required claim meets the requirements of the statute; however, the court has expressly held that if the notice is not filed with the person designated by statute as the authorized recipient, a substantial compliance analysis is not applicable. *Niemoller v. City of Papillion, supra*.

In the instant case, the evidence is undisputed that Lowe did not file his claim with Gourley, who was the superintendent of LPS and secretary of the board of education and, as such, was the person designated by LPS as the authorized recipient to receive tort claims under the Tort Claims Act. The aforementioned case law is clear that a substantial compliance analysis

is inapplicable to situations in which the political subdivision contends that the claim was not filed with the recipient designated by § 13-905. Because Lowe did not file his claim with the person designated by LPS to receive tort claims, he did not comply with the filing requirements of § 13-905.

Equitable Estoppel.

Next, Lowe contends that the district court erred in failing to apply the doctrine of equitable estoppel to preclude LPS and Kaczmarczyk from raising the affirmative defense that Lowe did not comply with the filing requirements of the Tort Claims Act.

[7] Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Becton, Dickinson & Co. v. Nebraska Dept. of Rev.*, 276 Neb. 640, 756 N.W.2d 280 (2008); *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002).

[8] The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003). In such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice. *Id.*

[9,10] Viewing Lowe's evidence in the light most beneficial to Lowe and giving him the benefit of all reasonable inferences deducible from the evidence, as we are required to do, we note the evidence establishes Lowe's attorney contacted

LPS on two separate occasions, once by telephone and once in person, and was told that the human resources department was the place to file his tort claim and that Wright was the person who "handles" the tort claims. "A claimant is entitled to rely on the representations and procedures of a political subdivision to identify the party to whom a claim should be addressed for filing—provided that the plaintiff is diligent in inquiring." *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. at 328, 664 N.W.2d at 470 (Gerrard, J., concurring; McCormack and Miller-Lerman, JJ., join) (joining majority opinion finding that plaintiff did not meet filing requirements of Tort Claims Act; however, concurrence noted that plaintiff made no inquiries of political subdivision and that therefore there were no representations by political subdivision upon which plaintiff could show reliance). However, we note that there is no legal duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuance of the law. *Estate of McElwee v. Omaha Transit Auth., supra.*

Other evidence, when also viewed in the light most favorable to Lowe, supports Lowe's claim of equitable estoppel. Wright's letter dated November 1, 2005, wherein she "acknowledges receipt by the Human Resources Department of your September 13, 2005 and October 26, 2005 letters on the above referenced claim," was clearly artfully crafted. Wright's letter, when viewed favorably to Lowe, can be seen as calculated to convey the impression that Lowe's attorney had properly filed the claim, which is inconsistent with the position LPS and Kaczmarczyk now assert. Moreover, when giving Lowe the benefit of all reasonable inferences deducible from the evidence, it can be said that this letter was drafted and, importantly, sent—given that the law requires no acknowledgment of the filing of a claim—with the expectation that the attorney would rely upon the letter as evidence that Lowe's tort claim had been properly filed. Consequently, the letter can be seen as lulling Lowe's attorney into a false sense of security regarding the purported filing and implies that the lawyer needed to neither make further inquiry nor take additional action with respect to the perfection of Lowe's claim.

In contrast to the impression conveyed by the letter, when viewed as outlined above, Wright had actual knowledge of the real facts and Wright knew at the time she mailed the aforementioned letter that the superintendent, rather than herself or Miller or the human resources department, was designated to accept tort claims on behalf of LPS. For purposes of the summary judgment motion, the evidence, when viewed favorably to Lowe, reveals that his attorney relied upon Wright's letter in his belief that Lowe's claim had been properly filed. Thus, the lawyer's failure to discover the proper person with whom to file the claim pursuant to the Tort Claims Act does not prevent the application of the doctrine of equitable estoppel.

Further, the fact that Lowe's letter was addressed to "Sir or Madam" in human resources, not to Wright, does not defeat his claim, because there is no statutory requirement that a claim filed pursuant to the Tort Claims Act need be addressed to a particular individual. Three Nebraska Supreme Court justices have indicated that addressing a claim in the statutory language of § 13-905 is sufficient:

> If the identity of the appropriate party is unknown, mirroring the statutory language and addressing a claim to the "clerk, secretary, or other official whose duty it is to maintain the official records" of a political subdivision would, in my opinion, suffice to meet the statutory requirement. See § 13-905.

Estate of McElwee v. Omaha Transit Auth., 266 Neb. 317, 328, 664 N.W.2d 461, 470 (2003) (Gerrard, J., concurring; McCormack and Miller-Lerman, JJ., join). Therefore, by extension, if the notice is addressed to a person or entity that the defendants are equitably estopped from asserting is improper, the addressee used by Lowe's attorney is not determinative.

We find, after viewing the evidence most favorably to Lowe, that there are genuine issues of material fact as to whether LPS and Kaczmarczyk are equitably estopped from asserting the defense that notice was not properly given, which would bar Lowe's claim. In so holding, we recall the standard for equitable estoppel against a governmental entity: There must be compelling circumstances where right and justice so demand

for the purpose of preventing manifest injustice. See *Estate of McElwee v. Omaha Transit Auth., supra*. Whether the circumstance here rises to that standard is part and parcel of the material issues of fact set out in the record made on the motion for summary judgment.

Therefore, we find that the evidence presented by Lowe, when viewed most favorably to him, raises genuine issues of material fact as to whether equitable estoppel should be applied to preclude LPS and Kaczmarczyk from raising the affirmative defense that Lowe did not comply with the filing requirements of the Tort Claims Act.

Cross-Appeal.

LPS and Kaczmarczyk have cross-appealed, claiming that the district court erred in receiving portions of exhibit 14, the attorney's deposition, into evidence over hearsay and foundation objections. Specifically, LPS and Kaczmarczyk objected to the oral conversations that Lowe's attorney claimed he had with alleged employees of LPS, where, in response to the attorney's question about where to file a tort claim against the district, he was told to send it to the human resources department and was given the post office box address to send the claim to. Additional testimony objected to on the basis of foundation and hearsay was Lowe's attorney's testimony that he was told to follow up with, and talk to, Wright because she was the person who handles the tort claims.

[11] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

During the attorney's deposition, he testified that he made notes contemporaneously with his first telephone call to LPS when he requested the place to file a political subdivision tort claim, which notes were marked as deposition exhibit 7. The notes stated "Nancy" and "HR Lincoln Public Schools PO Box 82889 Lincoln 68501." Although the attorney could not

recall whether "Nancy" was the person whom he talked to or a person who worked for human resources whom he was directed to contact, the attorney testified that he was directed to file his claim with the human resources department at the address which he had been provided and which he wrote down contemporaneously with the telephone call. Since the district court's consideration of deposition exhibit 7 was not raised as an issue on appeal and the attorney's testimony was necessary foundation for the admission of said deposition exhibit, the testimony was admissible. Further, as to the second telephone conversation, we find that, because other similar evidence was admitted during the deposition and was not objected to, the objected-to evidence was cumulative. Therefore, we find that the district court did not err in receiving portions of exhibit 14, the attorney's deposition testimony, into evidence over LPS and Kaczmarczyk's objections.

CONCLUSION

In sum, we find that the district court properly determined that Lowe failed to comply with the filing requirements of § 13-905 of the Tort Claims Act. However, we find that the evidence presented by Lowe, and the reasonable inferences deducible therefrom, has raised a genuine issue of material fact regarding whether the required elements of equitable estoppel should be applied to preclude LPS and Kaczmarczyk from raising the affirmative defense that Lowe did not comply with the filing requirements of the Tort Claims Act. Further, we reject LPS and Kaczmarczyk's claim that the district court erred in receiving portions of exhibit 14 into evidence over objection and affirm the district court's consideration of exhibit 14 for the purposes of the summary judgment determination. Therefore, the decision of the district court granting summary judgment in favor of LPS and Kaczmarczyk and dismissing Lowe's petition is affirmed in part, and in part reversed, and this cause is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL D. SCHURMAN, APPELLANT.

762 N.W.2d 337

Filed March 10, 2009. No. A-08-383.

1. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
2. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
3. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
4. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.

Appeal from the District Court for Adams County, STEPHEN R. ILLINGWORTH, Judge, on appeal thereto from the County Court for Adams County, JACK R. OTT, Judge. Convictions and sentences vacated. Judgment of District Court reversed and cause remanded for further proceedings.

Michael O. Mead, of Law Offices of Richard L. Alexander, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Michael D. Schurman appeals the decision of the Adams County District Court affirming the Adams County Court's denial of Schurman's motion to withdraw his no contest pleas to third degree assault and third degree domestic assault. Schurman also claims that the district court erred in failing to find that the sentences imposed upon him were excessive. For the reasons set forth herein, we reverse the decision of the

district court, vacate Schurman's convictions and sentences, and remand for further proceedings.

STATEMENT OF FACTS

On August 15, 2006, Schurman was charged in Adams County Court with third degree assault, in violation of Neb. Rev. Stat. § 28-310 (Reissue 2008), and third degree domestic assault, in violation of Neb. Rev. Stat. § 28-323(4) (Reissue 2008), both Class I misdemeanors. At the August 15 arraignment, Schurman appeared without counsel. Schurman stated that he did not understand the complaint but that he was "just gonna plead guilty right now." When asked if Schurman understood the rights that were previously read, Schurman stated, "Well, I'm not an attorney so your language is way over my head." However, Schurman did not want the clerk magistrate to go over the rights a second time and stated that he did not want an attorney and did not want an attorney appointed to represent him.

Once the clerk magistrate explained the different pleas to Schurman, Schurman stated that he understood and was ready to enter pleas of no contest to both counts. Schurman entered pleas of no contest which were accepted by the clerk magistrate. Following the entry of the pleas, Schurman stated that he did not want to be considered for probation. The following statements also occurred during the hearing:

> MR. SCHURMAN: I — I — Sir — I know it's — can't back up now. But I don't understand. If I would get out of here, I can't go get my personal belongings.
>
> . . . .
>
> MR. SCHURMAN: I don't understand what's goin' on. I'd just as soon be put inside so I can't get in trouble again because I don't understand this. How do I get my clothes?
>
> . . . .
>
> MR. SCHURMAN: Now, can I get my furniture and all that?
>
> . . . .
>
> MR. SCHURMAN: Just throw me in jail, right now.
>
> . . . .

MR. SCHURMAN: No, just take me right now.

. . . .

MR. SCHURMAN: I'm all mixed up. I don't understand it. So . . . .

. . . .

MR. SCHURMAN: I don't understand. I'm lost.

. . . .

MR. SCHURMAN: I know. I'm — I — I'm lost.

THE COURT: Have you had any mental problems in the past that I'm not aware of?

MR. SCHURMAN: No.

THE COURT: No?

MR. SCHURMAN: Well I've been in there once before — Yeah, but it's all — But that's been a long time ago.

THE COURT: Okay. So you're lost because of what?

MR. SCHURMAN: I'm lost because how do I get my vehicle, how do I get my clothes, and all that stuff.

. . . .

MR. SCHURMAN: See, I'm so lost, I don't know what's goin' on.

The following colloquy then occurred between the clerk magistrate and the county attorney:

THE COURT: My question to the County Attorney: Should I back track a little bit and just go ahead and appoint the public defender on this so we make sure we get this done correctly?

[County attorney]: Probably wouldn't be a bad idea. I guess I would ask that the Public Defender be appointed for him, to help him in this; and then if they decide they want to do a motion to withdraw the pleas, and then they can worry — we can worry about that later. I think he's — I think he's understood why he was here, and he made a conscious decision to plead guilty (sic).

The clerk magistrate did appoint counsel for Schurman for the sentencing phase of the proceedings. Counsel proceeded to file a motion requesting that the court allow Schurman to withdraw his no contest pleas for the reason that the pleas were not knowingly and voluntarily made. A hearing thereon was held on November 17, 2006, at which time the State objected to

Schurman's motion to withdraw his pleas. Schurman testified that he did not understand what was happening to him on the day of the pleas and did not have a thorough understanding of what was required for him to enter his pleas. He further testified that he has been diagnosed with bipolar disorder and has hearing loss. Schurman also testified that, the night before his arraignment, he did not get any sleep because he was in jail, and that although he tried to ask for a telephone call so that he could call his lawyer, he was not allowed a telephone call.

On February 21, 2007, the county court denied Schurman's motion to withdraw his pleas. Thereafter, Schurman was sentenced to 30 days' imprisonment on each count with the sentences ordered to be served concurrently. Schurman appealed to the Adams County District Court, which affirmed the county court's denial of his motion to withdraw his pleas and the sentences imposed upon Schurman. With regard to the county court's denial of Schurman's motion to withdraw his pleas, the district court found that "[i]t is clear from the record [that Schurman's] plea was freely, voluntarily and intelligently given. [Schurman's] confusion was on post plea issues not related to his plea of No Contest." Schurman has now timely appealed to this court.

ASSIGNMENTS OF ERROR

Schurman contends that the district court abused its discretion in refusing to allow him to withdraw his no contest pleas and in imposing excessive sentences.

STANDARD OF REVIEW

[1] Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

ANALYSIS

Schurman first contends that the district court abused its discretion in refusing to allow him to withdraw his no contest pleas.

[2-4] After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Williams, supra*. The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *Id*. The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *Id*.

The evidence presented by Schurman in support of his motion to withdraw his pleas establishes that he exhibited confusion during the plea hearing and that the clerk magistrate acknowledged as much at the end of the hearing when he asked the county attorney if an attorney should be appointed for Schurman. The county attorney agreed that appointing an attorney for Schurman would not be a bad idea and even acknowledged that, if the attorney wanted to file a motion to withdraw the pleas, the issue could be handled at a later time. Schurman testified that he has been diagnosed with bipolar disorder and has a hearing loss and that he was arrested the day before the hearing and was not able to sleep while in jail. Based on the record presented, Schurman established, clearly and convincingly, that his obvious confusion during the plea hearings, during which he was not represented by counsel, presents serious questions as to whether Schurman's plea was in fact freely, voluntarily, and intelligently entered. Further, the State would not have been substantially prejudiced by allowing Schurman to withdraw his no contest pleas as there was no plea agreement in this case and Schurman's plea occurred on the same day that the charges were filed. Therefore, we find that the denial of Schurman's motion to withdraw his no contest pleas was an abuse of discretion. Having made this determination, we need not consider Schurman's claim that the sentences imposed were excessive. Thus the decision of the district court is reversed, Schurman's convictions and sentences are vacated, and this cause is

remanded to the district court to remand to the county court for further proceedings.

CONVICTIONS AND SENTENCES VACATED.
REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

IN RE INTEREST OF SHAYLA H. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DAVID H., APPELLANT.

764 N.W.2d 119

Filed March 10, 2009. No. A-08-947.

1. **Juvenile Courts: Evidence: 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 juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Indian Child Welfare Act: Pleadings.** The Indian Child Welfare Act's requirement of "active efforts" is separate and distinct from the "reasonable efforts" provision of Neb. Rev. Stat. § 43-292(6) (Reissue 2008) and therefore requires the State to plead active efforts by the State to prevent the breakup of the family.
3. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Reversed and remanded for further proceedings.

Patrick T. Carraher, of Legal Aid of Nebraska, for appellant.

Jeremy P. Lavene, Deputy Lancaster County Attorney, and Richard Grabow, Senior Certified Law Student, for appellee.

CARLSON, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

David H. appeals from an order of the separate juvenile court of Lancaster County, adjudicating his minor children

as juveniles under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and placing the children outside the family home. For the reasons set forth herein, we reverse, and remand for further proceedings.

BACKGROUND

David is the father of three minor children, Shayla H., born August 21, 2001; Shania H., born August 1, 2003; and Tanya H., born September 26, 2004. Because the mother of the children is not involved in the present appeal, we have limited our recitation of the facts to only those applicable to David. Through David, the children are eligible for enrollment with the Rosebud Sioux Tribe (Tribe).

The State filed a petition in the juvenile court on February 15, 2008, alleging that the children were within the meaning of § 43-247(3)(a) in that they lacked proper parental care by reason of the faults or habits of David. The petition included the following allegations: (1) that since November 2007, David had failed to provide one or more of the children with proper medical care; (2) that on one or more occasion since January 2007, David had been involved in physical or verbal domestic confrontations with the children's mother occurring in the presence of or vicinity of one or more of the children; and (3) that on one or more occasion since November 2007, David had been under the influence of methamphetamine while being the primary caregiver of one or more of the children. The State alleged that because of these allegations, the children were at risk of physical or emotional harm. The petition does not contain any allegations under or references to the Nebraska Indian Child Welfare Act (ICWA), Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

The State also filed a motion for ex parte temporary custody of the children. In the motion, the State alleged that the case fell within the provisions of § 43-247(3)(a) and that the children were in such conditions or surroundings that their welfare and best interests required that their custody be immediately assumed by the Department of Health and Human Services (Department) in order to place the children in the safest and least restrictive placement pending a hearing. In the

accompanying affidavit, Holly Leonard, a protection and safety worker with the Department, set forth allegations of medical neglect, domestic violence, and substance abuse. Neither the motion nor the affidavit contains any information regarding the children's eligibility for enrollment with the Tribe or allegations under the ICWA. An ex parte order was entered, and the children were placed in foster care.

A hearing on the State's motion for temporary custody was held on February 20, 2008, and was continued for 1 week upon the parties' request. At the February 27 temporary custody hearing, the juvenile court heard testimony from Leonard, David, and the children's mother. The court received into evidence a copy of the State's motion for ex parte temporary custody, with Leonard's affidavit, and a copy of a letter from the Tribe indicating the children's eligibility for enrollment. Leonard testified that the Department was recommending that custody of the children be continued with the Department due to the lack of an appropriate safety monitor to reside in the family home to ensure the safety of the children. Leonard indicated that the Department was aware that David was enrolled with the Tribe. Leonard did not know whether the Tribe had been contacted about the pending juvenile case. Based on the evidence presented at the hearing, the court continued the children's temporary custody with the Department, but continued the hearing to allow for expert testimony relative to the provisions of the ICWA and to allow for notice to the Tribe.

On April 10, 2008, the matter came on for hearing for adjudication on the petition and further hearing on the out-of-home placement of the children under the applicable standards of the ICWA. The juvenile court informed David of the nature of the proceedings, the possible dispositions, and his rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 2008). David waived a formal reading of the petition and entered a denial to the allegations. During the placement portion of the hearing, Linda Dohmen, the children's caseworker as of March 6, testified. Dohmen has a bachelor's degree in human development and the family and, at the time of the hearing, had been employed by the Department for close to 11 years. In her job, Dohmen regularly assesses the safety and well-being

of children, including the children in this case. To assist her in doing so, Dohmen has received training through the Department. Initially, when Dohmen began her employment, she received 17 weeks of training, and then each year, she receives "up to 24 hours of continuous training to fulfil[l] [her] duties with the Department." Dohmen testified that "[a]ssessing children" is one of the duties she continues to be trained on and that she recently received a 6-day training on "the new safety model" being used by the Department. Dohmen testified that the safety model is "a new way of identifying whether there [are] any safety risks." Dohmen was asked whether placing the children back with David would likely result in serious emotional or physical damage. David's attorney objected that Dohmen was not a qualified expert witness as required under the ICWA for such an opinion. The court overruled David's objection, and Dohmen testified that returning the children to David's care would result in serious emotional or physical damage to the children. The hearing was recessed due to a lack of time. The court continued the placement hearing, set the matter for a formal contested hearing, and ordered that its previous temporary orders remain in effect as modified following the April 10 hearing.

David filed a motion on April 11, 2008, seeking an order transferring the matter to the jurisdiction of the Tribe.

On May 2, 2008, the juvenile court considered and denied the motion to transfer jurisdiction to the Tribe. The court also heard a motion by the State for approval of placement change and received further evidence relative to the ICWA standards in connection with out-of-home placement of the children. Dohmen testified further in connection with that motion. Dohmen testified that in her 11 years with the Department, she has had the opportunity to work with families with Native American heritage. Dohmen also testified that the Department believed that there was a risk to the children of emotional or physical harm such that they could not yet be allowed to return to the family home. The hearing was recessed due to a lack of time.

The continued placement hearing and an adjudication hearing were held on May 29, 2008. David entered his voluntary

appearance and waived service of summons of the amended petition on the record. In connection with the adjudication portion of the hearing, the court heard testimony from the children's grandmother, two police officers, Leonard and a former Department employee, and the children's mother. Following the conclusion of the mother's testimony, the hearing was recessed until July 2.

On July 2, 2008, the adjudication hearing resumed with testimony from David and Dohmen. In closing arguments in connection with the adjudication hearing, David's attorney argued that the ICWA requirements as to expert testimony applied both to temporary custody proceedings and to adjudication trials and that the case should be dismissed due to the State's failure to present ICWA expert testimony during the adjudication hearing. David's counsel also argued, based on this court's ruling in *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006), that the petition should be dismissed because it did not include any ICWA allegations. Following the parties' closing arguments with respect to adjudication, the court received evidence on the placement issue. In connection with the placement portion of the July 2 hearing, Dohmen testified, over David's objection, that it was the Department's position that placing the children back with either parent was likely to result in substantial emotional or physical harm to the children.

The juvenile court entered an order on August 15, 2008, adjudicating the children as juveniles under § 43-247(3)(a). The court addressed David's argument that the amended petition should be dismissed on the ground that it failed to include allegations pleading the applicability of the ICWA. The court's analysis is as follows:

> It is clear that the children . . . are "Indian children" for whom the provisions of [the ICWA] are applicable. [Certain exhibits] clearly show that the children are eligible for membership in the . . . Tribe, thus triggering the heightened evidentiary standards and substantive requirements for out of home placement of Indian children under Neb. Rev. Stat. Section 43-1505(4) and (5). The notice

requirements of the [ICWA] are also applicable and were complied with in this case . . . .

The only authority the Court has been referred to in support of the position that there is a "pleading requirement" of ICWA applicability and standards, is *In re Interest of Dakota* [*L. et al.*], . . . in which the appellate court found that the [juvenile court] erred when it proceeded under a petition which lacked ICWA allegations. In that case, however, the State had filed two petitions, the latter of which did include specific ICWA allegations, and the Court proceeded to allow the petitioner to proceed under the earlier petition over the objection of the parent, who requested additional service and preparation time in which to defend against the subsequent petition. The appellate court did not cite any specific authority for the proposition that there are "pleading" requirements under [the] ICWA which make it improper to proceed on a petition that lacks them. Further, it is noteworthy in that case that the Juvenile Court in its subsequent adjudication order did not make specific factual findings as to the substantive requirements of [the] ICWA.

There is no language in [the ICWA] which requires a specific "pleading" to be included in a petition or proceeding brought in the interest of children who are covered by the provisions of the [ICWA]. There are specific evidentiary requirements needed to support a Court-ordered out of home placement and there are also elevated standards of proof for proceedings seeking to place children in foster care. . . . In this case it is clear that those evidentiary requirements and elevated standards of proof apply insofar as the State has requested and is continuing to request an out of home placement of these children.

Counsel for [David] at no time moved to dismiss the petition or complained of its alleged insufficiency in terms of pleading requirements under [the] ICWA, until all of the evidence by all parties had been presented. Despite clear knowledge that the provisions of [the] ICWA were applicable . . . in this case, the issue was never raised as

> a defect in the petition that could easily have been corrected. Based upon counsel's clear opportunity to raise the issue of an alleged defect in the pleading at various opportunities prior to completion of the evidence, the lack of any specific statutory pleading requirement under the [ICWA], as well as the fact that the Court will clearly apply the evidentiary and burden of proof requirements under the [ICWA] to the evidence presented, the Court overrules the motion to dismiss the petition based solely upon the lack of ICWA allegations in the petition. The Court does note that the Amended Petition clearly alleges that the parents' actions or the situation place[s] the children at risk of physical or emotional harm, which closely parallels the language of [§ 43-]1505(5), requiring the State to prove by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent "is likely to result in serious emotional or physical damage to the child."

In its August 15, 2008 order, the juvenile court found that the State failed to prove the allegations of count I of the petition (medical neglect) as they related to David and dismissed that count for failure of proof. The court determined that the State proved the remaining counts of the petition (domestic violence and drug use) by clear and convincing evidence as they related to David.

The juvenile court also made findings on the issue of out-of-home placement. The court found that Dohmen's testimony, particularly when considered with the evidence presented by the State at the formal hearing as to the violent relationship between the parents over a period of years and the use of methamphetamines by the parents as recently as 2008, was sufficient to satisfy the elevated standards under the ICWA to warrant an out-of-home placement of the children. The court observed that in *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005), the Nebraska Supreme Court noted that the adjudicatory phase of juvenile proceedings is to determine whether a child falls within the meaning of § 43-247(3)(a) and that the dispositional phase is to address

the child's placement, including the parental preference for placement. The juvenile court found that, while the *In re Interest of Devin W. et al.* case did not involve Indian children, the placement standards under the ICWA would be further addressed at the dispositional phase of the present proceedings. The court determined that the State would be required to present further evidence, including the expert testimony required under the ICWA, as well as evidence of both reasonable and active efforts to reunify the family, if continued out-of-home placement outside either parent's home is requested at that time. The court determined, based on the evidence currently before it, including the testimony of Dohmen and Leonard, as well as testimony presented during the formal adjudication hearing, that reasonable and active efforts were made by the State to prevent the children's removal from the parental home and that to return them to either parent's care, at that time, would likely result in serious emotional or physical harm to the children.

ASSIGNMENTS OF ERROR

David asserts that the juvenile court erred in (1) not following decisions from this court regarding pleadings under the ICWA, (2) entering an order of adjudication when the State failed to present expert testimony regarding standards set forth in the ICWA, (3) adjudicating the children as juveniles under § 43-247(3)(a), and (4) removing the children from the family home and placing them in foster care without expert testimony as required under the ICWA.

David also argues, but does not assign as error, that the juvenile court erred in finding that a certain district court order was not relevant evidence in the present case. Errors argued but not assigned will not be considered on appeal. *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Taylor W.*,

276 Neb. 679, 757 N.W.2d 1 (2008); *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Jagger L., supra.*

ANALYSIS

Pleadings.

David asserts that the juvenile court erred in not following decisions from this court regarding pleadings under the ICWA. We treat this argument as one assigning error to the juvenile court's failure to sustain David's motion to dismiss the petition.

One of the reasons the juvenile court gave for overruling David's motion to dismiss the petition due to the lack of ICWA allegations was his counsel's failure to raise the issue earlier in the proceedings. David's motion was made during the course of closing arguments in connection with the adjudication hearing. David's motion was purportedly a motion for failure to state a cause of action under Neb. Ct. R. Pldg. § 6-1112(b)(6), and we observe that § 6-1112(b) allows for such a defense to be made at trial. See, also, § 6-1112(h)(2) (waiver or preservation of certain defenses). Thus, to the extent that the court's denial was based upon the motion's untimeliness, this was error.

David argues that the petition and motions for temporary custody should have alleged facts with regard to § 43-1505, which sets forth guidelines for state courts to follow in involuntary proceedings when the court knows or has reason to know that an Indian child is involved. The following subsections of § 43-1505 are relevant to our analysis:

> (4) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

> (5) No foster care placement may be ordered in [an involuntary] proceeding [in a state court] in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> (6) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

This court previously addressed ICWA pleading requirements in the context of a termination of parental rights proceeding in *In re Interest of Sabrienia B.*, 9 Neb. App. 888, 621 N.W.2d 836 (2001). In *In re Interest of Sabrienia B.*, the State failed to include ICWA language in its motion for termination, although the parties had stipulated that the child was Indian and that the ICWA would be applicable to any termination proceedings. The State's motion for termination included language under the general termination statute, see Neb. Rev. Stat. § 43-292 (Reissue 2008), but it failed to include any specific ICWA language under § 43-1505(4) and (6). The mother in that case demurred to the motion for termination, claiming that because the State's motion did not include any ICWA language, the allegations in the motion did not "'articulate an essential element to sustain a finding and Order of termination.'" 9 Neb. App. at 890, 621 N.W.2d at 839. The juvenile court denied the demurrer and terminated the mother's parental rights. The juvenile court concluded that the State had proved the requirements of § 43-1505(4) and (6), even though no ICWA language appeared in the motion. The mother appealed, alleging, among other things, that the juvenile court erred in finding that the State's motion stated a cause of action.

[2] On appeal, this court held that the ICWA's requirement of "active efforts" is separate and distinct from the "reasonable efforts" provision of § 43-292(6) and therefore requires the

State to plead active efforts by the State to prevent the breakup of the family. *In re Interest of Sabrienia B., supra*. This court determined that the State's motion failed to state a cause of action for termination of parental rights under the ICWA. We found the State's failure to include the relevant ICWA language in its motion was not remedied by the facts that the applicability of the ICWA had been discussed in court and that the juvenile court specifically found that the State had proved the relevant ICWA requirements. This court reversed the order of termination, granting the State leave to amend its motion on remand.

This court applied the rationale of *In re Interest of Sabrienia B.* to an adjudication proceeding in *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006). In that case, the State filed a petition alleging that the children were within the meaning of § 43-247(3)(a) and also filed a motion for temporary custody, requesting that temporary custody of the children be placed with the Department. Neither the original petition nor the motion for temporary custody included any allegations under the ICWA. The juvenile court ordered that temporary custody be given to the Department, with placement to exclude the mother's home. At a first appearance and detention/protective custody hearing, the court was informed that the ICWA was applicable and that the children were enrolled in an Indian tribe. The court informed the mother of her rights, including the enhanced evidentiary standard of the ICWA. An ICWA notice was then sent to the applicable tribe. Subsequently, the State filed an amended petition with the court, which petition included ICWA language in its allegations. Then, for reasons not important to our analysis, at the adjudication hearing, the court proceeded with the adjudication hearing on the original, rather than the amended, petition. The juvenile court adjudicated the children under § 43-247(3)(a), made a finding in the adjudication order that the ICWA applied to the proceedings, and found that certain allegations of the petition were true by clear and convincing evidence. The court made no specific findings under the ICWA.

On appeal to this court, the mother alleged, among other things, that the State's petition failed to meet the pleading

requirements of the ICWA, infringing her due process rights. This court applied the rationale of *In re Interest of Sabrienia B.*, 9 Neb. App. 888, 621 N.W.2d 836 (2001), and concluded that in an action for adjudication of Indian children, it is necessary to plead facts under the ICWA. *In re Interest of Dakota L. et al., supra*. This court observed that although the State filed an amended petition including allegations under the ICWA, the court did not adjudicate the children on that petition. We determined that it was error for the court to proceed under the original petition, which did not allege facts under the ICWA, despite the fact that the mother had been served with the amended petition and had been notified in court of the ICWA's applicability. We also concluded that the court erred in proceeding on the original petition, which had been superseded by the amended petition. Accordingly, we reversed the order of adjudication and remanded the cause for an adjudication under an appropriate amended petition, with directions to the court to make specific findings as required by § 43-1505.

In the present case, neither the petition nor the motion for temporary custody included any allegations under the ICWA. In the petition, the State asked the court to make such orders concerning the care, custody, and control of the children as it deemed proper, including liability for child support if the children were placed outside the parental home. The motion for temporary custody urged that the children's custody be immediately assumed by the court in order to place the children in the safest and least restrictive placement pending a hearing. Clearly, placement outside the family home was contemplated by both the petition and the motion. We observe that the juvenile court in this case did make ICWA findings in its August 15, 2008, order, unlike the court in *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006). Nonetheless, we conclude that allegations under the ICWA were required in the petition and motion for temporary custody. Therefore, we find that the juvenile court erred in failing to sustain David's motion to dismiss made at the adjudication hearing. The defects in the State's petition and motion appear capable of being cured by amendment. We note that the record does not show that the State ever sought to amend the petition and/or

motion. But see *Alston v. Parker*, 363 F.3d 229 (3d Cir. 2004) (noting that complaints vulnerable to Fed. R. Civ. P. 12(b)(6) dismissal should not be dismissed without allowing amendment even when plaintiff does not seek leave to amend). As such, we reverse, and remand for further proceedings consistent with this opinion.

Expert Testimony.

[3] David asserts that the juvenile court erred in removing the children from the family home and placing them in foster care without expert testimony as required under the ICWA. Because issues regarding the expert testimony required under the ICWA are likely to recur upon remand, we have reviewed this assignment of error. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Gavin v. Rogers Tech. Servs.*, 276 Neb. 437, 755 N.W.2d 47 (2008).

Pursuant to the ICWA, qualified expert testimony is required on the issue of whether serious emotional harm or physical damage to the Indian child is likely to occur if the child is not removed from the home before foster care placement may be ordered. See § 43-1505(5). A similar requirement is imposed by § 43-1505(6) in the context of termination of parental rights proceedings. This evidence must be established by qualified expert testimony provided by a professional person having substantial education and experience in the area of his or her specialty. See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

The Nebraska Supreme Court has previously addressed the qualifications of experts to give testimony under § 43-1505. In *In re Interest of C.W. et al.*, 239 Neb. at 824, 479 N.W.2d at 111, the court noted the following guidelines set forth by the Bureau of Indian Affairs under which expert witnesses will most likely meet the requirements of the ICWA:

> "(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

> "(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
>
> "(iii) A professional person having substantial education and experience in the area of his or her specialty."

In that case, the court reviewed case law from other jurisdictions finding that a witness' background in Indian culture does not necessarily determine that witness' qualifications as an expert under the ICWA. The court found no error in the admission of the expert's opinion in that particular case, where he possessed substantial education and experience in his area of specialty, which was clinical psychology, and the court determined that his lack of experience with the Indian way of life did not compromise or undermine the value of his testimony. See, also, *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. 919, 664 N.W.2d 470 (2003) (social work professor qualified to testify as expert witness under ICWA, where professor had substantial education and experience in area of child welfare, bonding, and attachment and in sociological aspects of childhood, and was experienced and knowledgeable about ICWA); *C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. App. 1992) (stating that phrase "qualified expert witness" is not defined by federal ICWA, but legislative history of federal ICWA reveals that phrase is meant to apply to expertise beyond normal social worker's qualifications), citing *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

In the present case, the only witness to provide testimony that returning the children to David's care was likely to result in serious emotional or physical damage to the children was Dohmen. Dohmen has a bachelor's degree in human development, had been employed by the Department for close to 11 years, and regularly assesses the safety and well-being of children in the course of her employment. To assist her in her duties, Dohmen receives regular training through the Department. Dohmen testified that in her 11 years with the Department, she has had the opportunity to work with families with Native American heritage. While we decline to address the

question of whether a Department caseworker can ever qualify as an expert witness under § 43-1505, we conclude in this case that this particular record did not establish that Dohmen was sufficiently qualified to testify as an expert witness under the requirements of the ICWA. The evidence does not support a conclusion that Dohmen had either substantial experience in the delivery of child and family services to Indians or extensive knowledge of social and cultural standards in childrearing practices within the Tribe. Nor does the evidence support a conclusion that Dohmen was a professional person with substantial education and experience in the area of her specialty. Accordingly, the juvenile court erred in relying on her for the required expert testimony to justify continued out-of-home placement under the ICWA.

David also asserts that the juvenile court erred in entering an order of adjudication when the State failed to present expert testimony regarding standards set forth in the ICWA, noting that no such expert testimony was presented during the adjudication portion of any of the hearings in this case. In addressing David's assertion, we simply observe that while the plain language of § 43-1505 requires expert testimony for foster care placement of an Indian child, the plain language of § 43-247(3)(a) does not require expert testimony to establish that a child is a juvenile as described in that section.

Because of our resolution of the above assignments of error, we need not address David's assertion that the juvenile court erred in adjudicating the children as juveniles under § 43-247(3)(a).

CONCLUSION

The juvenile court erred in failing to sustain David's motion to dismiss made at the adjudication hearing. Accordingly, we reverse the decision of the juvenile court and remand the cause for further proceedings as indicated above.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PATRICK K. GINN, APPELLEE, V.
PAMELA J. GINN, APPELLANT.
764 N.W.2d 889

Filed March 17, 2009. No. A-08-045.

1. **Divorce: Mental Health.** The condition which triggers the support and maintenance to be paid under Neb. Rev. Stat. § 42-362 (Reissue 2008) is a mental illness.
2. ____: ____. Where the evidence does not clearly and affirmatively establish that a spouse is suffering from a mental illness or that such mental illness affects the spouse's ability to work, it is not an abuse of discretion to deny support and maintenance pursuant to Neb. Rev. Stat. § 42-362 (Reissue 2008).
3. ____: ____. In making an award of support and maintenance pursuant to Neb. Rev. Stat. § 42-362 (Reissue 2008), a trial court must have due regard to the property and income of the parties.

Appeal from the District Court for Clay County: VICKY L. JOHNSON, Judge. Affirmed.

J. Bruce Teichman for appellant.

Shannon J. Samuelson, of Samuelson Law Office, for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. Pamela J. Ginn appeals from a decree of dissolution entered by the district court, which decree dissolved her marriage to Patrick K. Ginn, divided the parties' marital assets and debts, and awarded custody of the parties' minor children and child support to Patrick. On appeal, Pamela asserts that the district court erred in failing to award her support and maintenance pursuant to Neb. Rev. Stat. § 42-362 (Reissue 2008). For the reasons set forth below, we affirm.

BACKGROUND

Pamela and Patrick were married on October 3, 1997. There were three children born of the marriage, a daughter, born

June 15, 1994; a son, born August 28, 2000; and another daughter, born February 16, 2005.

For most of the parties' marriage, Pamela was employed as a nursing assistant at a medical center and Patrick was a self-employed truckdriver. In October 2006, Pamela resigned her employment at the medical center because she had "an issue being around a group of people that [she did not] know. Odd strangers, being out in crowds." Pamela subsequently began to receive "medical retirement" payments from her previous employer.

On November 30, 2006, Patrick filed a petition for dissolution of marriage. Patrick requested that the parties' marriage be dissolved and that he be awarded custody of the parties' three children and child support.

On March 22, 2007, Pamela filed an answer, counterclaim, and request for temporary alimony. Pamela sought dissolution of the parties' marriage, custody of the children, child support, and temporary and permanent alimony. In her request for temporary alimony, Pamela alleged that she was suffering from a mental illness which affected her ability to maintain any kind of employment.

The district court awarded Patrick temporary custody of the parties' three children pending trial and ordered Pamela to pay temporary child support. The court denied Pamela's request for temporary alimony.

On August 3, 2007, trial was held. At the trial, both Pamela and Patrick testified regarding their relationships with the children and their monthly incomes and expenses. In addition, Pamela testified about her mental health problems, about criminal charges that were currently pending against her, and about her ability to appropriately parent the children.

On August 22, 2007, the court entered a decree of dissolution. In the decree, the court awarded custody of the children to Patrick and ordered Pamela to pay child support in the amount of $219 per month. The court awarded Pamela "supervised" visitation with the children "until sufficient psychological evidence is adduced to alleviate concerns about her mental state." The court declined to award either party alimony payments.

Subsequently, Pamela filed a motion for new trial, alleging that the district court erred in "failing to award alimony to [her] where the evidence, without rebuttal, showed [she] was medically unable to work and provide her own support." The district court overruled Pamela's motion for a new trial. Pamela appeals here.

ASSIGNMENTS OF ERROR

On appeal, Pamela assigns that the district court erred in failing to award her support and maintenance pursuant to § 42-362 when she demonstrated that she was unable to work due to a mental illness.

ANALYSIS

In her brief to this court, Pamela argues that the evidence presented at trial demonstrated that she was mentally ill and that as a result of her mental illness, she was unable to work. Pamela further argues that because she is a "mentally ill divorcing spouse," she is entitled to spousal support and maintenance pursuant to § 42-362. See brief for appellant at 2.

Section 42-362 provides, in relevant part, as follows:

> When a marriage is dissolved and the evidence indicates that either spouse is mentally ill, the court may, at the time of dissolving the marriage or at any time thereafter, make such order for the support and maintenance of such mentally ill person as it may deem necessary and proper, having due regard to the property and income of the parties . . . .

Reasonableness is the ultimate criterion to be applied in testing whether support and maintenance are to be awarded a mentally ill spouse under the provisions of § 42-362 and, if so, the amount and duration thereof. *Kearney v. Kearney*, 11 Neb. App. 88, 644 N.W.2d 171 (2002). See, also, *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986). The support and maintenance to be awarded under § 42-362 are a matter initially entrusted to the discretion of the trial judge, which award, on appeal, is reviewed de novo on the record and affirmed in the absence of an abuse of that discretion. *Kearney, supra*.

In the instant case, the district court did not specifically address an award of support or maintenance pursuant to § 42-362 in the decree of dissolution. However, the district court did explicitly deny both Pamela and Patrick "any alimony." In addition, the district court did address the evidence concerning Pamela's mental health and her inability to work. The district court found that "Pamela is not employed and based on hearsay evidence, she will not be able to work for years due to a therapist's recommendation." The district court also noted that "Pamela was obviously disoriented at trial and at times had difficulty articulating." The court believed Pamela's "cognitive abilities" to be impaired.

Based on the language in the decree of dissolution, it appears that the district court considered evidence regarding Pamela's mental health in determining such issues as custody of the parties' children, child support, and "alimony." Although the court did not make an explicit statement denying Pamela support and maintenance pursuant to § 42-362, the absence of such statement, together with the court's acknowledgment of Pamela's mental health problems, evidences an implicit denial of an award of such support and maintenance. We review the district court's implicit denial of support and maintenance for an abuse of discretion.

In our review of the record, we find limited and conflicting evidence to demonstrate that Pamela was mentally ill and that as a result of that mental illness, she was unable to work. Additionally, we find evidence that both parties have limited financial resources and "struggle" to keep up with their financial obligations. Accordingly, we do not find that the court abused its discretion in failing to award Pamela support and maintenance pursuant to § 42-362.

Evidence of Pamela's Mental Health.

Pamela asserts that the evidence presented at trial demonstrated that she was mentally ill and that as a result of that mental illness, she was "unemployable." See brief for appellant at 2. Contrary to Pamela's assertions, our review of the record reveals that at the trial, there was limited and conflicting evidence regarding Pamela's mental health.

At trial, Pamela testified that she had been diagnosed with a mental illness and that at the time of the trial, she was still undergoing treatment for her mental illness. However, when Pamela was questioned regarding her ability to care for the children, Pamela testified that she had "gotten the proper treatment and [was] on the proper medications" and could "properly care" for herself and the three children. Pamela did not offer expert testimony to provide an explanation regarding her specific mental health diagnosis or to clarify her limitations as a result of that diagnosis.

Pamela testified that she was taking multiple medications as a result of her mental illness, including "Wellbutrin, Lexapro, Topamax, [and] Lamictal." She testified that these medications were for "[d]epression." However, she did not provide any further evidence regarding the specific effects of each medication or the length of time she had taken these medications. We recognize that the district court observed Pamela to be disoriented and inarticulate at the trial. However, without further information regarding the side effects of her medication, it is difficult to know whether Pamela's behavior was a symptom of her mental illness or was a side effect of any medication she was taking.

Pamela testified that she was not able to work because of her mental illness. She did not provide further explanation or expert testimony tying her inability to work to her mental illness other than her own testimony that she has an "issue" being around groups of strangers. Pamela testified that her therapist informed her that it would be at least 8 to 10 years before she could return to a work environment. However, Patrick objected to this testimony as hearsay and the court sustained the objection. There is no other evidence in the record to suggest how long Pamela will be unable to work.

There was evidence that Pamela may assert the defense of not responsible by reason of insanity to four felony charges pending against her at the time of the dissolution proceedings. When Patrick questioned Pamela about the possibility of asserting this defense, Pamela testified that the assertion that she was legally insane applied only at the time of the crime and not at the time of the current trial. She stated, "For

then and that time period. Not for now." The outcome of Pamela's criminal charges was unknown at the time of the current proceedings.

Other than Pamela's own assertions that she was mentally ill and unable to work as a result of that mental illness, there is little evidence to indicate that she is, in fact, suffering from a mental illness. In addition, Pamela, herself, presented conflicting evidence regarding her mental health. Pamela's testimony reveals her belief that her mental illness caused her to be unable to work but did not affect her parenting abilities or her ability to take care of herself. Pamela did not provide any expert testimony to support these somewhat conflicting assertions.

[1,2] The condition which triggers the support and maintenance to be paid under § 42-362 is a mental illness. See *Kearney v. Kearney*, 11 Neb. App. 88, 644 N.W.2d 171 (2002). Where the evidence does not clearly and affirmatively establish that a spouse is suffering from a mental illness or that such mental illness affects the spouse's ability to work, it is not an abuse of discretion to deny support and maintenance pursuant to § 42-362. Contrary to Pamela's assertions, the evidence did not clearly and affirmatively establish that she is suffering from a mental illness or that such mental illness affects her ability to work.

Circumstances of Parties.

[3] Even if we found sufficient evidence to indicate that Pamela was mentally ill, a review of the evidence regarding the parties' financial circumstances reveals that both parties have limited economic resources. Section 42-362 provides that a court *may* award a spouse support and maintenance when the evidence indicates that the spouse is mentally ill. However, that section also provides that in making such award of support and maintenance, the court must "hav[e] due regard to the property and income of the parties."

In the decree of dissolution of marriage, the district court found that Patrick's adjusted gross monthly income was $2,284.79. While Pamela argued at trial that Patrick's income was much closer to $4,000, she does not assign as error the

court's final calculation of Patrick's income. Because Pamela does not appeal from this finding and because we find support for the court's finding in the record, we conclude that Patrick's adjusted gross monthly income is $2,284.79.

At the trial, Patrick estimated his monthly expenses to be $4,740. Patrick testified that he was "struggling to get by" and that he did not have a surplus of money each month. Pursuant to the decree, Patrick was awarded custody of the parties' three children and was awarded $219 per month in child support. Patrick was ordered to pay Pamela an equalization payment of $12,000.

Pamela testified that she received $1,231 per month in "medical retirement" payments from her previous employer. Pamela estimated her expenses to be $2,000 a month. She also testified that she has "a lot of health care expenses" which total $2,000 a month.

Upon our review of the record and of the district court's division of the parties' assets and debts, it is clear that both Pamela and Patrick have limited financial resources available to them. Patrick is struggling to provide for himself and for the parties' three children, and Pamela is struggling to pay her medical bills. Considering the parties' financial circumstances and the overall division of the parties' property in the decree, we cannot say that the trial court abused its discretion in failing to award Pamela spousal support pursuant to § 42-362.

CONCLUSION

In light of the conflicting evidence regarding Pamela's mental health, the evidence regarding the financial circumstances of the parties, and the overall division of the parties' property, we find no abuse of discretion in the trial court's failure to award Pamela spousal support pursuant to § 42-362. We affirm.

AFFIRMED.

CHRISTOPHER D. PARENT, APPELLEE AND CROSS-APPELLANT, V. CITY OF BELLEVUE CIVIL SERVICE COMMISSION, APPELLEE, AND THE CITY OF BELLEVUE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

763 N.W.2d 739

Filed March 17, 2009. No. A-08-630.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
2. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.
3. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
4. **Judgments: Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional issues that do not involve factual disputes as a matter of law.
5. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
6. **Constitutional Law: Due Process: Public Officers and Employees: Termination of Employment: Notice.** When a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story.
7. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
9. **Statutes: Presumptions: Intent: Appeal and Error.** In construing a statute, appellate courts presume that the lawmaker intended a sensible result instead of an absurd one.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded with directions.

Patrick J. Sullivan and Michael F. Polk, of Adams & Sullivan, P.C., for appellant

John C. Hewitt, Steven M. Delaney, and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Christopher D. Parent.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This appeal, which has a complex procedural history, described below, follows the district court's review of an administrative proceeding addressing the firing of a police officer for alleged violation of a policy concerning physical ability. The court characterized as jurisdictional a time limitation specified by a collective bargaining agreement, and remanded the matter for further findings. Because case law demonstrates that such time limitations are not jurisdictional, we reverse. Reaching the merits, we conclude that under the specific policy utilized to justify the officer's firing, he satisfied the only objective standard imposed by the policy. Therefore, the decision of the administrative agency upholding the termination of employment must also be reversed.

BACKGROUND

The City of Bellevue, Nebraska (the City), employed Christopher D. Parent as a police officer. On August 31, 2007, police Lt. Mark Elbert filed an administrative report alleging that Parent had engaged in misconduct. The report alleged that Parent had violated specified portions of two separate employment policies of the Bellevue Police Department (Department): one concerning firearms proficiency and the other addressing physical, mental, and emotional health.

Because the City ultimately fired Parent for violating only the latter policy and because the wording of the policy is critical to the decision, we set forth the full content of the pertinent policy as follows:

> Police Officers are called upon to perform a variety of tasks that require physical endurance and agility. This dictates that officers maintain a high level of physical, mental and emotional conditioning, which can only be

> acquired through regular exercise, proper diet and utilizing time.
>
> All officers are required to maintain at least a "fair" level of physical wellness pursuant to the standards contained within the . . . Department's Wellness Program Manual.

Elbert's report stated that during firearm training which had occurred on August 28, 2007, Parent had "significant problems getting up from one knee throughout the course of fire." The report indicated that Parent subsequently performed better in firearm training on August 31, but still had problems getting up from the ground without using his gun hand. According to the record, Parent's excessive weight caused the difficulty with the firearms training.

On August 31, 2007, Parent was notified of the alleged violations of policies and placed on administrative leave pending the outcome of an investigation. Later, Elbert investigated this matter. Elbert concluded his investigation on or about September 18. However, a police captain who was charged with reviewing the investigation instructed Elbert to obtain medical evaluations of Parent.

The applicable collective bargaining agreement required that the investigation be concluded and that disciplinary action be taken within 30 days of the notification Parent received on August 31, 2007. The provision contains certain exceptions related to delays in obtaining necessary evidence. Elbert then requested and received an extension of the deadline to acquire medical reports. The record contains a memorandum recording the extension, which memorandum appears to be initialed by Parent and indicates that a copy of the memorandum was provided to an officer of the police union.

On November 9, 2007, after Elbert had concluded his investigation, the police captain who reviewed the investigation recommended that Parent's employment be terminated, in part due to the results of four medical evaluations. On November 13, the Bellevue chief of police also recommended that Parent's employment be terminated. The city administrator reviewed the police chief's recommendations and, after a pretermination hearing, adopted them and terminated Parent's employment as of November 28. Parent's employment was terminated on the

ground that he had violated the physical, mental, and emotional health policy.

Parent then requested a hearing before the City of Bellevue Civil Service Commission (the Commission). After a hearing, the Commission concluded that Parent had violated the first paragraph of the Department's physical, mental, and emotional health policy and stated that Parent "does not have a level of physical conditioning to safely perform the duties of a police officer." The Commission also found that Parent's termination of employment was "undertaken in good faith for cause." The Commission affirmed the City's decision and additionally stated that Parent's termination of employment was justified pursuant to Neb. Rev. Stat. § 19-1832(3) and (6) (Reissue 2007). With respect to these sections, the Commission found Parent to be respectively "physically unfit for the position he holds" and "unfit for his position."

Parent appealed the Commission's decision to the district court. The court did not consider the merits of the appeal but instead "remanded [the case] to the . . . Commission to determine whether the City complied with the requirements of the [applicable] collective bargaining agreement, so as to vest the Commission with proper jurisdiction over the termination hearing." The court relied upon a provision in the City's collective bargaining agreement with the police union, which agreement stated in pertinent part:

> The City shall begin investigation of any cause that might lead to disciplinary action upon notification of such cause. Disciplinary action shall be taken within thirty (30) days of such notification. This thirty (30) day period may be extended if the City finds it necessary to interview any person that is not a member of the Department, or if a Department member is not available due to leave, sickness, or training. If the Department finds it necessary to extend the investigation beyond the thirty (30) day period, the employee under investigation will be notified in writing of the extension. The [Bellevue Police Officers] Association President will also be notified in writing if the extension involves circumstances beyond the control of the Department.

The court reasoned that "disciplinary action was not taken against Parent within thirty (30) days of his notification," that the "unilateral" extension of the time "was not pursuant to one of the delineated reasons," and that no written notice of an extension of time was provided to Parent or the "Association President."

The City timely appeals from the decision of the district court. Parent timely cross-appeals.

ASSIGNMENTS OF ERROR

On appeal, the City made three assignments of error, which we consolidate and restate into two issues. First, the City alleges that the district court erred in reversing the decision of the Commission and remanding the matter to the Commission for a factual determination. Second, the City asserts the court erred in failing to find that the preponderance of the evidence supported the termination and that the termination was made in good faith for cause.

On cross-appeal, Parent makes four assignments of error regarding substantive matters which the district court did not reach because it decided the case on jurisdictional grounds. Parent assigns that the district court erred in (1) failing to find that the Commission's decision was not supported by sufficient relevant evidence; (2) failing to find that the Commission's decision was arbitrary, capricious, and not made in good faith for cause; (3) failing to find that the Commission violated due process in receiving a number of exhibits into evidence; and (4) failing to find that the Commission violated due process by relying on § 19-1832 as grounds for termination, where the notice Parent received alleged violations of the firearms policy and physical, mental, and emotional health policy.

STANDARD OF REVIEW

[1-3] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008). The

evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it. *Id.* In addition, the administrative action must not be arbitrary or capricious. *Id.* The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.*

[4,5] We determine jurisdictional issues that do not involve factual disputes as a matter of law. *Id.* On a question of law, we reach a conclusion independent of the court below. *Id.*

ANALYSIS

Jurisdiction.

We find no support for the district court's disposition of the case on jurisdictional grounds. In the court's order, it provided no authority to support its conclusion that a failure to comply with the time limitation of the collective bargaining agreement creates a jurisdictional defect. The parties have not cited any authority which suggests that the identified defect is jurisdictional. Further, we can find no authority in Nebraska law which indicates that this or any other circumstance apparent in the instant case creates a jurisdictional defect. Because the record demonstrates that Parent exhausted the available administrative remedies before appealing to the district court, the doctrine of exhaustion of remedies, see *Vaccaro v. City of Omaha*, 6 Neb. App. 410, 573 N.W.2d 798 (1998), did not prevent the district court from obtaining jurisdiction.

The City's alleged breach of the collective bargaining agreement did not create a jurisdictional defect. Other jurisdictions have held that a delay in disciplinary proceedings beyond the time period appointed in an employment contract does not, in itself, invalidate the disciplinary proceeding. See, *Atlantic Coast Line R. Co. v. Brotherhood of Ry., Etc.*, 210 F.2d 812 (4th Cir. 1954); *Brotherhood of Sleeping Car Porters v. Pullman Co.*, 200 F.2d 160 (7th Cir. 1952). In *Atlantic Coast Line R. Co., supra*, the applicable contract provision required that an "investigation" be held within 10 days of the employee's discharge and that a decision be rendered within

10 days of the completion of the investigation. The contract provided no recourse for the employer's failure to comply. Even though the employer rendered a decision approximately 2 weeks late, the court found that noncompliance with the provision did not render the proceeding null and void. The court reasoned:

> The purpose of the ten day provision is to expedite the proceedings for which the rule provides, not to serve as a limitation upon their being held; and the remedy for violation of that provision is damages for any delay that may have occurred, not reinstatement with an unassailable record or damages for an indeterminate period on the theory that the proceedings otherwise regularly held were a nullity.

Id. at 815. Thus, the results of a disciplinary proceeding are valid and appealable even if an employer does not strictly follow the timeline for discipline contained in the applicable contract.

The facts in the instant case are very similar to the facts of *Atlantic Coast Line R. Co.* In both the instant case and *Atlantic Coast Line R. Co.*, the employment contract provided a timeline for an investigation but no explicit recourse for the employee in the case of a delay. In both, there was a temporary delay. We conclude that the City's failure to strictly adhere to the timing requirement set forth in the collective bargaining agreement did not constitute a jurisdictional defect. The district court erred in so holding.

Parent's Assignments of Error.

We next consider Parent's assignments of error. In the instant case, the same standard of review applies to both the district court and this court. Both courts review the Commission's decision to determine whether the Commission acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the Commission. An analogous relationship exists between this court and the Nebraska Supreme Court, which has held that when it reverses a Court of Appeals decision, it "may consider, as [the Supreme Court] deem[s] appropriate, some or all of the assignments of error the Court of

Appeals did not reach." *Wagner v. Wagner*, 275 Neb. 693, 701, 749 N.W.2d 137, 143-44 (2008). Because the same standard of review applies, we deem it appropriate to consider the issues which the district court did not reach.

Parent first argues that his employment could be terminated only if he was found to be in violation of the Department's physical, mental, and emotional health policy, because that was the only charge of which he was notified. In response, the City has argued that § 19-1832(3) and (6), which the Commission cited in its opinion, contained adequate and independent grounds justifying the termination of Parent's employment and that Parent was provided with adequate notice of these grounds prior to the pretermination hearing.

We address the issue of notice and conclude that the only grounds for termination of which Parent received adequate notice were the grounds contained in the Department's physical, mental, and emotional health policy.

On August 31, 2007, at the inception of the investigation, Parent was notified in writing that the Department would investigate him for alleged violations of Department policy. Specifically, he received a document entitled "Alleged Violation Notification," in which he was notified that the alleged violations were "firearms proficiency" and "physical, mental, emotional health." The alleged violations corresponded directly to provisions with the same names contained in the Department's policy manual. After the Department had concluded its investigation and prior to the pretermination hearing, Parent received notice of the grounds for his recommended termination. At that time, Parent received a document entitled "Advisement of Adjudication," in which Parent was informed that the alleged "physical, mental, & emotional health 7/701/4" violation had been sustained pursuant to the investigation. Prior to the hearing, the Department also presented Parent with the evidence it intended to use in the pretermination hearing, which included evidence regarding Parent's level of physical fitness.

[6] The Nebraska Supreme Court has held that pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985),

> when a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story.

Hickey v. Civil Serv. Comm. of Douglas Cty., 274 Neb. 554, 563, 741 N.W.2d 649, 655 (2007). The parties do not dispute the fact that Parent had a protected property interest in his continued employment.

Because Parent was notified that he was investigated and that termination was recommended pursuant only to the alleged violation of the employment policy, we may not uphold the Commission's decision to affirm Parent's termination on any other grounds.

The City contends that Parent was notified of the grounds for termination contained in § 19-1832(3) (mental or physical unfitness) and (6) (other sufficient grounds). The City first argues that Parent was directly notified of these grounds but cannot point us to any document which supports this allegation. We find no such document in the record. Second, the City argues that the notice requirement was fulfilled when Parent received the Department's evidence that was used at the pretermination hearing. The City asserts that this provided notice because the evidence suggested that Parent was not physically fit to be a police officer pursuant to § 19-1832(3). However, under *Hickey, supra*, "evidence" does not constitute "notice of the charges." Both "notice of the charges" and "an explanation of the employer's evidence" are separate and distinct requirements. The plain meaning of the notice requirement in *Hickey* is that the employer must specify to the employee the grounds on which the employer seeks to terminate employment. To conclude otherwise would mean that the Commission could uphold the termination of Parent's employment on any ground suggested by the evidence provided to Parent before the pretermination hearing. This would place Parent in the awkward and unfair position of not being informed which grounds were at issue until after the Commission had decided his case.

Because Parent was notified that the ground for the termination of his employment was the physical, mental, and emotional health policy, we consider only whether the termination of his employment was appropriate on this ground and conclude that it was not.

Parent argues that he could not be fired for a violation of Department policy, because he fulfilled the only mandatory requirement, which was contained in the second paragraph of the policy. Parent further asserted that he could not be fired pursuant to the first paragraph of the policy, because it contained no mandatory provisions.

[7,8] We conclude that the policy contained only one mandatory requirement, which is enumerated in its second paragraph. In interpreting the policy adopted by the City, we apply the familiar rules of construction applicable to statutes and regulations. See *McKenzie v. City of Omaha*, 14 Neb. App. 398, 708 N.W.2d 286 (2006). Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007). A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008). Therefore, we construe both paragraphs of the physical, mental, and emotional health policy together.

[9] Both paragraphs pertain to the same subject—wellness—but only the second paragraph requires specific action. The plain language of the second paragraph states that officers are "required" to maintain the specified level of fitness. In contrast, the first paragraph contains no such mandatory language. The first paragraph of the policy is merely directory because it does not require that the officer take any actions. Further, if we construed the first paragraph to contain a mandatory standard, it would require us to conclude that the policy contained two distinct mandatory standards regulating the exact same subject matter, one of which is more difficult to fulfill than the other. This makes no sense. In construing a

statute, appellate courts presume that the lawmaker intended a sensible result instead of an absurd one. See *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007). We therefore conclude that Parent was required to comply only with the mandatory provision contained in the second paragraph.

Parent adduced evidence that the Department had developed a detailed wellness standard pursuant to the second paragraph and that he had fulfilled the requirements of this standard. This standard required each officer to accumulate a number of points which were earned by completing physical activities. The record contains the official log of Parent's activities and makes it clear that Parent had complied with these requirements. Therefore, the City had no grounds to terminate Parent's employment pursuant to the physical, mental, and emotional health policy, because he fulfilled its only mandatory requirement.

If the City wished to terminate Parent's employment based upon the provisions of § 19-1832(3) or (6), due process required that he be notified of that charge. Having elected to base the City's employment action solely upon the physical, mental, and emotional health policy, the City cannot use the statutory provisions as an alternative ground for termination. While the City's physical, mental, and emotional health policy may have "set the bar too low," the City alone is responsible for the policy it adopted.

We decline to address the remainder of Parent's assigned errors, because their resolution is not necessary to our disposition of this case.

CONCLUSION

The district court erred in determining that the Department's failure to comply with disciplinary procedure deadlines in a collective bargaining agreement created a jurisdictional defect. On the merits of the appeal, we find that Parent fulfilled the only objective standard contained in the employment policy that he was alleged to have violated. We therefore remand the cause to the district court with directions to

reverse the Commission's decision upholding the termination of Parent's employment.

REVERSED AND REMANDED WITH DIRECTIONS.

MARK OWEN ROUSSEAU, APPELLANT, V. ZONING BOARD OF APPEALS OF OMAHA, NEBRASKA, AND ELENA KERWIN, APPELLEES.

764 N.W.2d 130

Filed March 24, 2009. No. A-08-453.

1. **Zoning: Appeal and Error.** On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.
2. ____: ____. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court.
3. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.
4. **Zoning: Ordinances.** A variance from a zoning regulation is not appropriate where the person seeking the variance created the condition necessitating the variance.
5. ____: ____. Standing alone, neither the desire to build a larger building nor the desire to generate increased profits constitutes a sufficient hardship to justify a variance from a zoning regulation.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Marion F. Pruss for appellant.

Alan M. Thelen, Deputy Omaha City Attorney, for appellee Zoning Board of Appeals of Omaha.

Charles M. Bressman, Jr., of Anderson & Bressman Law Firm, P.C., L.L.O., for appellee Elena Kerwin.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Mark Owen Rousseau appeals from the judgment of the district court after a bench trial denying his request to reverse the decision of the Omaha Zoning Board of Appeals (Board). The Board granted Elena Kerwin three zoning variances, one of which amounts to at most a matter of inches. We conclude that the density of the existing development in the area where the lot in issue is located is sufficient to support the district court's determination that the additional variances were appropriate because of undue hardship.

BACKGROUND

In 2005, Kerwin purchased a lot located in a portion of Omaha, Nebraska, known as Dundee. Dundee is a residential area originally developed at the end of the 19th century. At the time Kerwin purchased the lot, it was vacant. A fire had destroyed the structure previously standing on the property.

After initially making plans to build 11 total condominiums on the property, Kerwin decided to build a four-story, four-unit condominium that included an elevator. Kerwin wanted to design a building in the old "federal" style with an interior that would look like a condominium found "in Chicago or New York." Kerwin designed this particular building to fit the needs of professionals coming from other parts of the country, who she believed did not generally like the housing in Omaha that was currently available.

Kerwin made changes in the project, working with an Omaha city planner to attempt to make the building comply with the Omaha Municipal Code. Kerwin had the project redesigned 11 times in an attempt to get it to comply with zoning regulations before deciding to seek a waiver. Kerwin decided that it would be impossible to accomplish her architectural goals and comply with the existing zoning ordinances and filed an appeal with the Board to seek variances. Her application stated that her grounds for seeking the variances were as follows:

> Waiver of variance to front yard setback ([Omaha Mun. Code, ch. 55, art. VI, §] 55-246 [(1980)]) from 35 [feet]

> to 20 [feet] to bring proposed structure into alignment with adjacent buildings which average 19.33 [feet] on the north side of Davenport Street. Waiver of off-street parking requirement ([Omaha Mun. Code, ch. 55, art. XIV, §] 55-734 [(2001)]) from 1.5 to 1.0 [parking stall] per unit (6 to 4 stalls total) due to inner-city location with good access to existing bus routes and availability of traditional on-street parking locations[.]

On May 17, 2007, the Board heard Kerwin's application for variances. In addition to the two variances which Kerwin had initially requested on her application, the Board considered a third variance that would allow Kerwin to decrease her side yard setback from 12 feet to 10 feet. Although the application did not specifically request this variance, the notice provided to the interested parties stated this and Kerwin's building plans as submitted to the Board indicated that this variance would be necessary. At the hearing, an attorney appeared on behalf of Rousseau, who owned the property directly west of Kerwin's lot, to oppose the application. At the conclusion of the hearing, the Board granted all three proposed variances.

Rousseau then filed a complaint in district court to seek a reversal of the Board's decision as to all three variances. On March 3, 2008, the parties tried this matter before the district court.

At trial, Kerwin admitted that it was possible to build a multiple-family residential building on the lot and still comply with zoning regulations. Nevertheless, Kerwin contended that the zoning regulations prohibited her from building the particular style of building that she desired to build. Kerwin adduced evidence that the zoning regulations from which she sought a variance were designed to control growth in more suburban areas.

Rousseau testified that he believed Kerwin's proposed building plans would decrease the value of his property. He also stated that Kerwin's failure to provide parking as per the zoning regulations would be problematic because there is limited parking available on the street.

The district court upheld the Board's decision. The court found that the zoning regulations permitted Kerwin's proposed

front yard setback without a variance. The court also found that the density of the neighborhood was a hardship that justified the side yard setback and parking space variances.

Rousseau timely appeals.

ASSIGNMENT OF ERROR

Rousseau's sole assignment of error is that the district court erred in determining that any evidence existed to support the Board's finding that there were practical difficulties or unnecessary hardships justifying a waiver of Omaha's existing zoning ordinances.

STANDARD OF REVIEW

[1,2] On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007). In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law. *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001). Where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court. *Id.*

ANALYSIS

Rousseau argues that Kerwin was unable to demonstrate sufficient hardship to justify the variances. Neb. Rev. Stat. § 14-411 (Reissue 2007) supplies the applicable standard governing the Board's power to grant variances from zoning ordinances. The applicable portion of § 14-411 states as follows:

> Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land,

> so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

Neb. Rev. Stat. § 14-413 (Reissue 2007) provides for an appeal from the Board's decision to the district court on the ground that the decision is illegal, and states in pertinent part as follows:

> Any person or persons . . . aggrieved by any decision of the board of appeals, or any officer, department, board or bureau of the municipality, may present to the district court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of such illegality.

Front Yard Setback "Variance."

First, it is clear that the front yard setback variance which Kerwin requested is at most a minor deviation from the requirements of the applicable ordinances. Kerwin requested a front yard setback of 20 feet. Omaha Mun. Code, ch. 55, art. VI, § 55-246 (1980), provides that in an R7 district, the minimum front yard setback is 35 feet. Thus, at first glance, it appears that Kerwin was requesting a substantial variance.

However, where existing nearby buildings have a lesser setback than the one required by current standards, the code provides an adjustment to the otherwise applicable setback. Omaha Mun. Code, ch. 55, art. XVI, § 55-782(c) (1995), provides an explicit exception to the regular setback requirement and specifies three alternative substitutes, one of which is pertinent to the instant case. Section 55-782(c) states:

> *Setback adjustment for developed residential blocks.* These provisions apply if 75 percent or more of the lots on a residentially zoned blockface are developed and if 50 percent or more of the buildings on that blockface have front yard setbacks less than those required for the specific district.
>
> (1) If a building is to be built on a parcel of land within 100 feet of existing buildings on both sides, the minimum front yard shall be the mean setbacks of the adjacent buildings.

> (2) If a building is to be built on a parcel of land within 100 feet of an existing building on one side only, the minimum front yard shall be the setback of the adjacent building.
>
> (3) If a building is to be built on a parcel of land not within 100 feet of an existing building on either side, then the minimum front yard shall be the mean setback of all existing buildings on the blockface.

(Emphasis in original.) The evidence clearly shows that the 75- and 50-percent criteria of § 55-782(c) were satisfied. The evidence also shows that Kerwin's building was to be built on a parcel of land within 100 feet of existing buildings on both sides. Thus, the exception provided by § 55-782(c)(1) applies to the instant case, and the required setback is determined by the average setback of the adjacent buildings. The Board granted a "variance" of the front yard setback.

The district court's order indicated that no actual variance was required, but the court apparently relied upon the wrong exception. In so doing, the court stated that "the average front yard setback for the nine structures on the north side of Davenport [Street] is 19.33 [feet]." The court apparently reasoned that Kerwin's proposed 20-foot setback exceeded the 19.33-foot-average setback of all buildings on the block. This would have been correct under § 55-782(c)(3), if Kerwin's lot was not within 100 feet of an existing building on either side. However, the evidence is clear and undisputed that Kerwin's lot was bordered on both sides by buildings within 100 feet. Thus, § 55-782(c)(1) applies, and the exception looks only to the average setback of the immediately adjoining structures.

The evidence is not entirely clear that any variance of the front yard setback was required. Omaha's city planning department seemed to treat the proposed setback as being in conformity with the applicable ordinance prior to the hearing before the Board. At the trial before the district court, Robert Peters, an architect who had retired in 2005 from his post as director of Omaha's city planning department, testified that the range of setbacks along the applicable street was 15 to 25 feet. Kerwin also introduced an exhibit which shows the structures on each side of Kerwin's lot having respective setbacks of

15 and 25 feet. If these distances were precisely correct, the Omaha code setback, applying § 55-782(c)(1), would be 20 feet, and no variance would have been required. However, this exhibit was generated by a computer-based tool utilizing aerial photographs, and the exhibit sets forth a disclaimer stating that "accuracy is not guaranteed" and that the document "should not be substituted for a . . . survey."

If a variance of the front yard setback is required, it amounts only to a matter of inches. Another exhibit showed the existing setbacks of the adjoining buildings as 15.40 feet and 24.90 feet, respectively. Under § 55-782(c)(1), the average of those setbacks, or 20.15 feet, would constitute the code requirement, and Kerwin's proposed setback would be approximately 1.8 inches less than the requirement. As Peters explained at the trial, the request for a variance of the front yard setback was made "because we get into decimal points" and because "it becomes a requirement on the owner to spend 5 to 500 to $1000 for a survey to justify the placement of that setback when common sense and looking at the existing setbacks would say . . . that you place it in the midpoint."

[3] The district court found that no variance was required, but relied on an incorrect understanding of the Omaha code. However, the Board's decision to grant this insignificant variance was supported by the evidence and was neither arbitrary, unreasonable, nor clearly wrong. A proper result will not be reversed merely because it was reached for the wrong reason. *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

Side Yard and Parking Variances.

Rousseau also argues that the district court erred in granting Kerwin variances which permitted her to decrease the side yard setback from 12 feet to 10 feet and decrease the number of on-property parking spaces from six to four. Section 55-246 requires that multiple-family dwellings in an R7 residential district have an interior side yard setback of 10 feet if the building is 45 feet or less high and "2 additional feet for each 10 feet or fraction thereof over 45 feet in height." Because Kerwin's proposed plans demonstrated that the building would be at

least 47 feet tall, the code required a setback of 12 feet. Omaha Mun. Code, ch. 55, art. XIV, § 55-734 (2001), also requires that a multiple-family dwelling unit provide 1½ off-street parking places for each one-bedroom unit. Because Kerwin's proposed building contained four one-bedroom units, the code required six off-street parking places.

At trial, the parties adduced conflicting testimony regarding whether there was a sufficient hardship to justify granting the variances. Kerwin testified that the current zoning regulations would prevent her from building the style of building that she desired to build. Kerwin also called Peters, who testified that historically, Dundee was developed into small lots for high-density worker housing. Peters testified that Dundee was developed with the assumption that only one off-street parking stall per unit would be available due to the extensive availability of nearby public transportation when the area was developed. Peters also stated that the current version of the zoning regulations was "definitely drafted to adequately control suburban growth" and "not as friendly" as other codes regarding existing development. Peters commented that in his experience, three out of four of the Board's cases came from the inner city.

In response, Rousseau called an architect who testified that he believed that the lot was not located in a high-density area. Rousseau also testified that he believed that Kerwin's proposed structure was not appropriate for the neighborhood and would decrease his property value.

In deciding to uphold the side yard setback and parking variances, the district court characterized the issues as "questions of density." The court characterized Dundee as having a "densely developed nature" relating to its "develop[ment] at the turn of the 20th Century." These findings are supported by Peters' trial testimony. Because competent evidence supports the findings, we will not substitute our factual findings for those of the district court. See *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001).

Rousseau claims that since the lot at issue can be developed in compliance with current zoning ordinances, there is no practical difficulty or substantial hardship that justifies a variance.

Rousseau relies on *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955), in this assertion. In *Frank v. Russell*, the Nebraska Supreme Court announced a general rule regarding when it is appropriate for a board of adjustment to grant a variance. As is relevant to this case, the court explained:

> It appears that the rule respecting the right of a board of adjustment, such as the one here, to grant a variance from zoning regulations on the ground of unnecessary hardship is generally that it may not be granted: Unless the denial would constitute an unnecessary and unjust invasion of the right of property; . . . if it relates only to a financial situation or hardship to the applicant; if the hardship is based on a condition created by the applicant; if the hardship was intentionally created by the owner; if the variation would be in derogation of the spirit, intent, purpose, or general plan of the zoning ordinance; if the variation would affect adversely or injure or result in injustice to others; or ordinarily if the applicant purchased his premises after enactment of the ordinance.

Id. at 362-63, 70 N.W.2d at 312. Specifically, Rousseau argues that pursuant to *Frank v. Russell*, Kerwin may not claim hardship, because the zoning regulation did not cause Kerwin a hardship tantamount to a taking, Kerwin purchased the lot after the regulations went into effect, and Kerwin's proposed structure would injure his property value.

First, as the Board correctly responds, the Nebraska Supreme Court has on several occasions approved zoning variances under circumstances that obviously did not constitute a taking or an unjust invasion of the fundamental right of property. See, e.g., *Barrett v. City of Bellevue*, 242 Neb. 548, 495 N.W.2d 646 (1993) (board ordered to allow variances in height and setback of fence); *McClelland v. Zoning Bd. of Appeals*, 232 Neb. 711, 441 N.W.2d 893 (1989) (board ordered to issue variance for deck, roof, and stairs); *Roncka v. Fogarty*, 152 Neb. 467, 41 N.W.2d 745 (1950) (affirming variance of rear yard setback).

[4] Second, the Nebraska Supreme Court has more recently held that the word "ordinarily" in the context of the above-quoted language of *Frank v. Russell* means that a previously

passed zoning ordinance does not automatically preclude a new owner from being able to seek a variance. See *Eastroads v. Omaha Zoning Bd. of Appeals, supra*. In *Eastroads v. Omaha Zoning Bd. of Appeals*, the court found that existing ordinances "do not remove the board's discretion, in an appropriate case, to relax the 'strict letter' of the zoning code by granting a variance." 261 Neb. at 979, 628 N.W.2d at 684. Further, the court commented that this portion of the *Frank v. Russell* holding was dicta. In *Frank v. Russell*, the court's explicit holding was only that a variance is not appropriate where the person seeking the variance had created the condition necessitating the variance.

Third, it appears that the trial court considered Rousseau's testimony that the proposed structure would impair his property value and did not accord weight to it. We will not substitute our factual findings for those of the district court.

[5] The ultimate question is whether the particular form of hardship found here—where the density of an already existing, land-poor development conflicts with a strict application of area requirements—is sufficient to justify a variance. Certain factual circumstances are by themselves insufficient to justify a finding of hardship. We acknowledge that, standing alone, neither the desire to build a larger building, see *Alumni Control Board v. City of Lincoln*, 179 Neb. 194, 137 N.W.2d 800 (1965), nor the desire to generate increased profits, see *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992), constitutes a sufficient hardship to justify a variance. Although these two cases were decided under different variance standards than the one at issue today, the reasoning justifying the decisions is applicable to the present case. Beyond these situations and the situation in *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955), where the applicant created his own hardship, there are not hard and fast rules.

Generally, it is the zoning board of appeals' duty, and not the function of a court, to make this kind of decision. The Legislature has granted zoning boards of appeals significant leeway in making decisions and has required district courts to uphold a board's decision, barring illegality, insufficient evidentiary support, or an arbitrary, unreasonable, or

clearly wrong decision. See *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001). Specifically, the Supreme Court has explained that administrative agencies including the zoning board of appeals provide

> "expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly or minimized by the judiciary."

Id. at 979, 628 N.W.2d at 684 (quoting *Bowman v. City of York, supra*). We recognize that the Board is dealing with the complex problem of zoning ordinances that must accommodate existing development by granting limited exemptions to their requirements. We are not called to determine whether we would make the same decision under the applicable standard. Therefore, we find that the district court did not abuse its discretion or make an error of law in upholding the Board's decision.

CONCLUSION

The variance for Kerwin's proposed front yard setback is either unnecessary because the proposed setback complies with § 55-782(c)(1) or a minor variance amounting to a mere matter of inches. The district court did not abuse its discretion or make an error of law in determining that the density of the already existing development in Dundee was sufficient hardship to justify upholding the Board's decision to grant the other variances.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
TINA R. SOSNOWSKI, APPELLANT.
764 N.W.2d 153

Filed March 31, 2009. No. A-08-586.

1. **Motor Vehicles: Theft: Proof.** Proof of theft under Neb. Rev. Stat. § 28-511(4) (Reissue 2008) requires the State to demonstrate that (1) the defendant rented the vehicle pursuant to a written rental agreement, (2) the written agreement specified the time and place for the return of the vehicle, (3) written demand for return of the vehicle was made upon the defendant by certified mail, and (4) the defendant failed to return the vehicle within 72 hours of such demand.
2. **Contracts: Motor Vehicles.** Neb. Rev. Stat. § 28-511(4) (Reissue 2008) specifically requires that the written rental agreement for rental of a vehicle specify the time and place for the return of the vehicle.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law and an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed.

Thomas J. Garvey for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Tina R. Sosnowski appeals her conviction and sentence on a charge of theft of a rented or leased vehicle pursuant to Neb. Rev. Stat. § 28-511(4) (Reissue 2008). On appeal, Sosnowski challenges the sufficiency of the evidence to support the conviction and challenges the sentence imposed by the district court for Sarpy County, Nebraska. We find the evidence insufficient to support a conviction under § 28-511(4), and we reverse.

II. BACKGROUND

This case arises from the circumstances surrounding Sosnowski's renting of a car from a company known as Rent 4 Less in the Omaha, Nebraska, area in September 2006. The evidence adduced at trial indicates that Rent 4 Less is a local business that rents used cars from three service stations in the Omaha area. Employees of the service station are responsible for the actual rental transaction. One of the three Rent 4 Less locations is at a service station named "Yeck's Auto Repair" in Bellevue, Nebraska.

On September 18, 2006, Sosnowski went to Yeck's Auto Repair to rent a vehicle from Rent 4 Less. That rental was pursuant to a rental agreement. The rental agreement included the designation "Rent 4 Less" at the top, with "Omaha, Nebraska," and "402-399-0600" below. The rental agreement also included an address for the "Corporate Office." The rental agreement indicates that the car was due to be returned on September 20. The rental agreement also indicates on the front that the vehicle is "presumed embezzled if not returned when due and subject to additional fee if not returned to above location" and indicates on the back that the renter agrees to return the vehicle "to the place" and specifies penalties if the vehicle is not returned "to the renting office specified on the [front] side." The undisputed testimony at trial, and a review of the rental agreement itself, demonstrates that the rental agreement does not include the addresses for any of the Rent 4 Less locations, does not include the address for Yeck's Auto Repair, and includes the address for only the Rent 4 Less corporate office. Additionally, the undisputed testimony at trial indicated that Rent 4 Less does not accept vehicle returns at the corporate office and that vehicles are not to be returned to the corporate office address included on the rental agreement.

The Yeck's Auto Repair employee who rented the vehicle to Sosnowski testified that he discussed the details of the rental agreement with her, including the date the vehicle was due back and specifically that it was to be returned to "Rent 4 Less." The undisputed testimony at trial was that Sosnowski returned to Yeck's Auto Repair on September 20, 2006, the date the vehicle was due, with the rental vehicle. Sosnowski

indicated to the employee that she needed the vehicle for an additional day. According to the employee, he extended the rental for an additional day, but did so without any written agreement of extension; he testified that extensions are typically done on a "verbal" basis.

Sosnowski did not return the vehicle on September 21, 2006. The Yeck's Auto Repair employee who had rented the vehicle to Sosnowski made several attempts to contact her about returning the vehicle, all without success. Eventually, the owner of Rent 4 Less was notified of the situation. He testified that Rent 4 Less mailed a certified letter to Sosnowski at the address she had provided when renting the vehicle. When no response was received from Sosnowski, he notified the Bellevue Police Department. The vehicle was eventually located approximately 6 months later, and the testimony indicates that the vehicle was recovered in good condition.

On February 8, 2007, the State charged Sosnowski by complaint with theft of a rented or leased vehicle pursuant to § 28-511(4). In the complaint, the State both specifically cited § 28-511(4) and quoted § 28-511(4) in its entirety in setting out the charge against Sosnowski. On July 13, the State filed an information in the district court charging Sosnowski with theft of a rented or leased vehicle pursuant to § 28-511(4). In the information, the State both specifically cited § 28-511(4) and quoted § 28-511(4) in its entirety in setting out the charge against Sosnowski.

At the conclusion of trial, a jury returned a verdict of guilty. The district court sentenced Sosnowski to a term of 15 to 15 months' imprisonment. This appeal followed.

III. ASSIGNMENTS OF ERROR

Sosnowski asserts on appeal that there was insufficient evidence to support a verdict of guilty and that the district court abused its discretion in sentencing Sosnowski.

IV. ANALYSIS

1. Sufficiency of Evidence

Sosnowski asserts that the evidence adduced by the State was insufficient to prove the statutory elements required by

§ 28-511(4) to support a conviction for theft of a rented or leased vehicle. Specifically, Sosnowski challenges the sufficiency of the evidence to demonstrate that she had the vehicle pursuant to a written rental contract at the time it was not returned, the sufficiency of the evidence to demonstrate that the contract at issue specified the date and time for return of the vehicle, and the sufficiency of the evidence to demonstrate that written demand for return of the vehicle was made by certified mail. We focus on Sosnowski's assertion regarding the contract specifying the location for return of the vehicle and conclude that the evidence was not sufficient.

[1] Section 28-511(4) specifies:

> A person is guilty of theft if he or she (a) rents or leases a motor vehicle under a written lease or rental agreement specifying the time and place for the return of the vehicle and fails to return the vehicle within seventy-two hours of written demand for return of the vehicle made upon him or her by certified mail to the address given by him or her for such purpose . . . .

Pursuant to the statute, and relevant to this appeal, proof of this offense requires the State to demonstrate that (1) Sosnowski rented the vehicle pursuant to a written rental agreement, (2) the written agreement specified the time and place for the return of the vehicle, (3) written demand for return of the vehicle was made upon her by certified mail, and (4) she failed to return the vehicle within 72 hours of such demand.

Sosnowski first challenges the sufficiency of the State's evidence that she rented the vehicle pursuant to a written rental contract. The undisputed evidence at trial indicates that she rented a vehicle on September 18, 2006, pursuant to a written contract that specified that the vehicle was to be returned on September 20. As Sosnowski argues, the undisputed evidence demonstrates that she returned to Yeck's Auto Repair on September 20, with the rented vehicle. On that date, the Yeck's Auto Repair employee responsible for renting Rent 4 Less vehicles *orally* agreed to allow Sosnowski to keep the vehicle for another day. Sosnowski argues that this oral agreement is not sufficient to serve as the basis for a conviction under § 28-511(4).

Although we agree with Sosnowski that the undisputed evidence demonstrates that she returned with the vehicle on the date specified in the lease, we decline to determine whether the oral extension constituted a new agreement entirely, such that her possession of the vehicle was not pursuant to a written rental agreement, or constituted merely an amendment to the existing written rental agreement. We similarly decline to address the issues of whether the written rental agreement could properly be extended orally or whether such extension was impermissible because of the written agreement's containing language specifying that all changes had to be in writing, or the legal ramifications raised by such issue.

[2] Even assuming for the sake of argument that we conclude the evidence was sufficient legally to establish that Sosnowski possessed the vehicle pursuant to a written rental agreement, an issue we expressly do not decide, we conclude that the written rental agreement itself was insufficient to satisfy the requirements of § 28-511(4) because it did not specify the place for the return of the vehicle. As noted above, § 28-511(4) specifically requires that the written rental agreement specify "the time and place for the return of the vehicle."

[3-5] Statutory interpretation presents a question of law. *State v. Mastne*, 15 Neb. App. 280, 725 N.W.2d 862 (2006). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Id.* In the absence of ambiguity, courts must give effect to the statutes as they are written. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Id.* Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

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, or unambiguous out of a statute. *Id.* In construing a statute, a court must attempt to give effect to all of its parts, and if it

can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Id.* Likewise, it is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there. *Id.*

Because § 28-511(4) specifically requires that the written rental agreement forming the basis of Sosnowski's prosecution must specify the time and place for the return of the vehicle, the evidence adduced by the State must demonstrate that the agreement specified the place for the return of the vehicle. It does not. A review of the written rental agreement makes it clear that there is no reference to Yeck's Auto Repair, the place where the vehicle was to be returned. There is no address for Yeck's Auto Repair. There is no address for any of the three rental locations for Rent 4 Less. The rental agreement itself indicates that the vehicle is considered "embezzled" if not returned to "the above location," but does not include any "above location."

The only address included on the written rental agreement is the corporate address for Rent 4 Less. Despite the State's reliance on appeal on that address as sufficient to satisfy § 28-511(4), that address is not the place to which the vehicle was to be returned. Indeed, the undisputed evidence at trial was that vehicles cannot be returned to that location.

We do not accept the State's assertion on appeal that Sosnowski knew where the vehicle was to be returned. Section 28-511(4) requires that the written rental agreement specify the place for the return of the vehicle, not that Sosnowski know or be aware of such location. To construe the plain and unambiguous language of § 28-511(4) as being satisfied if the renter "knows" where the vehicle is to be returned would be to write additional language into the statute that could easily have been included had the Legislature so intended.

As it is, the evidence presented indicates that the closest the written rental agreement comes to specifying the place for the return of the vehicle is that the top of the agreement includes "Rent 4 Less" on one line; "Omaha, Nebraska," on another line; and a telephone number on a third line. Rent 4 Less has corporate offices in Omaha. Rent 4 Less has three different locations

in the metropolitan area from which vehicles are rented. The specific location from which Sosnowski rented, however, is not in Omaha; Yeck's Auto Repair is in Bellevue. As such, there is nothing anywhere on the written rental agreement to indicate that the vehicle was to be returned to the Bellevue location or where in "Omaha" the vehicle could be returned. For this reason, the written agreement failed to satisfy the plain language of § 28-511(4).

Because the State failed to adduce sufficient evidence to prove one of the necessary statutory elements of the crime with which Sosnowski was charged, the district court erred in finding sufficient evidence to support the conviction and in overruling Sosnowski's motion for directed verdict. We do not suggest that Sosnowski was free of wrongdoing in this case, because the vehicle was not timely returned. Nonetheless, Sosnowski was charged with a specific crime which required specific statutory elements be proven, and the State failed to prove all of the elements. Accordingly, we reverse the judgment against Sosnowski.

2. Excessive Sentence

Our disposition of the sufficiency of the evidence issue in this case makes it unnecessary for us to further address the alleged excessiveness of the sentence.

V. CONCLUSION

We find the evidence was insufficient to prove a necessary element of § 28-511(4). We reverse the judgment against Sosnowski.

Reversed.

STATE OF NEBRASKA, APPELLEE, V. DWIGHT L. TUCKER, APPELLANT.

764 N.W.2d 137

Filed March 31, 2009. No. A-08-623.

1. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, an appellate court determines the issue as a matter of law.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Indictments and Informations.** It is not necessary to refile an information amended by interlineation where the cause had never been dismissed and the information remained in the files of the court during the entire proceeding.
6. **Courts: Pleas: Self-Incrimination.** A court must inform a defendant of the privilege against self-incrimination before it can accept a guilty or no contest plea.
7. **Constitutional Law: Effectiveness of Counsel.** Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
8. **Courts: Self-Incrimination.** Absent a statute providing otherwise, the trial judge is not required to warn a defendant represented by counsel of his or her privilege against self-incrimination, except that the trial judge may in his or her discretion impart such a warning.
9. **Effectiveness of Counsel: Time: Appeal and Error.** Claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal.
10. **Convictions: Weapons: Intent.** When the underlying felony for the use of a weapon charge is an unintentional crime, the defendant cannot be convicted of use of a deadly weapon to commit a felony.
11. **Criminal Law: Trial.** A trial judge sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases.
12. **Criminal Law: Trial: Judges: Presumptions.** It will be presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it otherwise clearly appears.
13. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

14. **Criminal Law: Words and Phrases.** A person commits terroristic threats if he or she threatens to commit any crime of violence with the intent to terrorize another.
15. ____: ____. A crime of violence is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
16. ____: ____. A defendant does not have to actually commit a crime of violence, because it is the threat of violence which is at the heart of the crime of terroristic threats.
17. ____: ____. For purposes of the offense of terroristic threats, a threat may be written, oral, physical, or any combination thereof.
18. **Intent: Words and Phrases.** A direct expression of intention by the actor is not required because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
19. **Intent: Circumstantial Evidence: Proof.** Whether a defendant possesses the requisite state of mind is a question of fact and may be proven by circumstantial evidence.
20. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the controversy before it.
21. **Statutes: Sentences.** The statute on indeterminate sentences does not require that a minimum term be different from a maximum term.
22. ____: ____. There is no statutory requirement that a sentence for either a Class II or a Class III felony have a minimum term less than the maximum term.
23. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
24. ____. When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
25. ____. A sentence validly imposed takes effect from the time it is pronounced.
26. ____. When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
27. **Judgments: Records.** When there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Dwight L. Tucker, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Following a bench trial, the district court convicted Dwight L. Tucker of manslaughter, use of a deadly weapon to commit a felony, and being a felon in possession of a deadly weapon. The court sentenced Tucker to consecutive sentences of imprisonment and set the same maximum and minimum term for each sentence. We reject Tucker's assertion that amending a duly filed information by interlineation deprives a district court of jurisdiction—an assertion that borders on the frivolous. We conclude that the court had no duty to advise Tucker of his privilege against self-incrimination and that Tucker's argument that his counsel provided ineffective assistance is premature. We further conclude that evidence supports the court's finding of an intentional felony upon which to base the use of a weapon conviction and that the court did not abuse its discretion in sentencing Tucker. We affirm.

BACKGROUND

The State charged Tucker with murder in the first degree (both premeditated murder and felony murder while attempting to perpetrate a robbery), use of a deadly weapon to commit a felony, and possession of a deadly weapon by a convicted felon. The district court conducted a bench trial, and the parties stipulated that Tucker was a convicted felon in Nebraska at the time the charged crimes were alleged to have occurred.

The evidence showed that during the early morning hours of June 2, 2007, the paths of Tucker and the victim—strangers to each other—intersected. The victim had driven his car to a gas station located at 13th and Vinton Streets in Omaha, Nebraska, and used the outside pay telephone to call his girlfriend. Meanwhile, Tucker had agreed to accompany his cousin, Jerry Valentine, on a drug deal to make sure nothing happened to Valentine.

Valentine drove Tucker to the gas station at 13th and Vinton Streets and handed Tucker a gun in case somebody tried to rob Valentine. Tucker testified that he and Valentine walked up to the person at the pay telephone, that Tucker had the gun pointed toward the ground, and that Valentine said "what's up." Tucker testified that the victim ignored Valentine, immediately looked at Tucker, and asked, "What you got a gun for? What, you going to shoot me?" Tucker testified that he did not say anything and that the victim pushed Tucker back and started coming toward him. Tucker backed away from the victim. He testified, "Everything just happened so quick. He tried to reach for the gun and tried to hit me and I just — I pulled my arm back and it just went off." Tucker explained that he did not know that the gun was cocked and loaded. He testified that he was shocked and scared, that he panicked, and that he ran off behind Valentine. Surveillance footage showed that two men approached the victim and that the victim acted in a confrontational manner toward Tucker, who appears to be holding a gun pointed to the ground. The surveillance footage from the rear of the gas station showed the two men running away from the gas station. The victim suffered a gunshot wound to his lower abdomen, exiting through his lower back. He later died at the hospital.

The district court convicted Tucker of manslaughter, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. The court sentenced Tucker to imprisonment of 20 to 20 years for count I (manslaughter), 10 to 10 years for count II (use of a deadly weapon), and 4 to 4 years for count III (possession of a deadly weapon).

Tucker timely appeals.

ASSIGNMENTS OF ERROR

Tucker's counsel alleges that the court erred in (1) finding Tucker guilty of use of a firearm to commit a felony because the evidence was insufficient as a matter of law, (2) imposing excessive sentences, and (3) imposing the same term of years on the minimum and maximum sentences.

In a supplemental pro se brief, Tucker alleges that (1) the court lacked subject matter jurisdiction, (2) the court abused

its discretion by failing to advise him of his privilege against self-incrimination, and (3) his counsel provided ineffective assistance in failing to advise him of the privilege against self-incrimination.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, an appellate court determines the issue as a matter of law. *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[3] On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

ANALYSIS

Jurisdiction.

[5] Tucker seems to contend that when a duly filed information is thereafter amended by interlineation, the court clerk must again make an endorsement of the date of filing—even though the document has continually been on file. Tucker cites no authority for this proposition, and we are not aware of any such authority. Indeed, at least one appellate court has specifically decreed to the contrary. See *French et al. v. State*, 17 Okla. Crim. 542, 190 P. 707 (1920). We agree that it is not necessary to refile an information amended by interlineation where the cause had never been dismissed and the information remained in the files of court during the entire proceeding. See *id.*

The case of *White v. State*, 28 Neb. 341, 44 N.W. 443 (1889), which Tucker cites as the sole authority for his argument, bears

no resemblance to the instant case. In *White*, the complaint before the magistrate for preliminary hearing did not name the defendant in the substance of the allegations but mentioned him and another individual in the title of the document. In the case before us, the information previously filed in the district court on July 18, 2007, was amended by interlineation to conform to the complaint (also amended by interlineation) in the county court. We conclude that the district court acquired jurisdiction in this case and that Tucker's argument to the contrary borders on the frivolous.

Advisement Regarding Privilege Against Self-Incrimination.

[6] The state and federal Constitutions provide that no person shall be compelled to give evidence against himself or herself of an incriminating nature. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Tucker testified in his own behalf at trial, and he now argues that the court abused its discretion in not advising him of his privilege against self-incrimination. Of course, a court must inform a defendant of the privilege against self-incrimination before it can accept a guilty or no contest plea. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). But Tucker has not cited any cases, nor have we found any, imposing a duty upon the trial court to advise a defendant proceeding to trial of his or her privilege not to testify.

Case law has imposed no duty on the court to advise a defendant of his or her right *to* testify. The State's brief directs our attention to *State v. El-Tabech*, 234 Neb. 831, 836, 453 N.W.2d 91, 95 (1990), where the Nebraska Supreme Court quoted the following holding from the Ninth Circuit: "'[T]he court has no duty to advise the defendant of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred.'" (Quoting *U.S. v. Martinez*, 883 F.2d 750 (9th Cir. 1989), *vacated on other grounds* 928 F.2d 1470 (9th Cir. 1991), and citing *U.S. v. Bernloehr*, 833 F.2d 749 (8th Cir. 1987).) The determination of whether the defendant will testify is an important part of trial strategy best left to the defendant and counsel without the intrusion of the trial court,

as that intrusion may have the unintended effect of swaying the defendant one way or the other. *U.S. v. Pennycooke*, 65 F.3d 9 (3d Cir. 1995). These cases speak to the right to testify, but the State's brief suggests that the same reasoning applies to the right not to testify.

[7,8] Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make. *State v. White*, 246 Neb. 346, 518 N.W.2d 923 (1994), citing *U.S. v. Teague*, 953 F.2d 1525 (11th Cir. 1992). Absent a statute providing otherwise, the trial judge is not required to warn a defendant represented by counsel of his or her privilege against self-incrimination, except that the trial judge may in his or her discretion impart such a warning. See 3 Charles E. Torcia, Wharton's Criminal Procedure § 350 (13th ed. 1991). Here, Tucker was represented by counsel at trial. Had the court independently advised Tucker of his privilege against self-incrimination during the trial, it would have run the risks of interfering with the attorney-client relationship and of influencing Tucker's decision by injecting itself beyond its duties. This assignment of error lacks merit.

Ineffective Assistance of Counsel.

Tucker also claims that his counsel provided ineffective assistance by failing to advise him of the privilege against self-incrimination. In *State v. Vann*, 2 Neb. App. 946, 519 N.W.2d 568 (1994), the defendant was represented by different lawyers from the Douglas County public defender's office at trial and on appeal, but the defendant filed two separate pro se appellate briefs raising claims in addition to those raised by appellate counsel. On postconviction, the defendant claimed ineffective assistance of counsel at both the trial and appellate levels and this court determined that the defendant raised those claims in his pro se direct appeal briefs. Relying on the reasoning of *State v. Falkner*, 224 Neb. 490, 398 N.W.2d 708 (1987), we concluded that the defendant could not use a motion for postconviction relief to secure review of issues which were or could have been litigated on direct appeal.

[9] Claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal. *State v. Walls*, 17 Neb. App. 90, 756 N.W.2d 542 (2008). We observe that Tucker was represented at trial and in this direct appeal by the same counsel, and we conclude that the rule from *Walls* should apply even though Tucker attempts to raise the issue in his pro se supplemental brief. Had Tucker's counsel raised the issue of ineffective assistance in his brief, we would have applied *Walls* and found the claim to be premature. We find Tucker's pro se attempt to be similarly premature.

Conviction for Use of Deadly Weapon to Commit Felony.

The heart of Tucker's appeal is his contention that the court erred in convicting him of use of a deadly weapon to commit a felony. Tucker argues that the evidence was insufficient as a matter of law to sustain the court's finding him guilty of use of a deadly weapon to commit a felony. Significantly, Tucker does not challenge the conviction as a violation of his due process rights. At the conclusion of closing arguments and after taking the matter under advisement, the court orally stated:

> So with respect to [c]ount I, the [c]ourt will find [Tucker] guilty of manslaughter by unintentionally causing the death of [the victim] while in the commission of an unlawful act.
>
> With regard to [c]ount II, the [c]ourt will find [Tucker] guilty of the use of a deadly weapon to commit a felony, that felony being an assault — at least in the first and/or second degree on [the victim] and/or a terroristic threat towards [the victim].

Tucker argues that the court's verdict on count II is inconsistent with its ruling that the State failed to prove Tucker intentionally killed the victim.

[10-12] When the underlying felony for the use of a weapon charge is an unintentional crime, the defendant cannot be convicted of use of a deadly weapon to commit a felony. See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). In *Pruett*, the

Nebraska Supreme Court vacated a jury verdict convicting the defendant of use of a weapon because the underlying felony was manslaughter due to unintentionally causing another's death while committing the offense of reckless assault. Here, the court found that Tucker did not intentionally kill the victim but that Tucker used the weapon to commit an unlawful act. The district court stated that the felony underlying the use of a weapon conviction was first or second degree assault, or terroristic threats. All three of those felonies can be committed intentionally and, thus, can support the use of a weapon conviction. As Tucker points out, second degree assault and terroristic threats can also be committed recklessly and the court did not specify that it found Tucker had committed these crimes intentionally and knowingly. However, a trial judge sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992). "'It will be presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it otherwise clearly appears.'" *Id.* at 586, 489 N.W.2d at 557, quoting *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979). We presume that the court was familiar with the state of the law involving the need for an intentional felony to support a use of a deadly weapon conviction, and we focus our inquiry on whether the State presented sufficient evidence of an intentional felony.

[13-19] A conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007). A person commits terroristic threats if he or she threatens to commit any crime of violence with the intent to terrorize another. Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 2008). A "crime of violence" is "an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority." *State v. Palmer*, 224 Neb. 282, 294, 399 N.W.2d 706, 717 (1986). Robbery, murder, sexual assault, and assault with intent to inflict great bodily injury are crimes of violence. *State v. Rye*, 14 Neb. App. 133, 705 N.W.2d 236 (2005). The State sought to prove that the

victim died while Tucker tried to rob him. A defendant does not have to actually commit a crime of violence, because it is the threat of violence which is at the heart of the crime of terroristic threats. See *id.* For purposes of the offense of terroristic threats, a threat may be written, oral, physical, or any combination thereof. *State v. Curlile*, 11 Neb. App. 52, 642 N.W.2d 517 (2002). A direct expression of intention by the actor is not required because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *Id.* Whether a defendant possesses the requisite state of mind is a question of fact and may be proven by circumstantial evidence. *Id.*

The evidence supports a finding that Tucker used or possessed a gun while committing the unlawful act of terroristic threats. The surveillance footage does not contain any sound, but it shows Tucker holding what appears to be a gun when he approached the victim. During trial, the judge had the benefit of a presentation and testimony by a crime laboratory technician whose specialty is in digital imaging and forensic graphics presentations. The technician described a frame of the video that was being displayed as follows: "If you look to that person's right side . . . you can see a dark black object with a sharp angle." Indeed, Tucker testified that as he approached the victim, he held a gun pointed toward the ground in his right hand. A reasonable fact finder could conclude that Tucker intended to terrorize—to scare—the victim by displaying a gun. Tucker and the victim then move out of the camera's range. There is no dispute that the victim sustained a gunshot wound to his lower abdomen while Tucker held the gun.

[20] "[T]erroristic threats cases will largely be determined by the context of the interaction between the involved people. Thus, the angle at which a gun is pointed directly at someone is not the determinative factor, although it is clearly an important factor." *Id.* at 57, 642 N.W.2d at 522. Based on the entry wound, the gun obviously was not pointed at the ground at the time that it was fired. Tucker testified that the gun fired when the victim reached for the gun and Tucker pulled back his arm. Obviously, the gun was pointed at the victim at that

time. But even if Tucker did not have the requisite intent at the time the gun was actually pointed at the victim, viewing the evidence in the light most favorable to the State, a rational finder of fact could conclude that Tucker, by visibly holding a gun while engaged in a face-to-face confrontation with the victim, threatened the victim with a crime of violence with the intent to terrorize the victim. The finder of fact could also reasonably conclude that Tucker intended to terrorize the victim without intending to kill him. We conclude that the law and the evidence support the conviction for use of a deadly weapon to commit a felony. Because the State presented sufficient evidence to prove a terroristic threat, we need not consider whether the evidence also supports a finding that Tucker committed an assault in the first or second degree. See *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate controversy before it).

Sentencing.

Finally, Tucker alleges that the court abused its discretion by imposing excessive sentences and by imposing sentences in which the minimum and maximum terms were the same. The court imposed consecutive sentences of 20 to 20 years' imprisonment for manslaughter, 10 to 10 years' imprisonment for use of a deadly weapon, and 4 to 4 years' imprisonment for possession of a deadly weapon by a felon.

Manslaughter and possession of a deadly weapon which is a firearm by a felon are both Class III felonies. See Neb. Rev. Stat. §§ 28-305(2) and 28-1206(3)(b) (Reissue 2008). A Class III felony is punishable by a minimum sentence of 1 year in prison and a maximum sentence of 20 years in prison, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 2008). Use of a deadly weapon which is a firearm to commit a felony is a Class II felony, Neb. Rev. Stat. § 28-1205(2)(b) (Reissue 2008), and is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment, § 28-105. The sentences are within statutory limits.

The district court did not abuse its discretion in fixing the same term of years for both the minimum and maximum terms.

The court convicted Tucker of Class II and III felonies, and Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Reissue 2008) states that in imposing an indeterminate sentence, the court shall

> [f]ix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum.

[21,22] In *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006), the defendant argued that § 29-2204 did not permit an indeterminate sentence fixing both the minimum and maximum terms of his sentence at life imprisonment. The *Marrs* court observed that in *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000), it noted that § 29-2204, the statute on indeterminate sentences, "'does not require that a minimum term be different from a maximum term . . . .'" *State v. Marrs*, 272 Neb. at 577, 723 N.W.2d at 503. The *Marrs* court concluded that the district court pronounced an indeterminate sentence in which the minimum and maximum terms were the same and that there was no statutory requirement that affirmatively stated the minimum term for a Class IB felony sentence be less than the maximum term. Similarly, there is no statutory requirement that a sentence for either a Class II or a Class III felony have a minimum term less than the maximum term.

[23,24] We also conclude that the sentences imposed were not excessive. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008). When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008). The presentence report shows that Tucker was born in 1984. He

graduated from high school, attended 1½ semesters of college on a basketball scholarship at Peru State College, and had performed coursework for certificates in real estate from Randall School of Real Estate. It appears that Tucker often had employment when not incarcerated. According to the presentence report, "Tucker has an extensive criminal record dating back to when he was first ticketed for shoplifting when he was 11 years of age in May of 1996." Based on a 2003 conviction for criminal trespassing, Tucker was placed on probation, but that was later revoked and he was sentenced to jail. In 2004, Tucker was convicted of burglary and possession of marijuana with intent to deliver and sentenced to imprisonment. Tucker was on parole at the time of the instant crimes. He chose to arm himself with a firearm, and his actions cost another young man his life. The probation officer recommended an extensive term of incarceration, and we find no abuse of discretion by the court in the sentences imposed.

Finally, we address an issue of ambiguity in sentencing because the written sentencing judgment contained sentencing terms inconsistent with the sentence imposed by the court's oral pronouncement. The court orally stated, "[T]he sentence on [c]ount II will run consecutive to [c]ount I, and the sentence on [c]ount III will run consecutive to [c]ount II." However, the court's written judgment provided that the sentence for count I run consecutively to the sentence for count II and that the sentence for count III run consecutively to the sentence for count I. The written order appears to be erroneous because under § 28-1205(3), a sentence for use of a weapon—count II in this case—must be served consecutively to any other sentence imposed.

[25-27] A sentence validly imposed takes effect from the time it is pronounced. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006). When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *Id.* When there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails. *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999). Because

the court orally pronounced valid sentences, the oral pronouncement controls.

CONCLUSION

We conclude that the district court acquired jurisdiction over the matter and that it did not have a duty to advise Tucker of his privilege against self-incrimination. We do not consider Tucker's allegation of ineffective assistance of counsel, because it is premature. We further conclude that evidence supports the conviction for use of a deadly weapon. Finally, we find no abuse of discretion by the court in the sentences of imprisonment.

AFFIRMED.

IRWIN, Judge, concurring in part, and in part dissenting.

Although I concur with the majority opinion concerning jurisdiction, advisement regarding the privilege against self-incrimination, ineffective assistance of counsel, and sentencing, I write separately because I cannot join with the majority's conclusion that the district court properly convicted Tucker of an unintentional killing but also of use of a weapon in the commission of an uncharged and unsupported intentional crime. I dissent from that portion of the majority opinion which affirms Tucker's conviction on the charge of use of a deadly weapon to commit a felony.

Initially, it bears emphasizing that the Nebraska Supreme Court has expressly held that when the underlying felony for the use of a weapon charge is an unintentional crime, the defendant cannot be convicted of use of a weapon to commit a felony. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). In *Pruett*, the defendant was convicted of manslaughter, just like Tucker, and the manslaughter conviction was based upon a death occurring during the commission of a reckless assault. In the present case, the district court did not specify the underlying unlawful act during which the unintentional killing occurred; however, Tucker was charged with murder in the first degree and the court found only that the killing was unintentional.

Although the majority recognizes the holding in *Pruett*, the majority does not acknowledge that the State cited this court to no authority, and the majority also provides none, to support

a conviction for use of a deadly weapon in the commission of a felony where there was no intentional felony charged or proven. Instead, the majority engages in the act of attempting to discern whether the record would support a conviction for an intentional felony that Tucker was never charged with or required to defend against to support the use conviction. There is no authority for doing so, and the majority overlooks the practical implications of doing such.

As a practical matter, it is contrary to the general tenor of the criminal law of this state to base a conviction for use of a deadly weapon in the commission of a felony on some underlying intentional felony that was never charged, that was never raised during the course of the trial, and against which the defendant never had an opportunity to defend. See *State v. Curlile*, 11 Neb. App. 52, 642 N.W.2d 517 (2002) (information must inform accused with reasonable certainty of charge against him so he may prepare defense and be able to later plead judgment as bar to later prosecution). In the present case, the crimes of terroristic threats and first or second degree intentional assault were never mentioned until closing arguments. The only intentional felony ever at issue during the entire trial was the killing, and it is clear that the State intended that to be the intentional felony upon which the use charge was premised. That intentional felony, however, was not proven.

Practical implications aside, and even assuming that Nebraska law would support the novel concept of allowing the State to convict a defendant for use of a deadly weapon in the commission of a felony without the underlying felony's ever being raised in the charging document or during the course of the evidence at trial, the record in the present case does not support a finding that the State actually proved the intentional felony of terroristic threats or of first or second degree assault. There is no evidence from which a fact finder could properly infer that Tucker intended to terrorize the victim or that Tucker intended to cause bodily injury to the victim. The only way to reach such a conclusion is to speculate.

The majority affirms the district court's judgment by concluding that the evidence was sufficient to support a finding

that Tucker committed a terroristic threat against the victim. The crime of terroristic threats requires that the defendant have the intent to terrorize the victim. Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 2008). There is no evidence to support such an intent in this case, and there is no basis to infer from the words and acts of Tucker and the circumstances surrounding the incident that Tucker had such an intent.

Tucker's testimony indicated that Valentine handed Tucker the gun to have in case somebody attempted to rob Valentine. There is no dispute that the video evidence surrounding this incident does not present any visual contradiction to Tucker's uncontroverted testimony that he had the gun pointed at the ground at all times when approaching the victim and prior to the victim's initiating a physical confrontation with Tucker. I would conclude that the video evidence surrounding this incident has almost no probative value, because the parties are only minimally visible on the video and there is no clear footage of the shooting. There is nothing on the video suggesting that the gun was ever pointed or aimed by Tucker at anyone. In fact, I cannot see a gun in the video, and despite the testimony of a crime laboratory technician that one frame of the entire video includes "a dark black object with a sharp angle," a review of that frame does not leave a viewer with an ability to discern anything resembling a firearm. The "dark black object" looks like a shadow that extends nearly to Tucker's elbow, and there is nothing about it that clearly resembles a handgun. The most that can be said about the video is that it corroborates the defendant's testimony that he never aimed or pointed the gun.

As the majority concedes, the angle at which a gun is pointed directly at someone is clearly an important factor in the analysis. *State v. Curlile*, 11 Neb. App. 52, 642 N.W.2d 517 (2002). In this case, there is no evidence, video or testimonial, that Tucker ever aimed the gun at the victim or ever pointed the gun at the victim.

Contrary to the majority's conclusion that a rational fact finder could conclude that "Tucker, *by visibly holding a gun while engaged in a face-to-face confrontation with the victim*, threatened the victim" (emphasis supplied) and intended to

terrorize the victim, there is no evidence that Tucker aimed the gun at the victim or that the gun was ever even visible to the victim. Rather, the only evidence presented to the district court was that Tucker had the gun pointed at the ground, that the victim rushed at Tucker and initiated a physical confrontation, and that during the confrontation, the gun discharged and struck the victim.

To conclude, or even infer, that Tucker intentionally aimed the gun or pointed the gun at the victim in the midst of a struggle requires speculation and is not properly inferable from the evidence presented. The majority's conclusion, and the State's contention at oral argument, would allow any incident involving a shooting to also support a conviction for terroristic threats, because it is based on nothing more than a conclusion that because the victim was shot, the gun must have been pointed in the victim's direction at some point. If allowed to stand, the majority opinion eliminates the need for evidence proving the mens rea of the crime, i.e., that a defendant intentionally pointed or aimed the gun at the victim at any time with the necessary specific intent.

If the majority's opinion is allowed to stand, accidental shootings will arguably now constitute the felony of terroristic threats. The majority's conclusion that "visibly holding" a gun is sufficient to support an inference of an intent to terrorize results in the inescapable conclusion that anytime somebody holds a firearm in the presence of somebody else, there has been a terroristic threat, and there is no authority for such an expansive conclusion. A better conclusion would be that the State should have to charge and prove an underlying intentional felony to support a use charge.

The majority opinion also does not address at length the district court's comment that the underlying felony could have been an assault in the first or second degree, but the record is similarly insufficient to support a finding of such an assault. First, just as Tucker was never charged with terroristic threats and the State never sought to introduce evidence to support such a charge, Tucker was also never charged with first or second degree intentional assault and the State never sought to introduce evidence to support such a charge. Both first degree

and second degree intentional assault require proof that the accused intended to inflict bodily injury on the victim. See Neb. Rev. Stat. §§ 28-308(1) and 28-309(1)(a) (Reissue 2008). The mere fact that the victim in this case was killed does not allow an inference that Tucker intended to inflict any bodily injury; as noted above, the only evidence presented indicated that the victim initiated a physical confrontation and that a struggle ensued, during which the firearm accidentally discharged. Perhaps even more salient is the fact that the trial court found that the killing was unintentional.

In this case, the State initially sought to prove that Tucker was guilty of first degree murder. The district court, after viewing all of the evidence presented by the State and after hearing the testimony of Tucker, concluded that the killing was an accident. The court's finding in this regard is a recognition that the court accepted Tucker's uncontroverted testimony that the firearm was discharged accidentally in the course of a struggle that resulted from the physical confrontation initiated by the victim. The only way to support the majority's conclusion regarding the conviction on the charge of use of a deadly weapon in the commission of a felony is to disregard the implicit conclusion of the trial court that the killing resulted from an accidental discharge of the gun and simultaneously speculate that Tucker intended to terrorize the victim or intended to inflict bodily injury with the firearm—intentional acts that were never charged, never discussed during the entire trial, and not supported by any evidence in the record beyond the fact that the victim was actually shot.

The majority breaks new ground in this case by affirming a conviction for use of a deadly weapon in the commission of a felony where the only other crime charged by the State and found by the court to have been proven beyond a reasonable doubt was the unintentional crime of manslaughter. There is no prior authority for supporting such a use conviction with an uncharged intentional act that was first raised during closing arguments, and the record is insufficient to support a finding that the requisite intent was proven. As a result, I dissent from that portion of the majority opinion that affirms Tucker's conviction on the use charge.

RACHELLE R. HALAC, APPELLANT, V. JOSEPH GIRTON AND ALEJANDRO VASQUEZ, APPELLEES.

766 N.W.2d 418

Filed April 7, 2009. No. A-08-784.

1. **Jurisdiction: Appeal and Error.** An appellate court has the duty and the power to examine whether it has jurisdiction sua sponte.
2. **Jurisdiction: Final Orders: Appeal and Error.** A final order is a prerequisite to an appellate court's obtaining jurisdiction of an intermediate appeal pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).
3. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Reissue 2008), an appeal can be taken pursuant to such statute only when (1) multiple causes of action or multiple parties are present, (2) the court enters a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
4. **Final Orders: Appeal and Error.** It is left to the trial court's discretion, to be exercised in the interest of sound judicial administration, to determine the appropriate time when each final decision in a multiple claims action is ready for appeal.
5. ____: ____. Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) was intended to prevent interlocutory appeals, not make them easier.
6. ____: ____. The certification of a final judgment for appeal under Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.
7. ____: ____. In deciding whether there are no just reasons to delay the appeal of individual final judgments, a trial court must take into account judicial administrative interests as well as the equities involved. Consideration of the former is necessary to ensure that application of Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) effectively preserves the general policy against piecemeal appeals.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Appeal dismissed.

Terrence J. Salerno for appellant.

Dennis J. Mullin for appellee Alejandro Vasquez.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

This appeal presents the issue of whether a summary judgment entered in favor of one of two defendants in a multiple

vehicle collision is properly certifiable as an immediately appealable order. The district court found that its order was immediately appealable under Neb. Rev. Stat. § 25-1315(1) (Reissue 2008), although the case against the other defendant was still pending and unresolved in the district court.

FACTUAL BACKGROUND

This lawsuit involves a four-car accident occurring on July 31, 2002, in which Rachelle R. Halac, the plaintiff, claims she was injured. Halac testified in her deposition that she was traveling westbound on Leavenworth Street in Omaha when she stopped behind a white van for a red light at Leavenworth's intersection with Turner Boulevard. The defendant Alejandro Vasquez was traveling behind Halac, and the defendant Joseph Girton was traveling behind Vasquez. Halac testified that she came to a complete stop at the intersection and was waiting for the light to change when she "heard a squealing of tires, [she] heard a crash, and then another, which at that point lurched [her] forward, sent things around [her] car. For example, things that were in the backseat were now in the front seat." Throughout her testimony, Halac was very clear that she felt only one impact, although her car was pushed into the van stopped 10 feet in front of her—which latter collision she described merely as a "bump"; "it was not an impact." We now turn to the testimony of the two defendants, beginning with Vasquez.

Vasquez was then an 18-year-old unlicensed driver who testified in his deposition that he had never driven before the day of the accident. Vasquez testified that he was going 30 miles per hour as he approached the intersection where the accident occurred. He then testified that he was 5 feet behind the "blue Cavalier" (Halac's vehicle) when he first saw it and that the blue Cavalier was stopped at the time. Vasquez said that he hit his brakes while going 30 miles per hour and that he was able to stop within 5 feet without hitting the blue Cavalier. Vasquez said that he did not remember seeing the "red car" (Girton's vehicle) before it hit him from the rear at a time when Vasquez had his foot on the brake. When asked about Girton's testimony that Vasquez was going to turn north

onto Turner Boulevard, Vasquez said that was not correct. In his redirect deposition testimony, Vasquez answered affirmatively when asked if he "appl[ied his] brakes and just c[a]me to a normal gradual stop behind the blue Cavalier," and he testified that he was stopped "[l]ike, five seconds" before his vehicle was rear-ended.

Girton, the driver of the "red car" that hit Vasquez' vehicle, was also 18 years old at the time of the accident, and his deposition is in evidence. He admitted that he pled guilty to a ticket for "following too close," issued as a result of the accident, and his answer admits negligence in the accident but denies that such caused injury. Girton testified that his vehicle and Vasquez' vehicle were traveling westbound in the lane nearest to the curb. Girton said that he did not see Vasquez stop nor did he see Halac's vehicle before the accident. In his testimony, he admitted that his vehicle hit Vasquez' vehicle and pushed it into the rear of Halac's vehicle. Finally, Girton admitted that he was going 45 miles per hour and that he left no skid marks.

DISTRICT COURT DECISION

On May 25, 2007, the district court entered an order on Vasquez' motion for summary judgment, finding that Girton's negligence was the sole proximate cause of the accident. After granting Vasquez' motion for summary judgment, the trial judge entered an order finding that there was no just reason for delay of an immediate appeal of the summary judgment in favor of Vasquez under § 25-1315(1). Halac then appealed to this court. We dismissed that appeal, see case No. A-07-630, filed Jan. 25, 2008, for lack of jurisdiction, citing *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), because of the trial court's failure to make specific findings setting forth the reasons that its order should be immediately appealable. After our mandate was issued in the first appeal, the cause returned to the trial court. On June 19, 2008, an "order and stay" was entered which included the following finding:

> I find that if the summary judgment order is not reviewed and the case proceeds to trial against the remaining defendant [Girton] without resolution of whether a fact

> question exists regarding the actions of the defendant driver Defendant Vasquez and his failure to see the stopped Halac car until he was 5 feet behind it, [it] will likely result in multiple trials and appeals.

The trial judge then found that judicial economy will not be served because of the strong likelihood of multiple trials and multiple appeals if the summary judgment in Vasquez' favor is not reviewed by an appellate court prior to a trial on the claim against Girton.

The trial court additionally found that immediate review was in the interest of sound judicial administration at both the trial level and the appellate level. For purposes of the appeal only, the court found that Halac has suffered injuries that have restricted her in her usual occupation, resulting in considerable ongoing economic loss, and that as a result, she is ill equipped to afford the long delay and costs associated with multiple trials and appeals. Finally, the trial court found that the summary judgment decision falls squarely within § 25-1315(1) and, thus, that the order of May 24, 2007, is a final order and there is no just reason for the delay of an immediate appeal. From this order of June 19, 2008, Halac now appeals.

JURISDICTION

[1] None of the parties to this appeal raise any challenge to our jurisdiction to hear this appeal, and we note that Girton has not filed a brief. Although Halac and Vasquez asserted at oral argument that the appeal is proper, it is well established that an appellate court has the duty and the power to examine whether it has jurisdiction sua sponte. See *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

[2,3] We begin by recalling the Supreme Court's core holdings and reasoning in *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), which begin with the proposition that a "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an intermediate appeal pursuant to § 25-1315(1). With the enactment of § 25-1315(1), an appeal can be taken pursuant to such statute only when (1) multiple causes of action or multiple parties are present, (2) the court enters a "final order" within the meaning of Neb. Rev. Stat.

§ 25-1902 (Reissue 2008) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. See *Cerny, supra.* Thus, to be appealable in a case with multiple parties or causes of action, an order must satisfy the final order requirements of § 25-1902 as well as the requirements of § 25-1315(1). However, the *Cerny* decision has put substantial limitations on circumstances when a trial court may properly certify an order or judgment as ripe for an appeal.

[4] In the instant case, the order granting summary judgment to Vasquez is indisputably a final order, and there is a claim against multiple parties—the claim against Girton remained pending and stayed pending during this appeal. The *Cerny* court said that "[i]t is left to the trial court's discretion, to be exercised in the interest of sound judicial administration, to determine the appropriate time when each final decision in a multiple claims action is ready for appeal." 273 Neb. at 808, 733 N.W.2d at 885. Thus, we review the trial court's decision certifying the grant of summary judgment in Vasquez' favor as appropriate for an immediate appeal under an abuse of discretion standard. See, also, *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

[5-7] That said, the court in *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 809-10, 733 N.W.2d 877, 886-87 (2007), summarized the legislative intent behind § 25-1315 and laid down a number of considerations for trial courts when making the decision whether to certify an immediate appeal:

> Section 25-1315 was an evident attempt by the Legislature to simplify the issue and clarify many of the questions regarding final orders when there are multiple parties and claims. In other words, § 25-1315(1) was intended to *prevent* interlocutory appeals, not make them easier. It attempts to strike a balance between the undesirability of piecemeal appeals and the potential need for making review available at a time that best serves the needs of the parties.

> Therefore, it is well established in every other jurisdiction to have considered a similar rule that certification of a final judgment must be reserved for the "unusual case" in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. The power § 25-1315(1) confers upon the trial judge should only be used "'"in the infrequent harsh case"'" as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.
>
> As a general principle, in deciding whether there are no just reasons to delay the appeal of individual final judgments, a trial court must take into account judicial administrative interests as well as the equities involved. Consideration of the former is necessary to ensure that application of § 25-1315(1) effectively preserves the general policy against piecemeal appeals. Plainly, sound judicial administration does not require that certification requests be granted routinely. Therefore, entry of judgment under § 25-1315(1) should not be indulged as a matter of routine. Section 25-1315(1) was simply not meant to be employed in the absence of sufficiently compelling circumstances.

(Citations omitted.)

The *Cerny* court made the general observation that the law disfavors piecemeal appeals, that multiple appeals interfere with efficient judicial administration and impose on the parties costs and risks associated with protracted litigation. There are only a few appellate cases applying the jurisdictional aspect of the *Cerny* decision. We upheld the trial court's certification of an immediate appeal in *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008). *Sand Livestock Sys.* was a highly complex case involving multiple parties, claims including libel and false light invasion of privacy, and a counterclaim alleging a violation of Nebraska's statutory provisions concerning strategic lawsuits against public participation,

i.e., a "SLAPP" lawsuit, as well as an anti-SLAPP counterclaim resulting in a judgment of $900,000. This highly unusual situation made it rather obviously the "unusual case" that the *Cerny* court said is appropriate for an immediate appeal even though not all claims had yet been tried. Moreover, *Sand Livestock Sys.* presented a first impression issue of law. In *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007), we remanded the cause to the trial court because of inadequate findings by the trial judge to justify certification, as we earlier did in the instant case. In *Jones v. Jones*, 16 Neb. App. 452, 747 N.W.2d 447 (2008), we dismissed an appeal because the trial court simply had not certified the case under § 25-1315(1). Therefore, despite several decided cases after *Cerny, supra*, the *Cerny* opinion is still the primary guidepost for the issue before us.

That said, we first note that after our remand in this case, the trial court detailed its reasons and rationale for its certification, and we have included the core portions thereof in our opinion. The trial court's rationale assumed that Halac was injured and suffering economic loss from such, and the only reason cited for certification was that Halac could not afford the cost and delay of "multiple trials and appeals." However, having multiple trials, assuming absence of error in a Halac-versus-Girton trial followed by an appeal, only flows from the possibility that the grant of summary judgment to Vasquez would be reversed on appellate review. Intending no comment on the merits of the grant of summary judgment, the specter of "multiple trials" in this rather commonplace automobile accident case does not make this the type of case that the court in *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), described as being appropriate for an interlocutory appeal, and it obviously is a much more straightforward case than *Sand Livestock Sys., supra*.

Trial courts are required by *Cerny* to make specific findings, and clearly such must comport with the parameters for certification as laid down in *Cerny*. While the trial judge did make findings upon our remand, such findings are at odds with the key considerations justifying certification set forth in *Cerny*.

Initially, we recall the *Cerny* court's caution that § 25-1315(1) certification should be reserved for the "unusual" or "infrequent harsh" case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties because of delay in entering a final judgment as to part of the case. The *Cerny* court said that the point of § 25-1315 was to limit interlocutory appeals, not facilitate them. The *Cerny* opinion, relying in part on federal decisions, has a rather extensive list of considerations that bear on whether § 25-1315(1) certification should be entered. We summarize these *Cerny* considerations as follows:

• Is there a pressing need for early or separate judgments as to some claims or parties?

• Is there a grave need for immediate appellate intervention or grave injustice remediable only by allowing an appeal to be taken forthwith?

• The interrelationship of issues remaining for trial and those on appeal weighs against certification.

• If claims overlap (being predicated on the same incident involving the same witnesses and evidence), such counsels against certification.

• The possibility that the need for review will be mooted by developments in the trial court weighs against certification.

• If the appellate court will be forced to confront successive appeals with common issues of fact or law, such fact counsels against certification.

This is not an unusual case, and it does not involve complex issues of law or fact. There is considerable overlap between what we would examine on the merits of the grant of summary judgment and what remains to be tried against Girton. The trial court's rationale for certification—the avoidance of multiple trials, i.e., a retrial if summary judgment were incorrectly granted to Vasquez—is the primary reason cited by the trial court. However, such is inadequate justification for certification under *Cerny, supra.* There is substantial "overlap" in Halac's claims against Girton and Vasquez because this is a single incident and the witnesses are the same with respect to both claims. And the fact that a plaintiff in an automobile accident

case suffers economic hardship while the litigation process runs its course is not unusual.

Therefore, for these reasons, we are compelled to find that the trial court abused its discretion in certifying the summary judgment in Vasquez' favor for immediate appeal. This case has most, if not all, of the contraindications for immediate appeal detailed in *Cerny*, remembering that the policy behind § 25-1315(1) was the avoidance of piecemeal appellate review in routine cases, not the facilitation thereof.

CONCLUSION

We, therefore, find that we do not have jurisdiction to hear this appeal. Thus, we do not address the merits of the summary judgment, and we remand the cause to the district court for trial as to the remaining defendant, Girton, after which, if there is an appeal, we will then have jurisdiction to review the summary judgment entered as to Vasquez, if appropriately raised.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
LARRY D. HARRIS, APPELLANT.
765 N.W.2d 673

Filed April 14, 2009. No. A-08-240.

1. **Criminal Law: Restitution: Sentences.** Restitution cannot be ordered pursuant to Neb. Rev. Stat. § 28-427 (Reissue 2008) for drug purchases made subsequent to the sale for which the defendant was convicted because they could not have been part of the investigation leading to conviction, and the State forgoes its right to claim restitution of reasonable costs in connection with sales for which the State did not seek to convict the defendant.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed as modified.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Larry D. Harris appeals his sentences on two counts of delivery of a controlled substance and appeals a restitution order imposed by the district court for Lancaster County, Nebraska, related to the two convictions. We find that the district court abused its discretion in imposing a restitution order exceeding that allowed by Neb. Rev. Stat. § 28-427 (Reissue 2008), and we modify the restitution order accordingly. We find no abuse of discretion in the sentence imposed. We affirm as modified.

II. BACKGROUND

On July 26, 2007, Harris was charged by information with three counts of delivery of a controlled substance. In the information, the State alleged that the three incidents forming the basis of the charges occurred on three separate dates: February 9, February 17, and March 3, 2007.

On December 13, 2007, Harris pled no contest to the first two counts charged in the information and the State dismissed the third count, pursuant to plea negotiations. The State presented a factual basis for the pleas, including asserting that on February 9 and 17, the State, through an undercover officer, had provided Harris with $50 and that Harris had purchased drugs with the money; according to the State, Harris returned $10 on February 17 because he was able to purchase only $40 worth of drugs. After hearing the factual basis as presented by the State, Harris again iterated his desire to plead no contest to both counts. The court accepted the pleas and found Harris guilty of two counts of delivery of a controlled substance.

On February 19, 2008, Harris appeared in court for sentencing. A presentence investigation had been completed, and Harris had an opportunity to review the contents of the presentence investigation report. The court inquired whether Harris had any additions or corrections to the presentence

investigation report, and Harris requested the addition of two letters and informed the court that he was also on the waiting list for a rehabilitation center. Harris requested and was given additional time to review the presentence investigation report with his counsel, after which he indicated to the court that he did not have any other additions or corrections to advise the court about.

Harris' counsel and the State's counsel both argued to the court concerning the appropriate sentence to be imposed. Harris was also given an opportunity to speak to the court. At the conclusion of the State's argument, counsel for the State indicated that "the State's asking for restitution to be ordered in the amount of $140." No objection appears in the record to this statement by counsel for the State.

The court then commented on Harris' prior record, the facts of the instant convictions, and Harris' failure to take advantage of an opportunity to participate in drug court. When the court commented on Harris' failure to participate in drug court, Harris interrupted and asked to be heard, and the court declined to give Harris an opportunity to speak at that time. The court then continued to comment and ultimately pronounced consecutive sentences of 1 to 5 years' imprisonment for each conviction and ordered Harris to pay court costs and restitution of $140 "for the drug money." The court then specifically asked both the State and Harris if there was "[a]nything further," to which Harris' counsel responded, "Uh, no." This appeal followed.

III. ASSIGNMENTS OF ERROR

Harris has assigned two errors on appeal. First, Harris asserts that the district court erred in ordering him to pay restitution. Second, Harris asserts that the court imposed excessive sentences.

IV. ANALYSIS

1. Restitution

Harris first asserts that the district court erred in ordering him to pay restitution of $140. Harris argues that the State failed to provide notice that it was seeking restitution and that

the court erred in failing to hold a hearing or receive proof of the amount sought for restitution. Although we find that Harris failed to properly challenge the notice or need for proof of the amount expended by the State for drug money and investigation in this case, we do find that the court abused its discretion in ordering a greater amount of restitution than authorized by the applicable statute, § 28-427.

Section 28-427 provides, in relevant part:

> If any person is convicted for violation of the Uniform Controlled Substances Act, in addition to any penalty imposed by the court, the court may order that such person make restitution to any law enforcement agency for reasonable expenditures made in the purchase of any controlled substances from such person or his or her agent as part of the investigation leading to such conviction.

[1] In *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986), the Nebraska Supreme Court held that restitution ordered pursuant to § 28-427 was in the nature of a civil or administrative penalty, not a criminal penalty imposed as punishment for the crime. In *State v. Rios*, 237 Neb. 232, 465 N.W.2d 611 (1991), the Supreme Court held that restitution could not be ordered pursuant to § 28-427 for drug purchases made subsequent to the sale for which the defendant was convicted because they could not have been part of the investigation leading to conviction and that the State forgoes its right to claim restitution of reasonable costs in connection with sales for which the State did not seek to convict the defendant. See, also, *State v. Thomas*, 6 Neb. App. 510, 574 N.W.2d 542 (1998).

In the present case, as detailed above in the factual background portion of this opinion, the State indicated as part of the factual basis for the pleas that Harris was provided with a total of $100 for the two drug buys that led to these convictions and that he returned $10 of that money. Harris did not object to any portion of the factual basis. Further, at sentencing, the State indicated that it was seeking restitution and Harris did not object, despite having an opportunity at the conclusion of the sentencing hearing to raise any objections he might have had. Finally, the presentence investigation report provided

further information, in the form of police reports, indicating that Harris was provided $100 for the two drug buys that led to these convictions and that he returned $10 of that money. Despite more than one opportunity to do so, Harris did not raise any objection, challenge, or correction to this information in the presentence investigation report.

We conclude that, with respect to the $90 of the State's money that was used for the two drug buys that led to these convictions, Harris failed to properly raise any objection or challenge to the notice or form of proof presented by the State to support the amount sought. We find no need to resolve the underlying issue that Harris raises concerning whether, if a request for restitution is properly challenged at the trial court level, sufficient notice and an appropriate hearing are required. Resolution of that issue is unnecessary because Harris did not properly object or otherwise challenge the request below and the record presented to us is comparable to the stipulation concerning the amount of expenditure for which restitution was requested in *State v. Holmes, supra*.

We do find that the district court abused its discretion, however, in ordering restitution of the $50 allegedly spent for the drug buy that formed the basis of the third count with which Harris was charged. A review of the information indicates that the third count, which the State dismissed as part of the plea negotiation, occurred subsequent to the two counts upon which Harris was convicted. Pursuant to *State v. Rios, supra*, the State is not entitled to restitution under § 28-427 for expenditures subsequent to the drug buys forming the basis for the actual convictions. As such, we modify the district court's restitution order to direct that Harris be ordered to pay restitution in the amount of $90, rather than $140. The restitution order is otherwise affirmed.

2. Excessive Sentences

Harris also asserts that the sentences imposed by the district court were excessive. Harris does not assert that the sentences imposed exceeded the statutory limits. Rather, Harris argues that the court should have been more lenient, despite his criminal history, prior struggles with drug and alcohol

issues, and failure to follow through with an opportunity to enroll in drug court. In *State v. Rios*, 237 Neb. 232, 234, 465 N.W.2d 611, 613 (1991), the Nebraska Supreme Court repeated "yet again the axiom that a sentence within the statutory limits will not be disturbed upon appeal absent an abuse of discretion." The record presented here does not reveal an abuse of discretion, and as stated in *Rios*, 237 Neb. at 235, 465 N.W.2d at 614:

> While it is true that, as he laments, [the appellant] is in part a victim of his own addiction, the fact remains that he stands convicted of spreading his affliction for profit. The nature of the crime is such that it cannot be said the sentence imposed constitutes an abuse of discretion.

This assignment of error is meritless.

V. CONCLUSION

We modify the restitution order to reflect that Harris is ordered to pay restitution in the amount of $90, rather than $140. We affirm the remainder of the restitution order, and we affirm the sentences imposed.

AFFIRMED AS MODIFIED.

MARTIN L. COLEMAN, APPELLANT, V.
JONI K. KAHLER, APPELLEE.
766 N.W.2d 142

Filed April 14, 2009. No. A-08-333.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
3. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Child Custody.** Before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent.
6. **Child Custody: Jurisdiction: Words and Phrases.** Under the Uniform Child Custody Jurisdiction and Enforcement Act, a "child custody determination" is defined to mean a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order.
7. **Child Custody: Child Support.** A child custody determination does not include an order relating to child support or other monetary obligation of an individual.
8. **Child Custody.** While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child.
9. **Child Custody: Visitation.** Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time.
10. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
11. **Paternity: Child Support: Attorney Fees: Costs.** Attorney fees and costs are statutorily allowed in paternity and child support cases.
12. **Child Custody: Jurisdiction: Attorney Fees.** Under the Uniform Child Custody Jurisdiction and Enforcement Act, the court shall award the prevailing party attorney fees unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.
13. **Attorney Fees.** Customarily, attorney fees and costs are awarded only to the prevailing party or assessed against those who file frivolous suits.
14. ____. The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Christopher A. Furches, of Johnson, Flodman, Guenzel & Widger, for appellant.

Stephanie Payne, of Payne Law, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Martin L. Coleman appeals from a declaratory judgment granting relief determining him to be the father of Joni K. Kahler's son, but awarding Kahler custody of the parties' minor children and allowing her to remove the children from Nebraska. We hold that Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. Because we find no abuse of discretion by the district court, we affirm its judgment.

BACKGROUND

The parties, who never married, are the biological parents of two children: a daughter, born in 1992, and a son, born in 2002. In May 1993, a consent decree established Coleman's paternity to the parties' daughter and ordered him to pay child support, but it did not address custody or visitation rights. In February 2003, Coleman filed an acknowledgment of paternity concerning the parties' son, but there was no judicial determination of his paternity.

On October 5, 2007, Coleman filed his complaint for declaratory judgment. He sought an order establishing his paternity to the parties' son, establishing the parties' custodial and visitation rights with respect to both children, establishing child support obligations over the son, and prohibiting Kahler from removing the children from Nebraska.

Coleman also sought temporary custody of the children or, in the alternative, an order compelling Kahler to return the children to Nebraska during the pendency of the proceedings. After a hearing, the court denied Coleman's motion. The court stated:

> [T]his is not a case in which a custodial parent has filed a request seeking permission to remove the children from the jurisdiction of the court. The reason [Kahler] made no such request before moving or contemplating moving the children to Ohio is because there has been no judicial custody determination made concerning either of the children (i.e., neither party has previously

> sought to have a court address custody and parenting time-related issues). The court considers this to be a significant factor in addressing [Coleman's] alternative request that [Kahler] be ordered to return the children to Nebraska.

On March 4 and 5, 2008, the court conducted a trial on Coleman's complaint. In the interest of brevity, we summarize the detailed evidence regarding Coleman's visitation with the children. Coleman moved to Georgia after Kahler became pregnant with the parties' daughter. In November 1992, when the child was approximately 7 months old, Coleman returned to Nebraska and lived with Kahler and their daughter for approximately 1 to 2 months. Between 1993 and 1995, the parties both lived in Lincoln, Nebraska, and Coleman's mother provided daycare for the child. Kahler testified that Coleman saw the child approximately 20 times at Coleman's mother's house. Coleman testified that he did not see the child on a regular basis but saw her at least once every 2 weeks.

In 1997, Kahler married and moved with her husband and the parties' daughter to Kansas City, Missouri. Coleman initially had visitation every other weekend, but that became less frequent, and he also had summer visitation of 4 to 6 weeks, broken into 1- or 2-week periods. Kahler and her husband separated in 1999, and a decree dissolved Kahler's marriage in 2003. From 1999 to 2001, Kahler lived in Kansas City with the parties' daughter; Kahler's "partner," Kimberly S.; and Kimberly's son. During that time, Coleman visited the parties' daughter a couple of times a year.

In the fall of 2001, Kahler and the parties' daughter returned to Lincoln, along with Kimberly and her son. Coleman visited the parties' daughter on weekends.

In late 2001, the parties discussed having a second child, but Kahler wanted Coleman to impregnate Kimberly. Ultimately, Kahler became pregnant with the parties' son. Kahler testified that the agreement with Coleman was that their son would be raised by Kahler and Kimberly, that Kahler and Kimberly would have full financial responsibility and custody, and that Coleman could be part of the child's life if Coleman wished. Coleman testified that although he had not been ordered to

pay child support for the parties' son, he gave Kahler $500 to $1,000 once their son was born and provided financial support in the form of clothes and toys and by paying certain bills.

Kahler testified that once their son was born, Coleman usually saw him at least once a week. Coleman testified that he regularly had visitation with both of the parties' children in Kahler's home, but Kahler testified that Coleman's regular visits with the children began in 2005 and that he did not have much involvement with them prior to that time. When the parties' son was 1 or 2 years old, their children began having overnight weekend visits at Coleman's home every other weekend in addition to visits with Coleman at Kahler's house on Wednesday and Sunday nights.

In 2007, Coleman's visitation with the children varied, but it generally included Sundays and Wednesdays and every other weekend from Saturday night to Sunday night. Sometimes Coleman would keep the parties' son from Wednesday to Friday night, and at times, the parties' son stayed with Coleman from Wednesday night to Sunday.

The parties had an amicable relationship. Some of Coleman's visits were as a family unit with Kahler and Kimberly along with Coleman and his wife, whom Coleman married in July 2007. Kimberly's teenage son lived with the Colemans for nearly a year, beginning in November 2006. Coleman testified that Kimberly's son's behavior and schoolwork improved the longer the child lived with the Colemans.

Coleman testified that he and Kahler shared the responsibility of taking their children to the doctor and dentist. They both disciplined the children. Coleman testified that Kahler remarked on several occasions he was more of a disciplinarian than she, but Kahler disagreed. Coleman testified that the parties' daughter had behavioral problems when she began high school and that Kahler requested his assistance in helping deal with issues such as poor grades, not completing homework, sneaking out of the house, and having friends stop by the house when no adults were present. Coleman's wife testified that the parties' daughter confided in her about sex-related issues, but Kahler testified that she had discussed such issues in detail with the parties' daughter multiple times.

On September 5, 2007, Kahler learned that her job as a broadband support technician would be eliminated and that her employer's broadband support division would be relocated to Ohio. Kimberly worked for the same company. At that time, Kahler earned close to $13 an hour and approximately $26,000 a year. Kahler testified that a position which she had applied for and accepted with the same company in Ohio would pay $16.30 an hour, or $33,900 a year, with an opportunity for advancement. The position also offered health care for Kahler and the children. Kahler testified that the company had two positions open in Nebraska at that time but that neither was in her field. She testified that she inquired about employment with a cellular telephone company in Lincoln and with a computer-payment-processing firm in Omaha, Nebraska, and checked a Web site with a Nebraska employment database, but that she did not apply for any positions, "[b]ecause they were all really low, low pay."

Kahler discussed with Coleman a potential out-of-state move due to the outsourcing of her job and that of Kimberly. Kahler told Coleman that she and Kimberly would not accept positions in Ohio if Coleman did not want the children to move. Coleman testified that he told Kahler he did not want the parties' children moved from Nebraska, but that Kahler accepted the job in Ohio anyway. Kahler testified that at some point, Coleman agreed to allow her to move the children to Ohio, saying, "'I don't like it, but you have to do what you have to do.'" Kahler testified that on the following day, she and Kimberly signed paperwork to accept the positions in Ohio. According to Kahler, Coleman later sent Kahler an e-mail that said only, "'I've sold my soul,'" which Kahler understood to mean that Coleman had changed his mind about agreeing to the move.

Coleman then initiated this action. After Kahler was served with the complaint, she told Coleman that he would never see the parties' children again. While Kahler admitted making the threat in anger, she claimed that she immediately sent Coleman an e-mail apologizing for having done so. Coleman testified that he then had problems exercising visitation and that Kahler sent an e-mail informing him that he had to provide 24-hour

notice of any visitation and that all visits would be supervised. Kahler testified that she told Coleman that a visit needed to be supervised on one occasion, which was the visit right before the move to Ohio.

The children moved with Kahler to Ohio on October 23, 2007. From that time to the time of trial, Coleman had telephone communications with the children on Wednesday and Sunday nights, one Web camera visit, and 2 weeks' visitation over Christmas. Coleman testified that the parties' daughter spends approximately 2 to 5 minutes on the telephone with him. His access to the children had been "[e]xtremely limited," and he feared that the parties' son will "grow away" from him. Coleman testified that it would cost roughly $500 to drive to and from Ohio and that the average cost for an airplane ticket was around $350. Coleman described his relationship with the parties' daughter prior to the move as very close and very loving. Kahler, however, testified that Coleman's relationship with their daughter did not seem to be a close relationship. Coleman testified that their daughter had been pretty distant since the move. He described his relationship with Kahler and Kimberly as strained.

On March 11, 2008, the court entered an order finding Coleman to be the biological father of the parties' son. The court found it was in their children's best interests that custody of both be awarded to Kahler. The court ordered Coleman to pay $513.85 per month in child support for the parties' son. With regard to removal from Nebraska, the court addressed some of the issues set out in *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007), and after doing so, it gave Kahler permission to remove the children to Ohio.

Coleman timely appeals.

ASSIGNMENTS OF ERROR

Coleman assigns three errors. First, he alleges that the district court deprived him of a substantial right and a just result by granting Kahler temporary permission to remove the parties' children from the jurisdiction. Second, he contends that the court abused its discretion by granting Kahler permission to remove the children permanently from the jurisdiction. Finally,

Coleman assigns that the court abused its discretion by denying his request for custody.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

[2] While a paternity action is one at law, the award of child support in such an action is equitable in nature. *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007).

[3] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

ANALYSIS

Temporary Order.

Coleman argues that the district court deprived him of a substantial right and a just result by granting Kahler temporary permission to remove the minor children from the jurisdiction. We recognize that trial courts are discouraged from granting temporary permission to remove children to another jurisdiction prior to a ruling on permanent removal. See, *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). Here, the court did not affirmatively grant Kahler permission to remove the children, but, rather, denied Coleman's request for temporary custody of the children or for an order compelling Kahler to return the children to Nebraska. In any event, even assuming without deciding that the court's order was an abuse of discretion, we cannot afford relief to Coleman from the court's ruling on a temporary order. See *Wild v. Wild, supra*.

[4] A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *State on behalf of Pathammavong v. Pathammavong, supra*. The issue of whether the order denying Coleman's request for temporary custody was proper was relevant only from the time it was entered until it was replaced by the order determining the children's permanent custody. Accordingly, any issue relating to the temporary order is moot and need not be resolved in this appeal. See *id.*

Permanent Removal and Custody.

Coleman argues that the court abused its discretion by not awarding him custody and by allowing Kahler to remove the children from Nebraska because Kahler did not meet the test set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Kahler argues that the *Farnsworth* test is inapplicable.

[5] The Nebraska Supreme Court has held that before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent. *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Our review of removal jurisprudence in Nebraska involving children born in and out of wedlock reveals a common element: a prior child custody determination. See, e.g., *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton, supra*; *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Farnsworth v. Farnsworth, supra*; *State ex rel. Reitz v. Ringer, supra*; *Wild v. Wild, supra*; *Gartner v. Hume*, 12 Neb. App. 741, 686 N.W.2d 58 (2004).

[6,7] Under the Uniform Child Custody Jurisdiction and Enforcement Act, a "child custody determination" is defined to mean "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary,

initial, and modification order." Neb. Rev. Stat. § 43-1227(3) (Reissue 2008). A child custody determination does not include an order relating to child support or other monetary obligation of an individual. *Id.* Under the above definition, before Coleman commenced the instant proceeding, there had been no child custody determination in this case with regard to either child.

[8] Coleman argues that a custody determination has already been made because an unwed mother is initially entitled to automatic custody. But the Nebraska Supreme Court implicitly rejected that argument in *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 8, 679 N.W.2d 749, 756 (2004), when it stated that the custody issue before it was a matter of initial judicial determination after reciting the proposition—the same one upon which Coleman relies—that "[w]hile an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child."

Pathammavong merits further discussion, although the general factual background is not squarely on point with the situation at hand. In *Pathammavong*, like in the instant case, paternity proceedings were instituted in Nebraska concerning a child born out of wedlock. In *Pathammavong*, however, the parties lived together in Nebraska and in Texas before the mother returned to Nebraska with the child while the father remained in Texas. Subsequently, the father sought temporary and permanent child custody. The court granted the father temporary custody and, following a hearing, determined that the child should remain in the father's permanent custody. On appeal, the mother argued that the test set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), was applicable. The *Pathammavong* court observed that unlike *Farnsworth*, the case presented did not concern parental relocation or the modification of a previous court-ordered custody agreement, and that the order on appeal was the first court order assigning custody to a parent. The *Pathammavong* court determined that the district court was not required to apply the *Farnsworth* test, explaining:

> The issue before the district court was not whether one or the other of the parents was free to relocate with the child, but, rather, which parent should be awarded permanent custody of [the child] as a matter of initial judicial determination. This question must be resolved on the basis of the fitness of the parents and the best interests of the child.

268 Neb. at 6, 679 N.W.2d at 755.

Like in *Pathammavong*, the order on appeal in the instant case is the first court order awarding custody of either child and there had been no request for parental relocation. A significant distinction, however, is that in *Pathammavong*, the father was already in Texas at the time of his filings, whereas here, Kahler completed her move to Ohio after Coleman filed his complaint but before the court heard it. Nonetheless, we find guidance in the court's reasoning.

Similarly, the Nebraska Supreme Court conducted no removal analysis in *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). In that case, pursuant to a 1989 filiation proceeding, a Nebraska district court adjudged the respondent as the child's father and ordered him to pay child support. Shortly after June 1990, the mother and the child moved to New York. In early 1992, the mother returned to Nebraska. In March, she filed a motion for custody of the child and the court entered an ex parte order granting her custody. The father filed a "'Motion to Set Aside Order, for Temporary Custody, and for Order Prohibiting [Mother] from Removing Child from State.'" *Id*. at 33, 524 N.W.2d at 795. The court set aside its ex parte order, granted the father temporary custody, and ordered that the child not be removed from Nebraska. The mother and child returned to New York. The father filed the temporary custody order in New York and brought the child back to Nebraska. Following the sustaining of the mother's demurrer to the father's above-mentioned motion, the father filed an application for temporary and permanent custody of the child. The court held a hearing and, on April 29, 1993, entered an order placing permanent custody of the child with the father.

On appeal, the *State ex rel. Grape* court stated that no court had made a custody determination until the April 29, 1993,

order. The court stated that in a filiation proceeding in which paternity had been admitted and the natural father had demonstrated a familial relationship with the child and fulfilled his parental responsibilities of support and maintenance, the fact that the child was born out of wedlock was to be disregarded and custody determined on the basis of the child's best interests. In so doing, the Nebraska Supreme Court determined that the district court did not abuse its discretion in awarding custody to the father.

[9] Based on *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004), and *State ex rel. Grape v. Zach, supra*, we hold that Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. But like we stated in a case where the children's coguardians filed a motion to remove the children to Texas, "if the instant case is determined by the children's best interests, then we can conceive of no good reason why *Farnsworth* [*v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999),] would not be properly included in the analytical framework to determine the children's best interests." *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 684, 617 N.W.2d 824, 831 (2000). Accordingly, we give some consideration to the *Farnsworth* factors in determining custody based on the children's best interests.

Farnsworth enunciated three broad considerations in considering whether removal is in the children's best interests: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the children and the custodial parent; and (3) the impact such a move will have on contact between the children and the noncustodial parent, when viewed in the light of reasonable visitation.

The parties' children, ages 15 and 5 at the time of trial, have always primarily resided with Kahler, and Coleman did not seek placement of the children with him until he learned of Kahler's plans to move. Kahler wished to move because her position had been outsourced to Ohio and her job search did not uncover employment in Nebraska with pay comparable

to what she had been earning. The evidence established that Kahler's pay in Ohio would be greater, as would Kimberly's pay. Coleman opposed the move because of the adverse impact it will have on his visitation and his ability to foster a relationship with the children. Unfortunately, Kahler's plans to move with the children created hostilities between the parties. Up until that time, the parties and their significant others interacted together as a family unit. Afterward, their relationship became strained.

The move to Ohio brought improved housing conditions for Kahler. In Lincoln, she rented a three-bedroom house with just over 1,000 square feet for $600 a month. The parties' son shared a room with Kimberly's son. Kahler testified that the house was not in good shape, that it had many cracks in the walls, that she had problems with pests, and that it was expensive to heat and cool. On the other hand, the house in Ohio has four bedrooms, has 2,400 square feet, and costs $1,000 a month to rent. Kahler testified that the Ohio house is very clean and well kept and that her utility bills are less expensive.

The parties did not adduce much evidence regarding educational advantages in one state versus the other. Kahler testified that she felt the Ohio schools were better and safer and that the schools were near to the Ohio house. The parties' son attended a full-day kindergarten in Lincoln, but only a half-day kindergarten in Ohio. Kahler testified that the parties' daughter's grades had improved since the move.

The parties have no family in Ohio, whereas they have numerous family members in Nebraska. Kahler's brother lives in Lincoln, and Coleman's family members residing in the Lincoln area include his parents, two brothers, a sister, four cousins, an aunt, and an uncle. Coleman testified that the parties' children have a relationship with those family members and that they would get together with the children on holidays, birthdays, and anniversaries. Coleman's mother testified that the children's move to Ohio had interfered with her relationship with them because she rarely is able to see them. Coleman's sister, who saw the children at least once a week up until 2004, testified that she had a close relationship with the

parties' daughter and that since the move, she has communicated with the parties' daughter by sending messages through a Web site.

We conclude that the children's best interests are served by being in Kahler's custody. The children are bonded to both parties, but it appears that they have a stronger bond with Kahler. Aside from overnight visitations with Coleman in the past few years, the children have always lived with Kahler, and she has been the parent primarily responsible for the daily tasks involved in raising the children. Coleman testified that Kahler is a good mother. Because the children's best interests dictate that they remain with Kahler, we find no abuse of discretion by the district court in awarding Kahler custody and allowing her to remove the children to Ohio.

Attorney Fees.

Kahler filed a motion with this court requesting an award of attorney fees in this appeal. In support of Kahler's motion, she attached the affidavit of her counsel which stated that she charged Kahler $3,442.50 in attorney fees, based upon counsel's hourly rate of $135.

[10-12] As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Young v. Midwest Fam. Mut. Ins. Co.*, 276 Neb. 206, 753 N.W.2d 778 (2008). Attorney fees and costs are statutorily allowed in paternity and child support cases. See, Neb. Rev. Stat. § 43-1412(3) (Reissue 2008); *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Further, under the Uniform Child Custody Jurisdiction and Enforcement Act, "[t]he court shall award the prevailing party . . . attorney's fees . . . unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate." Neb. Rev. Stat. § 43-1259(a) (Reissue 2008).

[13,14] Customarily, attorney fees and costs are awarded only to the prevailing party or assessed against those who file frivolous suits. See *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). Clearly, Kahler was the prevailing party in

this case. The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007). We award Kahler an attorney fee of $1,500 for her attorney's services on appeal.

CONCLUSION

We do not consider Coleman's assignment of error regarding the temporary order, because that issue is moot. We conclude that the district court did not err in awarding custody of the children to Kahler and allowing the children to remain with her in Ohio. We sustain Kahler's motion for attorney fees for services in this court and allow a fee in the amount of $1,500.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OSCAR L. FLORES, APPELLANT.

767 N.W.2d 512

Filed April 21, 2009. No. A-08-609.

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 of the court below.
2. **Pleas: Appeal and Error.** Withdrawal of a plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
3. **Statutes.** In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
4. **Criminal Law: Statutes.** A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence.
5. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
6. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.

7. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Oscar L. Flores was convicted and sentenced for driving under a revoked license pursuant to Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2008). Flores principally contends that the revocation of his operator's license pursuant to a city-ordinance-based prior conviction falls outside of the scope of qualifying prior revocations identified in § 60-6,197.06. Because we conclude that the listed statutes incorporate convictions for violations of conforming city ordinances and because Flores' remaining assignments of error lack merit, we affirm.

BACKGROUND

On October 12, 2007, the automobile driven by a man later identified as Flores rear-ended a vehicle on a street in Lincoln, Nebraska. Flores attempted to flee but later returned to the scene. In this appeal, Flores does not dispute the fact that he was operating a motor vehicle.

On November 16, 2007, Flores was charged with driving during revocation, subsequent offense. Flores' license had been revoked for 15 years pursuant to a February 5, 1993, third-offense driving under the influence (DUI) conviction under a Lincoln municipal ordinance. Flores committed the offense on May 10, 1992. At an arraignment on November 28, 2007, Flores waived service of a copy of the information and entered a plea of not guilty. On December 7, Flores moved to withdraw

his plea of not guilty so that he could file a plea in abatement. The district court denied the motion.

After a bench trial conducted on March 14 and 19, 2008, the court found Flores guilty of the underlying offense. Following an enhancement hearing held on May 7, the court determined that the instant offense should be enhanced for punishment as a subsequent offense of driving during revocation. The State relied upon evidence of a 2006 conviction for driving during revocation, which had resulted in a sentence to probation. After a sentencing hearing on May 19, the court sentenced Flores to 2 to 3 years' imprisonment and revoked his operator's license for 15 years from the date of his release.

This timely appeal followed.

ASSIGNMENTS OF ERROR

Flores assigns, consolidated and restated, that the district court erred in (1) admitting exhibit 1 because it was not relevant, (2) denying his motions to dismiss, (3) finding that there was sufficient evidence to convict Flores under § 60-6,197.06, (4) denying his motion to withdraw his not guilty plea, and (5) imposing an excessive sentence.

STANDARD OF REVIEW

[1] This appeal presents a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

[2] Withdrawal of a plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

ANALYSIS

Application of § 60-6,197.06.

Flores argues that even if he drove while his license had been revoked pursuant to a city ordinance, he could not be

convicted of the offense contained in § 60-6,197.06 for driving under a revoked license, because this section only proscribes driving with a license revoked after being convicted under a state statute. Flores asserts that he committed no offense, because § 60-6,197.06 lacks language that declares to be unlawful driving during a license revocation imposed as a penalty for violation of a city ordinance. This argument, which we reject, underlies three of Flores' assigned errors. First, Flores argues that exhibit 1—a record of the conviction which resulted in a revocation of his operator's license—was irrelevant. Second, Flores argues that the court erred in denying his motions to dismiss. Third, he claims the court erred in convicting him.

At first blush, this argument might appear to have merit because § 60-6,197.06 does not explicitly refer to license revocations pursuant to city ordinance. The relevant portion of § 60-6,197.06 provides as follows:

> 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 (4), (5), (6), (7), (8), (9), or (10) of section 60-6,197.03 or section 60-6,198, or pursuant to subdivision (2)(c) or (2)(d) of section 60-6,196 or subdivision (4)(c) or (4)(d) of section 60-6,197 as such subdivisions existed prior to July 16, 2004, shall be guilty of a Class IV felony, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01.

However, the reference to earlier versions of Neb. Rev. Stat. § 60-6,196 (Reissue 2004) requires us to consider the statutory language in effect at the time Flores committed the offense, which, in turn, entails an examination of whether Flores was convicted of a city ordinance enacted in conformance with statute.

Flores' license had been revoked pursuant to § 60-6,196(2)(c) as it existed at the time of the offense. At the time of Flores' offense, § 60-6,196(2)(c) was codified at Neb. Rev. Stat. § 39-669.07(2)(c) (Cum. Supp. 1990). As a result of enactment

of 1993 Neb. Laws, L.B. 370, the former § 39-669.07(2)(c) became § 60-6,196(2)(c) without any substantive change to its language. Section 39-669.07(2)(c) set forth the elements of third-offense DUI and the term of license revocation which results from a conviction for the offense—both of which are the same as those contained in the city ordinance which Flores violated.

While Flores was not directly convicted of violating § 39-669.07(2)(c), another provision of § 39-669.07 as it then existed made violation of a conforming city ordinance a violation of § 39-669.07(2)(c) for purposes of license revocation. Section 39-669.07(6), in effect at the time of Flores' conviction, provided as follows:

> Any city or village may enact ordinances in conformance with this section . . . . Upon conviction of any person of a violation of such a city or village ordinance, the provisions of this section with respect to the license of such person to operate a motor vehicle shall be applicable the same as though it were a violation of this section.

[3] The words of the second sentence of § 39-669.07(6) must be given their plain and ordinary meaning, which requires us to view the ordinance violation as a violation of § 39-669.07(2)(c). In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008). The ordinary meaning of the phrase "as though it were" requires us to treat a violation under a city ordinance enacted in conformance with § 39-669.07 as indistinguishable, or as the exact same thing, for purposes of matters "with respect to the license . . . to operate a motor vehicle." Therefore, Flores' violation of a city ordinance constituted a violation of § 39-669.07(2)(c) for purposes of license revocation, so long as the ordinance was enacted "in conformance" with the applicable statutes.

[4] We reject Flores' contention that the statutory language equivalent to § 39-669.07(6) merely constitutes a grant of power for cities and villages to prosecute DUI's—"not a legislative determination that a felony conviction may be secured by convictions deriving from city or village ordinances." Brief

for appellant at 17. This construction would lead to an absurd result. A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001). Flores' interpretation of § 60-6,197.06 would render license revocation meaningless for all those in a situation similar to Flores—i.e., for those whose licenses had been revoked pursuant to a city ordinance and prior to July 16, 2004. We can find nothing that suggests that this was the intended result of § 60-6,197.06.

Flores also argues that the city ordinance under which he was convicted was not enacted "in conformance" with § 39-669.07. Flores states that the city ordinance did not afford him the opportunity to receive a jury trial—to which he was entitled pursuant to *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), and which he could have requested if he had been charged with a violation of the corresponding statute. In *Wiltshire*, which was decided shortly after Flores pled guilty to third-offense DUI, the Nebraska Supreme Court decided that Neb. Rev. Stat. § 25-2705 (Reissue 1989), which prevented a criminal defendant charged with violating a city ordinance from requesting a jury trial, was unconstitutional as it pertained to third-offense DUI convictions. We note that Flores does not contend that the ordinance did not otherwise conform to statute.

The problem with Flores' contention is that he has not shown that any *city ordinance* prevented him from requesting a jury trial. It appears that Flores believes that § 25-2705 prevented the city of Lincoln from enacting any conforming ordinance. This is not a logical interpretation of § 39-669.07(6). Section 39-669.07(6) only required that the city enact its DUI ordinances "in conformance" with statute—which Lincoln did by enacting an ordinance with the same material provisions as the corresponding state statute. The apparent purpose of § 39-669.07(6) was to govern the content of ordinances passed by cities—not the content of legislation passed by the Legislature. Because cities have no control over the Legislature, they cannot be required to amend statutes that may prevent

conformance. Because Flores has not shown us that a city ordinance impaired his right to a jury trial, we need not further consider this matter.

[5,6] We also conclude that any further argument directed to the validity of Flores' 1993 conviction would constitute a collateral attack, which is not permitted in the present circumstances. When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006). Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *Id*. Further, pursuant to *State v. Louthan, supra*, the only ground on which a DUI conviction may be collaterally attacked is that it was obtained in violation of the defendant's Sixth Amendment right to counsel. Finding no evidence of such situation in the instant case, we conclude that the 1993 conviction is binding for purposes of this appeal.

Motion to Withdraw Not Guilty Plea.

Flores insists that the court erred in denying his motion to withdraw his earlier plea of not guilty so that he could make a plea in abatement. We find no merit to this claim. The record clearly shows that Flores desired to enter a plea in abatement solely to make the legal argument we have already rejected. Thus, no prejudice resulted from the court's action. We find no abuse of discretion in the court's denial of the motion.

Excessive Sentence.

Flores argues that the district court's sentence of 2 to 3 years' imprisonment and a 15-year license revocation was excessive. Flores was convicted for a subsequent offense of driving during revocation, which § 60-6,197.06 assigns as a Class III felony. A Class III felony is punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. The 15-year license revocation was mandatory under § 60-6,197.06 and thus by definition is not excessive.

[7] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an

abuse of judicial discretion. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008). Flores argues that a lesser sentence would have fulfilled the statutory purposes, but does not identify the circumstances supporting a lesser penalty. As the State correctly responds, Flores was not convicted of a drug- or alcohol-related offense and he disclaimed any need for substance abuse treatment. Flores fails to articulate any basis upon which a lesser sentence would deter future instances of driving under revocation.

Under the circumstances before us, we find no basis for characterizing a sentence close to the statutory minimum as excessive. We find no abuse of discretion in the sentence imposed by the district court.

CONCLUSION

Because the statutes require us to treat a violation of a DUI ordinance as if it were a violation of the equivalent statute for purposes of license revocation, we conclude that the district court did not err in admitting exhibit 1 into evidence, denying Flores' motion for a directed verdict, and finding Flores guilty beyond a reasonable doubt. Because Flores sought to enter a plea in abatement to assert a legal argument which we rejected, we find that the district court did not err in denying Flores' request. Finally, we conclude that the district court did not abuse its discretion in sentencing Flores.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
TURNER J. HYLAND, APPELLANT.
769 N.W.2d 781

Filed April 21, 2009. No. A-08-897.

1. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.

3. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo.
4. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.

Appeal from the District Court for Lancaster County, KAREN B. FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Randall Wertz, of Recknor, Williams & Wertz, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Turner J. Hyland appeals his conviction for first-offense driving under the influence. A state trooper stopped Hyland's vehicle because its front license plate was secured by one bolt and hanging downward. Hyland claims that the stop was not justified because the license plate was plainly visible, more than 12 inches off the ground, and not swinging. Because a license plate hanging downward in nearly a vertical position is not "fastened in an upright position" as required by the statute, we affirm.

BACKGROUND

On June 9, 2007, at approximately 1:06 a.m., Nebraska State Trooper Kaleb Bruggeman stopped a vehicle because the vehicle's front license plate was "hanging sideways" by one bolt. Bruggeman performed a traffic stop and arrested Hyland, the driver of the vehicle, as a result of the stop. The State subsequently filed a complaint in county court, charging Hyland with first-offense driving under the influence.

Hyland filed a motion to suppress any evidence obtained as a result of the alleged unlawful stop. During the hearing on the motion, Bruggeman drew a diagram representing the appearance of the front license plate. The diagram showed that the license plate was held by the bolt on the right side of the license plate and that the left side of the license plate was hanging down toward the ground. Bruggeman testified that when he stopped the vehicle, he advised Hyland that the reason for the stop "was that his front license plate was hanging by one bolt." Bruggeman testified that the plate was plainly visible, more than 12 inches off the ground, and not swinging.

Hyland disputed the degree to which the license plate was hanging. In Bruggeman's diagram, the license plate was nearly in a vertical line and practically perpendicular to the bumper. In Hyland's diagram, on the other hand, the license plate was slanted downward only to a slight degree, and Hyland testified that "it was more at a 45[-]degree angle than angled straight down." Hyland's diagram showed the plate to be affixed by the left-side bolt, rather than the right-side bolt. Hyland admitted that his own diagram showed the plate to be tilted downward and not fully upright in a horizontal position.

The county court stated that if the plate was hanging down as represented in Bruggeman's drawing, the trooper "would assume that it would be swinging, or that it wasn't prevented from swinging." Based on the drawing, the county court denied Hyland's motion to suppress.

On April 15, 2008, the county court held a stipulated trial. The parties stipulated that Bruggeman's testimony would be consistent with his testimony at the suppression hearing and with his narrative of the arrest. In the narrative, Bruggeman stated that he observed the license plate "hanging sideways, not parallel to the ground." After stopping the vehicle, Bruggeman detected the strong odor of alcoholic beverage, and once Hyland stepped into the patrol car, Bruggeman ascertained that the odor of alcohol was coming from Hyland's breath. Bruggeman observed signs of impairment while Hyland performed field sobriety tests, and results of a preliminary breath test showed Hyland to have a breath alcohol content over the legal limit. Bruggeman then arrested Hyland. The county court

found Hyland guilty of driving under the influence, and the sentence imposed by the court included 9 months' probation and a $400 fine.

Hyland appealed to the district court, which affirmed the judgment and sentence of the county court. Hyland now timely appeals to this court. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Hyland assigns two errors. First, he alleges that the county court erred in finding that a license plate attached by one bolt constitutes reasonable suspicion that a crime is being committed pursuant to Neb. Rev. Stat. § 60-399 (Cum. Supp. 2008). Second, he contends that in deciding the motion to suppress, the county court assumed facts which were not in evidence.

STANDARD OF REVIEW

[1,2] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *Id.*

[3] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. *Id.*

ANALYSIS

Like our recent decision in *State v. Richardson*, 17 Neb. App. 388, 763 N.W.2d 420 (2008), the case before us centers upon whether the placement of a license plate on a motor vehicle complies with § 60-399(1), which states in relevant part that

"license plates shall be securely fastened in an upright position to the motor vehicle . . . so as to prevent such plates from swinging and at a minimum distance of twelve inches from the ground to the bottom of the license plate." We agree with Hyland that § 60-399 does not require a plate to be attached by any specific number of bolts. But Bruggeman also testified that the plate was "hanging," and his drawing showed the plate to be at nearly a 90-degree angle to the bumper. Even Hyland admitted that his front license plate was not fully upright in a horizontal position.

[4] A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Royer, supra*. Because the statute requires the license plate to be "in an upright position" and there is no dispute that it was not fully upright, we conclude that Bruggeman had not only a reasonable suspicion to conduct an investigatory stop, but also probable cause to stop the vehicle for violating a traffic statute.

Because we focus upon the requirement that the plate be in an "upright position," we do not need to address the county court's statement that if the plate was hanging as depicted in Bruggeman's drawing, the trooper "would assume that [the plate] would be swinging, or that it wasn't prevented from swinging." See *State v. White*, 276 Neb. 573, 755 N.W.2d 604 (2008) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it). While we recognize that § 60-399 also requires that the plate be securely fastened so as to prevent it from swinging, we decide the case based on the other statutory language.

CONCLUSION

We conclude that the county court did not err in overruling Hyland's motion to suppress, because the state trooper had probable cause to stop Hyland's vehicle for violating the statute requiring license plates to be securely fastened in an upright position. We therefore affirm the judgment of the district court, which upheld the judgment below.

AFFIRMED.

IN RE INTEREST OF KENNA S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. DAVID S., APPELLEE.

766 N.W.2d 424

Filed April 28, 2009. No. A-08-793.

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 juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Juvenile Courts: Parental Rights: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2008), it must find that one or more of the statutory grounds listed in this section have been satisfied and that such termination is in the child's best interests. The State must prove these facts by clear and convincing evidence.
4. **Parental Rights.** In a case of termination of parental rights based on Neb. Rev. Stat. § 43-292(7) (Reissue 2008), the protection afforded the rights of the parent comes in the best interests step of the analysis.
5. ____. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
6. ____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
7. **Parental Rights: Self-Incrimination.** Courts may not terminate parental rights on the sole basis that a parent refuses to waive his or her right against self-incrimination.
8. **Parental Rights.** Termination of parental rights may be based on a parent's failure to undergo meaningful therapy.
9. ____. Where the duration of a child's out-of-home placement warrants termination of parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 2008), a parent's failure to substantially comply with court-ordered sex offender treatment weighs in favor of a finding that such termination is in the child's best interests.

Appeal from the Separate Juvenile Court of Sarpy County: LAWRENCE D. GENDLER, Judge. Reversed and remanded with directions.

Sandra K. Markley, Deputy Sarpy County Attorney, for appellant.

Ann W. Davis, P.C., for appellee.

IRWIN, CARLSON, and CASSEL, Judges.

PER CURIAM.

I. INTRODUCTION

The State of Nebraska appeals from an order of the juvenile court denying the State's motion to terminate the parental rights of David S., the natural father of Kenna S. The State alleges that the juvenile court erred in failing to find that the statutory grounds for termination under Neb. Rev. Stat. § 43-292(6) and (7) (Reissue 2008) were proven and in failing to find that such termination was in the best interests of Kenna. Upon our de novo review of the record, we find that the State proved by clear and convincing evidence that at the time of the termination hearing, Kenna had been in an out-of-home placement for more than 15 months of the most recent 22 months pursuant to § 43-292(7), and that terminating David's parental rights is in the best interests of Kenna. Accordingly, we reverse the order of the juvenile court and remand the matter with directions.

II. BACKGROUND

These proceedings involve Kenna, David's daughter, who was born on July 26, 1999. The juvenile court terminated Kenna's mother's parental rights as to Kenna, and such termination is not a part of this appeal.

David's and Kenna's involvement with the juvenile court began in January 2006 as a result of allegations that David had sexually assaulted his 11-year-old stepdaughter, Kenna's half sister, and had viewed child pornography. Kenna was removed from David's care on January 5 and placed in the custody of the Department of Health and Human Services (DHHS). Ultimately, Kenna was adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004).

1. PROCEDURE AT TERMINATION HEARING

We begin our review of the background of this case with a discussion of the procedural abnormalities which took place at the parental rights termination hearing in November 2007. While we normally begin our analysis with a more chronological review of the substance of the case, we briefly diverge from this typical format in order to provide a clear context for our factual analysis.

The termination hearing began on November 16, 2007. Although both the State and David rested at the close of the hearing on November 16, the juvenile court continued the matter and heard additional evidence in March, June, and July 2008. We briefly recount the specific circumstances of each hearing; however, we note that, as we will discuss more thoroughly below, we do not consider any evidence presented after the hearing on November 16, 2007, in our analysis of whether David's parental rights should be terminated.

The initial hearing on the State's motion for termination of parental rights was held on November 16, 2007. At the hearing, the State called numerous witnesses to testify concerning David's compliance with the court-ordered rehabilitation plan and Kenna's best interests. At the conclusion of its evidence, the State rested. Subsequently, David testified in his own behalf. At the conclusion of David's testimony, he rested. The State then offered rebuttal evidence, and both the State and David provided a closing argument to the court. At the conclusion of the arguments, the juvenile court stated that it would provide the State "30 days to submit cases or a brief" and would provide David 30 days to respond to the State's brief. The court indicated that it would revisit the case in "less than 90" days. The court also informed David: "So, in the interim, I'm going to direct [that DHHS] arrange services for you that are consistent with what are contained in [a therapist's] evaluation and that you participate in some sort of sex offender treatment."

On March 19, 2008, the court held a further hearing to address the State's motion to terminate David's parental rights. The evidence presented at this hearing generally indicated that David was attending therapy with Dr. Stephen Skulsky, but that he had not yet submitted to a polygraph examination despite his adamant assertions that he had not sexually assaulted his stepdaughter. Additionally, the evidence indicated that Dr. Skulsky could not conduct therapy "properly" without the results of a polygraph.

Based on the evidence presented at this hearing, the juvenile court found, "Dr. Skulsky's testimony suggests that a little more time, in fact, is actually reasonable and necessary and I'm

not going to dispute that." The court ordered David to submit to a polygraph examination and told him:

> [T]he issue for me is whether or not you're making an earnest effort at correcting what brought this case here, and what I heard today is no from Dr. Skulsky, [you are] not, but over the next short term [you] might be capable of doing it. So that's really the issue for me. You don't have a lot of time.

The court continued the matter and took the issue of termination under advisement.

On June 25, 2008, a third hearing was held regarding the State's motion to terminate David's parental rights. At this hearing, the parties informed the court that David had taken a polygraph examination and that the results of the test revealed that David was deceptive when he stated that he had not touched the vaginal area of his stepdaughter and when he stated that he had not viewed pornographic images of children.

Dr. Skulsky had stated in a treatment summary that he was not able to tell the court that David was ready to see Kenna. At the hearing, Dr. Skulsky also stated that he would like the court to give David additional time to pursue his therapeutic goals and to work on acquiring a relationship with Kenna.

The juvenile court again took the issue of termination under advisement and continued the hearing. The court also told David:

> I need you to engage with Dr. Skulsky totally with what brought you here and how this can be corrected. Now, he's just told me that he would like two months to work with you. I can probably do that, but I don't want to do that if I think there's no chance or no hope that the circumstances will change.

On July 16, 2008, another hearing was held on the State's motion to terminate David's parental rights. At this hearing, the court dismissed the State's motion to terminate David's parental rights.

2. Substantive Evidence

We continue our review of the record with a more chronological and detailed discussion of the evidence presented at the

November 2007 termination hearing, which evidence we consider in our analysis of whether David's parental rights should be terminated.

As we noted above, Kenna was removed from David's care on January 5, 2006, shortly before the State filed a petition alleging that Kenna was a child within the meaning of § 43-247(3)(a) through the faults or habits of David. The petition alleged, among other things, that David had been arrested and charged with first degree sexual assault of his 11-year-old stepdaughter, Kenna's half sister, and with 11 counts of "child pornography." Kenna was placed in foster care by DHHS and has remained in foster care since that time. David was ordered to have no contact with Kenna. He denied the allegations in the petition.

From January to October 2006, numerous hearings were held on the matter, but David's adjudication hearing was delayed as the parties gathered evidence and resolved unrelated issues. During these 9 months, the juvenile court continued placement of Kenna with DHHS and ordered David to have no contact with her.

In November 2006, an adjudication hearing was held. After the presentation of evidence, the juvenile court found the allegation that David had been arrested and charged with sexual assault and child pornography to be true by a preponderance of the evidence. The court found Kenna to be a child within the meaning of § 43-247(3)(a). The court ordered David to (1) complete a psychological evaluation; (2) cooperate with DHHS; (3) have no contact with Kenna; and (4) maintain a suitable residence for himself, seek and maintain gainful employment, and maintain reasonable contact with his case manager.

In January 2007, a disposition hearing was held. The juvenile court found that reasonable efforts had been made to eliminate the need for the removal of Kenna from her home, but that returning Kenna to David would be contrary to her best interests. The court continued placement of Kenna with DHHS. The court also ordered David to complete additional requirements, including (1) participating in sex-offender-specific treatment or therapy and (2) completing a parenting program.

In February 2007, David entered into a plea agreement with the State regarding the pending sexual assault and child pornography charges. The exact terms of this plea agreement are not discussed in our record. However, the record does indicate that as a result of this plea agreement, David was incarcerated from February to June.

After David was released from jail in June 2007, another disposition hearing was held. At this hearing, the juvenile court again found that reasonable efforts had been made to eliminate the need for the removal of Kenna from her home, but that returning Kenna to David would be contrary to her best interests. The court continued placement of Kenna with DHHS. The court also ordered David to participate in the "R-SAFE" program, a therapeutic program focused on the specific needs of individuals who have been identified as sex offenders.

Sometime after this disposition hearing, David contacted the R-SAFE program and began meeting with the coordinator of the program to complete the "assessment phase" of the therapeutic process. David attended three sessions in July 2007. During his third session, David was informed that he would have to submit to a polygraph test as a part of the intake process. At a subsequent session, David stated that he did not want to continue with the program. He believed that he had not done anything wrong and that to participate in the program any further would force him to incriminate himself in some way.

On August 9, 2007, the State filed a motion for termination of David's parental rights. In the motion, the State alleged that Kenna was a child within the meaning of § 43-292(6) and (7) and that it would be in Kenna's best interests if David's parental rights were terminated.

After David's involvement with the R-SAFE program had ceased and a few weeks prior to the hearing on the State's motion to terminate his parental rights, he inquired about other sex-offender-specific treatment or therapy providers. David ultimately set up an appointment with Dr. Skulsky and completed a psychological evaluation. In the evaluation report, Dr. Skulsky recommended that David participate in psychotherapy to address his mental health issues.

Dr. Skulsky stated that he did not possess enough information to determine whether David had, in fact, sexually assaulted his stepdaughter.

Ultimately, the juvenile court found that the State presented insufficient evidence to terminate David's parental rights. The State appeals from the decision here.

III. ASSIGNMENTS OF ERROR

The State alleges that the juvenile court erred in failing to find that the statutory grounds for termination of David's parental rights with regard to Kenna under § 43-292(6) and (7) were proven and in failing to find that such termination was in the best interests of Kenna.

IV. ANALYSIS

1. Standard of Review

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. See *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005).

[3] For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that such termination is in the child's best interests. See *In re Interest of Xavier H., supra*. The State must prove these facts by clear and convincing evidence. See *id.*

2. Procedure at Termination Hearing

Before we begin our discussion of the State's argument that the juvenile court erred in failing to terminate David's parental rights, we first determine the evidence we are to consider in our analysis.

As we mentioned above, there were abnormalities in the manner the termination hearing was conducted. The termination

hearing began in November 2007. At the conclusion of the parties' presentation of evidence, both parties rested and gave closing arguments. The juvenile court requested that the parties brief the issues and set up a briefing schedule. The juvenile court then indicated that David should continue to work with DHHS to complete his rehabilitation plan. The court stated it would revisit the case in less than 90 days.

In March 2008, the parties again appeared before the juvenile court. At this hearing, the court heard testimony and accepted evidence concerning David's progress in therapy. The court continued the hearing to allow David more time to engage in the therapeutic process.

In June 2008, another hearing was held. Again, the parties appeared before the juvenile court, and again, the court heard testimony and accepted evidence concerning David's progress in therapy. Again, the court continued the hearing to allow David more time to engage in the therapeutic process.

In July 2008, the juvenile court determined that the State did not provide sufficient evidence to warrant termination of David's parental rights. The court did indicate that it "base[d its] decision . . . upon what's been submitted as of November 16th . . . ." However, the court also mentioned David's efforts in therapy since the November 2007 hearing.

We note that the juvenile court's decision to accept further evidence after the November 2007 hearing resulted in confusion and an unclear record. Upon our review, we conclude that the case was submitted after the November hearing, pending the submission of briefs. The parties had presented all of their evidence and had rested their cases. Accordingly, the only evidence we consider in our analysis of whether the State met its burden in proving that David's parental rights should be terminated is the evidence presented at the November hearing.

3. Statutory Grounds for Termination

The State assigns as error the juvenile court's failure to find that it presented clear and convincing evidence to prove the statutory grounds for termination of David's parental rights. In the State's motion to terminate David's parental

rights, it alleged that termination was appropriate pursuant to § 43-292(6) and (7). Upon our de novo review, we agree with the State's assertions that it presented sufficient evidence to prove a statutory basis for termination of David's parental rights. Specifically, we find that the evidence clearly and convincingly established that Kenna was in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7).

Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 are established. Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." This section operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

In this case, the record contains uncontradicted evidence that Kenna was removed from David's care in January 2006 and that she continuously resided in an out-of-home placement throughout the pendency of the proceedings. As a result, at the time of the filing of the State's motion to terminate David's parental rights in August 2007, Kenna had been in an out-of-home placement for approximately 19 months. Accordingly, it is clear that Kenna was in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

We note that the record indicates that David was incarcerated from February to June 2007. David's 4-month incarceration occurred during the 22 months immediately prior to the State's filing of the motion for termination of parental rights. There is some discussion in the record and in the parties' appellate briefs regarding the effect of David's incarceration on the calculation of how long Kenna has been in an out-of-home placement for the purposes of § 43-292(7).

[4] This court has previously described the proper application of § 43-292(7) as follows:

> The proper application of this subsection consists of counting the most recent 22 months preceding the filing of the petition to terminate parental rights, followed by counting how many of those 22 months the child was in out-of-home placement. If the child was in out-of-home placement for 15 of those 22 months, the statutory grounds for termination of parental rights are satisfied and termination of parental rights is appropriate, subject to a determination that such termination is in the child's best interests.

In re Interest of Kindra S., 14 Neb. App. 202, 210, 705 N.W.2d 792, 801 (2005). In addition, this court has held that "[i]n a case of termination of parental rights based on § 43-292(7), the protection afforded the rights of the parent comes in the best interests step of the analysis." *In re Interest of Kindra S.*, 14 Neb. App. at 209-10, 705 N.W.2d at 800.

Given the mechanical manner in which § 43-292(7) is to be applied, we find that the time that David spent incarcerated need not be excluded from our determination of whether Kenna was in out-of-home placement for 15 of the 22 months immediately preceding the motion to terminate parental rights. Rather, we find that David's incarceration is a factor to consider in the best interests step of the analysis of whether his parental rights should be terminated.

There is clear and convincing evidence that termination of David's parental rights was appropriate pursuant to § 43-292(7). In light of our finding, we move to the next step in our analysis and examine whether the State proved by clear and convincing evidence that termination of David's parental rights is in Kenna's best interests.

4. Best Interests

The State asserts that the juvenile court erred in failing to find that it had presented sufficient evidence to demonstrate that termination of David's parental rights is in Kenna's best interests. Essentially, the State alleges that because David failed to complete a sex-offender-specific treatment or therapy program, he failed to adequately comply with his court-ordered

rehabilitation plan, failed to become rehabilitated, and failed to prove himself a "fit" parent.

Upon our de novo review of the record, we find sufficient evidence to demonstrate that David has not complied with his court-ordered rehabilitation plan and that termination of David's parental rights is in Kenna's best interests. We, therefore, reverse the order of the juvenile court and remand the matter with directions to terminate David's parental rights as to Kenna.

In the previous section, we found that termination of David's parental rights was appropriate pursuant to § 43-292(7). As a result, we declined to address the sufficiency of the evidence demonstrating that termination was also appropriate pursuant to § 43-292(6). We, therefore, treat our discussion of whether terminating David's parental rights is in Kenna's best interests as though § 43-292(7) is the only statutory basis for termination.

In cases where termination of parental rights is based solely on § 43-292(7), the Nebraska Supreme Court has held that appellate courts must be particularly diligent in their de novo review of whether termination of parental rights is, in fact, in the child's best interests. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In such a situation, because the statutory ground for termination does not require proof of such matters as abandonment, neglect, unfitness, or abuse, as the other statutory grounds do, proof that termination of parental rights is in the best interests of the child will require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292. *In re Interest of Aaron D., supra.*

[5,6] Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Furthermore, the Nebraska Supreme Court has previously recognized that children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *Id.*

In this case, the evidence shows that despite almost 2 years of efforts by DHHS and the juvenile court, David has been unable or unwilling to rehabilitate himself. Kenna was adjudicated as a child within the meaning of § 43-247(3)(a) because of allegations that David had sexually assaulted his stepdaughter and had possessed child pornography. As a result of these allegations, the juvenile court ordered David to complete sex-offender-specific treatment or therapy. David did not comply with the court's orders regarding the sex offender treatment, and as a result, he did not correct the conditions that led to Kenna's adjudication.

David was first ordered to complete sex offender treatment in January 2007. There is no indication that David took any steps toward achieving this goal from January to February 2007, before David was incarcerated. David did not contact any agencies about beginning sex offender treatment, nor did he discuss his options with the family's caseworker, during that time.

The record indicates that David was incarcerated from February to June 2007. While we understand that David's incarceration may have precluded him from engaging in sex offender treatment from February to June 2007, we also note that David could have taken steps to inquire about or set up a treatment program while he was still in jail. However, the family's caseworker testified that she did not have any contact with David during his incarceration.

After David was released from jail in early June 2007, he did not take any active steps toward achieving the goals of his rehabilitation plan. He did not seek out sex offender treatment from that time through mid-June 2007, when a hearing was held in the juvenile court to review Kenna's case. At the June hearing, the juvenile court ordered David to complete the R-SAFE program, a sex-offender-specific treatment program.

David began meeting with the coordinator of the R-SAFE program on July 9, 2007. He attended approximately four sessions, but ended his involvement with the program in August after learning in July that he would have to submit to a polygraph test. David informed the coordinator of the program that to participate any further would force him to incriminate

himself; he stated to the coordinator's assistant that he had not done anything wrong.

The State filed its motion to terminate David's parental rights in August 2007. After this motion was filed, David began to inquire with DHHS about other possible treatment providers for the sex offender treatment. David's caseworker contacted providers to ascertain whether they would be able to provide him with a sex offender treatment program. Ultimately, David contacted Dr. Skulsky, and in October, he underwent a psychological evaluation.

Taken as a whole, the evidence reveals that David was no closer to completing a sex offender treatment program at the November 2007 parental rights termination hearing than he was in January 2007, when such treatment was initially ordered. David continually put off the court's order concerning sex offender treatment. David did not participate in sex offender treatment in January after such treatment was ordered. When David was released from jail in early June, he did not participate in sex offender treatment. It was only after the mid-June hearing that David took any steps toward completing sex offender treatment. However, David attended only four sessions at the R-SAFE program before he quit. David did not begin attending other sex offender treatment until October 2007, months after the motion to terminate his parental rights had been filed.

[7,8] We briefly digress to discuss the possible implication of David's assertion that he left the R-SAFE program because he did not want to incriminate himself by participating in the program or to admit that he had sexually assaulted his stepdaughter. This court has previously found that courts may not terminate parental rights on the sole basis that a parent refuses to waive his or her right against self-incrimination. See *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). However, termination of parental rights may be based on a parent's failure to undergo meaningful therapy. See *id.*

Initially, we note that our analysis of David's noncompliance with the juvenile court's order to complete sex offender treatment does not center on David's termination of his

involvement with the R-SAFE program. Rather, our analysis focuses on David's procrastination at seeking out any sex offender treatment.

Additionally, we note that evidence in the record is conflicting concerning why David stopped attending the R-SAFE program. The coordinator of the program testified that David stopped attending because he did not want to incriminate himself by continuing to participate. David testified that he stopped attending because he did not want to sign a piece of paper stating that he had sexually assaulted his stepdaughter. David indicated that he was willing to take a polygraph examination to prove he was innocent. Other evidence in the record indicates that David had already pled guilty or no contest to a charge stemming from the sexual assault allegations, which suggests that further prosecution for the sexual assault allegations may have been precluded.

Based on all of the evidence presented at the termination hearing, we conclude that this is not a case where David failed to engage in meaningful therapy solely because he did not want to incriminate himself. Rather, the evidence suggests that David did not believe that he needed sex offender treatment, did not want to participate in the treatment, and chose to delay compliance until it was too late.

[9] At the time of the November 2007 termination hearing, Kenna had been out of David's home for almost 2 years. In fact, as a result of a no contact order stemming from David's criminal charges and as a result of David's failure to comply with the sex offender treatment, David had not seen or talked to Kenna for almost 2 years. Despite the amount of time that had passed, David had not complied with the juvenile court's order to complete sex offender treatment. Rather, David continually put off the court's order. Testimony at the termination hearing revealed that sex offender treatment can often take 2 years. Testimony at the termination hearing also revealed that David would not be ready to regain custody of Kenna until he had completed such treatment. In fact, David would not be able to have any contact with Kenna until he had made significant progress in his sex offender treatment. Where the duration of a child's out-of-home placement warrants termination of

parental rights under § 43-292(7), a parent's failure to substantially comply with court-ordered sex offender treatment weighs in favor of a finding that such termination is in the child's best interests.

Kenna should not be made to wait indefinitely for David to rehabilitate himself. She deserves permanency and stability. Although David was made aware that he could not regain custody or have contact with Kenna until he participated in sex offender treatment, he continuously delayed his participation in the treatment. Based on this evidence, we find sufficient evidence to demonstrate that termination of David's parental rights is in Kenna's best interests. We reverse the order of the juvenile court and remand the matter with directions to terminate David's parental rights as to Kenna.

V. CONCLUSION

We find that the State presented sufficient evidence to demonstrate that Kenna is a child within the meaning of § 43-292(7) and that termination of David's parental rights is in Kenna's best interests. Accordingly, we reverse the order of the juvenile court which denied the State's motion to terminate David's parental rights. We remand the matter with directions to enter an order terminating David's parental rights.

REVERSED AND REMANDED WITH DIRECTIONS.

IRWIN, Judge, dissenting.

I respectfully dissent from the conclusion of the majority that the State presented sufficient evidence to demonstrate that termination of David's parental rights is in Kenna's best interests. Contrary to the conclusion of the majority, there is insufficient evidence in the record to establish that termination of David's parental rights is in Kenna's best interests. For this reason, I would affirm the determination of the juvenile court which found that the State failed to prove by clear and convincing evidence that termination of David's parental rights is in Kenna's best interests.

The majority concentrates its analysis of whether terminating David's parental rights is in Kenna's best interests exclusively on David's failure to complete a sex offender treatment program. The majority concludes that evidence in the record

establishes that "David did not believe that he needed sex offender treatment, did not want to participate in the treatment, and chose to delay compliance until it was too late."

There is no evidence in the record to suggest that David intentionally delayed participating in a treatment program. Rather, the evidence reflects that David sought out treatment when ordered to do so and worked to find a program suited to his individual needs. Evidence in the record revealed that a sex offender treatment program can last up to 2 years. Simply stated, David did not complete a sex offender treatment program because there was not enough time to complete such a program.

Kenna was not adjudicated as a child within the meaning of § 43-247(3)(a) until November 2006. David was not ordered to complete sex offender treatment until approximately 2 months after that, in January 2007.

Additionally, David was incarcerated from February to June 2007. While this incarceration does not necessarily excuse David's noncompliance with the rehabilitation plan, there was evidence to suggest that David was not able to participate in sex offender treatment while he was in jail.

After David was released from jail in June 2007, the court ordered him to complete the R-SAFE program, a sex-offender-specific treatment program. David began meeting with the coordinator of the program on July 9. He attended approximately four sessions. He ended his involvement with the program after learning that to participate in this particular program, he would have to admit that he had sexually assaulted his stepdaughter.

Shortly after David ended his involvement with the R-SAFE program, the State filed its motion to terminate his parental rights. While this motion was pending, David inquired with DHHS about other possible treatment providers for the sex offender treatment. David's caseworker contacted multiple providers on his behalf to ascertain whether they would be able to provide him with a sex offender treatment program. Ultimately, in September 2007, David contacted Dr. Skulsky, and in October, he underwent a psychological evaluation and began treatment.

Therefore, when the evidence is taken as a whole, David was allowed only approximately 7 months to complete a sex offender treatment program. David was in jail for 4 out of those 7 months. As such, David was essentially provided with 3 months to complete sex offender treatment.

Even though David was not provided with a great deal of time to comply with the court's order, David did attempt to achieve compliance, and his efforts are clearly detailed in the record. He began attending the R-SAFE program just 25 days after the court ordered him to participate in that specific program. For 3 weeks thereafter, he attended one session a week. While David did discontinue his involvement with this program during the initial stage of the process, he explained that he did so because part of the program required him to "incriminat[e] himself."

After the State filed its motion to terminate his parental rights, David continued his efforts to comply with the court's order. He began to independently search for a different treatment provider for the sex offender treatment. At the time of the termination hearing, David was participating in a treatment program with Dr. Skulsky. As demonstrated at the termination hearing, David's efforts at compliance do not evidence a person who was intentionally delaying treatment. In fact, the only substantive evidence of any voluntary delay at compliance that the majority articulates is David's decision to discontinue treatment with the R-SAFE program. However, David's decision to discontinue his involvement with that program can be traced to his disagreement with some of the program's requirements, rather than to any attempt to delay his treatment.

Most notably, David declined to admit that he sexually assaulted his stepdaughter, which admission was a mandatory program requirement. David testified that he did not want to "incriminat[e] himself" with such an admission. While David's concern is not necessarily legally sound, it is not wholly unreasonable; nor does his concern rise to the level of proof that he was trying to delay treatment or that he had no intention of ever completing treatment, as the majority appears to infer.

Furthermore, the evidence reveals that David began to search for a more suitable program almost immediately after he terminated his involvement with R-SAFE. Such behavior is not consistent with someone who "did not believe that he needed sex offender treatment, did not want to participate in the treatment, and chose to delay compliance until it was too late." Rather, this evidence indicates that David was working to comply with the court's orders, to rehabilitate himself, and to be reunited with Kenna.

While it is true that Kenna should not be made to wait indefinitely for David to rehabilitate himself, it is important to recognize the importance of granting a parent adequate opportunity to effectuate rehabilitation. David should be provided with an adequate opportunity to comply with the court's rehabilitation plan.

David was provided with approximately 3 months to complete a treatment program. Evidence in the record revealed that a sex offender treatment program can last up to 2 years. David's failure to complete his treatment during this brief time period does not, without more, establish that termination of his parental rights is in Kenna's best interests.

WALTER C. DIERS PARTNERSHIP, A NEBRASKA PARTNERSHIP, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT AND CROSS-APPELLEE.

767 N.W.2d 113

Filed May 5, 2009. No. A-08-274.

1. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.
2. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.

4. **Eminent Domain: Damages.** In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits.
5. ____: ____. In an eminent domain proceeding, damages are to be measured as of the date of the taking.
6. **Eminent Domain: Real Estate: Valuation.** There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.
7. **Eminent Domain: Damages.** Ordinarily, the entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole.
8. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
9. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
10. **Eminent Domain: Damages.** Where, in eminent domain proceedings, the property is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. In determining whether the property is to be considered as a whole or as units, usually unity of use is given greater emphasis, and has been called the controlling and determining factor.
11. **Eminent Domain: Evidence.** Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.
12. ____: ____. Whether properties, the subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court.
13. **Eminent Domain: Interest: Appeal and Error.** Neb. Rev. Stat. § 76-711 (Reissue 2003) provides that if an appeal is taken from the award of the appraisers by the condemnee and the condemnee obtains a greater amount than that allowed by the appraisers, the condemnee shall be entitled to interest from the date of the deposit at the rate provided in Neb. Rev. Stat. § 45-104.02 (Reissue 2004), as such rate may from time to time be adjusted, compounded annually,

on the amount finally allowed, less interest at the same rate on the amount withdrawn or on the amount which the condemnor offers to stipulate for withdrawal as provided by Neb. Rev. Stat. § 76-719.01 (Reissue 2003).

14. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Affirmed and remanded with directions.

Jon Bruning, Attorney General, Bradley D. Thornton, Jennifer A. Huxoll, and Jeffery T. Schroeder for appellant.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

The State of Nebraska, Department of Roads (the State), condemned land in a rapidly evolving commercial development owned by Walter C. Diers Partnership (Diers) at the intersection of U.S. Highways 275 and 30 on the eastern edge of Fremont, Nebraska. In the appeal to district court from the county court's award, the court entered judgment pursuant to jury verdict for $1,043,079, without mentioning interest on the award. We find no abuse of discretion in the court's evidentiary rulings admitting the expert testimony of Diers' appraiser, excluding the State's offer of an earlier appraisal prepared for Diers for another purpose, and admitting the property owner's testimony regarding the sale price of other lots within the development. Because we conclude that Neb. Rev. Stat. § 76-711 (Reissue 2003) mandated that Diers be awarded interest on the judgment, we remand with directions to amend the judgment.

II. BACKGROUND

The State acquired fee simple title to 4.12 acres of Diers' land and a temporary easement to an additional 4.47 acres as of September 28, 2004, for purposes of road construction. Diers appealed to the district court from the assessment by the county court's board of appraisers. The district court conducted a jury

trial on December 11 to 14 and 18, 2007, for the sole purpose of assessing the damages that resulted from the taking. At the conclusion of the evidence, the jury awarded Diers $1,043,079. The court entered judgment pursuant to the verdict but did not explicitly award Diers any interest.

1. Land

The land acquired by the State was originally part of a 195-acre parcel owned exclusively by Diers and lies at the northeast corner of Diers' property. This corner adjoins the intersection of Highways 275 and 30 and is located on the eastern edge of Fremont. In light of the location, the parties do not dispute that the highest and best use of the property acquired was for development purposes.

As of September 28, 2004, Diers had taken significant measures to develop the northern 125 acres of the property, which was separated from the southern 70 acres of the property by a creek. Charles H. Diers (Charles), one of the partners in Diers, began to contemplate developing the northern 125 acres in 1998, when he hired a development coordinator to create site plans. Ultimately, Diers decided to develop the land in stages, in order to avoid the prohibitive costs associated with developing the entire 125 acres at one time. These costs would have included both the cost of improving the land and the cost of paying increased real estate taxes on lots after they had been platted but not yet sold, and a likely loss associated with having created more lots than the market then demanded.

In approximately 2002, Diers had a parkway constructed in roughly the middle of the property, running from the northern edge to the southern boundary of the property. Although the city of Fremont actually constructed the parkway, Diers paid for a large portion of the cost associated with its construction. The parkway has two lanes on each side, a landscaped median, and streetlights. The parkway also contained sewer, water, and gas lines that would be connected to lots as they were later developed.

Diers then platted four lots that were adjacent to the parkway and located at the northern edge of the property. In order

to do so, Diers first developed a preliminary plat which showed a development plan for the entire 125 acres. On April 30, 2002, the city council approved Diers' preliminary plat, which contained 27 proposed lots and was entitled "Diers Second Addition." The approval of the preliminary plat remained effective for 2 years. At the same time as the approval of the preliminary plat, Diers received approval of a final plat of the four lots adjacent to the parkway. This plat was also called Diers Second Addition. As a result of the final platting, the four lots were rezoned from agricultural to commercial and became salable.

Prior to the condemnation, Diers sold and fully developed three of the four lots in the final plat of the second addition. A chain restaurant purchased one lot for $300,000, or $4.47 per square foot. Charles testified that he purposefully gave the restaurant a significant discount because he wanted to "jump-start" development. A local bank acquired two lots for a total of $1,269,773, or $10.16 per square foot. To accomplish these sales and the development of these properties, Diers had an additional road constructed which ran parallel to Highway 30 and along the southern edge of these lots.

In 2002, Diers also established the "Deer Pointe" commercial association and created restrictive covenants for the commercial development which Diers had planned. Prior to the condemnation, Diers had also obtained a topographical map of the entire area and had a boundary survey conducted. By the time the taking occurred, Diers had spent a total of approximately $2.6 million to develop the northern 125 acres.

At trial, Diers adduced evidence that but for the taking, the area of the taking would have already been developed, platted, and sold. Diers had created and circulated a pricelist to market the lots that were proposed but not yet developed as of the date of condemnation. Douglas Halvorson, the site's development coordinator, and Charles testified that they had originally planned to next develop the lots on the corner of Highways 275 and 30 but discontinued these plans once they became aware of the taking. Numerous witnesses testified to the desirability of the location where the taking occurred.

Primarily, the appeal of this particular location was that it was in a high-traffic area, was highly visible, and would have been easily accessible.

Diers also adduced evidence regarding the detrimental effects of the taking on the remainder of the property. The taking included the removal of an access which would have allowed convenient entrance to the land remaining in the northeast corner of the property. Richard See—Diers' certified real estate appraiser—testified that this land would now have to be accessed via the parkway, which was 2,000 feet from the proposed lots, whereas the access taken by the State would have been 300 feet from the lots. Diers offered the testimony of Halvorson and two others who had worked on developing the property, all of whom testified that the taking of this access made the property in this area less valuable to potential buyers.

2. Valuation Testimony

Diers offered See's expert testimony regarding the damages resulting from the taking. See concluded that the damages totaled $2,158,158. See calculated the damages resulting from the loss of land based on the assumption that but for the taking, the northeast corner of Diers' property would have otherwise been sold as individual commercial lots as depicted in the preliminary plat of Diers Second Addition. See used already-developed lots as comparables to arrive at the condemned property's value by factoring in the costs associated with developing the condemned property. See then calculated damages to the remainder of the land on the premise that removing the access would transform corner lots—which have a higher value due to easy access—into interior lots—which are less valuable because access is more difficult.

Charles testified regarding the sale price of the lots on the portions of the property which were sold both before and after the taking and which had been commercially developed.

The State offered the testimony of Gary Hassebrook, a general certified appraiser, and that of another appraiser regarding the land's value. At the request of Diers' accountant, Hassebrook appraised the property for tax purposes and valued

the land at $25,000 per acre as of January 16, 2003. The district court sustained Diers' objection to the relevance of the testimony, excluding the appraisal both because it was "too remote in time" and because the court "didn't hear anything linking [Hassebrook's] appraisal from January of '03 to September 28, 2004," the date of the taking.

Although no error is assigned regarding the amount of the jury verdict or the admissibility of the State's evidence, for the sake of completeness, we note that the State presented valuation testimony of its expert, George Tesar, Jr., a general certified appraiser, who testified that the value of the property taken by the State was $137,066 total.

The State timely appeals, and Diers cross-appeals.

III. ASSIGNMENTS OF ERROR

The State alleges, as restated, that the district court erred (1) in allowing valuation testimony from See which valued the subject parcel using a "lot" or "subdivision" method of valuation, including a hypothetical assumption that the property acquired was fully developed as of the valuation date; (2) in excluding Hassebrook's expert testimony regarding his January 16, 2003, appraisal of Diers' property; and (3) in overruling the State's objection to Charles' testimony regarding the sale of developed lots on the subject property.

On cross-appeal, Diers alleges that the district court erred in failing to award interest pursuant to § 76-711 on the judgment.

IV. STANDARD OF REVIEW

[1] The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[2] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[3] An appellate court reviews questions of law independently of the lower court's conclusion. *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (2008).

V. ANALYSIS

1. The State's Appeal

All of the State's assignments of error pertain to whether particular evidence regarding the valuation of Diers' damages is relevant and admissible. For this reason, we first recall the applicable rules for calculating damages in a condemnation action and address the district court's ruling regarding each piece of disputed evidence.

[4,5] In a condemnation proceeding, the landowner whose property is taken is entitled to compensation for the damages caused to the landowner's property. See *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003). In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits. *Id.* Damages are to be measured as of the date of the taking. See *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

[6] There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. *Id.* Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole. *Id.*

In the present case, all valuation testimony was based upon the comparable sales method and neither party argues that either of the remaining methods of valuation was appropriate—nor do we believe that this is a situation where either would apply.

(a) See's Expert Testimony

[7] The State alleges that See's expert testimony violated the "unit" rule and thus is not relevant to valuation. Ordinarily, the

entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole. *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975). The State claims that See's testimony violated the "unit" rule (1) by valuing the condemned land as if it had been subdivided, (2) by valuing the southern 70 acres on a different per-unit basis from the northern 125 acres, and (3) by calculating severance damages as the total of the damages to each affected tract. We address each issue in turn.

[8] The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008). An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). The State's arguments primarily pertain to whether See's testimony is relevant and thus of assistance to the trier of fact.

(i) Valuation Pursuant to Subdivision Method

The State insists that the particular land taken had to be valued using comparables similar in size to Diers' entire property because the "unit" rule of valuation required that the land be valued as a whole. The State alleges that See's testimony is inadmissible because he valued the land taken on the premise that it would have otherwise been subdivided, developed, and sold. In his appraisal, See assumed that the property taken would have composed a portion of the proposed lots depicted in the preliminary plat of the second addition. He then valued these lots by using comparables similar in size but fully developed. See then accounted for the fact that the comparable lots had been developed by accounting for the cost of developing the property. In arriving at the proposed lots' value, See also accounted for the likely delay in selling the property and a bulk sale. See determined a per-square-foot value for these lots—which was the same for all of the lots. See then calculated the value of the condemned land by taking the number of

square feet condemned and multiplying it by the per-square-foot value. In determining the total value of the land taken, See added the full value of the land the State acquired in fee simple to the rental value of the land to which the State took a temporary easement.

Where land has not been developed at all, but has the potential for development, the "unit" rule applies and the land must be valued as one unit. See *Rath v. Sanitary District No. One*, 156 Neb. 444, 56 N.W.2d 741 (1953). However, the Nebraska Supreme Court's decision in *Timmons v. School Dist.*, 173 Neb. 574, 114 N.W.2d 386 (1962), provides an alternative basis for valuation where land is in the process of development. Diers maintains that the valuation method in *Timmons* applies.

In *Timmons*, the Nebraska Supreme Court upheld the trial court's decision to reject proposed jury instructions that would have instructed the jury not to consider the condemned land's subdivided value. One such instruction stated that the property could not be valued "'as though it were platted and public improvements installed by a computation of the aggregate value of such prospective subdivision into lots deducting therefrom the estimated cost of such public improvements not yet made and other expenses incident to the future developments of the property.'" *Id.* at 583, 114 N.W.2d at 392. The landowner offered evidence of his property's value according to the method proscribed by this instruction. In upholding the district court's decision to reject this instruction, the Nebraska Supreme Court determined that the extent to which the owner had already taken substantial steps to develop the condemned property justified the use of the valuation method proscribed by the instruction. In particular, the property owner had purchased a large tract of property, had planned to develop it into residential subdivisions in stages, had filed a preliminary plat for the area taken, and had already fully developed the property directly adjacent to the area of the taking. At the time of the taking, the pavement and all utilities had been brought up to the edge of the condemned area, the condemned area had been graded, and a street had been cut and graded through the condemned area in preparation for paving. The property

owner had spent a total of $28,000 to develop the land that was condemned.

[9] Considering all of the circumstances, we cannot say that the district court abused its discretion in admitting See's expert testimony. When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007). The relevant method of valuation is determined by the facts, and See's valuation accounted for the facts in the record. In the instant case, Diers put a significant amount of time and effort into developing the property, as did the property owner in *Timmons*. Both had created an overall development scheme for a large tract of property, had spent significant sums to realize the overall scheme, had fully developed other portions of the property, and had preliminarily platted the area of the taking. Although, in the instant case, the preliminary plat had expired approximately 5 months before the taking, this difference is of little significance. According to undisputed testimony, it would have been a mere formality to obtain reapproval if the taking had not intervened. The only notable difference between the instant case and *Timmons* is that Diers had not yet physically improved the property subject to the taking or immediately adjacent thereto. However, we find that this is a matter that goes to the weight of the evidence as opposed to its admissibility.

The state of development of the overall tract in the instant case made finding a precisely comparable tract of land difficult. The tracts of land utilized as comparable properties varied from the subject land in their state of development. They were either large, undeveloped tracts similar in size to Diers' entire tract or small, developed properties similar in size to the lots Diers had preliminarily platted. The larger undeveloped properties were dissimilar because they had not yet been improved, while Diers had already begun to improve the property and sell it off in small developed tracts. The smaller developed properties were dissimilar because they had been finally platted and improved, whereas this was not true for a significant portion

of Diers' property. The record reflects that Diers' tract was somewhere in between the two types of comparables. In order to obtain a valuation using comparables, See had to choose one category of dissimilar property and make adjustments to analogize it to Diers' property as best he could. Based upon the record, the district court did not abuse its discretion in permitting See to do so.

(ii) Valuation of Portions of Parcel on Distinct Per-Unit Bases

The State next contends that the district court abused its discretion in overruling an objection to See's testimony in which he valued the southern 70 acres of the property separately from the northern 125 acres for purposes of determining damages. In his appraisal, See valued the 70 acres on a per-acre basis and at a lesser per-unit value than the 125 acres. The State contends that this testimony also violated the "unit" rule.

[10] As noted above, ordinarily, the entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole. *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975). See *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). Where, however, it is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. *Y Motel, Inc. v. State, supra*. In determining whether the property is to be considered as a whole or as units, usually unity of use is given greater emphasis, and has been called the controlling and determining factor. *Id*. In *Y Motel, Inc.*, the Nebraska Supreme Court upheld the district court's decision to admit valuation testimony in which a motel property was valued separately from adjoining property that was unimproved, except for a barn.

Similarly, the record in the case before us reflects that the northern 125 acres and the southern 70 acres were not adaptable for the same use. Diers had filed a preliminary plat for the northern 125 acres and had begun to develop it for commercial use. In contrast, Diers had not developed the southern 70 acres of the property, had no plans to do so in the immediate future, and, from the photographic evidence, appears to have used it

as farmland. Diers presented evidence that the southern portion was better adapted to development for residential purposes. Further, the northern 125 acres was separated from the southern 70 acres by a creek, which served as a significant physical boundary affecting the adaptability of the southern portion. In addition, the northern 125 acres was bordered by Highway 30 on the north, but there is no such busy road to the south of the property. In light of the substantial differences between the northern and southern portions of the overall tract, we find no abuse of discretion in the district court's ruling allowing the testimony.

(iii) Calculation of Remainder Damages

Finally, the State contends that See violated the "unit" rule when he calculated remainder damages as the sum of the damage to three "corner" lots caused by the taking of an access point. See calculated damages as the difference in value of these lots with the access point and without the access point.

While damage to the remaining property as a "whole" is the correct measure of remainder damages, damage to the "whole" may result from an injury which affects only particular portions of the property. The Nebraska Supreme Court's decision in *McGinley v. Platte Valley Public Power and Irrigation District*, 133 Neb. 420, 275 N.W. 593 (1937), illustrates this point. In *McGinley*, the condemnor acquired by eminent domain 78.13 acres of riparian land from the landowners' cattle ranch, which exceeded 46,000 acres in total size. The property owners offered testimony that each of the remaining acres of land would decrease by $1 in value, even though the record reflected that the taking detrimentally affected only a portion of the property and that the remainder of the property had not been affected. The Nebraska Supreme Court held that the trial court erred in permitting the jury to assess damages on a per-acre basis for the entire property where portions of the property were not affected. The court reasoned that "[t]here must be a limit to remote, unaffected lands that may be considered in estimating depreciation in their value by condemnation of contiguous lands taken for public purposes." *Id.* at 426, 275 N.W. at 596.

Thus, severance damages, although assessed to the "whole" property, may result from the injury caused to only portions of the property. Therefore, the district court did not abuse its discretion in admitting See's expert testimony that only a portion of the property was injured by the severance.

The State has cited *Frank v. State*, 176 Neb. 759, 127 N.W.2d 300 (1964), in support of its argument that damages must be assessed to the whole. In *Frank*, the property owners attempted to increase their award of severance damages by requesting that the fact finder calculate severance damages only as to two small strips of the property directly adjacent to the area of the taking. These strips of land were not "platted, marked, or naturally divided in any way," and the remainder damages claimed by the landowners appeared to stem only from the fact that adjoining land was taken and not a loss of available resources or access. *Id.* at 762, 127 N.W.2d at 302. The property owners objected to the condemnor's evidence that the taking—used to build a highway—actually increased the property's value as a whole. The Nebraska Supreme Court held that the evidence regarding the overall benefit was relevant and admissible.

We distinguish *Frank* because it is inapposite to the instant case for two reasons. First, we have already determined that evidence of damages calculated using the "subdivision" method of valuation is admissible in the instant case and thus, unlike *Frank*, a per-lot assessment of severance damages is admissible. Second, neither party has claimed that anything other than the loss of access—which affects only a portion of Diers' property—impacts the value of the remaining property. Clearly, the loss of access does not affect those portions of the property that did not rely upon the access taken by the State.

(b) Hassebrook's Valuation Testimony

The State argues that the district court erred in excluding Hassebrook's expert testimony regarding his January 16, 2003, appraisal of Diers' property. Hassebrook appraised 350 acres of Diers' property, including the property at issue, on a per-acre basis for tax purposes. In an offer of proof, the State indicated that he would have valued Diers' land at $25,000 per

acre. The trial court excluded Hassebrook's testimony based on its determination that the testimony was not relevant, because Hassebrook could not link his appraisal to the value of Diers' property as of the date of the taking and that it was "too remote in time." Hassebrook had not updated his appraisal to reflect sales that occurred after the appraisal.

Additionally, Hassebrook did not know the status of Diers' plans to develop the property. Hassebrook admitted that he had no information regarding development plans and that had he been aware of "real detailed plans ready for development" or "information that [the property is] ready to develop," he would have valued the property using a different method.

A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). Under these circumstances, the trial court did not abuse its discretion in determining that Hassebrook's appraisal was not relevant. The appraisal failed to account for factors relevant to property value. After Hassebrook finished his appraisal, the surrounding property continued to develop and change, and Hassebrook did not purport to account for these changes. Also, Hassebrook failed to account for the fact that Diers was in fact developing the property.

(c) Charles' Valuation Testimony

The State argues that the district court abused its discretion in overruling its foundation objections to Charles' testimony on the sale prices of developed lots on the northern 125 acres of Diers' property. The sales to which Charles testified occurred both before and after September 28, 2004—the most recent of which was pending at the time of trial.

[11,12] Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008). The foundation evidence should show the time of the sale, the similarity or dissimilarity

of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *Id*. Whether properties, the subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court. *Id*.

We have reviewed the record and determined that the foundational requirements were fulfilled. Charles personally testified to the time of the sale, the location of the property, and any conditions that affected the sale price. Charles and other witnesses testified to the condition of the market—that during the entire time period, the land in this area was selling well because the area was being commercially developed. Because the foundational requirements were fulfilled, we find that the district court did not abuse its discretion in allowing Charles to testify to the sale price of other lots in the northern 125 acres.

2. Diers' Cross-Appeal

[13] In its cross-appeal, Diers assigns that the district court erred in failing to award Diers interest on the judgment as required by § 76-711. Section 76-711 provides that the condemnee is to receive interest as follows:

> If an appeal is taken from the award of the appraisers by the condemnee and the condemnee obtains a greater amount than that allowed by the appraisers, the condemnee shall be entitled to interest from the date of the deposit at the rate provided in section 45-104.02, as such rate may from time to time be adjusted, compounded annually, on the amount finally allowed, less interest at the same rate on the amount withdrawn or on the amount which the condemner offers to stipulate for withdrawal as provided by section 76-719.01.

Pursuant to this section, if a property owner appeals the county court's award to the district court, interest begins to accrue when the condemnor deposits the amount of the award.

[14] We first address the State's argument that Diers failed to preserve this issue for appellate review. Ordinarily, an

appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009). However, in the instant case, Diers had no opportunity to raise this issue prior to entry of the final judgment. The omission occurred in the entry of the judgment itself. While Diers may have had another remedy in the form of a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Reissue 2008), the State has provided no authority for the proposition that the failure to file such a motion precludes raising the omission on appeal. We reject the State's argument and, thus, address the cross-appeal.

We note that Diers did not request interest in the prayer of its petition filed with the district court. However, pursuant to *Thacker v. State*, 193 Neb. 817, 821, 229 N.W.2d 197, 201 (1975), whether Diers is entitled to interest "rests upon [§] 76-711 . . . and not upon the prayer of the petition."

Pursuant to § 76-711, Diers is entitled to interest in the prescribed amount, because it received a larger judgment in district court than was awarded by the appraisers in county court and we find merit in Diers' cross-appeal. We therefore remand to the district court with directions to modify the judgment to include the interest required by § 76-711.

We recognize that in some circumstances, judgments are deemed to include statutorily mandated interest even though the judgment does not explicitly mention interest. See, *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993); *Stuart v. Burcham*, 62 Neb. 84, 86 N.W. 898 (1901). However, we believe that the better practice is for the district court to include an explicit award of interest where the statute mandates interest as part of the relief to be granted. This ensures that parties can fulfill the obligations of a judgment without the necessity of further proceedings.

VI. CONCLUSION

Because we find that the district court did not abuse its discretion in admitting See's or Charles' valuation testimony, or in excluding Hassebrook's prior appraisal, we find no merit in the State's assignments of error on appeal. On Diers' cross-appeal,

we conclude that Diers was entitled to interest pursuant to § 76-711. We therefore affirm the judgment of the district court and remand with directions to modify the judgment to expressly award Diers interest pursuant to § 76-711.

AFFIRMED AND REMANDED WITH DIRECTIONS.

ELKHORN RIDGE GOLF PARTNERSHIP, A NEBRASKA GENERAL PARTNERSHIP, ET AL., APPELLANTS AND CROSS-APPELLEES, V. MIC-CAR, INC., A NEBRASKA CORPORATION, AND CARVILLE BUTTNER, APPELLEES AND CROSS-APPELLANTS.

767 N.W.2d 518

Filed May 5, 2009. No. A-08-1076.

1. **Actions: Restrictive Covenants: Equity.** An action to enjoin a breach of restrictive use covenants is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor 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.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Restrictive Covenants: Injunction: Proof.** Where there has been a breach of a restrictive covenant, it is not necessary to prove that the injury will be irreparable in order to obtain injunctive relief.
6. **Restrictive Covenants: Injunction: Damages.** It is a well-defined exception to the general rule requiring a showing of actual and substantial injury as a basis for entitlement to injunctive relief, that, where one who has entered into a restrictive covenant as to the use of the land commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no substantial monetary damage.
7. **Restrictive Covenants.** A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had

in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

8. **Restrictive Covenants: Appeal and Error.** When two articles of a restrictive covenant are clear and unambiguous when read separately, an appellate court must read the instrument containing the covenants as a whole.
9. **Restrictive Covenants.** Under Nebraska law, covenants are not ambiguous if there are not at least two reasonable but conflicting interpretations thereof.
10. ____. When considering a restrictive covenant, a court should keep in mind that covenants which restrict the use of land are not favored by the law, and, if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property.
11. ____. Under no circumstances shall restrictions on the use of land be extended by mere implication.
12. ____. When provisions within an instrument imposing restrictive covenants irreconcilably conflict, the provision that allows the broadest use of the land will apply.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Danny Stoller, pro se.

Barb Stoller, pro se.

Jeff C. Miller and Duncan A. Young, of Young & White, for appellees.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Elkhorn Ridge Golf Partnership (Elkhorn Ridge), Danny Stoller, and Barb Stoller filed suit against Mic-Car, Inc., and Carville Buttner, seeking a temporary and/or permanent injunction to prevent Mic-Car and Buttner from constructing an apartment building on Lots 93 through 95 in the High Point subdivision in Elkhorn, Nebraska. The district court found in favor of Mic-Car and Buttner but denied their counterclaim against Elkhorn Ridge and the Stollers. We address the issue of the enforcement of two restrictive covenants in the same instrument that are in irreconcilable conflict.

FACTUAL AND PROCEDURAL BACKGROUND

Restrictive covenants against Lots 92 through 103 of the High Point subdivision in Elkhorn had been filed in November 1987. All such lots were replatted and renamed in 1999, but for the sake of clarity, we will use the original lot numbers. Elkhorn Ridge owns Lots 96, 97, and 103 and part of Lot 98. The Stollers own part of Lots 98 and 100 and all of Lot 99. Elkhorn Ridge constructed a golf course on Lot 103. The Stollers constructed their home on Lot 99. In 2005, Mic-Car, whose president, board of directors chairman, and majority stockholder is Buttner, purchased Lots 93 through 95. In 2007, Buttner obtained a building permit issued by the city of Elkhorn for construction of the Elkhorn Apartments, which would cover all three lots owned by Mic-Car. The plans for the Elkhorn Apartments specified that there would be 10 one-bedroom apartments with 752.6 square feet apiece and 8 two-bedroom apartments with 912.9 square feet apiece.

On February 16, 2007, Elkhorn Ridge and the Stollers filed suit against Mic-Car and Buttner, seeking an injunction and alleging that the plans and specifications for the new apartment building they were planning to build did not meet the requirements set forth in the applicable two restrictive covenants. There are two restrictive covenants pertinent to this case. The first paragraph of article III, § 8, of the covenants provides: "Except lots designated in Article IV herein, all lots within the Properties shall be used only for detached single family residences, and not more than one single family dwelling with garage attached shall be erected, altered, placed or permitted to remain on any one of said lots." Article III, § 8, goes on to specify various building restrictions pertaining to telephone and electrical power lines, completion time for construction, height, garages, and setback requirements. This section also includes the following language: "The above ground total finished living area of every *multi-family single dwelling* shall be not less than 1,250 square feet." (Emphasis supplied.)

Article IV, § 1, of the restrictive covenants provides that "Lots 92 thru 103, inclusive, as shown on the plat, are zoned R3; but no building or structure may be erected thereon exceeding

two and one-half stories in addition to basement or garden type apartments." In the R3 zoning designation, the city of Elkhorn allowed apartments.

Mic-Car and Buttner filed an answer and counterclaim, alleging Elkhorn Ridge and the Stollers violated the restrictive covenants by the construction of a clubhouse facility in 2006 on Lots 96 and 97 and part of Lot 98. Elkhorn Ridge and the Stollers' answer to the counterclaim alleged that the counterclaim was barred by waiver, acquiescence, laches, and equitable estoppel. On February 21, 2007, the district court for Douglas County issued an ex parte order, temporarily restraining Buttner from starting construction, but on April 18, the district court issued an order terminating the ex parte order.

Both parties filed motions for summary judgment, which the court heard on August 9, 2007. The case was submitted to the court on affidavits and exhibits offered by the parties at the injunction hearing and at the August 9 hearing. The parties stipulated that the motions for summary judgment were to be ruled upon, which ruling would be the final order in the case. The court issued its order on August 31, finding that the covenant in article III, § 8, of the building restrictions was unambiguous and, therefore, not subject to interpretation or construction by the court and that the lots owned by Mic-Car and Buttner were not subject to the restrictions found therein. The court also found that the restrictive covenants found in article IV did apply to the lots owned by Mic-Car and Buttner, but that the building plans offered by Mic-Car and Buttner complied with such. The court denied the motion for summary judgment by Elkhorn Ridge and the Stollers and denied Mic-Car and Buttner's motion for summary judgment on their counterclaim. The court further granted Mic-Car and Buttner's motion for summary judgment as to the allegations in Elkhorn Ridge and the Stollers' complaint.

Elkhorn Ridge and the Stollers appealed to this court, case No. A-07-990, but on July 1, 2008, we dismissed the case for lack of jurisdiction because the order was not a final order due to unresolved issues on the counterclaim. On September 18, the parties submitted another stipulation to the trial court

withdrawing their respective motions for summary judgment, submitting the case on the exhibits previously received by the court, and asking the court to decide all issues raised via the complaint, answers, and counterclaim. The district court then issued a final order on September 22, finding that Elkhorn Ridge and the Stollers failed to meet their burden of proof on their original claim and that Mic-Car and Buttner failed to meet their burden of proof on the counterclaim. Judgment was entered in favor of Mic-Car and Buttner, and Elkhorn Ridge and the Stollers' complaint was dismissed with prejudice. Judgment was also entered in favor of Elkhorn Ridge and the Stollers on Mic-Car and Buttner's counterclaim, and such counterclaim was likewise dismissed with prejudice. In short, the trial court approved the construction of the proposed apartment building. Elkhorn Ridge and the Stollers timely appealed that order, and Mic-Car and Buttner cross-appeal.

ASSIGNMENTS OF ERROR

Elkhorn Ridge and the Stollers assign as error that the district court (1) failed to sustain their objection to exhibit 13; (2) failed to sustain their objection to exhibit 15; (3) found that the general building restrictions in article III, § 8, did not apply to Mic-Car and Buttner's lots; and (4) found that the plans for Mic-Car and Buttner's apartment building did not violate the covenant limiting a building to 2½ stories in addition to basement or garden-type apartments. In their cross-appeal, Mic-Car and Buttner assign as error that the district court (1) admitted exhibit 10 into evidence and (2) ruled that Elkhorn Ridge's use of Lots 96 through 98 did not violate the restrictive covenants.

STANDARD OF REVIEW

[1,2] An action to enjoin a breach of restrictive use covenants is equitable in nature. *1733 Estates Assn. v. Randolph*, 1 Neb. App. 1, 485 N.W.2d 339 (1992). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court

considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001).

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). Judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Id*. 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. *Id*. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

ANALYSIS

Admission of Exhibits 13 and 15.

Exhibit 13 is the affidavit of a licensed real estate agent. The affidavit contained the agent's opinion that the area surrounding the lots in question was of mixed use and that construction of the Elkhorn Apartments would not diminish the value, integrity, character, or use of the lots owned by Elkhorn Ridge and the Stollers. Such exhibit was offered at the summary judgment hearing on August 9, 2008, after this court remanded the cause to the trial court. Elkhorn Ridge and the Stollers objected to this exhibit on the ground that it was irrelevant. The objection was overruled, and exhibit 13 was received by the court.

[5,6] Elkhorn Ridge and the Stollers argue that exhibit 13 is not relevant, because a party seeking an injunction is not required to show actual damage or irreparable harm. Where there has been a breach of a restrictive covenant, it is not necessary to prove that the injury will be irreparable in order to obtain injunctive relief. *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988). It is a well-defined exception to the general rule requiring a showing of actual and substantial

injury as a basis for entitlement to injunctive relief, that, where one who has entered into a restrictive covenant as to the use of the land commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no substantial monetary damage. *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 266 N.W.2d 62 (1978).

[7] However, exhibit 13 also describes the nature of the neighborhood, listing various surrounding uses, and includes an opinion not only about the impact on the value of the surrounding lots, but also about the impact of the construction of Elkhorn Apartments on the character, integrity, or use of surrounding lots.

> A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

Lund v. Orr, 181 Neb. 361, 363, 148 N.W.2d 309, 310-11 (1967). Because exhibit 13 contains reference to the character of the neighborhood and surrounding circumstances, we find that the district court did not abuse its discretion in admitting exhibit 13 even though evidence of actual damages or irreparable harm is not required to show a breach of a restrictive covenant. We assume the trial court ignored the irrelevant portions of the exhibit, as do we in our de novo review.

Exhibit 15 is the affidavit of the attorney for Mic-Car and Buttner, which affidavit included a portion of the court reporter's transcription of the proceedings held on April 2, 2007, when the court heard arguments on the issuance of a temporary injunction to halt construction of Elkhorn Apartments. Elkhorn Ridge and the Stollers objected to this exhibit on the ground that it was irrelevant. The court overruled this objection and received exhibit 15. Because the Stollers were appearing pro se, portions of the exhibit may well be relevant as admissions.

Again, we assume that the trial court ignored the irrelevant portions. However, the exhibit is not relevant to our analysis in our de novo review, and thus we simply assume it was error to admit it, but such is of no consequence in this appeal. Thus, any claimed error is harmless.

Article III, § 8, and Article IV, § 1.

Elkhorn Ridge and the Stollers argue that the court erred in determining that the provisions in article III, § 8, of the restrictive covenants did not apply to the Elkhorn Apartments. Article III, § 8, of the restrictive covenants provides: "Except lots designated in Article IV herein, all lots within the Properties shall be used only for detached single family residences, and not more than one single family dwelling with garage attached shall be erected, altered, placed or permitted to remain on any one of said lots." Elkhorn Ridge and the Stollers also argue that the court erred in determining that the plans for the Elkhorn Apartments satisfied the provisions set out in article IV, § 1, of the restrictive covenants. Article IV, § 1, of the restrictive covenants states that "Lots 92 thru 103, inclusive, as shown on the plat, are zoned R3; but no building or structure may be erected thereon exceeding two and one-half stories in addition to basement or garden type apartments."

[8] The two provisions—article III, § 8, and article IV, § 1—are inconsistent and in irreconcilable conflict with each other. Article III, § 8, addresses all lots within the subdivision, Lots 92 through 103, and it provides that "single family residences" must be built thereupon. However, article III, § 8, begins by stating, "Except lots designated in Article IV." And article IV allows 2½-story apartment buildings. Thus, article III, § 8, excludes from its restrictions those lots designated in article IV, upon which lots 2½-story apartment buildings may be built. In other words, when read together, article III, § 8, and article IV effectively cancel each other. Thus, while the language of the two articles under consideration is clear and unambiguous when read separately, we must read the instrument containing the covenants as a whole, and when doing so, the two provisions hopelessly conflict. See, *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988); *Ross v. Newman*, 206 Neb. 42,

291 N.W.2d 228 (1980); *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976) (covenants to be read and construed as whole). In saying that the two articles are clear and unambiguous when read separately, we ignore the fact that article III, § 8, generally requires "single family residences" on the lots but has a minimum square footage requirement on "multi-family single dwelling[s]." Frankly, we must concede that we do not know what a "multi-family single dwelling" might be or what was intended by this term. Counsel, upon questioning at oral argument, were not able to convincingly enlighten us. And, a thorough search did not turn up a single published case, state or federal, in which this term was used. However, given the result we reach, thankfully, we do not have to assign a meaning to the phrase "multi-family single dwelling."

[9-12] We conclude that the conflicting provisions—article III, § 8, and article IV—do not make the covenants ambiguous under Nebraska law, because under the well-known definition of ambiguity, we cannot find two reasonable but conflicting interpretations of the interplay between the two covenants. See *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993) (instrument is ambiguous when it is susceptible of at least two reasonable but conflicting interpretations or meanings). Thus, we do not construe, in the typical sense of the word as used by courts, the covenants at issue, but, rather, we turn to the general law concerning the reach of covenants restricting the use of land. See *Knudtson v. Trainor*, 216 Neb. 653, 655, 345 N.W.2d 4, 6 (1984) (when considering restrictive covenant, court should keep in mind that "covenants which restrict the use of land are not favored by the law, and, if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property"). Moreover, under no circumstances shall restrictions on the use of land be extended by mere implication. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994). From this authority, we conclude that to the extent that article III, § 8, prohibits construction of an apartment building on Lots 93 through 95, the restriction is simply unenforceable, and of no force and effect. While a reasonably exhaustive search has failed to turn up an appellate decision, state or federal, with like facts involving

two conflicting covenants, we believe our holding necessarily follows from the law disfavoring restrictive covenants, including the cited Nebraska precedent. Thus, we hold that when provisions within an instrument imposing restrictive covenants irreconcilably conflict, the provision that allows the broadest use of the land will apply. Accordingly, the proposed apartment building is not prohibited by article III. However, the limitation that such building cannot be more than 2½ stories in height found in article IV is valid and enforceable. Accordingly, we turn to the argument that the proposed apartment building violates this restriction.

Article IV, § 1.

Article IV, § 1, clearly applies to the apartments proposed by Mic-Car and Buttner and restricts what can be built to 2½ stories plus basement or garden apartments. Elkhorn Ridge and the Stollers argue that the Elkhorn Apartments are three full stories above grade and that as such, the building exceeds the foregoing height limitation. There is considerable evidence, however, that Elkhorn Apartments is a 2½-story building because the lowest floor is considered a basement and not a story "above grade plane." Four individuals testified to this fact. The Elkhorn building inspector testified that for the purposes of the Elkhorn building code, the building qualifies as a 2½-story building because the plans called for dirt to be placed up against the side of the first floor for more than 50 percent of the building. An architect testified that pursuant to the 1985 and 1988 Uniform Building Codes and the 2003 International Building Code, the lowest level of the Elkhorn Apartments qualifies as a garden floor or basement because the finished floor level directly above the garden floor is less than 5 feet 10 inches above grade plane, and that to qualify as a first story, the finished floor level would have to be more than 6 feet above grade plane. A civil engineer with a consulting firm in Omaha agreed that under the 2003 International Building Code, the garden level of the Elkhorn Apartments does not qualify as a story above grade plane, but, rather, qualifies as a basement. A community planner testified that the proposed building qualifies as a 2½-story building because its maximum height is less

than 35 feet, which is the height prescribed as the maximum height for a 2½-story building in Elkhorn's zoning regulations. There is no evidence in the record that the proposed apartment building is in fact a three-story building according to the various applicable building codes. Thus, we find that the Elkhorn Apartments clearly meet the requirements set out in the restrictive covenant found in article IV, § 1.

Cross-Appeal: Admission of Exhibit 10.

[13] Exhibit 10 is the affidavit of a high school English teacher for Elkhorn Public Schools. In her affidavit, she sets forth her opinion as to how the language in the covenant in article III, § 8, should be interpreted. Exhibit 10 was received by the court over an objection on the grounds that the affiant was not a qualified expert and that the subject of the affidavit was not a proper subject for her testimony. The cross-appeal challenges the admission of this affidavit, but given the result we have reached above, we need not decide this issue. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

Cross-Appeal: Elkhorn Ridge's Compliance With Other Covenants.

Mic-Car and Buttner argue that the district court erred in finding that Elkhorn Ridge had not violated the restrictive covenants as to Lots 96 through 98. The only evidence in the record to establish a potential violation of the restrictive covenants by Elkhorn Ridge and the Stollers in their use of their lots is exhibit 14, an affidavit from Buttner. In it, he states that Lots 96 and 97 and part of Lot 98 are used for facilities, structures, and uses associated with a commercial golf course, including a parking lot, a storage building, outside storage of materials, a dumpster, fuel tanks, and other outdoor equipment storage. We are not persuaded that such use, either originally or as a result of the new construction in 2006, constitutes a breach of the restrictive covenants upon such lots. Article III, § 1, specifically states that lots shall be used only

for residential purposes and not business, professional, trade, or commercial purposes, except that this prohibition does not apply to a clubhouse or other necessary structure used in connection with the golf course on Lot 103. Based upon the clear and unambiguous language of this provision in the restrictive covenants, applicable to Lots 96 through 98, we find that the current uses of those three lots as described by Buttner in exhibit 14 do not violate the restrictive covenants. The uses described are all related and necessary for the operation of the golf course on Lot 103, and therefore, the prohibitions in article III, § 1, do not apply to such use. We find Mic-Car and Buttner have failed to show that Elkhorn Ridge has violated any applicable covenant, and therefore, we find this assignment of error lacks merit.

CONCLUSION

Although upon different reasoning, we affirm the ruling of the district court. The restrictive covenant found in article III does not apply to the Elkhorn Apartments described herein, and the covenant in article IV, § 1, does apply, but is not violated by the proposed apartment building. Finding no breach of either restrictive covenant, we find in favor of Mic-Car and Buttner on these claims. As to the cross-appeal alleging improper use of Lots 96 through 98 by Elkhorn Ridge, we find such claim lacks merit, because the current use does not violate any applicable restrictive covenant.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
ERIC A. RITZ, APPELLEE.
767 N.W.2d 809

Filed May 12, 2009. No. A-08-399.

1. **Criminal Law: Judgments: Appeal and Error.** In the absence of a specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
2. ____: ____: ____. Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review.

3. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity.
4. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
5. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.
6. **Judgments: Final Orders: Appeal and Error.** The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Appeal dismissed.

Thomas P. Herzog, Holt County Attorney, for appellant.

Gregory G. Jensen, P.C., L.L.O., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

This is an error proceeding brought by the State, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). The State alleges that the district court erred in sentencing Eric A. Ritz to 60 days in jail upon his conviction for issuing a bad check, a Class III felony. The State asserts that the mandatory minimum sentence for a Class III felony is 1 year's incarceration. We conclude that this court is without jurisdiction in this matter and, accordingly, dismiss the State's appeal.

II. BACKGROUND

On September 13, 2004, Ritz pled guilty to issuing a bad check, a Class III felony. The district court sentenced Ritz to a 2-year term of probation.

Approximately 1 year after Ritz' conviction and sentence, the State filed an information and affidavit alleging that Ritz had violated the conditions of his probation. Ritz pled no contest to the allegations in the information, and the district court extended his term of probation through November 22, 2007.

On March 15, 2006, the State filed another information and affidavit alleging that Ritz had violated the conditions of his

probation. Ritz admitted to the allegations in the information, and the district court again extended his term of probation. The probation term was extended through September 2008.

On August 28, 2007, the State filed a third information and affidavit alleging that Ritz had violated the conditions of his probation. Ritz pled no contest to the allegations in the information. Subsequently, on January 14, 2008, the district court revoked Ritz' probation and sentenced him to 60 days in jail on the original charge of issuing a bad check.

On January 16, 2008, 2 days after the sentencing order was filed, Ritz filed a motion to amend the sentence, which motion he captioned as a "Motion for Amendment to Sentencing Order." In the motion, Ritz requested that the district court amend the previous sentencing order to permit him to serve 30 days of his sentence at a residential treatment center for alcohol abuse.

On January 17, 2008, the day after Ritz filed his motion to amend the sentencing order, the State filed its application for leave to docket an appeal, pursuant to § 29-2315.01. The State alleged that the district court erred in sentencing Ritz to 60 days in jail when the minimum sentence for a Class III felony was 1 year's imprisonment.

On January 28, 2008, the district court held a hearing wherein the court granted Ritz' request to amend the sentencing order and granted its approval for the State's request for leave to docket an appeal.

We subsequently granted the State's application for leave to docket an appeal. After the parties filed their briefs on appeal, but prior to oral arguments, Ritz filed a motion to dismiss the appeal because of lack of jurisdiction in this court. Ritz alleged that the State's application for leave to docket an appeal was not timely, because it was filed prior to the entry of the final order. Ritz alleged that the final order was the amended sentencing order, entered on January 29, 2008, rather than the original sentencing order entered on January 14, 2008.

In an order filed December 1, 2008, we directed the parties to file supplemental briefs on the question of whether the State's application for leave to docket an appeal was timely

filed. We have considered the parties' supplemental briefs, and we address in the analysis portion of this opinion the jurisdictional question raised in Ritz' motion to dismiss.

III. ASSIGNMENT OF ERROR

The State contends that the district court erred in failing to impose the mandatory minimum sentence of 1 year's incarceration upon a conviction for a Class III felony.

IV. ANALYSIS

In his motion to dismiss, Ritz raises the issue of whether this court has jurisdiction over the State's appeal. Ritz argues that this court lacks jurisdiction because the State failed to timely file an intent to prosecute appeal from the date of the "final" sentencing order. In light of Ritz' assertions and in light of the issue presented by the timing of the State's application for leave to docket an appeal, we must first determine whether we have jurisdiction to decide the issue presented in the instant case. 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. See *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997).

[1,2] In the absence of a specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *Id.* Section 29-2315.01 grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review. *State v. Wieczorek, supra*. Section 29-2315.01 provides in pertinent part:

> The prosecuting attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the prosecuting attorney as to the part of the record he or she proposes to present to the appellate court. Such application shall be presented to the trial

> court *within twenty days after the final order is entered in the cause*, and upon presentation, if the trial court finds it is in conformity with the truth, the judge of the trial court shall sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. The prosecuting attorney shall then present such application to the appellate court within thirty days from the date of the final order.

(Emphasis supplied.)

[3,4] Timeliness of an appeal is a jurisdictional necessity. *State v. Wieczorek, supra*. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. *Id.* By its terms, § 29-2315.01 does not permit an appeal by the State from any interlocutory ruling of the trial court in a criminal proceeding. This is consistent with the longstanding principle of avoiding piecemeal appeals arising out of one operative set of facts. *State v. Wieczorek, supra*.

In this case, Ritz was sentenced on January 14, 2008. Two days later, on January 16, Ritz filed a motion to amend the sentencing order. On January 28, the district court granted Ritz' motion to amend the sentencing order.

On January 17, 2008, the State filed its application for leave to docket an appeal, 1 day after Ritz filed his motion to amend the sentencing order and approximately 11 days before the district court granted Ritz' motion to amend and altered the previous sentencing order. Thus, we are confronted with the question of whether a final order had been entered prior to the date on which the State filed its application for leave to docket an appeal.

[5,6] A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006). The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment. *Id.*

On January 17, 2008, the State filed its application for leave to docket an appeal, 1 day after Ritz filed a motion to amend the sentencing order. As such, the State filed its application during a time in which further action was necessary to completely dispose of the cause pending in the district court. The case was not completely disposed of until the district court ruled on Ritz' motion to amend the sentencing order. Accordingly, the State's application was premature and failed to comply with the jurisdiction requirements of § 29-2315.01.

The State argues that the original sentencing order was a final order because Ritz' motion to amend the sentencing order "did not seek substantive alteration of the judgment." Supplemental brief for appellant at 4-5. The State appears to base its argument solely on Neb. Rev. Stat. §§ 25-1912 and 25-1329 (Reissue 2008), which address the finality of orders in civil cases.

We decline to specifically address whether the practices and procedures for determining whether an order is final in civil cases apply to an action brought by the State pursuant to § 29-2315.01. Rather, we find that the State's assertion that Ritz' motion did not seek substantive alteration of the judgment but merely sought to correct a clerical error or sought relief collateral to the judgment is without merit. Ritz' motion requested a substantive alteration to the district court's prior sentencing order. Ritz sought to amend the terms of the sentence imposed on him by the district court. Because Ritz' motion requested such a substantive alteration, the case was not completely disposed of until the district court ruled on Ritz' motion to amend the sentencing order.

V. CONCLUSION

The January 14, 2008, sentencing order was not a final order. Because Ritz filed a motion to amend that sentencing order, further action was required to completely dispose of the case. The case was finally disposed of on January 29, when the district court granted Ritz' motion to amend. Accordingly, the State's application for leave to docket an appeal filed on January 17, 2008, was premature. Because the State did not appeal from a final order as is required by § 29-2315.01, we

lack jurisdiction over this appeal. When an appellate court is without jurisdiction to act, the appeal must be dismissed. *State v. Dunlap, supra*. Therefore, we dismiss this appeal.

APPEAL DISMISSED.

IN RE INTEREST OF TAYLA R., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
CHRISTINA R., APPELLANT.

IN RE INTEREST OF LEA D. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
CHRISTINA R., APPELLANT.

767 N.W.2d 127

Filed May 12, 2009. Nos. A-08-1150, A-08-1151.

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 juvenile court's findings.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
6. **Juvenile Courts: Parental Rights: Final Orders.** Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
7. **Juvenile Courts: Parental Rights.** A preadjudication order granting continued detention affects a parent's substantial right.
8. **Juvenile Courts: Final Orders.** Orders determining where a juvenile will be placed are dispositional in nature.

9. **Juvenile Courts: Final Orders: Appeal and Error.** Dispositional orders are final and appealable.
10. **Juvenile Courts: Parental Rights: Appeal and Error.** In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.
11. **Juvenile Courts: Appeal and Error.** A dispositional order which merely continues a previous determination is not an appealable order.
12. **Juvenile Courts: Parental Rights: Appeal and Error.** To determine whether an order can be appealed, it is necessary to consider the nature of the order and what parental rights, if any, the order affected.
13. **Juvenile Courts: Proof.** The State must prove the requirements of Neb. Rev. Stat. § 43-254 (Reissue 2008) by a preponderance of the evidence.
14. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.

Appeals from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Judgment in No. A-08-1150 affirmed. Appeal in No. A-08-1151 dismissed.

David Kyker for appellant.

Gary Lacey, Lancaster County Attorney, and Jeremy P. Lavene for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

This appeal presents two juvenile cases which were consolidated for briefing and oral argument. In case No. A-08-1150, the juvenile court continued the out-of-home placement of a newborn child, pending adjudication, and we conclude that a preponderance of the evidence supports the court's order. In case No. A-08-1151, the review order appealed from continued the out-of-home placement of the three oldest children and changed the permanency goal from reunification to adoption, but contained a rehabilitation plan with the same terms from prior orders. We conclude that the order appealed from was not a final order because, taken as a whole, it merely continued a

previous determination and did not affect a substantial right of the mother.

II. BACKGROUND

Christina R. is the mother of Lea D., born in October 1994; Charlie D., born in January 1997; Sierra R., born in November 2000; and Tayla R., born in September 2008.

On May 25, 2007, the court entered an ex parte order placing temporary custody of Lea, Charlie, and Sierra with the Nebraska Department of Health and Human Services (DHHS). On July 24, the court adjudicated Lea, Charlie, and Sierra. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The court found that the children lacked proper parental care by reason of the fault or habits of Christina or that the children were in a situation dangerous to life or limb or injurious to their health or morals because on May 4, Christina became involved in a theft by shoplifting while one or more of her children were with her and because between February 1 and May 19, Christina subjected one or more of the children to inappropriate discipline which resulted in "physical and/or emotional injury or pain." The court ordered that the temporary legal and physical custody of the children remain with DHHS for placement, treatment, and care.

On August 27, 2007, the court entered an order of disposition. The court found that reasonable efforts had been made to return legal custody of the children to Christina, but that returning legal custody to Christina would be contrary to the children's welfare because of the need to ensure the children's safety in Christina's care and because Christina was not able to demonstrate appropriate parenting skills and judgment, including nonabusive discipline. The court ordered that the children remain in the temporary legal custody of DHHS. The court ordered Christina to comply with a number of provisions. The court entered a similar order on October 10.

On January 11, 2008, the court entered an order of review. The court stated that the primary permanency plan was for reunification, and it approved DHHS' plan as modified. On April 14, the court ordered that Christina's individual visitation with the children be changed from supervised parenting time

to monitored parenting time. On May 2, the court entered an order of review, which identified reunification as the permanency plan.

A court report prepared on July 18, 2008, recommended adoption as the primary permanency plan for Lea, Charlie, and Sierra.

On September 16, 2008, Christina gave birth to Tayla. On September 17, the court entered an ex parte order regarding Tayla. The court found that Christina's other children had been removed from her care and that Christina had failed to correct the conditions which led to the children's removal and continued placement outside her care and which placed Tayla at risk of harm. The court ordered that DHHS have continued temporary custody and placement pending a placement hearing.

On September 18, 2008, the State filed a petition alleging that Tayla was a child defined by § 43-247(3)(a) because she lacked proper parental care by reason of the fault or habits of Christina or because the child was in a situation dangerous to life or limb or injurious to her health or morals. Specifically, the petition alleged that Christina's other children had been placed with DHHS for placement in a foster home. The petition alleged that a plan to correct the issues which led to the adjudication of Christina's other children had been adopted by the court, but that Christina had failed to correct the conditions that led to adjudication. Also on September 18, Christina filed motions for custody of Tayla and Sierra.

On September 22, 2008, the court held a review of disposition and permanency hearing regarding Lea, Charlie, and Sierra. Christina's counsel informed the court that he had filed motions for temporary physical custody of Tayla and Sierra and that there would likely be an overlap of evidence. The court and counsel agreed that testimony adduced at the hearing could be considered with regard to the motion concerning Tayla which was set for hearing on September 24. The court further heard evidence on September 30, and attorneys for the parties and the guardian ad litem agreed to consolidate the matters due to overlapping testimony.

Margaret Snyder, a licensed mental health practitioner and professional counselor, provided individual therapy for Christina and home-based family therapy for Christina and her children each Saturday. Snyder first met Christina in March 2007, and she has worked with Christina on parenting, management, and coping skills. Snyder also worked with Christina on dealing with feelings of depression, managing medication, and utilizing supports. Snyder believed that Christina had made progress in her parenting skills because Snyder saw Christina as being more consistent and structured in her interactions with the children.

Christina sees each child 2 days a week: once during the week for individual parenting time and then on Saturdays for family therapy. Initially, Christina's time with all of the children was supervised, but the individual visits had since moved from supervised to monitored visitation. Snyder testified that she recommended visitation be moved to monitored visitation because she felt that the children's behaviors had stabilized. Snyder testified that no concerns had been reported to her regarding the monitored visitation.

Snyder testified that the last family therapy session, which included Tayla, was "okay" compared to past therapy sessions. But Snyder testified that there were some moments of conflict with the children, because Charlie wanted to hold Tayla, and Christina told him "no." Snyder testified that consistency had been a problem throughout her time with Christina: Things would go well for 3 or 4 weeks, then there would be 1 or 2 weeks where things were "kind of rocky," but then there would be structure again.

Snyder testified that she was supportive of Tayla's residing with Christina "[w]ith the condition that there be supportive services." Snyder testified that Christina had a crib, that her home was ready for a baby, and that Tayla's basic needs could be met. Snyder believed that Christina could keep both Sierra and Tayla safe at her home, and she hoped that Christina would cooperate with any services that would be provided to allow Tayla to come home. Snyder did not have concerns regarding a need for a transition period with Tayla, so long as there

was some family support. Snyder had a concern regarding Christina's ability to nurture Tayla, and she explained that there is a distinction between being able to meet the basic needs of a child and nurturing the child.

Tesia Risk, who is employed through Region V in the integrated care coordination unit, is assigned to the children's cases. Risk testified that Lea, Charlie, and Sierra had been out of the home for over 15 months. Risk testified that Christina's boyfriend had sexually abused Lea, that Christina knew of the abuse, and that Christina did not do anything about it. Risk testified that DHHS' biggest concern was Christina's failure to protect the children. Risk testified that Tayla was removed from Christina's care at the hospital due to Christina's failure to complete the matters that her other three children were adjudicated on and due to Christina's lack of consistency over the last 6 months to 1 year.

Risk identified the lack of consistency as her concern. She testified that Christina had always said she was willing to be cooperative with services and service providers, but that she had not always done so. When asked if Christina cooperated with the family support services that Risk put in place, Risk answered, "I believe she cooperates and then there are times that she doesn't always follow the rules and things like that."

Risk did not disagree with placing Tayla in Christina's care, but Risk was concerned with Christina's prior lack of consistency and cooperation with services. Risk testified that she did not "necessarily feel that at this time I'm willing to take a chance of her not being consistent or cooperative with services when we're talking about a newborn child." To be supportive of Tayla's moving home, Risk testified that DHHS would need to see consistency and progress from Christina.

Risk testified that Christina has a "pretty good" support base and that numerous family members and friends attended a family group conference and were very vocal and supportive, stating that they would be there to assist Christina. Risk believed that services necessary for Tayla were community support services and things like the "WIC" nutrition program and food banks. She testified that DHHS would not necessarily have

control over those services and that they would be things that Christina would need to access.

On October 3, 2008, the court entered an order of review concerning Lea, Charlie, and Sierra. The court found that reasonable efforts had been made to return physical custody of the children to Christina, but that the return of custody would be contrary to the children's best interests. The court found that the primary permanency plan of adoption was supported by the evidence, and the court approved the plan. The court approved DHHS' rehabilitation plan and set the next hearing to review disposition for November 5.

On October 3, 2008, the court entered an order continuing temporary custody of Tayla with DHHS. The court found that reasonable efforts to prevent Tayla's continued removal from the parental home had been made in the form of services offered in connection with the other children's removal from Christina's care, including intensive family preservation, family support services, individual and family therapy, psychological and parenting assessments of Christina, and case management. The court found that return of legal custody to Christina would be contrary to Tayla's health, safety, and welfare due to Christina's lack of progress in services designated to assist her in having her other minor children returned to her care, Christina's impaired judgment and intellectual limitations which continue to impact her parenting, and her demonstrated inability to parent her children without full supervision and limitation of her visitation to one child at a time. The court found that Christina should have reasonable rights of supervised visitation a minimum of three times per week for a minimum of 3 hours per visit. On October 15, the court entered an order continuing the adjudication hearing to October 28.

On October 30, 2008, Christina filed a notice of appeal in each case, seeking to appeal from the respective orders entered on October 3.

III. ASSIGNMENTS OF ERROR

Christina assigns that the juvenile court erred in two respects. First, she alleges that the court erred by failing to return Sierra

and Tayla to her care. Second, Christina contends that the court erred by changing the permanency goal to adoption even though she continued to make progress toward the goal of reunification.

IV. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

V. ANALYSIS

1. Jurisdiction

[2,3] In a juvenile case, as in any other appeal, 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. *In re Interest of Taylor W., supra*. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[4-6] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *Id.* A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Thus, the pertinent inquiry is whether the orders affect a substantial right of Christina. "[W]hether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed." *In re Interest of R.G.*, 238 Neb. 405, 415, 470 N.W.2d 780, 788 (1991*), disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

(a) Case No. A-08-1150

[7] Tayla has not been adjudicated, and the order appealed from continued Tayla's temporary custody with DHHS. A preadjudication order granting continued detention affects a parent's substantial right. See *In re Interest of R.G., supra*. We have jurisdiction because the order appealed from is a final order.

(b) Case No. A-08-1151

[8-11] In this case, the children were adjudicated in July 2007 and have been in out-of-home placements for over 15 months. Orders determining where a juvenile will be placed are dispositional in nature. *In re Interest of Taylor W., supra*. Dispositional orders are final and appealable. *Id.* The court has entered several review orders, which largely contained the same terms and from which Christina did not appeal. In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). Thus, a dispositional order which merely continues a previous determination is not an appealable order. *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

[12] Christina appeals from the October 3, 2008, order of review. The court found that reasonable efforts had been made to return custody of Lea, Charlie, and Sierra to Christina, but that such a return would be contrary to the children's best interests. The court had made similar findings in its May 2 order of review. Thus, the denial of the children's placement with Christina is not an appealable issue. However, the two orders contain different primary permanency plans. The May 2 order set forth a plan of reunification, whereas the October 3 order contains a permanency objective of adoption. To determine whether the order can be appealed in this case, it is necessary to consider the nature of the order and what parental rights, if any, the order affected. See, *In re Guardianship of Rebecca B. et al., supra*; *In re Interest of Sarah K., supra*.

In *In re Interest of Sarah K.*, the Nebraska Supreme Court examined orders from October 22 and December 22, 1998. The October 22 order approved the case plan which provided for long-term foster care for the child, supervised visitation by the parents, and reunification as the goal. The December 22 order adopted the State's permanency plan of long-term foster care transitioning to independent living which provided for the possibility of reunification. On appeal, the Supreme Court stated that the terms of the December order "merely repeat the essential terms" of the October order, that "[t]here is nothing inconsistent with the December 22 order compared to the plan approved by the court in its October 22 order," and that "[t]he parents were not disadvantaged by the juvenile court's order of December 22, nor were their substantial rights changed or affected thereby." 258 Neb. at 58, 601 N.W.2d at 785. The court further stated that the December order "effects no change in the parents' status or the plan to which the parents and [child] were previously subject." *Id.* at 59, 601 N.W.2d at 785.

In the instant case, the order from October 3, 2008, changed the permanency goal from reunification to adoption. Viewed in isolation, this modification appears to affect Christina's right to reunification with the children. Neb. Rev. Stat. § 43-283.01(3) (Reissue 2008) states:

> If continuation of reasonable efforts to preserve and reunify the family is determined to be inconsistent with the permanency plan determined for the juvenile in accordance with a permanency hearing under section 43-1312, efforts shall be made to place the juvenile in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the juvenile.

Reasonable efforts to reunify the family would be inconsistent with the permanency plan of adoption. However, it appears that the terms of the court's order have the effect of continuing reasonable efforts to preserve the family. The October 3 order approved, as modified, the rehabilitation plan of DHHS. Whether there is still a plan allowing Christina to rehabilitate herself or to take steps to reunite with the children is a

pertinent inquiry. See *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). In *In re Interest of Tabatha R.*, the Nebraska Supreme Court determined that an initial dispositional order which did not include a rehabilitation plan for the parents deprived them of any opportunity for reunification with their child and thus affected a substantial right.

In the case at hand, the October 3, 2008, order directed Christina to maintain a safe home environment for the children, to continue with weekly individual therapy sessions, to participate in family therapy, to have supervised/monitored visitation with each child, to cooperate with family support services, to continue seeing her psychiatrist, to not use physical discipline on the children, and to maintain legal means of support. These terms are the same as the terms contained in the May order. Even though the permanency objective changed from reunification, the order taken as a whole did not affect Christina's substantial rights. The court implemented a rehabilitation plan with the same services provided. Christina's visitation with the children did not change, nor did her status. The State has not filed a motion to terminate Christina's parental rights, and no adoption can occur until Christina's parental rights are actually terminated. Because the October order implicitly provides Christina with an opportunity for reunification by complying with the terms of the rehabilitation plan, which terms have not changed from the previous order, we conclude that the October 3 order does not affect a substantial right. Accordingly, we dismiss the appeal in this case for lack of a final, appealable order.

2. Failure to Return Tayla to Christina's Custody

[13] Christina argues that the State failed to prove under Neb. Rev. Stat. § 43-254 (Reissue 2008) that placement at home would be contrary to Tayla's welfare. Section 43-254 states in pertinent part:

> [T]he court may enter an order continuing detention or placement upon a written determination that continuation of the juvenile in his or her home would be contrary to the health, safety, or welfare of such juvenile and that reasonable efforts were made to preserve and reunify the

> family if required under subsections (1) through (4) of section 43-283.01.

The State must prove the requirements of § 43-254 by a preponderance of the evidence. *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997).

The evidence did not establish either unconditional support or opposition to Tayla's being returned home to Christina. The testimony established that it was important for Tayla, who was approximately 2 weeks old, to bond with her mother. Snyder supported Tayla's residing with Christina "[w]ith the condition that there be supportive services" and the hope that Christina would cooperate with such services. Risk was concerned with Christina's prior lack of consistency and cooperation with services, especially where a newborn is involved. She testified that she did not disagree with returning Tayla home but that DHHS was not supportive of Tayla's being placed with Christina until Christina showed consistency with services. Risk explained that it was not realistic to put in services for Christina when Christina had not been cooperative with those services. Snyder testified that Christina's home was ready for a baby and that Tayla's basic needs could be met, but Snyder was concerned about Christina's ability to nurture Tayla. Risk testified that DHHS had concerns based on Christina's failure to protect her other children.

[14] The State needed to show only by a preponderance of the evidence that placement with Christina would be contrary to Tayla's health, safety, or welfare. Upon our de novo review, we conclude that burden has been met. There appears to be no dispute that Christina would need supportive services if Tayla were returned to her care, and the evidence shows that Christina has not consistently cooperated with services that have been put in place for her. There is no dispute that Christina expresses a willingness to comply. But the question before this court is whether she will, in fact, do what she says. When the evidence is in conflict, the appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008). We do so in this case. Because the State proved by a

preponderance of the evidence that Tayla's custody should continue to be withheld from Christina pending adjudication, we affirm the court's order.

VI. CONCLUSION

In case No. A-08-1150, we conclude that a preponderance of the evidence supports the court's order placing Tayla outside of Christina's physical custody pending adjudication. We conclude that the order appealed from in case No. A-08-1151 is not a final order, and we dismiss the appeal for lack of jurisdiction.

JUDGMENT IN NO. A-08-1150 AFFIRMED.
APPEAL IN NO. A-08-1151 DISMISSED.

KOMALPREET BHULLER, APPELLEE, V.
AMARDIP S. BHULLER, APPELLANT.
767 N.W.2d 813

Filed May 12, 2009. No. A-08-1195.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Divorce: Judgments: Final Orders.** In the context of a special proceeding, which includes a dissolution proceeding, a final judgment must decide all of the issues pending before the court.
3. **Child Custody.** Neb. Rev. Stat. § 43-2929 (Reissue 2008) requires that a parenting plan be developed and approved by the court in any dissolution proceeding where the custody of a minor child is at issue.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Appeal dismissed.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellant.

Mark Goodall for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Amardip S. Bhuller appeals from a decree of dissolution entered on November 13, 2008. We consider the motion of Komalpreet Bhuller for summary dismissal. Because the decree did not incorporate a parenting plan as required by Neb. Rev. Stat. § 43-2929 (Reissue 2008), the decree was not a final, appealable order. We therefore lack jurisdiction to hear this appeal.

BACKGROUND

The instant case arises out of a dissolution proceeding in which the parties disputed parenting time. On November 12, 2008, Amardip appealed from a "Decree of Dissolution" signed by the district court on November 12 and entered on November 13. In the decree, primary physical custody of the minor child was placed with Komalpreet. The decree provided as follows regarding visitation: "In order to preserve and promote the bond between [the minor child] and his father, liberal visitation is ordered. The parties shall participate in mediation to determine the parameters of visitation."

On December 11, 2008, Amardip filed a motion in which he requested that the court order a parenting schedule and alleged that the parties had not reached an agreement regarding parenting time in mediation. On February 2, 2009, the district court entered an "Order for Parenting Schedule." The February 2 order set forth the dates and length of Amardip's visitation with the minor child.

In response to Amardip's appeal, Komalpreet filed a motion for summary dismissal pursuant to Neb. Ct. R. App. P. § 2-107(B)(1).

ASSIGNMENTS OF ERROR

Because we resolve the instant appeal on jurisdictional grounds, we do not reach Amardip's assigned errors, which asserted, as restated, that the district court erred in (1) permitting Komalpreet to remove the minor child from the state, (2) granting Komalpreet physical custody of the minor child, (3) awarding alimony, and (4) ordering mediation to resolve a parenting plan.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

ANALYSIS

The district court's failure to include a parenting plan in the decree prevents the decree from being a final, appealable judgment. Therefore, this appeal from the decree was premature.

[2] In the context of a special proceeding, which includes a dissolution proceeding, a final judgment must "decide all of the issues pending before the court." *Jacobson v. Jacobson*, 10 Neb. App. 622, 625, 635 N.W.2d 272, 276 (2001). Further, the final judgment must "[dispose] of all the issues presented by the pleadings." *Wagner v. Wagner*, 275 Neb. 693, 699, 749 N.W.2d 137, 142 (2008).

Where an issue implicated by the pleadings has not been determined, the order is not a final, appealable order. For example, in *Johnson v. Johnson*, 15 Neb. App. 292, 726 N.W.2d 194 (2006), we decided that an order modifying child custody which did not include a child support calculation was not a final order. We reasoned that, even though the party requesting modification failed to request a modification of child support, a final order must include a child support determination because it is an "inherent part of a custody modification action." *Id.* at 296, 726 N.W.2d at 197.

The Nebraska Supreme Court dealt with a similar matter in *Wagner v. Wagner, supra*. In *Wagner*, the Supreme Court decided that a dissolution proceeding "order" in which the district court "had not found that the marriage was irretrievably broken, or dissolved the marriage," could not be a final judgment. *Id.* at 699, 749 N.W.2d at 142. The Supreme Court determined that the order did not dispose of all the issues implicated by the pleadings, because Neb. Rev. Stat. § 42-361(1) (Reissue 2008) required the district court to make a finding as to whether the marriage was "irretrievably broken."

[3] Because the parties' pleadings in the instant case raised the issue of child custody, § 43-2929 required the final judgment to incorporate a parenting plan which resolved the issue of visitation. Section 43-2929 provides as follows:

> (1) In any proceeding in which parenting functions for a child are at issue under Chapter 42, a parenting plan shall be developed and shall be approved by the court. Court rule may provide for the parenting plan to be developed by the parties or their counsel, a court conciliation program, an approved mediation center, or a private mediator. When a parenting plan has not been developed and submitted to the court, the court shall create the parenting plan in accordance with the Parenting Act. A parenting plan shall serve the best interests of the child pursuant to sections 42-364 and 43-2923 and shall:
>
> . . . .
>
> (b) Include, but not be limited to, determinations of the following:
>
> . . . .
>
> (ii) Apportionment of parenting time, visitation, or other access for each child . . . .

The plain language of § 43-2929 requires that a parenting plan be developed and approved by the court in any dissolution proceeding where the custody of a minor child is at issue. Clearly, in the case before us, the issue of child custody and parenting time was both raised in the pleadings and tried to the district court. The instant case is very similar to *Wagner* in that the district court failed to resolve an issue that the court by statute was required to resolve. The court's failure to do so precludes us from having jurisdiction over this appeal.

Amardip states that pursuant to *Huffman v. Huffman*, 236 Neb. 101, 105, 459 N.W.2d 215, 219 (1990), an order is not final for purposes of appeal only if the order "reserv[es] some issue or issues for later determination." Amardip argues that because the order "outsourced" the issue of visitation but did not reserve it for later determination, the decree was a final order. However, whether or not the court intended to reserve the issue of visitation is not relevant. In interpreting the terms of a decree, the Nebraska Supreme Court has stated, "'[T]he

fact is that neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. . . .'" *Gutierrez v. Gutierrez*, 5 Neb. App. 205, 217, 557 N.W.2d 44, 52 (1996). What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant. *Id.* Because the decree left unresolved an issue that the court was required by statute to resolve, it cannot be a final order no matter how the district court characterized its actions.

CONCLUSION

Because the decree from which Amardip appealed does not incorporate a parenting plan as is required by § 43-2929, we conclude that the decree was not a final, appealable order and that we must dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
STEVEN R. BLAIR, APPELLANT.
767 N.W.2d 143

Filed May 19, 2009. No. A-08-587.

1. **Attorneys at Law: Stipulations.** The unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts.
2. **Courts: Arrests: Records.** Under Neb. Rev. Stat. § 29-3523(2)(c) (Reissue 2008), which requires that the notation of a person's arrest be removed from the record if the charges are later dismissed, the person arrested may file a petition seeking to enforce his or her right to have their record expunged.
3. **Courts: Arrests: Records: Proof.** A trial court may not grant a person's petition seeking to enforce his or her right to have a record expunged under Neb. Rev. Stat. § 29-3523(2)(c) (Reissue 2008) unless the petitioner proves that the charges against him or her have not been removed from the record.
4. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Steven R. Blair, pro se.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Steven R. Blair appeals from an order of the district court for Douglas County denying his motions to expunge certain information from the public record and to return his bond money. For the reasons set forth below, we affirm.

BACKGROUND

In 1998, Blair was convicted of kidnapping, use of a deadly weapon to commit a felony, and terroristic threats. In 2003, Blair moved for postconviction relief. The district court granted the motion, setting aside Blair's convictions and sentences and ordering a new trial. The State appealed to this court.

Before the State's appeal was heard, Blair filed another motion—a motion for status of the case on jurisdiction. In that motion, Blair requested that the district court release him on bond and appoint counsel for the appeal. While the motion was under advisement in the district court, we ordered the district court to rule on Blair's request for counsel. The district court granted Blair's request for counsel but denied the remainder of Blair's motion because it lacked jurisdiction.

Shortly thereafter, we dismissed the State's appeal and concluded that the court lacked jurisdiction due to Blair's motion to alter or amend the judgment. See *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005). After the State's appeal was dismissed, a new trial date was set. Before trial, the county attorney moved to dismiss the case and the district court entered an order of dismissal.

After the case was dismissed, Blair filed separate motions for expungement and return of his bond money. In his motion for expungement, Blair asked the court for an order expunging from all official records, other than those nonpublic records retained by the Omaha police, his arrest, indictment, information, trial,

and dismissal. In his motion for the return of his bond money, Blair moved for an order requiring the county court to return his full bond and asked that a 10-percent administrative fee be waived.

A hearing was held on May 6, 2008. In an order filed May 14, the district court denied both motions. Blair appeals.

ASSIGNMENT OF ERROR

Blair argues that the district court erred in determining that it was without authority to rule on his motions for expungement of the public record and a return of his bond money.

ANALYSIS

Return of Bond Money.

Regarding the bond money, Blair claims that the district court had discretion to remit the full amount of his bond. Blair claims he is entitled to a return of a 10-percent administrative fee, because he did not breach any conditions of release. The transcript shows that in February 2006, the trial court set Blair's bond at $75,000 and ordered Blair to pay 10 percent. At the hearing, Blair's counsel stated that Blair received 90 percent of his bond when his case was dismissed, but that a 10-percent administrative fee was withheld. Blair's counsel argued that Blair was requesting that the administrative fee be waived on the bases that his case was dismissed and his previous convictions were overturned.

The State argues that Blair is not entitled to recovery, because he failed to present any evidence supporting his motion for the return of his bond money. Specifically, the State contends that Blair's counsel's comments at the hearing are not evidence and that there is no evidence which shows that Blair put up his bond or that the entire bond was not returned to Blair. We agree.

[1] The unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts. *Schroeder v. Barnes*, 5 Neb. App. 811, 565 N.W.2d 749 (1997). We find that because the State failed to stipulate that Blair posted his bond and that it had not been returned and because Blair failed to present

such evidence, the trial court did not err in overruling Blair's motion to return his bond.

Expungement of Blair's Record.

[2] As for the expungement issue, Blair claims he should have his record expunged because he falls within Neb. Rev. Stat. § 29-3523(2)(c) (Reissue 2008), which states:

> In the case of an arrest for which charges are filed, but dismissed by the court on motion of the prosecuting attorney or as a result of a hearing not the subject of a pending appeal, the arrest shall not be part of the public record after three years from the date of arrest.

The State claims that this court is unable to address Blair's argument because Blair attempted to invoke a procedure to expunge his record which is not authorized by § 29-3523(2)(c). The State notes that § 29-3523(2)(c) appears to apply automatically and does not authorize a person to file a petition to expunge. We disagree. The language of § 29-3523(2)(c) appears to be self-executing—specifically, if the conditions fit, a notation of dismissal shall be made on the defendant's record. And therefore, even though Blair did not need to file a petition to expunge, the fact that he did so does not mean that Blair's claim cannot be addressed. Therefore, the trial court erred in finding that it was without authority to grant Blair's motion to expunge.

[3] Although this is true, we conclude, after reviewing the record, that the trial court reached the correct conclusion for the wrong reasons. At the hearing on Blair's motion, Blair's attorney asked the court to issue an order for the Omaha Police Department to erase Blair's charges from his criminal record. Blair did not present evidence showing that the charges were still on his record and that expungement was required.

[4] Given this lack of evidence, we cannot say that the trial court erred in denying Blair's motion to expunge the record. Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

CONCLUSION

After reviewing the record, we conclude that the district court did not err in denying Blair's motions for expungement of the public record and return of his bond money, given that Blair failed to present sufficient evidence to support his claims. Therefore, the district court's order is affirmed in its entirety.

AFFIRMED.

PAMELA S. WILKINS ET AL., APPELLEES, V. RICHARD F. BERGSTROM, M.D., APPELLANT.

767 N.W.2d 136

Filed May 19, 2009. No. A-08-801.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Motions for New Trial: Appeal and Error.** Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
3. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
4. **Jury Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
6. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
7. **Jury Instructions.** The trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case.

8. **Judges: Jury Trials: Witnesses: Evidence.** Judges should be careful in jury trials and refrain from commenting upon witnesses or their testimony, for each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value.
9. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Affirmed.

Earl G. Greene III, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellant.

Matthew A. Lathrop and Kate E. Placzek for appellees.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Richard F. Bergstrom, M.D., appeals from a jury verdict awarding damages to Pamela S. Wilkins in a medical malpractice case. The district court refused Bergstrom's requested jury instruction addressing Bergstrom's purported admission that he "made a mistake." Because Bergstrom's proffered instruction was sufficiently covered in the instructions given to the jury and unduly emphasized a portion of the evidence, we affirm the district court's refusal to give the requested instruction.

BACKGROUND

Pamela and Donald R. Wilkins filed a complaint alleging that Bergstrom negligently injured Pamela during the performance of a right carpal tunnel release procedure and that Donald suffered loss of consortium. Specifically, the complaint alleged that Bergstrom was negligent in causing a laceration of the median nerve.

At trial, Donald testified that after Pamela's surgery, he asked Bergstrom how the procedure went. According to Donald, Bergstrom responded: "'Not good, I made a mistake, I cut the median nerve.'"

At the conclusion of trial, the court conducted a jury instruction conference. Prior to the instruction conference, the court

submitted its proposed instructions to the parties. On the day of the conference, Bergstrom submitted a proposed jury instruction which read as follows: "You have heard testimony that . . . Bergstrom reportedly told [Donald] that he, . . . Bergstrom, 'made a mistake.' You are instructed that the word ['']mistake' is not synonymous with negligence."

At the instruction conference, the court first dealt with the matter of the parties' additional requested instructions. The court heard the parties' arguments on the parties' proposed instructions and made explicit rulings on each instruction. The court refused Bergstrom's proposed instruction at issue in the instant appeal. The court subsequently read through its own proposed instructions and offered the parties an opportunity to object to these instructions. Bergstrom did not object to the court's proposed instructions as being inconsistent with his proposed instruction.

The court submitted the case to the jury, which returned a verdict for Pamela in her negligence claim in the amount of $175,000. The jury found for Bergstrom as to Donald's claim.

Bergstrom timely appeals.

ASSIGNMENTS OF ERROR

Bergstrom assigns that the district court erred in (1) refusing to give his proposed jury instruction and (2) overruling his motion for a new trial in which he alleged that the court erred in refusing to give his proposed jury instruction.

STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

[2] Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

ANALYSIS

Preservation of Error.

[3] Pamela and Donald argue that Bergstrom failed to preserve the assigned error regarding his proposed jury instruction for purposes of this appeal by failing to make a proper objection. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). Pamela and Donald assert that in order to preserve any error related to the court's failure to give his proposed jury instruction, Bergstrom had to object to the court's refusal to adopt his proposed instruction at the instruction conference after the court had already explicitly ruled on the instruction. However, we conclude that because Bergstrom raised the issue of his proposed instruction at the instruction conference and the district court engaged in an extended colloquy with counsel regarding its merits, Bergstrom preserved the issue of his proposed jury instruction for this appeal.

[4] We first consider what is required to preserve the issue of a jury instruction in the context of the instant case. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004); *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003). Sometimes, this rule has been stated another way: The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005); *Ellis & Guy Advg. v. Cohen*, 219 Neb. 340, 363 N.W.2d 180 (1985).

Although the second statement of the rule may seem to provide an additional, inconsistent method of preserving an objection—by offering more specific instructions—both statements of the rule are consistent. Offering more specific instructions at the conference is a method of objecting to the court's instructions as insufficient.

Pamela and Donald rely upon *Olson v. Sherrerd, supra*, and *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003), to support the proposition that Bergstrom failed to preserve the claimed error. However, in both of these cases, the party requesting an instruction filed the requested instruction but failed to mention the requested instruction at the instruction conference. Thus, in both instances, the requesting party failed to object to the instructions in any manner calculated to make the trial court aware that the party was objecting to the omission. In the instant case, however, unlike the situations in both *Olson* and *Farmers Mut. Ins. Co.*, Bergstrom specifically raised the issue of the proposed instruction at the instruction conference, the parties made extended arguments regarding the instruction, and the court explicitly refused to give the instruction. Bergstrom thereby called to the court's attention the omitted language.

Further, Bergstrom's action fulfilled the general objective set forth in *Farmers Mut. Ins. Co. v. Kment, supra*. As the Nebraska Supreme Court explained, "The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission." *Id.* at 659, 658 N.W.2d at 666-67. Consideration of Bergstrom's requested instruction at the instruction conference provided the court a full opportunity to correct what Bergstrom claimed to be an error of omission of the requested instruction.

We therefore conclude that the totality of Bergstrom's actions during the instruction conference constituted a sufficient objection to the omission of the requested language in the court's proposed jury instructions. Pamela and Donald's argument would exalt form over substance and require the recitation of "magic words" despite a specific request, discussion, and ruling. We find no merit to this argument.

Proposed Instruction.

[5] Bergstrom argues that the district court erred in refusing to give his proposed instruction. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered

instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

Bergstrom argues that pursuant to *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004), and *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000), his proposed jury instruction was a correct statement of law. We note that in *Fossett*, the court stated that "[a] mistake is not synonymous with negligence," 258 Neb. at 711, 605 N.W.2d at 471, and that in *Keys*, the court approved this language in *Fossett*. In both cases, the court held that a physician's alleged admission of a mistake, standing alone, is not sufficient to rebut the presumption against negligence created on summary judgment by the physician's affidavit stating that he did not breach the appropriate standard of care. For purposes of this appeal, we will assume without deciding that Bergstrom's proposed jury instruction was a correct statement of the law.

The second requirement—that the tendered instruction was warranted by the evidence—was clearly established in the record. The requested instruction was based directly on Donald's testimony.

[6] However, Bergstrom cannot show that the court's failure to give this instruction was prejudicial. In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007). Bergstrom does not contend that the court's instructions on negligence were an incorrect statement of the law or were misleading. Bergstrom contends only that the court's instructions did not adequately cover the issues. We disagree because the district court provided the jury with adequate instructions on negligence and Bergstrom's requested instruction would unduly emphasize a portion of the evidence.

First, Bergstrom does not claim that the district court failed to provide adequate instructions on negligence in general. We have reviewed the record and found that the court gave appropriate instructions on negligence that were based on the second edition of the Nebraska Jury Instructions. Among other things, the jury was instructed on the "Function of Judge, Jury, and Counsel," pursuant to NJI2d Civ. 1.01; negligence in general, pursuant to an instruction nearly identical to NJI2d Civ. 2.01; the duty of a professional, pursuant to NJI2d Civ. 12.04; burden of proof, pursuant to NJI2d Civ. 2.12A; proximate cause, pursuant to NJI2d Civ. 3.41; evidence, pursuant to NJI2d Civ. 1.02 and 1.31; and "Evaluation of Testimony—Credibility of Witnesses" pursuant to NJI2d Civ. 1.41. Bergstrom does not argue that these instructions were inappropriate in the instant case, but instead claims that the district court was required to give a special instruction to explain the effect of his statement.

[7] The trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case. *First Mid America, Inc. v. Palmer*, 197 Neb. 224, 248 N.W.2d 30 (1976). In *First Mid America, Inc.*, the Nebraska Supreme Court upheld a trial court's decision to reject a proffered instruction because the instruction unduly emphasized a portion of the evidence even though it implicitly determined that the instruction was a correct statement of the law and was applicable to the facts. The plaintiff proposed a jury instruction which stated that the defendant's failure to read the customer agreement that he signed did not relieve the defendant of the "'obligations'" or "'consequences'" imposed by the documents. 197 Neb. at 235, 248 N.W.2d at 37. The Supreme Court agreed with the rejection of the instruction because the agreement at issue in the case consisted of both written and oral understandings and the instruction drew undue attention to the written customer agreement.

In the instant case, the proposed instruction likewise placed too much focus on one portion of the evidence. The instruction would have stated that one particular piece of evidence did not constitute negligence. However, the overall question for the

jury was whether the totality of the evidence presented at trial established that Bergstrom was negligent by a preponderance of the evidence. In addition to Bergstrom's statement, there was a significant amount of evidence adduced at trial regarding negligence—including expert testimony. If the court had given Bergstrom's proposed instruction, it would have distracted the jury from the overall inquiry at hand.

[8] In addition, by giving Bergstrom's proposed instruction, the court would have ventured into the area of commenting on the evidence, which is a practice that has been strongly discouraged. Judges should be careful in jury trials and refrain from commenting upon witnesses or their testimony, for each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value. *Styskal v. Brickey*, 158 Neb. 208, 62 N.W.2d 854 (1954).

New Trial.

[9] Because the district court did not err in failing to give Bergstrom's proposed instruction, the court did not abuse its discretion in denying Bergstrom's motion for a new trial which was made on the same basis. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002).

CONCLUSION

Because Bergstrom's proposed jury instruction addressed a subject adequately covered by the instructions given and unduly emphasized a portion of the evidence, we affirm the district court's decision to reject the instruction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSE JUAN AGUILAR-MORENO, APPELLANT.

769 N.W.2d 784

Filed May 26, 2009. No. A-08-1008.

1. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Trial: Evidence: Waiver: Appeal and Error.** Ordinarily, error is waived if after a party has adduced objectionable evidence, the opposing party adduces on direct or cross-examination evidence on the same subject.
6. **Trial: Evidence.** Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.
7. **Convicted Sex Offender: Pleas.** Nebraska's Sex Offender Registration Act applies to any person who pleads guilty to or is found guilty of certain offenses listed in Neb. Rev. Stat. § 29-4003(1) (Reissue 2008).
8. **Convicted Sex Offender: Judgments.** Neb. Rev. Stat. § 29-4005(2) (Reissue 2008) requires a court's finding relating to the lifetime registration requirement to be part of the court's judgment.
9. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
10. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
11. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed in part, and in part vacated.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

After a jury convicted Jose Juan Aguilar-Moreno of incest of his adult daughter, the district court sentenced Aguilar-Moreno to 19 to 20 years' imprisonment and required him to register as a sex offender for the remainder of his life. We conclude that the court did not abuse its discretion in allowing evidence of sexual activity between Aguilar-Moreno and his daughter that occurred outside of Nebraska and of DNA evidence concerning the paternity of his daughter's child. We vacate the court's findings regarding the registration requirement because incest of an adult is not a registrable offense. Finally, we conclude that the court did not impose an excessive sentence.

BACKGROUND

The victim in this case, T.A.C., was born in 1977 and was 30 years old at the time of trial. The State originally charged Aguilar-Moreno with first degree sexual assault, but it later filed an amended information charging Aguilar-Moreno with incest of T.A.C. based on events occurring in Adams County, Nebraska, between January 1, 1999, and August 1, 2007. After trial commenced, the court sustained Aguilar-Moreno's oral "demur[rer]" based on the statute of limitations and limited the charged conduct to that occurring between March 15, 2005, and August 1, 2007.

Following a hearing concerning the State's intention to adduce evidence of other crimes, wrongs, or acts under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008), the court found that the evidence sought to be introduced by the State—evidence of Aguilar-Moreno's sexual penetration of T.A.C. in Mexico and Texas and evidence that T.A.C.'s child is Aguilar-Moreno's biological child—was admissible under § 27-404(2) as evidence of opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The court conducted a 3-day jury trial beginning on March 31, 2008. After the jury was selected but prior to opening statements, Aguilar-Moreno's attorney made a continuing objection to the challenged evidence. He contended that such evidence was highly prejudicial and that the prejudice substantially outweighed any evidentiary value.

Aguilar-Moreno denied having had sex with T.A.C. On the other hand, T.A.C. testified that Aguilar-Moreno first sexually abused her when she was 16 years old and living in Mexico. She testified that Aguilar-Moreno would beat her and her mother if T.A.C. did not do as Aguilar-Moreno wanted. T.A.C. denied ever having sexual intercourse with anyone other than her father. She testified that her father impregnated her when she was 18 and that he took her to Texas, where her son—who was 11 years old at the time of trial—was born. Aguilar-Moreno denied paternity of T.A.C.'s child and testified that he did not know she was pregnant until 3 months after they arrived in Texas.

In October 1998, T.A.C. and her son moved with Aguilar-Moreno to Hastings, Nebraska. They moved into a house with other immediate family members. T.A.C. testified that since arriving in Hastings, her father forced her to have sex with him every day. T.A.C. testified that Aguilar-Moreno would threaten to kill her if she did not have sex with him and that he said her "family was going to pay for it if [she] didn't do it."

On August 2, 2007, T.A.C. had an argument with Aguilar-Moreno over money, and T.A.C. testified that Aguilar-Moreno threatened to kill her and her brothers if she left the house. Later that day, T.A.C. left the family home along with other family members and told her entire family what had been happening to her all these years. On August 21, she reported Aguilar-Moreno's sexual contact with her to the police. She testified that she did not report it earlier because she believed her father's threats and was afraid of him. Members of the Hastings police department obtained buccal swabs from T.A.C., her son, and Aguilar-Moreno. A DNA analyst performed paternity testing on T.A.C.'s child and concluded that Aguilar-Moreno could not be excluded as the father. The analyst testified that it was "84,900 times more likely that the observed DNA profiles

from these individuals [was] a true paternity mother, child, and father [versus] a mother, child, and random male[']s being the father."

The jury found Aguilar-Moreno guilty of incest. During the sentencing hearing on August 18, 2008, the court stated that pursuant to Nebraska's Sex Offender Registration Act (Act), Aguilar-Moreno must register within 5 days of release from incarceration and within 5 days of any change of address for the rest of his life. In a "Journal Entry and Order" filed August 20, the court stated that it notified Aguilar-Moreno of his duties to comply with the Act and with the requirements of lifetime community supervision. The court then ordered that Aguilar-Moreno be incarcerated for 19 to 20 years but made no further mention of any registration requirements. On August 21, the judge and Aguilar-Moreno signed a "Notice of General Conditions of Civil Commitment Evaluation and Lifetime Community Supervision." The notice stated in part, "IT IS ORDERED, pursuant to the . . . Act, . . . you must register . . . for the remainder of your life." The final sentence of the order stated, "AS TO ALL OF THE FOREGOING, IT IS SO ORDERED." Also on August 21, the court entered a "Journal Entry and Order," which stated that the court notified Aguilar-Moreno of his duty to comply with the Act and that "IT IS SO ORDERED." The commitment did not refer to any registration requirement.

Aguilar-Moreno timely appeals.

ASSIGNMENTS OF ERROR

Aguilar-Moreno assigns, reordered and consolidated, that the district court erred in (1) allowing the State to present evidence of sexual activity with T.A.C. which occurred in Mexico and Texas and evidence that he is the father of T.A.C.'s child, (2) requiring him to register as a sex offender for incest of an adult, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[1] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), and prejudice under Neb. Evid.

R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

[3,4] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

ANALYSIS

Evidence of Sexual Activity Outside of Nebraska and Paternity.

[5] Aguilar-Moreno argues that evidence of sexual relations with T.A.C. in Mexico and Texas and of his fathering T.A.C.'s child should have been excluded from trial because it was unfairly prejudicial. The State contends that Aguilar-Moreno has waived any error regarding the admission of this evidence because his counsel elicited testimony on the subjects during cross-examination of T.A.C. and her mother and during direct examination of Aguilar-Moreno. Ordinarily, error is waived if after a party has adduced objectionable evidence, the opposing party adduces on direct or cross-examination evidence on the same subject. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). However, the rule does not apply where the objecting party introduces similar evidence solely for the purpose of meeting the adversary's case by explaining or rebutting the original evidence. *Id.* We conclude that the exception to the general rule applies in this case because the testimony elicited by Aguilar-Moreno's counsel was to explain or rebut prior admitted testimony.

The district court found that the evidence at issue was admissible under § 27-404(2) as evidence of opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident. Aguilar-Moreno does not appear to argue that the court's determination of a proper purpose was erroneous; rather, his argument focuses on admissibility under § 27-403. We limit our analysis accordingly.

[6] Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." § 27-403. Only evidence tending to suggest a decision on an *improper* basis is *unfairly* prejudicial. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

The sexual assaults and events occurring in Mexico and Texas are connected with the circumstances leading to the crime charged. The evidence established that the sexual conduct occurred over a long period of time, and it showed the circumstances under which T.A.C. arrived in the United States, i.e., that Aguilar-Moreno took T.A.C. to Texas because he did not want the family to realize she was pregnant. Also, the evidence helped explain why T.A.C. did not report the sexual conduct earlier. Further, because Aguilar-Moreno denied having had sex with T.A.C., the fact that he could not be excluded as the father of T.A.C.'s child was highly probative of the issue at the heart of the case—whether Aguilar-Moreno engaged in sexual penetration with his daughter. We conclude that the district court did not abuse its discretion in allowing evidence that sexual activity occurred between T.A.C. and Aguilar-Moreno outside of Nebraska and that Aguilar-Moreno could not be excluded as the father of T.A.C.'s child, because the probative value of the evidence was not substantially outweighed by any prejudice to Aguilar-Moreno.

Registration as Sex Offender.

[7] Aguilar-Moreno argues that the court erred in requiring him to register under the Act. The Act applies to any person who pleads guilty to or is found guilty of certain offenses listed in Neb. Rev. Stat. § 29-4003(1) (Reissue 2008). *State v.*

Hamilton, 277 Neb. 593, 763 N.W.2d 731 (2009). Certain sex offenders, including those who commit an aggravated offense or who have a prior conviction for a registrable offense, are subject to a lifetime registration requirement. See, *id.*; Neb. Rev. Stat. § 29-4005(2) (Reissue 2008). Other sex offenders are required to register for a period of 10 years. See § 29-4005(1).

Aguilar-Moreno contends that because § 29-4003(1)(a)(vii) applies the Act only to "incest *of a minor*" (emphasis supplied) and because T.A.C. was not a minor at any time of the instant offense, the Act did not impose a registration requirement upon him as a result of the instant offense. He does not discuss the fact that a prior conviction had subjected him to the Act's 10-year registration requirement.

The court determined that the instant conviction caused Aguilar-Moreno to become subject to lifetime registration and supervision. During the sentencing hearing, the court ordered Aguilar-Moreno to register under the Act within 5 days of release from incarceration and within 5 days of any change of address "for the remainder of your life." The court further ordered that Aguilar-Moreno was subject to lifetime community supervision by the Office of Parole Administration. The court's written sentencing order states in its findings that it notified Aguilar-Moreno of his duties to comply with the Act. The day after the court entered its written judgment, a notification of registration responsibilities under the Act—signed by Aguilar-Moreno and the judge—was filed, and it "ordered" Aguilar-Moreno to register under the Act for the remainder of his life.

The State asserts that the registration requirement is not properly at issue in this direct appeal. We compare two Nebraska Supreme Court decisions that guide our answer to the State's assertion.

In *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998), the court sentenced the defendant to probation and informed him of his duty to comply with the Act, but the defendant's obligation to register pursuant to the Act was not made part of the court's order. The defendant appealed, arguing that his

sentence was excessive because the Act potentially increased his sentence for failing to register. The Nebraska Supreme Court stated that the defendant attempted to challenge his sentence by arguing that the Act violates state and federal Ex Post Facto Clauses, but that he was prohibited from challenging his conviction by mounting a constitutional attack on another statute. The Supreme Court determined that the Act's registration requirements were separate and collateral to any sexual offense affected by the Act and that the registration requirements "arose solely and independently by the terms of the [A]ct itself only *after* [the defendant's] conviction." *State v. Torres*, 254 Neb. at 95, 574 N.W.2d at 155.

The Nebraska Supreme Court distinguished *Torres* in *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). In *Worm*, the defendant was subjected to the lifetime registration requirement associated with an aggravated offense. At the time of the *Torres* decision, the lifetime registration requirement for committing an aggravated offense did not exist. See 2002 Neb. Laws, L.B. 564. The *Worm* court stated that the lifetime registration requirement for an aggravated offense did not arise solely and independently from the defendant's conviction, but, rather, the court was required, as part of the sentence, to determine whether the offense was aggravated and make that fact part of the sentencing order. See § 29-4005(2). Thus, the *Worm* court determined that the court's finding that the defendant committed an aggravated offense was part of the judgment, and it considered the constitutional challenge to the registration requirements.

While both of these decisions assist us, neither case provides a specific answer to the question before us. In the above cases, the defendants sought to challenge the requirements at issue on constitutional grounds. Here, Aguilar-Moreno is not challenging the constitutionality of the registration requirement; rather, he is arguing that the court erred in finding that he was subject to the Act based on the conviction at issue. Like the defendant in *Torres*, Aguilar-Moreno was not found to have committed an aggravated offense. But like the defendant in *Worm*, Aguilar-Moreno was subjected to a lifetime registration

requirement under § 29-4005(2), rather than the 10-year registration in *Torres*.

[8] In the instant case, the district court evidently recognized that Aguilar-Moreno had previously been ordered to register as a sex offender and that he was still subject to the 10-year registration period. Because the statutes required the court to make a finding of fact concerning lifetime registration as part of the sentencing judgment, we consider the situation in the instant case similar to the circumstances in *Worm*. Like the defendant in *Worm*, the court required Aguilar-Moreno to register under the Act for the rest of his life. Section 29-4005(2) instructs that a person required to register under § 29-4003 must register for the rest of his or her life if the person has a prior conviction for a registrable offense and that the court make that fact part of the sentencing order. Because § 29-4005(2) required the court's finding relating to the lifetime registration requirement to be part of the court's judgment, we conclude that Aguilar-Moreno's claim is properly before us in this direct appeal.

As we have already stated, § 29-4003(1)(a)(vii) provides that the Act applies to any person found guilty of incest of a minor, pursuant to Neb. Rev. Stat. § 28-703 (Reissue 2008). Here, Aguilar-Moreno was convicted of violating § 28-703, but he committed incest of an adult. Accordingly, the district court erred in finding that Aguilar-Moreno was subject to the provisions of the Act based upon this conviction. We conclude that the portion of Aguilar-Moreno's sentence requiring him to register as a sex offender for the remainder of his life must be vacated.

Excessiveness of Sentence.

Aguilar-Moreno argues that the sentence of 19 to 20 years' incarceration is excessive and disproportionate to the severity of the offense when considered with his background and prior record. Incest is a Class III felony, which is punishable by a minimum of 1 year's imprisonment and a maximum of 20 years' imprisonment, a $25,000 fine, or both. See Neb. Rev. Stat. §§ 28-105(1) (Reissue 2008) and 28-703(2). The sentence imposed is within the statutory limit.

[9-11] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Aguilar-Moreno was born in 1957, and he completed 8 or 9 years of education in Mexico. He is a registered sex offender, due to an April 2000 incident because of which he was convicted of criminal trespass and sexual assault without consent. He was also sentenced to 90 days in jail for an August 2007 violation of a protection order. The court stated that Aguilar-Moreno was not a suitable candidate for probation and that there was a high likelihood that he would engage in additional criminal conduct. The court observed that testing showed Aguilar-Moreno scored in the "very high risk" range for pro-criminal attitude and as a high risk for recidivism. According to the presentence investigation report, Aguilar-Moreno is not amenable to treatment because of his unwillingness to admit any wrongdoing in this case and it is likely that T.A.C. will be in danger if Aguilar-Moreno were released into the community. We find no abuse of discretion by the district court in its determination of the sentence.

CONCLUSION

We conclude that the court did not abuse its discretion in allowing evidence of sexual activity between Aguilar-Moreno and T.A.C. that occurred outside of Nebraska and of evidence concerning the paternity of T.A.C.'s child because the probative value of such evidence was not unfairly prejudicial to Aguilar-Moreno. We vacate the court's findings regarding the registration requirement under the Act because incest of an adult is not

a registrable offense. Finally, we conclude that the court did not impose an excessive sentence.

AFFIRMED IN PART, AND IN PART VACATED.

STATE OF NEBRASKA, APPELLEE, V.
DENISE M. SMITH, APPELLANT.
771 N.W.2d 151

Filed May 26, 2009. No. A-08-1013.

1. **Ordinances: Minors: Negligence: Proof.** The plain language of the Omaha city ordinance regarding caretaker neglect requires proof by the State that the defendant acted negligently in placing a child in a situation that endangered the child's life or physical or mental health.
2. **Minors: Negligence: Licenses and Permits.** Despite the importance and function of licensing childcare providers, the failure to be properly licensed is not negligence per se.

Appeal from the District Court for Douglas County, SANDRA L. DOUGHERTY, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Judgment of District Court affirmed in part, and in part reversed.

James W. Knowles, Jr., and Matthew J. Knowles, of Knowles Law Firm, for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and Kevin J. Slimp for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Denise M. Smith was charged under Omaha city ordinances with the crimes of caretaker neglect and giving false information to a police officer for events surrounding the injury of an infant at Smith's childcare facility. Smith was convicted of both offenses in the county court for Douglas County, Nebraska, and her convictions and sentences were affirmed by the district court. In this appeal, Smith challenges the sufficiency of the evidence to support the caretaker neglect conviction and alleges that the sentences imposed

were excessive. We find the evidence insufficient to support the caretaker neglect conviction, and we reverse that conviction and sentence. We affirm the false information conviction and sentence.

II. BACKGROUND

The events giving rise to this case occurred on or about March 17, 2008. The events concern injuries sustained by Dravion Settles, who was then 7 months old. At the time, Dravion was in daycare at "Acquainted With an Angel" daycare center. Smith transported Dravion from his home to Acquainted With an Angel in the mornings and back home in the evenings.

On March 17, 2008, Smith picked up Dravion from Acquainted With an Angel and then stopped at the daycare facility Smith owned, "ABC 123" (ABC). Smith had an errand to run and left Dravion at ABC, along with approximately eight other children ranging in age from infants to teenagers, in the care of one adult, Shawnee Allen (Shawnee). According to Smith's testimony, when she left to run her errand, Dravion was being held by Shawnee.

Smith was gone for 45 minutes to an hour, and when she returned to ABC, "Shawnee had the kids ready" to be transported to their homes in a van. Smith testified that she did some brief cleaning up and that "[b]y the time [she] did that, everybody was in the van already." Shawnee loaded Dravion in the van. Smith dropped Dravion off at his home and left.

Dravion's mother testified that she went out to the van and picked up Dravion. She testified that there was a cover over Dravion's car seat, so she did not observe Dravion when taking him from the van. She took Dravion into the house, used the restroom, and then removed the cover from Dravion's car seat. When she removed the cover, she discovered that Dravion was not moving, was not breathing properly, and had a bite mark on his cheek, as well as bruises under his chin and purple coloring because of his breathing difficulties. Dravion's mother called for medical attention and also called Smith.

Dravion suffered numerous injuries while he was at ABC. According to the evidence adduced at trial, Dravion suffered

two broken legs, a broken arm, a bite mark to the face, and postobstructive pulmonary edema. The injuries were caused by an 8-year-old child at the daycare.

During the investigation of this case, police officers interviewed Smith on at least three occasions. During those interviews, Smith provided inconsistent information to the police officers. Among the inconsistencies was information about the number and identity of adults present at ABC while Smith was on her errand and Dravion was injured. Smith initially told police officers that both Shawnee and another adult were present at ABC, but later acknowledged that Shawnee was the only adult. Smith also acknowledged to police officers that Shawnee was "not a licensed daycare provider through ABC."

The evidence adduced at trial indicates that on March 17, 2008, Shawnee was licensed to work at Acquainted With an Angel, the daycare center where Dravion was enrolled during the day. There also was uncontradicted evidence that Shawnee was "an excellent provider" who was capable of watching eight or nine children by herself. There was also evidence that Smith had taken steps toward having Shawnee licensed to work at ABC, but that the paperwork had not yet been completed. Finally, there was evidence that Shawnee had not yet been authorized to work at ABC "because there's a past investigation with the State going on with Shawnee," but there was no evidence adduced concerning the subject of the investigation.

On April 24, 2008, the State filed a criminal complaint in county court charging Smith with caretaker neglect and providing false information to law enforcement. Both charges alleged violations of ordinances of the city of Omaha.

At the conclusion of the trial in the county court, the court made the following specific findings:

> The Court notes that there's no question that [Smith] was the owner of this childcare facility. And that she gave several different versions to the police officer. And there's no question that the Court finds her guilty of false information.

> With respect to the negligent caretaker neglect . . . the Court notes that Sergeant Thorson's testimony was that this child was in trauma and in critical condition, and that there were several versions given by [Smith]. *But the thing that was so clear to this Court was that prior to* [*Smith's*] *leaving on her 60-minute errand, she noticed this bite mark . . . on the child's cheek. Sergeant Thorson testified that . . . Shawnee . . . was holding the minor child and that* [*Smith*] *saw the mark on the cheek.*
>
> At this point, a simple check would have revealed the extent of this minor child's injuries, and that they were life-threatening and that that child should have there and then been transported to a hospital. *Instead of checking further, seeing a bite mark on the cheek, she left the child . . . for 60 minutes and then transported* [*the child*] *back home and didn't bother to tell* [*the child's*] *mother about the bite mark on the cheek or any other injury or the crying or anything.* ***And it is that very delay that endangered the child's life and physical health and the Court finds*** [***Smith***] ***guilty of negligent minor care.***

(Emphasis supplied.) The county court sentenced Smith to two concurrent sentences of 60 days in jail.

On appeal, the district court affirmed the convictions and sentences. The district court specifically noted that "the County Court's reference to one aspect of the evidence was incorrect," but concluded that there was sufficient evidence to uphold both convictions beyond a reasonable doubt. This appeal followed.

III. ASSIGNMENTS OF ERROR

Smith has assigned two errors on appeal. First, Smith asserts that there was insufficient evidence to support the caretaker neglect conviction. Second, Smith asserts that the sentences imposed were excessive.

IV. ANALYSIS

1. Sufficiency of Evidence

Smith first challenges the sufficiency of the evidence to support the caretaker neglect conviction. We note that Smith has

not assigned any error or presented any argument challenging her conviction for providing false information to law enforcement. With respect to the caretaker neglect conviction, Smith argues that there was no evidence she was present at the time of the injuries and no evidence that she did or failed to do anything that a reasonable person would have done in this case. After our review of the record, we agree that the State failed to adduce evidence indicating that Smith acted negligently in this case.

[1] The city of Omaha's ordinance under which Smith was charged provides: "(1) A person commits caretaker neglect if he or she negligently causes or permits: . . . . (b) A minor child to be placed in a situation that endangers his or her life or physical or mental health[.]" Omaha Mun. Code, ch. 20, art. IV, § 20-97 (2004). The plain language of this ordinance requires proof by the State that Smith acted negligently in placing Dravion in a situation that endangered his life or physical or mental health.

There is no dispute in this case that Dravion suffered severe injuries while at ABC. There is no dispute that Smith owned and operated ABC or that Smith was responsible for leaving Dravion at ABC in Shawnee's care. The issue is whether Smith's action of leaving Dravion in Shawnee's care was negligence.

The State's argument on appeal amounts to an assertion that Smith acted negligently because she left Dravion in the care of an adult who was not licensed to provide daycare at ABC and who was not an employee of ABC. The uncontradicted evidence at trial, however, indicates that Shawnee was licensed to provide childcare at the facility Dravion attended during the day, that Shawnee was an excellent care provider, and that she had experience working at Head Start and other childcare facilities. There was no evidence adduced to indicate any reason Smith should have known or predicted that Dravion would suffer severe injuries or be improperly cared for while in Shawnee's care. There was no evidence adduced of any prior problems with the child who inflicted the injuries. There was no evidence adduced to indicate that Shawnee has ever failed

to provide proper care before or that Smith was aware of any such failures.

[2] We are aware of no authority, and the State has cited us to none, that would support a finding that leaving children in the care of an adult who is not licensed to provide child care at one facility, but who is licensed to provide care at another facility, amounts to negligence per se. Indeed, the fact that the Nebraska state statutes governing the licensing of childcare centers provide that "[i]f unlicensed child care is occurring in violation of [state statutes], the person providing the unlicensed care shall have thirty days to either become licensed or cease providing unlicensed child care" seems to suggest that despite the importance and function of licensing childcare providers, the failure to be properly licensed is not negligence per se. Neb. Rev. Stat. § 71-1914.01 (Cum. Supp. 2008).

A review of the county court's findings when convicting Smith indicates that the county court simply made a factual finding that is not supported by any evidence in the record. The county court's findings, as quoted above in the background section of this opinion, very clearly indicate that the county court based the conviction for caretaker neglect entirely on the county court's belief that one of the police officers testified Smith was aware of some injury to Dravion *before* Smith left Dravion in Shawnee's care and that Smith failed to seek medical attention for Dravion despite that knowledge. The county court specifically found that it was "that very delay" which resulted in Dravion's being placed in a situation injurious to his life or physical health.

All the evidence adduced at trial, however, indicates Smith had no such knowledge. Indeed, a review of the evidence adduced at trial indicates that Dravion was being held by Shawnee when Smith left and that Smith did not personally have occasion to observe Dravion again upon her return to ABC or delivery of Dravion to Dravion's mother. When Smith returned from her errand, Shawnee already had Dravion ready to be returned home, in his car seat, with a cover over it. Shawnee placed Dravion, in this condition, into the van. When Smith arrived at Dravion's home, Dravion's mother took

Dravion out of the van, still covered and in his car seat, and took him into the house. There is no evidence that Smith was aware of any injuries until she received a telephone call from Dravion's mother. The district court recognized this error by the county court, but found that some other unspecified evidence supported the conviction.

Without evidence that Smith knew or should have known of some reason that Shawnee was incapable of providing adequate care—or that after Smith returned from her errand, she knew or should have known of the injuries and sought medical attention sooner—there is no evidence that Smith did anything unreasonable or failed to do anything reasonable. In this case, Smith left Dravion with an adult who, according to the record, was qualified and capable of providing childcare to Dravion. Indeed, Shawnee was actually employed by and licensed to provide childcare at the very facility Dravion spent his days. Despite the fact that Shawnee was not licensed to provide childcare at ABC, there is no evidence of negligence on behalf of Smith. Accordingly, we reverse the conviction and sentence for caretaker neglect.

2. Excessive Sentences

Smith also challenges the sentences imposed by the county court. We have already reversed her conviction and sentence for caretaker neglect. As such, the only remaining issue is whether the sentence of 60 days in jail was excessive for providing false information to law enforcement. We conclude that it is not an excessive sentence.

The applicable penalty for providing false information, under the city of Omaha's ordinances, is a fine not exceeding $500, imprisonment not exceeding 6 months, or both. See Omaha Mun. Code, ch. 1, § 1-10 (1980). A sentence imposed within statutory limits will not be disturbed absent an abuse of discretion. See *State v. Wiemer*, 15 Neb. App. 260, 725 N.W.2d 416 (2006). In this case, the sentence imposed is well within the applicable statutory limits and we find no abuse of discretion by the county court in imposing the sentence. As such, we find this assignment of error to be without merit.

V. CONCLUSION

We find the evidence insufficient to support the county court's conviction of Smith for caretaker neglect. We reverse the conviction and sentence for caretaker neglect. We find no abuse of discretion concerning the sentence imposed for providing false information to law enforcement, and Smith has not challenged her conviction for providing false information. We affirm the conviction and sentence for providing false information.

AFFIRMED IN PART, AND IN PART REVERSED.

LINDA HAYNES, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS E. LUCAS, DECEASED, APPELLEE, V. MARC DOVER AND LORI DOVER, APPELLANTS.

768 N.W.2d 140

Filed May 26, 2009. No. A-08-1209.

1. **Rules of Evidence: Hearsay.** According to Neb. Rev. Stat. § 27-804 (Reissue 2008), a statement made by an unavailable witness is not excluded by the hearsay rule if such statement was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest that a reasonable man in his position would not have made the statement unless he believed it to be true.
2. **Words and Phrases.** A pecuniary interest is also termed a financial interest.
3. **Uniform Commercial Code: Negotiable Instruments: Promissory Notes.** Discharge of a negotiable instrument such as a promissory note is governed by the Uniform Commercial Code.
4. ____: ____: ____. According to Neb. U.C.C. § 3-604(a) (Reissue 2001), a person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.
5. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Justin W. High, of Sodoro, Daly & Sodoro, for appellants.

Thomas K. Harmon, of Law Offices of Thomas K. Harmon, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Marc Dover and Lori Dover appeal the decision of the district court for Sarpy County finding that the Dovers were in breach of contract on a promissory note in the amount of $20,600 to Louis E. Lucas, deceased, that his personal representative sought to collect in this lawsuit.

FACTUAL AND PROCEDURAL BACKGROUND

Lucas died on September 3, 2002. Linda Haynes, Lucas' daughter, was appointed the personal representative of Lucas' estate. In June 2005, Haynes, on behalf of the estate, brought an action against the Dovers relating to two separate promissory notes that were past due and still owed to the estate. Haynes' complaint alleged three causes of action against the Dovers: two for breach of contract and one for fraud. One cause of action for breach of contract and the fraud cause of action were ultimately dismissed. Thus, only one cause of action for breach of contract remains relevant in this appeal.

On March 6, 2001, the Dovers borrowed $20,600 from Lucas, Lori's grandfather, in exchange for a promissory note. At the time of trial in September 2008, the Dovers had made no payments on the promissory note, alleging that Lucas verbally canceled the $20,600 debt the Dovers owed Lucas. At trial, the district court sustained Haynes' hearsay objection and excluded Marc's testimony that Lucas verbally canceled the $20,600 debt the Dovers owed Lucas. The Dovers were allowed to make an offer of proof regarding the same. In its order, the district court found that Haynes sustained her burden of proof on the breach of contract claim and entered judgment against the Dovers in the amount of $20,600 plus interest. The Dovers now appeal.

ASSIGNMENTS OF ERROR

The Dovers allege that the trial court improperly sustained Haynes' hearsay objection and excluded Marc's testimony that

Lucas verbally canceled and forgave the $20,600 debt the Dovers owed Lucas.

STANDARD OF REVIEW

Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

ANALYSIS

During the bench trial, both Lori and Marc testified that they had previously borrowed money from Lucas, but had always paid him back. When questioned about their nonpayment of the promissory note at issue, the following colloquy took place between Marc, counsel for both parties, and the court:

> [Defense counsel:] And was there some reason for the change in — to in not making the payments?
>
> [Plaintiff's counsel]: Objection: Relevancy.
>
> THE COURT: No, overruled. You may answer.
>
> [Marc]: Okay. Thank you.
>
> Honestly, when things were busy with [the Lucases], and Lori was taking care of [Lucas], it never really got taken care of. And the day that [Lucas' wife] was buried, I went to his bedroom where he was laying down, he was going to have surgery the next day, and I —
>
> [Plaintiff's counsel]: I think we're coming into a hearsay here, so I'm going to object as to hearsay.
>
> THE COURT: Sustained.
>
> [Defense counsel]: Can I make an offer of proof with respect to an exception?
>
> THE COURT: Well, what's the exception?
>
> [Defense counsel]: It would be under 27-804, Subsection 2, Subsection C.
>
> THE COURT: Is that the dead man statute? Twenty-seven what?
>
> [Defense counsel]: 27-804, Subparagraph 2, Subparagraph C.
>
> THE COURT: I'll let you make your offer of proof.

> [Defense counsel]: I'd offer — under that provision of the statute, Judge, that would be an exception to the hearsay rule, and the witness should be allowed to answer the question.
>
> THE COURT: Well, it says intended to subject him — that's the declarant — to civil or criminal liability. I don't see it. It — the objection's sustained. If you want to make your offer of proof, you can.
>
> [Defense counsel]: Well, for the record, I'd like the [sic] make the offer of proof that the — the statement — if this witness was allowed to answer that question, it would be that . . . Lucas forgave the note at the — at this time and place that he's testified to up to the point of objection.
>
> THE COURT: All right.
>
> [Defense counsel]: And that that statement ought to be allowed because the statement is made, which is contrary to . . . Lucas's pecuniary interest in that he's owed this money and he's making the statement that it's being forgiven. That would be my offer of proof.
>
> THE COURT: The offer of proof will be made a part of the record. You may proceed.
>
> [Marc]: That evening after we got back, I went to his room because he was laying down, he was going to have surgery the next day —
>
> [Plaintiff's counsel]: Well, I'm going to object —
>
> [Defense counsel]: Counsel's objecting to it, [Marc], so I have to go on to another question.
>
> [Marc]: That's fine. I didn't understand. I'm sorry.
>
> THE COURT: That's fine.

Thus, while the court did not allow the evidence after finding that such was hearsay, the offer of proof was that Lucas had verbally canceled the $20,600 debt the Dovers owed Lucas.

[1] Neb. Rev. Stat. § 27-804 (Reissue 2008) states in relevant part:

> (2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .

> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In the instant case, Lucas was certainly an unavailable witness, as he was deceased at the time of trial.

[2,3] The next question is whether Lucas' alleged verbal cancellation of the Dovers' debt was contrary to Lucas' pecuniary interest. See Black's Law Dictionary 829 (8th ed. 2004) (pecuniary interest is also termed financial interest). We find that the alleged verbal cancellation or discharge of the promissory note cannot be said to be against Lucas' pecuniary interest, because there was no writing offered or received into evidence which purported to discharge the Dovers' debt to Lucas. Discharge of a negotiable instrument such as a promissory note is governed by the Uniform Commercial Code. *FirsTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993).

[4] Neb. U.C.C. § 3-604(a) (Reissue 2001) states:

> A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

There was no evidence of discharge by one of the physical acts detailed in § 3-604(a)(i). Therefore, any discharge or cancellation could only be proved by a signed writing, and thus, the alleged statement attributable to Lucas regarding the Dovers' debt would not be against his pecuniary interest

because such would not affect the validity of the note. Thus, the evidence of the alleged verbal forgiveness of the debt was not admissible as an exception to the hearsay rule, and such was properly excluded by the trial court.

[5] Although our reasons for concluding that the testimony was not admissible are somewhat different than the district court's, there was no error when the trial court sustained Haynes' hearsay objection. A proper result will not be reversed merely because it was reached for the wrong reason. See *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001). We affirm the decision of the district court.

AFFIRMED.

IN RE INTEREST OF CHANCE J., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANDREW J., APPELLANT.

768 N.W.2d 472

Filed June 2, 2009. No. A-08-962.

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 juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
4. **Constitutional Law: Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection, and state intervention to terminate the parent-child relationship must be accomplished by fundamentally fair procedures meeting the requisites of the Due Process Clause.
5. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
6. **Parental Rights: Abandonment: Intent: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2008), abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse,

the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.

7. **Parental Rights: Abandonment: Time.** Neb. Rev. Stat. § 43-292(1) (Reissue 2008) provides that there are grounds for termination of parental rights when a parent has abandoned the juvenile for 6 months or more immediately prior to the filing of the petition.
8. ____: ____: ____. The time period for abandonment in Neb. Rev. Stat. § 43-292(1) (Reissue 2008) is determined by counting back 6 months from the date the juvenile petition was filed.
9. **Parental Rights: Words and Phrases.** Neglect, in the context of Neb. Rev. Stat. § 43-292(2) (Reissue 2008), requires that the parents substantially and continuously or repeatedly neglected and refused to give the juvenile necessary parental care and protection.
10. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-292(9) (Reissue 2008) provides statutory grounds for termination of parental rights if the juvenile court finds that the parent has subjected the child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.
11. **Parental Rights: Abandonment.** Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2008) excuses reasonable efforts when the parent has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment.
12. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2008) exists and that termination is in the child's best interests.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Reversed and remanded for further proceedings.

Patrick A. Campagna and Justin A. Roberts, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer Chrystal-Clark, and Carolyn H. Curry, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

PER CURIAM.

I. INTRODUCTION

Andrew J. appeals the Douglas County Separate Juvenile Court's termination of his parental rights to Chance J. The juvenile court terminated Andrew's parental rights pursuant

to Neb. Rev. Stat. § 43-292(1), (2), and (9) (Reissue 2008). For the following reasons, we reverse, and remand for further proceedings.

II. STATEMENT OF FACTS

1. Background of Chance's Mother

On April 17, 2006, Miranda J. gave birth to Chance. In June 2007, the State initiated juvenile proceedings, alleging that Chance came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). Chance was removed from Miranda's home and placed with a foster family. On February 14, 2008, the State filed a motion to terminate Miranda's parental rights. After a hearing, the juvenile court found by clear and convincing evidence that Chance was a child within § 43-292(1), (2), and (9) and that it was in Chance's best interests that Miranda's parental rights be terminated. Miranda appealed to this court in case No. A-08-619, and we subsequently affirmed the juvenile court's termination of Miranda's parental rights in a memorandum opinion filed on October 28, 2008.

2. Background of Chance's Father

Miranda married Chance's father, Andrew, in Omaha, Nebraska, on February 6, 2002. In 2004, Miranda and Andrew moved to Bowling Green, Kentucky, where they resided together until approximately June or July 2005. Andrew testified that the two separated because he found out Miranda was prostituting and using drugs and that he did not see her again until April 2006, when Andrew's grandmother, from Omaha, contacted Andrew and informed him that Miranda was going to have a baby. To determine whether the baby was his child, Andrew traveled from Kentucky to the hospital in California where Miranda was scheduled to give birth.

Andrew explained that after Chance was born, the hospital room atmosphere was "awkward," because when a nurse brought the baby to him, "the baby was white, had blue eyes, and red hair." Miranda asked what was wrong and, when she saw Chance, indicated that Chance must have been "'a trick's baby.'" Because Andrew is black, he believed that Chance was

not his child and returned to Kentucky. There is no father's name listed on Chance's birth certificate.

3. Chance's Background

At the time of trial, Chance was nearly 2½ years old. When juvenile proceedings were first initiated, Chance was placed with a licensed foster parent for approximately 6 months. At Andrew's termination hearing, this foster parent testified that when she received Chance, he was about 1 year old and she believed he was delayed in his development because he could not walk. She testified that Amy Watson, the Department of Health and Human Services (DHHS) caseworker, told her Andrew was Chance's father, but that in the 6 months of placement in that foster home, there were no visitations and no contact from Andrew.

Chance was then transferred to a second foster home, where he has remained. Chance's second foster mother testified that Chance had been with her family for nearly a year. She testified that she believed Chance was developmentally delayed when he came to her home and that, at 18 months old, Chance was barely walking, was unable to communicate, and "just sat there." She described Chance as not interacting well, including not wanting to be held or touched. The second foster mother was concerned about Chance's behavior and quit her job to stay at home with him, explaining that he was afraid to be at daycare. She took Chance to a pediatric specialist to test for autism and also to the Munroe-Meyer Institute in Omaha. She also initiated testing with Omaha Public Schools and secured services for Chance, such as early childhood development and speech therapy. The service providers come to Chance's second foster home and also to Chance's daycare to work with him daily. She testified that Chance is still "delayed," but has adjusted very well, and is now walking, talking, and riding bikes.

Chance's second foster mother explained that Chance has had no visitation with Andrew and has not received any form of contact from him. In late July 2008, she was instructed that Chance would be having visitation with Andrew, but the visitation never took place and the second foster mother was never

contacted. She testified that she and her husband would like to adopt Chance if Andrew's parental rights were terminated.

4. Locating Chance's Father

In June 2007, when Miranda and Chance became involved in juvenile proceedings, a DHHS initial assessment worker, Kris Kircher, was assigned to Chance. At the termination hearing for Andrew, Kircher testified that from the earliest involvement with DHHS, Miranda had consistently informed her that Andrew was Chance's father. Kircher, through Miranda, child support databases, and department of corrections Web sites, was able to find three addresses for Andrew, to which Kircher sent letters on June 4, 2007, informing Andrew that he was the alleged father of Chance and that a juvenile case had been filed. The letters included the case docket number, Miranda's name, and contact telephone numbers. One of the three letters was sent to Andrew at an address on Richland Drive in Bowling Green. Andrew testified that he resided at this address during this time, but received no such letter. Kircher testified that the letters were sent by certified mail, but no evidence was adduced that the letters had been either received or returned. Kircher explained that she had not attempted to contact Andrew by telephone, although she had been present at a visitation wherein Miranda claimed to be on the telephone with Andrew discussing Chance. No evidence was ever presented that Andrew was actually on the telephone during that call.

Shortly thereafter, the case was transferred to the DHHS caseworker, Watson, who testified that she also was involved in the process of locating Andrew. Watson explained that, in such a case where the parent's whereabouts are unknown, she first checks to see what the initial assessment worker has completed and then conducts her own investigation, which includes looking for addresses and telephone numbers, talking with family members, and Internet research. Watson testified that she knew Andrew was Chance's legal father from the marriage certificate of Andrew and Miranda. According to Watson, she did not send out letters to the possible known addresses, because Kircher had recently done that, so Watson

double-checked all the information, while searching for any additional information.

Miranda supplied Watson with a telephone number for Andrew, and Watson testified that she immediately tried to contact Andrew several times and then again "every couple of months" until February 2008. Watson sent Andrew two letters on February 1, 2008, sending one of the two, again, to the Richland Drive address in Bowling Green. Watson testified that on February 14, she received a voice mail from Andrew stating that he had received her letter and providing a new contact telephone number. Watson called Andrew at the newly provided number and left him a lengthy message, with court dates and telephone numbers, but did not actually talk to Andrew until March 4.

During the conversation on March 4, 2008, Andrew told Watson that he did not believe Chance was his son because of how Chance looked at birth and that Andrew had spoken with Miranda approximately 5 months before. Watson explained to Andrew that under Nebraska law, because he and Miranda were married at the time of Chance's birth, he was considered Chance's legal father. Watson testified that Andrew explained that he had not seen Chance since birth, but had talked with Miranda "'all the time'" about Chance and how he looked. Andrew told Watson, again, that he did not think Chance was his, because Andrew is black, but would "take him" if Chance was his child. Watson indicated that she gave Andrew several referrals for DNA testing and several contact numbers for herself, as well as child support agencies. Andrew did not ask to have any contact with the child at that time, but continued to maintain contact with Watson over the following months.

In late April 2008, genetic testing was completed, indicating that Andrew was Chance's father. Watson testified that the first time she and Andrew discussed visitation with Chance was near the end of June 2008, when she asked him about visitation. As previously mentioned, visitation was scheduled between Chance and Andrew in July. Andrew drove to Nebraska from Kentucky, but the visitation did not occur. Trial testimony from Watson, Andrew, and Chance's second foster mother indicates

that a series of miscommunications between the parties resulted in the visitation's never taking place.

5. Juvenile Proceedings

On February 14, 2008, the State filed a supplemental petition alleging that Chance was within the meaning of §§ 43-247(3)(a) (Cum. Supp. 2006) and 43-292(1), (2), and (9), by virtue of abandonment by Andrew for reason of no contact or support in the previous 6 months, and that it was in the best interests of Chance that Andrew's parental rights be terminated.

The adjudication hearing on the supplemental petition was held on August 4, 2008. The State called Chance's foster parents, the initial assessment worker, and the current caseworker. The caseworker, Watson, testified that she believed it was in Chance's best interests that Andrew's parental rights be terminated. Watson explained that in making such a determination, she uses several factors, such as the legal reasons, efforts to locate and work with the parent, services done voluntarily and services ordered, length of time in foster care, permanency options and the care the child is currently receiving, and the long-term emotional, social, educational, and psychological needs of the child. Watson testified that in Chance's case, Chance is stable and has improved with the current foster placement.

At the hearing, Andrew testified in his own behalf. Andrew testified that he still lives in Bowling Green and has been employed with the "Lincoln Way Agency" for 1 year. Andrew testified that he was not previously married, but does have three older children in their twenties. Andrew testified that he raised those children on his own, after their mother left them in the care of Andrew. Andrew testified that he was still married to Miranda and that after the two separated, he traveled to California to see Miranda give birth to Chance. Andrew described the atmosphere in the hospital room as "awkward" because when the nurse gave him the child, Chance was "white, had blue eyes, and red hair." Andrew explained that when Miranda saw the baby, she responded by saying that "'[i]t was a trick's baby.'" Andrew testified that, thus, since he is black, he believed Chance was not his child.

Andrew testified that Miranda did not keep in contact with him after Chance's birth and Andrew's return to Bowling Green. Specifically, Andrew maintained that he had no contact with Miranda until May 2008, even though there was testimony presented that Andrew had told Watson he had spoken with Miranda in the months prior to the petition's being filed. Andrew testified that even though he was living at one of the addresses to which the certified letters had originally been sent in June 2007, he did not receive any such letter. Andrew further explained that until the February 1, 2008, letter from Watson, he knew nothing of the situation involving Chance. Andrew testified that he was never informed that he could send cards, letters, or gifts to Chance and was never offered any type of visitation.

On cross-examination, Andrew testified that once he saw Chance, after birth, he did not believe that Chance was his son and made no effort to try and determine whether he was not in fact the father. Andrew testified as follows:

> Q. Okay. So during that time frame up until you received — allegedly received the second letter from the Department, you didn't make any inquiry during that time to whether or not Chance was your son?
>
> A. Right.
>
> Q. So while Chance was in foster care and you were in Bowling Green, you kept on thinking Chance was someone else's child; correct?
>
> A. Yes, I did.
>
> Q. Now, was the only reason why you didn't think that Chance was your son was because he was white?
>
> A. Yes, because he was white.
>
> Q. So if Chance was born black you would have made some effort to try to be his dad at that time; correct?
>
> A. Not without a DNA test I wouldn't.
>
> Q. So are you saying if the child was born darker at birth, you would have actually made an effort in regards to trying to find out for DNA testing, you would have actually thought of that?
>
> A. Yes, I would have.

However, Andrew testified that since discovering that Chance was his son, in April 2008, he has made continuing efforts to establish a home for Chance, including requesting that a home study be completed and keeping in close contact with Watson. Andrew testified that he would do "whatever it takes" in order to provide a home and be a parent to Chance.

On August 8, 2008, the juvenile court issued an order determining that Chance was a child within the meaning of §§ 43-247(3)(a) (Reissue 2008) and 43-292(1), (2), and (9) and that it was in the best interests of Chance that Andrew's parental rights be terminated. Andrew has timely appealed.

III. ASSIGNMENTS OF ERROR

Andrew has no assignments of error, but argues that the juvenile court erred in (1) finding that statutory grounds for termination of his parental rights were proved by clear and convincing evidence, (2) finding that reasonable efforts under Neb. Rev. Stat. § 43-283.01 (Reissue 2008) were not required, and (3) finding that termination of Andrew's parental rights was in Chance's best interests.

IV. STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008); *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007). When the evidence is in conflict, however, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Tyler F., supra.*

V. ANALYSIS

1. Grounds for Termination of Parental Rights

[3,4] The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697

N.W.2d 707 (2005). The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection, and state intervention to terminate the parent-child relationship must be accomplished by fundamentally fair procedures meeting the requisites of the Due Process Clause. See *In re Interest of Mainor T. & Estela T., supra.*

[5] Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007).

Andrew argues that the juvenile court erred in finding that statutory grounds for termination of his parental rights pursuant to § 43-292(1), (2), and (9) were proved by clear and convincing evidence.

(a) Abandonment

[6] For purposes of § 43-292(1), abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Dezтiny C.*, 15 Neb. App. 179, 723 N.W.2d 652 (2006).

[7,8] Section 43-292(1) further provides that there are grounds for termination of parental rights when a parent has "abandoned the juvenile for six months or more immediately prior to the filing of the petition." The time period for abandonment in this section is determined by counting back 6 months from the date the juvenile petition was filed. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). The supplemental petition in this case was filed on February 14, 2008, which is counted back 6 months to August 14, 2007.

The record clearly shows that Andrew had no contact with Chance during this 6-month time period, from August 14, 2007, to February 14, 2008. In fact, Andrew's only contact with Chance, ever, was immediately following his birth in April 2006. The State's witnesses, including Chance's two foster mothers and two DHHS workers involved, all corroborated

the fact that Andrew had no contact with Chance during this time, or at any time, prior to or following the requisite 6-month time period. The State's witnesses further testified that Andrew has not provided Chance any financial support, and also has not provided any cards, gifts, or letters for Chance. Andrew himself admitted to having no contact with Chance after the hospital visit following Chance's birth.

However, Andrew argues that he did not intend to abandon Chance and had "a just cause or excuse for withholding his presence," because he was not aware that he was Chance's father. Brief for appellant at 11. Andrew argues that this situation is akin to that of the father in *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005), in which this court held that the father's lack of contact with his minor child was directly attributable to his lack of knowledge that he was the child's father. We concluded that the father's failure to connect with his child was due to just cause and excuse because DHHS and the protection safety worker made no attempts to contact the father during the relevant 6-month time period.

The facts of *In re Interest of Dylan Z., supra*, indicate that the parents of Dylan Z. were not married, they were not together when Dylan was born, the father was not present at Dylan's birth, the father was not named on the birth certificate, and Dylan's father suspected Dylan's mother of being involved with another man around the time of conception. The facts also indicate that the DHHS protection safety worker was aware of the name of Dylan's father for 2 years before the supplemental petition was filed and made only two attempts to contact the father, not within the requisite 6-month time period. Dylan's father presented evidence that he was unaware that he was Dylan's father until he was served with the petition.

While the facts in this case differ somewhat from those in *In re Interest of Dylan Z.* because, unlike Dylan's parents, Miranda and Andrew were married at the time of Chance's birth and remained married during the juvenile proceedings, the issue remain the same, whether or not Andrew had the intent to abandon Chance.

Upon our de novo review of the record, we find that Andrew did not have the intent to abandon his child. Clearly,

Andrew abandoned a child, inasmuch as he was present for the birth of a child by his wife; however, the circumstances surrounding the birth indicated to Andrew that he was not Chance's father.

The record indicates that Miranda had been using drugs and prostituting for several months before and after she left Andrew in Kentucky. Miranda disappeared from Andrew's life, and Andrew had no idea where she was or what she was doing until approximately 9 to 10 months after the two separated, when Andrew learned that Miranda was giving birth to a child and subsequently traveled to California to see the birth. Upon viewing Chance after the birth, Andrew did not believe the child was his, the idea of which was confirmed when Miranda indicated that Chance was "'a trick's baby.'" Miranda listed no name for Chance's father on the birth certificate, and Andrew returned to Kentucky.

There is nothing in the record to indicate that Andrew had actual knowledge that Chance was his child until the genetic testing was completed in April 2008; thus, Andrew could not have intentionally abandoned his child (Chance) for 6 months or more immediately prior to the filing of the petition, as required by § 43-292(1), because he did not know Chance was his child. Moreover, despite being legally married to Miranda at the time of Chance's birth, there were abundant reasons for Andrew to reasonably believe that he had not fathered the child, including the child's physical appearance and the mother's statement that the baby was "'a trick's baby.'" The record indicates that once Andrew learned Chance was his child, Andrew made attempts to secure visitation with Chance and Andrew wanted to be a part of Chance's life.

Therefore, because we conclude that the record lacks clear and convincing evidence to support a finding that Andrew intentionally abandoned his child (Chance), we find that the juvenile court erred in finding that this statutory ground was proved by clear and convincing evidence.

(b) Neglect

[9] Neglect, in the context of § 43-292(2), requires that the parents "substantially and continuously or repeatedly neglected

and refused to give the juvenile . . . necessary parental care and protection." We interpret § 43-292(2) to be referring to a parent's obligation to care for his or her child.

The record in this case fails to establish by clear and convincing evidence that Andrew substantially and continuously or repeatedly neglected and refused to give his child (Chance) the necessary parental care and protection. The record demonstrates that Andrew's failure to parent Chance was not due to indifference or intention to abandon or neglect Chance, but a result of Andrew's lack of knowledge that Chance was his child. Further, the record does not support a finding by clear and convincing evidence that Andrew refused to give Chance the necessary parental care and protection, because once Andrew knew Chance was his child, he immediately took steps to become involved with Chance as his father.

Thus, the juvenile court also erred in determining that this statutory ground for termination of Andrew's parental rights was proved by clear and convincing evidence.

(c) Aggravated Circumstance

[10] Finally, § 43-292(9) provides statutory grounds for termination of parental rights if the juvenile court finds that the parent has subjected the child to "aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse." The aggravated circumstance at issue in this case is abandonment. As noted above, we concluded that the juvenile court erred in finding that the State proved by clear and convincing evidence that Andrew had abandoned Chance in accordance with § 43-292(1). Therefore, it also follows that the record does not clearly and convincingly demonstrate that Andrew subjected Chance to the aggravated circumstance of abandonment in § 43-292(9), and the juvenile court erred in finding that this statutory ground for termination was proved by clear and convincing evidence.

2. Reasonable Efforts to Preserve and Reunify

Andrew next argues that the juvenile court erred in failing to require reasonable efforts pursuant to § 43-283.01 to preserve and reunify the family, because the juvenile court erroneously found that Andrew had abandoned Chance.

[11] Section 43-283.01(4)(a) excuses reasonable efforts when the parent "has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment." In accordance with the above findings that the State failed to prove by clear and convincing evidence any of the alleged statutory grounds for parental termination, we find the juvenile court also erred in concluding that reasonable efforts were not required.

3. Best Interests of Child

[12] Finally, Andrew contends that it is not in Chance's best interests to terminate Andrew's parental rights. Andrew argues that he has been employed for 1 year at the Lincoln Way Agency, has already raised three children, and has made repeated trips to Omaha to attend hearings and attempt visitation and that there is no evidence, beyond the opinion of Watson, to suggest that termination of his parental rights is appropriate. In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005).

The only evidence in the record which suggests that termination of Andrew's rights would be in Chance's best interests is the testimony of Chance's caseworker, Watson. Watson testified that it was her opinion, looking at the case as a whole, including Andrew's lack of involvement, Chance's special needs, and Chance's current situation, that it was in Chance's best interests that Andrew's parental rights be terminated. Chance's second foster mother had worked with Watson and testified that Chance has several special needs concerning his developmental delays which require significant time and appropriate services. While Andrew did testify that until hearing the testimony of Chance's second foster mother, he did not know Chance had any special needs, there was no evidence presented that Andrew was unable or unwilling to provide for any of Andrew's special needs.

Watson also testified that her opinion was partly based on Chance's current situation, inasmuch as he had been placed

with a caring and involved foster family who was willing to have permanent placement of Chance. The evidence presented at the trial indicates that Chance's second foster mother has provided appropriate care and that the foster home is a suitable placement for Chance; however, these factors do not support a finding that termination of Andrew's parental rights is in Chance's best interests. Thus, upon our de novo review of the record, we find that the record does not support the juvenile court's finding that termination of Andrew's parental rights is in Chance's best interests.

VI. CONCLUSION

Upon our de novo review of the record, we conclude the State failed to present sufficient evidence to support a finding by clear and convincing evidence that Andrew's parental rights should be terminated, that reasonable efforts were not required, and that termination of Andrew's parental rights is in Chance's best interests. Therefore, we reverse, and remand to the juvenile court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

INBODY, Chief Judge, dissenting.

I must respectfully dissent from the majority's opinion reversing the juvenile court's order which terminated the parental rights of Andrew and remanding for further proceedings. The majority opines that although Andrew abandoned *a child* in this case, he did not intend to abandon *his child*, and that therefore, his parental rights should not be terminated. The majority relies on *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005), in reaching its decision by focusing on Andrew's intent to abandon Chance. The majority reasons that, because Miranda told Andrew that Chance was "'a trick's baby,'" in combination with the physical features of Chance, Andrew did not intentionally abandon his child, not unlike the father in *In re Interest of Dylan Z.*

However, a closer reading of *In re Interest of Dylan Z.* shows a different set of facts from those presented in the present case. In *In re Interest of Dylan Z.*, Dylan's parents were not married or in a relationship when Dylan was born

and the alleged father was not present at Dylan's birth, or anytime thereafter. Conversely, in the present case, Andrew and Miranda were, and still are, legally married. The record contains the marriage certificate for Andrew and Miranda, who were married in Omaha, Nebraska, on February 6, 2002, and those facts were not disputed. Andrew and Miranda's marriage creates a rebuttable presumption that a child born of a marriage is legitimate, unless otherwise decreed by the court. See Neb. Rev. Stat. § 42-377 (Reissue 2008). The presumed legitimacy of a child born in wedlock may not be rebutted by the testimony or declaration of a parent. *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974); *Cavanaugh v. deBaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992). Thus, Miranda's statement to Andrew that Chance must be "'a trick's baby'" (which statement is relied upon by the majority) is not enough to clearly and convincingly rebut the presumption that Chance was Andrew's child.

Also distinguishable from *In re Interest of Dylan Z.* is the testimony by several witnesses, including Andrew, that he had been informed of Chance's birth and subsequently traveled to California to witness the birth. However, Andrew felt that because he is a black man and Chance was "born white, with red hair and blue eyes . . . , there did not appear to be much further need for discussion" as to Chance and Andrew's relationship. Brief for appellant at 13. Andrew admitted that after Chance was born, Andrew left the hospital and had no further contact with Miranda regarding Chance until Miranda's termination of parental rights hearing in May 2008.

There is nothing in the record to indicate that Andrew did not have the means or opportunity, while at the hospital or anytime thereafter, to confirm his suspicions that Chance was not his child. Instead, Andrew made a conscious decision to walk out of the hospital room and out of Chance's life. It was not until nearly 3 years later, after DNA testing had been completed, and almost 4 months after the State had filed the petition to terminate his parental rights, that Andrew took any responsibility for Chance. These circumstances clearly amount to abandonment as provided by Neb. Rev. Stat. § 43-292(1) (Reissue 2008). Andrew has intentionally withheld from

Chance, without just cause or excuse, his presence, care, love, protection, maintenance, and opportunity for the display of parental affection. See *In re Interest of Dezztiny C.*, 15 Neb. App. 179, 723 N.W.2d 652 (2006). Moreover, the record clearly shows that Andrew had no contact from August 14, 2007, through February 14, 2008, which satisfies the requisite 6-month time period for abandonment under § 43-292(1). See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004).

I also disagree with the majority's conclusion that termination of Andrew's parental rights is not in Chance's best interests. In addition to the abandonment issues discussed above, Chance's second foster mother testified that Chance has several special needs, including developmental delays, and that she has sought to provide Chance the appropriate services for those special needs. Andrew testified that he was unaware Chance had any special needs until hearing the second foster mother's testimony, but thought he could get services for Chance, because "in every state of the United States there is [sic] all types of services for kids with needs." The DHHS caseworker also testified that it was her opinion—looking at the case as a whole, including Andrew's lack of involvement, Chance's special needs, and the stability of Chance's current situation—that it was in Chance's best interests that Andrew's parental rights be terminated.

In my opinion, the outcome reached by the majority leads us down a slippery slope. A married man would be able to abandon a child of the marriage based upon the physical features of a child that are substantially different from his own physical features.

Therefore, under a de novo review of the record, I would find that the evidence in the record clearly and convincingly establishes the existence of statutory grounds permitting termination of Andrew's parental rights, as Chance's presumptive father under § 42-377, and that termination of those rights is in Chance's best interests. See *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). Furthermore, because I would find that the juvenile court did not err in finding that Andrew had abandoned Chance pursuant to § 43-292(1), I

would conclude that the State was not required to make reasonable efforts to reunify the family pursuant to Neb. Rev. Stat. § 43-283.01 (Reissue 2008).

CAPITOL CONSTRUCTION, INC., APPELLEE, V. MICKEY C. SKINNER AND JEAN M. SKINNER, AS PROPERTY OWNERS, AND MIKE SKINNER, AS CONTRACTOR, APPELLANTS.

769 N.W.2d 792

Filed June 9, 2009. No. A-08-588.

1. **Courts: Pleadings: Time: Appeal and Error.** When the district court functions as an intermediate court of appeals, its order is not a judgment, but, rather, an appellate decision, and in such circumstance, a motion to alter or amend is not an appropriate motion to file after the district court's decision and does not toll the time for filing a notice of appeal.
2. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. ____: ____. It is the perfection of an appeal to a higher court that divests the district court, sitting as an appellate court, of jurisdiction.
4. **Judgments: Jurisdiction: Appeal and Error.** The generally recognized common-law rule is that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction.
5. **Courts: Judgments: Jurisdiction: Time: Appeal and Error.** A motion asking a district court sitting as an appellate court to exercise its inherent power to modify its decision does not toll the time for taking an appeal. A party can move the court to vacate or modify a final order—but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it. And if an appeal is perfected before the motion is ruled upon, the district court loses jurisdiction to act.
6. **Judgments: Time: Appeal and Error.** A motion to reconsider a district court's appellate decision does not extend the time in which to appeal.

Appeal from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, JEFFREY MARCUZZO, Judge. Appeal dismissed.

Aaron D. Weiner, of Abrahams, Kaslow & Cassman, L.L.P., for appellants.

Brian T. McKernan, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

PROCEDURAL HISTORY

A judgment adverse to Mickey C. Skinner and Jean M. Skinner in the amount of $5,698.38 was entered in favor of Capitol Construction, Inc., by the Douglas County Court. Mickey and Jean, as well as Mike Skinner (collectively the Skinners), timely appealed to the district court by new counsel (appellate counsel), although there was never a withdrawal of the lawyer who tried the case (trial counsel). On November 26, 2007, the clerk of the district court sent a "Notice of Intent to Dismiss" addressed to the trial counsel. On December 27, the district court dismissed the appeal. The dismissal order recited that a "Notice of Intent to Dismiss" letter had been sent to "counsel of record" and had provided instructions on how to avoid dismissal. The district court's order found that case progression standards had not been met and that the "procedural process to avoid dismissal was not followed." On January 14, 2008, appellate counsel filed a "Motion to Reinstate and for Scheduling" that asserted that the notice of intent to dismiss had been sent to trial counsel rather than to appellate counsel, depriving appellate counsel of notice. This motion was heard on February 20, although we have no record of what occurred other than a journal note that a hearing was held in chambers with counsel present and that the matter was taken under advisement. Thus, we do not know what was said or discussed, and of course, there is no evidence before us from that hearing. On April 24, the district court denied the motion to reinstate without any explanation. A notice of appeal to this court was filed on May 23, which was within 30 days of the court's denial of the motion to reinstate, but well beyond 30 days from the dismissal of the appeal by the district court.

ASSIGNMENTS OF ERROR

At the outset, we note that on November 6, 2008, we sustained Capitol Construction's motion to strike portions of the Skinners' brief to this court "to the extent that the exhibits attached to the brief of appellant and all references in said brief to said exhibits are stricken." This is of consequence because

the Skinners' argument largely centers on the contents of the stricken exhibits, which are not in evidence.

The Skinners assert in their first assignment of error that the district court misapplied *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007), when it concluded that it did not have jurisdiction under that decision to hear the Skinners' appeal. However, the district court's order denying the motion to reinstate makes no finding of a lack of jurisdiction, nor does it mention the *Goodman* decision. As a matter of appellate practice, it is difficult to address a finding the lower court did not make or a rationale it did not employ. Nonetheless, the *Goodman* holding is necessarily implicated in our decision to a degree. *Goodman* held that when the district court was functioning as an intermediate court of appeals, its order "was not a judgment, but, rather, was an appellate decision," and that in such circumstances, a motion to alter or amend was not an appropriate motion to file after the district court's decision and did not toll the time for filing a notice of appeal. 274 Neb. at 544, 742 N.W.2d at 30.

With the *Goodman* holding in place, we set forth the Skinners' second assignment of error: The Skinners assert that the district court erred in overruling their motion to reinstate, because the dismissal would not have occurred without error by the district court administrator in sending the notice of intent to dismiss to trial counsel rather than appellate trial counsel, and further that "justice requires [that] the appeal be reinstated."

DISCUSSION

[1,2] The term of the district court for Douglas County begins on January 1 of each year and ends on December 31 of each year. See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1C (rev. 1995). The judgment of dismissal occurred on December 27, 2007, followed by the filing of the motion to reinstate on January 14, 2008. Therefore, the term of the district court at which the dismissal was rendered and entered had ended, meaning that the motion to reinstate was filed "after term," a procedural fact that would be of consequence but for the holding of *Goodman*, 274 Neb. at 544, 742 N.W.2d at 30, that district courts when sitting as intermediate appellate courts do

not render judgments, but, rather, "appellate decision[s]." In a system of vertical stare decisis, we are dutybound to follow *Goodman*. See *Pogge v. American Fam. Mut. Ins. Co.*, 13 Neb. App. 63, 688 N.W.2d 634 (2004). Thus, while there is a series of statutes expressly dealing with the modification of judgments and orders, see Neb. Rev. Stat. §§ 25-2001 and 25-2002 (Reissue 2008), the dismissal at issue here is not an order or judgment, but, rather, an "appellate decision." Accordingly, the statutes relating to modification or vacation of judgments and orders are inapplicable because of the *Goodman* holding. However, we must turn to the issue of jurisdiction because it is the duty of an appellate court to settle jurisdictional issues presented by a case. See *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005).

We have withheld our resolution of this appeal pending the Nebraska Supreme Court's decision in *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009), which was released on May 22, 2009. Although it is a criminal case and does not involve a motion to reinstate after a dismissal of a civil appeal as we have here, it nonetheless informs our decision. Alecia Hausmann was convicted in county court of being a minor in possession of alcohol, and she appealed to the district court. That court dismissed the appeal on September 10, 2007, because the record was inadequate for appellate review because it lacked a final order from the county court. On September 28, Hausmann filed a motion to vacate the dismissal and file a supplemental transcript. The district court granted this motion on October 5, the supplemental transcript was filed October 9, and the district court affirmed the county court's judgment on October 22. Hausmann then appealed to this court on November 21.

In our decision, *State v. Hausmann*, 17 Neb. App. 195, 758 N.W.2d 54 (2008), *reversed* 277 Neb. 819, 765 N.W.2d 219 (2009), we dismissed Hausmann's appeal as untimely filed, reasoning that if the district court lacked jurisdiction to vacate its order of September 10, 2007, then the September 10 order would have been final and appealable, and that if Hausmann's motion to vacate did not toll the time for taking an appeal, then Hausmann's November 21 notice of appeal was untimely. In

our analysis of the jurisdictional issue, we found conflicting authority from the Nebraska Supreme Court, but we followed the most recent decisions and concluded that the district court had no power, when sitting as an appellate court, to rehear its decisions. We concluded that the district court lost jurisdiction over the appeal when it entered the September 10 order and that the subsequent district court proceedings were a nullity and did not toll the time for Hausmann to file her notice of appeal. Therefore, we found that her appeal to this court was out of time. The Supreme Court, on further review, disapproved one of its prior decisions upon which we had relied, reversed our decision, and held that the appeal was timely filed.

Thus, we now turn to what the Supreme Court's opinion in *Hausmann* means for this case, and we begin with the analytic focus that the Supreme Court articulated therein:

> [I]t is important to clarify the difference between two related, but analytically distinct issues: whether the district court has jurisdiction to rehear an appeal on which a final order has been entered, and whether a motion asking the court to exercise such jurisdiction tolls the time for taking an appeal.

277 Neb. at 824, 765 N.W.2d at 223.

[3,4] The Supreme Court observed that the district court vacated its earlier order and entered a new order disposing of the appeal and that Hausmann could clearly appeal within 30 days of the district court's new final order, if the court had the power to enter such an order. The Supreme Court then turned to its decision in *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998), *disapproved, State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009), which held that the district court did not have such power. The Supreme Court then found that *Dvorak* was incorrect and disapproved that decision. The flaw in *Dvorak* was explained to be its suggestion that the entry of a final order, standing alone, divested the court of jurisdiction, when it is the perfection of an appeal to a higher court that divests the district court, sitting as an appellate court, of jurisdiction. The Supreme Court further explained, and we quote:

> [F]undamentally, we erred in finding no authority for the district court, sitting as an appellate court, to modify its

> previous order. We overlooked our decisions to the contrary in [*State v.*] *Painter*[, 224 Neb. 905, 402 N.W.2d 677 (1987),] and *Interstate Printing Co.* [*v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990)]. In particular, we overlooked our reasoning in *Interstate Printing Co.*, in which we relied on the district court's inherent power to vacate or modify its judgments or orders, either during the term at which they were made, or upon a motion filed within 6 months of the entry of the judgment or order. And, as noted by the Court of Appeals in this case, our holding in *Painter* that "an intermediate appellate court may also timely modify its opinion" is consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction.

State v. Hausmann, 277 Neb. at 826, 765 N.W.2d at 224-25.

[5] Having said this, the Supreme Court in *Hausmann* reaffirmed the viability of the holdings of *Painter* and *Interstate Printing Co.* that while an intermediate appellate court still has jurisdiction over an appeal, it has the inherent power to vacate or modify a final judgment or order. With this principle firmly and clearly embraced, the Supreme Court then said:

> We emphasize, however, that in the absence of an applicable rule to the contrary, a motion asking the court to exercise that inherent power does not toll the time for taking an appeal. A party can move the court to vacate or modify a final order—but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it. And if an appeal is perfected before the motion is ruled upon, the district court loses jurisdiction to act.

State v. Hausmann, 277 Neb. at 827, 765 N.W.2d at 225.

In the instant case, the Skinners invoked the district court's inherent power via a motion to reinstate or vacate filed within 30 days of a final order (or, under *Goodman v. City of Omaha*, 274 Neb. 539, 544, 742 N.W.2d 26, 30 (2007), a final "appellate decision"), but the district court did not rule on the motion until well after the 30 days to appeal had run. Therefore, under

State v. Hausmann, 277 Neb. 819, 765 N.W.2d 219 (2009), the time to appeal from the dismissal of December 27, 2007, was well past when the Skinners filed the notice of appeal on May 23, 2008. Accordingly, we lack jurisdiction to consider the merits of the dismissal of December 27, 2007.

Nonetheless, it seems to us that the remaining question is whether we have jurisdiction to consider the April 24, 2008, denial of the motion to vacate, given that the notice of appeal was filed within 30 days of that ruling. In deciding this question, we remember that in *Hausmann*, the Supreme Court made it clear that an "'intermediate appellate court may also timely modify its opinion.'" 277 Neb. at 826, 765 N.W.2d at 225. However, in this case, the district court did not modify its order of dismissal, although the Supreme Court's resolution of *Hausmann* leaves no doubt that the district court could have done so, even though 30 days from the original dismissal had run because no notice of appeal had been filed, nor had the district court issued a mandate—actions that would have deprived the district court of jurisdiction.

[6] Nonetheless, we remember that the district court did not modify its dismissal and that certainty and finality of orders for appeal purposes are desirable. Those factors, coupled with the Supreme Court's clear directive in *Hausmann* that the litigant must within 30 days either achieve the modification he or she seeks or file an appeal, cause us to conclude that once the 30 days in which to appeal run, without either the filing of a notice of appeal or a ruling on the motion to modify, the motion to vacate becomes akin to a "motion to reconsider." And the case law is clear that a motion to reconsider, except when based on newly discovered evidence, does not extend the time in which to appeal. See, *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000); *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999); *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996).

Therefore, for these reasons, we find that this appeal was filed out of time and that we lack jurisdiction.

APPEAL DISMISSED.

MARY LYNN HASKELL AND ELIZABETH MENDOZA, APPELLANTS, V. MADISON COUNTY SCHOOL DISTRICT NO. 0001, ALSO KNOWN AS MADISON PUBLIC SCHOOLS, ET AL., APPELLEES.

771 N.W.2d 156

Filed June 9, 2009. No. A-08-1047.

1. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
2. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
3. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 2008) for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion by the trial court.
4. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Actions: Parties.** Privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.
6. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
7. **Constitutional Law: Initiative and Referendum.** Under Nebraska constitutional provisions vesting the legislative power of the state in the Legislature, but reserving to the people the right of initiative and referendum, the Legislature on the one hand and the electorate on the other are coordinate legislative bodies, and there is no superiority of power between the two. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other.
8. ____: ____. Neb. Const. art. III, § 3, suspends the operation of legislation pending the outcome of a referendum vote only where, among other requirements, the petition was signed by not less than 10 percent of the registered voters.
9. **Schools and School Districts.** Neb. Rev. Stat. § 79-1094 (Reissue 2008) expressly authorizes the school board of any district maintaining more than one school to close any school or schools within such district.
10. **Judgments: Attorney Fees.** A court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

11. **Actions: Attorney Fees: Words and Phrases.** In the context of Neb. Rev. Stat. § 25-824 (Reissue 2008), a frivolous action is one in which a litigant asserts a legal position wholly without merit, that is, without rational argument based on law and evidence to support the litigant's position.
12. **Actions: Attorneys at Law.** Attorneys and litigants should not be inhibited in pressing novel issues or in urging a position which can be supported by a good faith argument for an extension, modification, or reversal of existing law.
13. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed in part, and in part reversed.

John F. Recknor, of Recknor, Williams & Wertz, for appellants.

Joshua J. Schauer, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., and, on brief, Karen A. Haase and Adam J. Prochaska, of Harding & Schultz, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Good Cheer Public Schools (Good Cheer) formerly existed as an elementary-only school district, but was merged into a "K-12" district under the mandate of 2005 Neb. Laws, L.B. 126. After the merger, voters repealed L.B. 126 by referendum. Mary Lynn Haskell and Elizabeth Mendoza now appeal from the district court's orders (1) dismissing their suit for an injunction to stop the surviving district from closing Good Cheer and (2) taxing attorney fees to the appellants and their attorneys. Because the repeal had no retroactive effect, the passage of the referendum did not revive Good Cheer as a separate legal entity. But because the issues presented in this case were not identical to those determined in prior case law and were not entirely without an arguable basis, the district court abused its discretion in awarding attorney fees.

BACKGROUND

Before we turn to the background of the instant case, we summarize the historical events concerning L.B. 126 and its subsequent repeal by referendum, as the issues in the instant

appeal revolve around the effect of the repeal. To provide the historical background, we paraphrase from the decision in *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

L.B. 126 and Its Repeal.

On June 3, 2005, the Legislature passed L.B. 126 over the Governor's veto. L.B. 126 required that all Class I school districts disband and attach to other school districts by June 15, 2006.

On September 1, 2005, a group called Nebraskans for Local Schools Committee filed a referendum petition to repeal L.B. 126. The petition contained the signatures of approximately 7.7 percent of Nebraska's registered voters. The Secretary of State determined that the petition did not contain sufficient signatures to suspend the operation of L.B. 126 pursuant to Neb. Const. art. III, § 3. This would have required the signatures of 10 percent of registered voters. Therefore, L.B. 126 went into effect.

The appellants have alleged that on November 7, 2006, Nebraska voters repealed L.B. 126 in a referendum vote.

Instant Case.

The appellants filed a "Complaint for Injunctive Relief, Declaratory Judgment, and Monetary Damages" with the district court against Madison County School District No. 0001, also known as Madison Public Schools, and its board members, Paul Randles, George Moyer, Douglas Wagner, Harlow Hansen, Mark Higby, and Steve Ruh (collectively Madison). The complaint alleged that the appellants were injured by Madison's decision to close Good Cheer, because their children would be prevented from attending Good Cheer. The complaint also alleged that Good Cheer was a Class I school district and that "[a]s a result of the enactment of [L.B.] 126, the State Reorganization Committee purported to dissolve Good Cheer . . . and attach its geographic territory and assign its property both real and personal to . . . Madison . . . ." The appellants further alleged that the Madison school board decided to close Good Cheer effective at the end of the 2007-08 school year but lacked the power to do so because the repeal of L.B. 126

restored Good Cheer to its former status as an independent Class I school district.

The district court granted Madison's motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6). In doing so, the district court applied the doctrine of res judicata. Neither of the appellants has previously been a party to litigation involving L.B. 126.

Madison also moved for sanctions pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2008). The district court granted sanctions in the amount of $6,700 in attorney fees, one-third of which was taxed to the appellants and two-thirds of which was taxed to the appellants' attorneys.

This timely appeal followed.

ASSIGNMENTS OF ERROR

The appellants assign that the trial court erred (1) in granting Madison's motion to dismiss, (2) in finding the doctrine of res judicata applicable to this case, and (3) in finding the litigation frivolous and granting sanctions against the appellants.

STANDARD OF REVIEW

[1,2] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007). Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008).

[3] On appeal, a trial court's decision allowing or disallowing attorney fees under § 25-824 for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion by the trial court. *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007).

ANALYSIS

Res Judicata.

The appellants request that we consider whether the district court erred in finding that res judicata precluded their cause of action. We decline to do so, because (1) the answer depends

upon a theory of "virtual representation" not yet considered by the Nebraska Supreme Court and (2) there are alternate grounds which are sufficient to uphold the district court's dismissal of the appellants' complaint under § 6-1112(b)(6).

The district court dismissed the appellants' complaint pursuant to § 6-1112(b)(1) and (6) on the basis of res judicata. The court adopted the reasoning of *Nolles v. State Com. Reorganization School Dist.*, 524 F.3d 892 (8th Cir. 2008). In *Nolles*, the Eighth Circuit Court of Appeals applied the doctrine of "virtual representation" to preclude the plaintiffs' claim that L.B. 126 constituted a violation of their fundamental right to vote. The Eighth Circuit determined that the exact same issue was validly decided on the merits in *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006), which case precluded the claim even though the plaintiffs in *Pony Lake Sch. Dist.* were completely different from the plaintiffs in *Nolles*.

[4,5] Although the Eighth Circuit purported to apply Nebraska law, the Eighth Circuit utilized a theory of res judicata not yet recognized in Nebraska. The Nebraska Supreme Court has held that the doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008). The difference between Nebraska law and the Eighth Circuit decision lies in the definition of "privity." The Nebraska Supreme Court has held that privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same. See *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). In *Nolles*, the Eighth Circuit adopted an expansive definition of privity termed "virtual representation," which the Nebraska Supreme Court has not yet adopted. Virtual representation is "'an equitable theory rather than . . . a crisp rule with sharp corners and clear factual predicates, such that a party's status

as a virtual representative of a nonparty must be determined on a case-by-case basis.'" *Nolles v. State Com. Reorganization School Dist.*, 524 F.3d at 902, quoting *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994).

[6] Because we find no Nebraska precedent either adopting or rejecting the virtual representation theory of privity, we decline to resolve the case before us on the ground of res judicata but nevertheless find that the district court correctly sustained the motion to dismiss. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006). As we explain more fully below, we conclude that the appellants' complaint does not set forth a cause of action recognized under Nebraska law and that the complaint was properly dismissed pursuant to § 6-1112(b)(6).

Failure to State Cause of Action.

The premise underlying the appellants' cause of action is that the repeal of L.B. 126 reestablished Good Cheer even though, as the appellants alleged, "the State Reorganization Committee purported to dissolve Good Cheer" pursuant to L.B. 126. The appellants argue that the repeal of L.B. 126 rendered L.B. 126 a nullity, nullified all actions taken pursuant to L.B. 126, and thus restored all Class I schools to their status prior to the enactment of L.B. 126. The appellants support their argument by citing to *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 192, 710 N.W.2d 609, 625 (2006), wherein the Supreme Court stated as follows in concluding that the referendum vote to repeal L.B. 126 would not merely be advisory: "If the voters reject L.B. 126 at the referendum election, the act will stand repealed. . . . To repeal is to rescind or abrogate an existing law." The appellants argue that this language—specifically the word "rescind"—requires us to analogize the repeal of a law pursuant to a referendum to the rescission of a contract. The appellants insist that because rescission restores the parties to the status quo as if the contract had never existed, a referendum which "rescind[s] . . .

an existing law" must similarly restore everyone to status quo as if the law had never existed. See brief for appellants at 22 (emphasis omitted).

[7] However, the rules of contract law are not applicable to measures passed via initiative or referendum. The Nebraska Supreme Court has recognized that measures passed via initiative or referendum are to be treated the same as bills passed by the Legislature. See *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966). Under Nebraska constitutional provisions vesting the legislative power of the state in the Legislature, but reserving to the people the right of initiative and referendum, the Legislature on the one hand and the electorate on the other are coordinate legislative bodies, and there is no superiority of power between the two. See *id*. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other. *Id*. Thus, the rules of contract law do not apply in the instant case.

[8] Further, in the instant case, Neb. Const. art. III, § 3, prevents the referendum vote from repealing L.B. 126 retroactively. Although this section does not explicitly prohibit retroactive repeal, the operation of the section would be substantially impeded if we treated the repeal of L.B. 126 as retroactive. Neb. Const. art. III, § 3, suspends the operation of legislation pending the outcome of a referendum vote only where, among other requirements, the "petition [was] signed by not less than ten percent of the registered voters of the state." A petition containing the signatures of 5 percent of registered voters triggers a referendum vote but does not suspend the operation of legislation. *Id.* In *Pony Lake Sch. Dist. v. State Committee for Reorg., supra*, the Nebraska Supreme Court decided that the petition to repeal L.B. 126 did not contain sufficient signatures to suspend the operation of L.B. 126 pending the referendum vote. In effect, the appellants request that we declare that the referendum accomplished retrospectively what Neb. Const. art. III, § 3, prevented prospectively—the suspension of the operation of L.B. 126 from its effective date until the date of its repeal. We decline to do so, because it would render meaningless the 10-percent requirement contained in Neb. Const. art. III, § 3.

The appellants also urge that because the referendum was not an advisory vote and successfully repealed L.B. 126—which had eliminated Class I school districts—the referendum must have had some effect on the reestablishment of Class I school districts. There indeed was such an effect: Nebraskans may now organize new Class I school districts pursuant to Neb. Rev. Stat. § 79-403 (Reissue 2008). At oral argument, the appellants claimed and Madison conceded that a practical difficulty—the requirement of consent of the K-12 district now encompassing the area of the former Class I district—makes the creation of a new Class I district unlikely. But we reject the appellants' argument that creation of a new Class I district is impossible in the legal sense. There has indeed been an important change in the law accomplished by the referendum vote. However, the vote did not have the effect which the appellants desired—the repeal did not operate to reestablish the former Class I school districts.

[9] Because the repeal of L.B. 126 did not affect the already completed dissolutions of Class I school districts and their attachments to other school districts, Madison's school board had the unrestricted ability to close Good Cheer as of April 14, 2008, when the board adopted a motion declaring such action. Neb. Rev. Stat. § 79-1094 (Reissue 2008) expressly authorizes the school board of any district maintaining more than one school to "close any school or schools within such district." Moreover, Neb. Rev. Stat. §§ 79-525 and 79-526 (Reissue 2008) vest school boards with the power to make decisions regarding school premises. Madison's school board was fully empowered to close Good Cheer. The district court did not err in dismissing the appellants' complaint.

Sanctions.

The appellants argue that the district court abused its discretion in imposing sanctions pursuant to § 25-824. The district court imposed sanctions based on its determination that this case was frivolous because it was precluded by res judicata. Because we deem it inappropriate to decide the primary issue in this case on the basis of res judicata and because the instant case was the first case addressing the claim of retroactivity

after the referendum vote, we conclude that sanctions were not appropriate.

[10,11] A court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith. *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996). In the context of § 25-824, a frivolous action is one in which a litigant asserts a legal position wholly without merit, that is, without rational argument based on law and evidence to support the litigant's position. *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003).

[12] In the instant case, the appellants presented an issue similar to but distinct from the issue decided in *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006). In *Pony Lake Sch. Dist.*, the Nebraska Supreme Court determined that the referendum petition for L.B. 126 would not suspend the operation of L.B. 126, pursuant to Neb. Const. art. III, § 3, pending the referendum election, because there were not sufficient signatures. In the case before us, the appellants posed the question of whether a successful referendum operated retroactively to the statute's original effective date. Although we have determined that in substance, the appellants have requested the same thing prohibited by *Pony Lake Sch. Dist.*, they have asserted a rational argument derived from the language of that decision. Attorneys and litigants should not be inhibited in pressing novel issues or in urging a position which can be supported by a good faith argument for an extension, modification, or reversal of existing law. *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987).

[13] Because in considering sanctions, we must resolve any doubt about the appellants' legal position in their favor, we conclude that the district court abused its discretion in awarding attorney fees. Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. *Cornett v. City of*

Omaha Police & Fire Ret. Sys., supra. Although in the case before us, the appellants' argument is somewhat farfetched, we cannot say that it was wholly without merit.

CONCLUSION

Because the appellants are not entitled to relief from the operation of L.B. 126 prior to its repeal and the repeal was not retroactive, we conclude that Good Cheer, a former Class I school district disbanded pursuant to L.B. 126, no longer exists. Therefore, the appellants' complaint premised on the existence of Good Cheer fails to state a cause of action. The district court did not err in dismissing the appellants' complaint. However, because the appellants' allegation that the repeal of L.B. 126 applied retroactively was not frivolous, we conclude that the district court's award of attorney fees constituted an abuse of discretion, and we reverse the award.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
DARREN J. DRAHOTA, APPELLANT.
772 N.W.2d 96

Filed June 16, 2009. No. A-08-628.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
3. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
4. **Disturbing the Peace: Words and Phrases.** A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community.
5. ____: ____. Breach of the peace is a common-law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.

6. **Constitutional Law: Disturbing the Peace: Words and Phrases.** There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

Darren J. Drahota, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

This appeal involves the conviction of Darren J. Drahota for disturbing the peace. Drahota was convicted after a bench trial in the Lancaster County Court, and his conviction was affirmed on appeal to the Lancaster County District Court. Drahota has now perfected his appeal to this court.

BACKGROUND

The charge of disturbing the peace flows from an exchange of 18 e-mails beginning in late January 2006 and ending February 10, followed by two more e-mails in mid-June 2006—the latter two being the subject of the charge at issue.

In late January 2006, Drahota, apparently then a student at the University of Nebraska-Lincoln, began writing to William Avery, then a professor of political science at the university, who by the end of the exchange was a candidate for election to the Nebraska Legislature and who was ultimately elected to that post, which he held at the time of trial. While it is clear from the record that Drahota and Avery had a student-professor relationship, it is not clear whether that relationship

was prior to the e-mails at issue or was ongoing at the time of the exchange. In this background section, we think the stage is set most efficiently by broadly characterizing the content of the e-mails and the parties involved and then using pertinent quotations from the lengthy e-mails.

The initial series of e-mails began January 27, 2006, by Drahota to Avery and ended February 10 with an e-mail from Drahota to Avery. There are a total of 18 e-mails, 11 by Drahota and 7 by Avery, and 11 of the 18 occur in the timeframe beginning with Drahota's of 2:16 a.m. on February 9 and ending with Drahota's of 12:02 p.m. on February 10. From the content of these e-mails, it appears that Drahota likely falls on the "right," or conservative, side of the conventional political spectrum, whereas Avery appears to fall to the "left," or liberal, side of the spectrum. Obviously, these are very rough generalizations intended to lend some generalized context to the initial e-mail exchange. Essentially, these 18 e-mails are an exchange of differing opinions on a variety of topics, such as the Bush presidency and its policies, the Clinton impeachment, the Iraq conflict, Muslims, terrorism, the "war on terror," the use of force in the Middle East, Al Qaeda, and military service to the United States. In short, the topics of these e-mails involve issues of the day. However, Drahota's e-mails are much longer, to the point that such might be called "rants," and often laced with profanity and invective. Avery's responses, while suggesting disagreement, were quite brief. Interestingly, some portions of the e-mails from Drahota had friendly, respectful, and admiring comments about Avery and his teaching, but in the same e-mail, Drahota would include disrespectful, hostile, angry, profane, and arguably discriminatory comments about blacks, Muslims, and people on the liberal, or left, side of the political spectrum, as well as comments that certainly could be read as disrespectful and insulting to Avery.

The end of these initial exchanges occurred via Avery's e-mail of 3:35 p.m. on February 9, 2006, which responded to Drahota's sent at approximately noon that day, in which Drahota asserted that the university's football team would be good in a couple of years "if Al Queda doesn't destroy us first because of Liberals aiding them (just kidding). . . . You were

my favorite instructor from any class . . . . Even though you're a liberal bum, I'll take you under my wing when the bad times come." Avery's response stated: "I will not respond to this. It is far too extreme, vile, and angry. Plus, it is full of untruths about very decent people (including me), whom you insist on accusing falsely of treason. So, let's end this." This generated an immediate response from Drahota in which he essentially asserted that his intention was to debate with an instructor and that Avery had mistaken the "tone" of his e-mails, ending with, "Let's go drink and discuss your campaign." Approximately 20 minutes later, Avery responded:

> I am tired of this shit. You have accused me of being anti-American, unpatriotic, and having a mental disorder, among other things. I find this offensive and I will not engage in anymore of this with you. I served my country in uniform honorably for four years. How many have you served? Since you are so pure, so pro-American, so absolutely correct, and wonderfully patriotic, I suggest you sign-up for duty in Iraq right away and put all your claims to the test. But, of course, you will not do that. You, Michael Savage, and the "Chicken Hawks" in the Bush Administration don't have the guts!!

While the exhibit containing Drahota's response lacks a time and date, the inference is clear that it was rather immediate, and we quote pertinent portions:

> Fuck you! You don't know me one bit. You are a liberal American coward. If it were up to you, you would imprison Bush before bin Laden . . . . I spent 18 months in Pensacola Florida before I was honorably discharged for a neck injury. You can go fuck yourself if you are going to get that way. I'd kick your ass had you said that right in front of me, but YOU don't have the guts to say that. If you think you do, just try me. . . . We call you people turncoats and I'll be dammed if I'm going to take that kind of disrespect from someone who is so clueless as to my military background. . . . You contradict yourself so much that I want to puke. . . . You lie so much and don't show the true you. . . .
>
> You've really pissed me off[.]

Before Avery responded, Drahota sent another missive at 9:50 p.m. on February 9 that began, "I take that back. I would not resort to violence with you . . . ." This e-mail continued by recounting that Drahota had had friends who were in Iraq at the time or who had been there and that he "was absolutely hearbroke [sic] when [I] realized that I would never be able to achieve my dream of flying planes. . . . I was trying to be nice about everything until you assumed too much and fired me an email that was pretty scathing. Good luck[.]"

The next morning, Avery responded:

> Please consider this email a request that you not contact me again for the purpose of spilling more vile. Also, I think you should know that I have saved ALL of your ranting and threatening emails and will not hesitate to turn them over to the police if I hear anything more of this nature from you. Have a nice day.

Less than an hour later, Drahota wrote a long e-mail of apology stating that he would not further contact Avery regarding politics. We quote selected portions from this lengthy e-mail sent at noon on February 10, 2006:

> I am sorry for using the F-word in my email, and I apologize for saying that I would have become physical had you said that to my face. That kind of stuff goes against my own values . . . . I understand why you were so upset when I inferred that you were a Benedict Arnold. I do not feel that way about you . . . . Will you at least accept my apology. . . . You have taught me a lot . . . . You did not deserve any of the emails that I sent you. I just wanted to debate someone whom, I believe, is very knowledgeable with the opposite point of view that I foster. . . . I believe I have made a complete ass out of myself to my favorite instructor . . . . I'm sorry professor Avery and I hope you will forgive me. You're a good person and you shouldn't have to email me what you just did. Please understand that I feel bad about this. . . . Have a good weekend Bill, and I apologize for disrespecting you.

The above-quoted e-mail appeared to be the end of the matter, at least until 4 months later. Avery received an e-mail at

his university e-mail address, dated June 14, 2006, at 11:58 p.m. from "averylovesalqueda@yahoo.com," with the subject line "Al-Zarqawi's dead. . . ." This was followed on June 16 at 8:50 a.m. with another e-mail to Avery from the same Internet address, with the subject line "traitor." We discuss the contents of these two e-mails later in our opinion.

At this juncture, Avery contacted the Lincoln police. A police investigator traced the e-mails to a computer owned by a woman with whom Drahota lived. Drahota ultimately admitted to the investigator that he had sent the e-mails referenced above on June 14 and 16, 2006. Drahota was charged by complaint under Neb. Rev. Stat. § 28-1322 (Reissue 2008) with disturbing the peace and quiet of Avery "on or about June 14, 2006." After a bench trial before the Lancaster County Court concluding on January 30, 2007, Drahota was found guilty by oral pronouncement and fined $250. Drahota's appeal to the district court was unsuccessful, and he now appeals his conviction to this court.

ASSIGNMENTS OF ERROR

Drahota's pro se appellant's brief does not contain assignments of error, but, rather, lists "Issues," and there are two, which we quote: "The Court erred in overruling Defendant's Motion To Dismiss after the State rested," and "The verdict is not sustained by sufficient evidence that proves the Defendant's guilt beyond a reasonable doubt."

[1] Neb. Ct. R. App. P. § 2-109(D)(1)(e) requires a separate section for assignments of error, designated as such by a heading, and requires that the section be located in the sequence specified by such rule—after a statement of the case and before a list of controlling propositions of law. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007). Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Linch v. Northport Irr. Dist.*, 14 Neb. App. 842, 717 N.W.2d 522 (2006). In instances where the

above-referenced rules are not followed, as here, we review the record for plain error.

We note that in addition to the easy availability of such rules on the Nebraska Judicial Branch Web site, the "Self Help Center" located on the Web site is designed for pro se litigants and contains a section entitled "Find help with . . . Appeal to the Supreme Court/Court of Appeals." See http://www.supremecourt.ne.gov/self-help/ (last visited June 8, 2009). There, a litigant can easily use a link to the "Citizen's Guide to the Nebraska Appellate Courts," which, among other things, emphasizes the need for compliance with § 2-109(D) concerning assignments of error. Accordingly, we review the record for plain error, bearing in mind Drahota's claim that the e-mails were protected political speech.

STANDARD OF REVIEW

[2,3] Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Linch v. Northport Irr. Dist., supra*. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005). 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. *Id.*

ANALYSIS

The trial court found, summarized, that while there was initially some back-and-forth banter, Avery asked that it stop. Instead, Drahota waited 4 months, then created a fake address, "averylovesalqueda@yahoo.com," from which he sent the two e-mails forming the basis of the charge. Avery testified that he was "disturb[ed]" by Drahota's actions. The trial court convicted Drahota of disturbing Avery's peace.

In the two e-mails sent to Avery from the above address, with no indication that they were actually from Drahota, Drahota first wrote concerning the death of Abu Musab

al-Zarqawi (a known high-level terrorist in Iraq), and asked Avery: "Does that make you sad that the al-queda leader in Iraq will not be around to behead people and undermine our efforts in Iraq? . . . You . . . and the ACLU should have a token funeral to say goodbye to a dear friend of your anti-american sentiments."

In Drahota's e-mail of June 16, 2006, with the subject line "traitor," Drahota wrote to Avery:

> I have a friend in Iraq that I told all about you and he referred to you as a Benedict Arnold. I told him that fit you very well. . . . I'd like to puke all over you. People like you should be forced out of this country. Hey, I have a great idea!!!! . . . Let's do nothing to Iran, let them get nukes, and then let them bomb U.S. cities and after that, we will just keep turning the other cheek. Remember that Libs like yourself are the lowest form of life on this planet[.]

[4,5] Therefore, looking at only the two e-mails that were sent on or about June 14, 2006, per the complaint filed against Drahota, we note that after a hiatus of 4 months, Drahota, using a libelous e-mail address, accused Avery of being aligned with a terrorist group responsible for unspeakable violence in this country as well as in Iraq against U.S. troops and Iraqi citizens. He called Avery a traitor, said that he wanted to "puke all over" him, and stated that Avery is the "lowest form of life on this planet." This hardly represents civil discourse or debate, and such accusations impugn Avery's loyalty to the United States. And by labeling him a traitor, Drahota has accused Avery of the crime of treason. The undisputed evidence is that Drahota wrote these two e-mails without identifying himself and that he used a false and libelous source for such e-mails using Avery's name. But, Drahota asserts that what he did is not the criminal act of disturbing Avery's peace. We cannot agree. The Nebraska Supreme Court has said in *State v. Coomes*, 170 Neb. 298, 301-02, 102 N.W.2d 454, 457 (1960):

> A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense

> of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. . . .
>
> Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.

(Citations omitted.)

[6] The argument that the communications of June 14 and 16, 2006, are constitutionally protected speech fails. The U.S. Supreme Court's opinion in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), was quoted at some length by the Nebraska Supreme Court in *State v. Broadstone*, 233 Neb. 595, 600, 447 N.W.2d 30, 34 (1989), as follows:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U.S. 296, 309-310[, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)]."

It would be difficult to author a more apt description of Drahota's actions in sending the two e-mails to Avery in June 2006, or to better explain why the two June e-mails subject him to criminal prosecution and conviction. We emphasize that while we have recounted much of the earlier e-mail exchange in late January and early February 2006, we have done so for background, and to show how what Drahota wrote in June had

changed in tone and content. It is of consequence that in June, he attempted to hide his authorship, in contrast to the February exchange when he plainly identified himself. And, of course, he knew after February 10 that Avery was finished with the "discussion" and wanted no more e-mail from him. Therefore, our affirmance of the conviction is based on the June e-mails, not the exchange 4 months previously. The evidence is plainly sufficient to sustain the conviction.

AFFIRMED.

JOHN KRUID, APPELLANT, V. FARM BUREAU MUTUAL INSURANCE COMPANY AND WESTERN AGRICULTURAL INSURANCE COMPANY, APPELLEES.

770 N.W.2d 652

Filed June 16, 2009. No. A-08-883.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts.** When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
4. **Insurance: Contracts.** An insurer may limit its liability and impose restrictions and conditions upon its obligations under an insurance contract as long as the restrictions and conditions are not inconsistent with public policy or statute.
5. **Statutes: Insurance: Contracts.** When an applicable statutory provision conflicts with the provisions of an insurance policy, the statute and not the insurance policy controls.
6. **Workers' Compensation: Insurance: Contracts.** All workers' compensation insurance policies shall include within their terms the payment of compensation to all employees, officers, or workers who are within the scope and purview of the Nebraska Workers' Compensation Act.
7. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law.
8. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.
9. **Jurisdiction: Courts: Legislature.** The Legislature cannot limit or control the jurisdiction of the district court.

10. **Jurisdiction: Courts.** Where the law does not mandate an exclusive forum for a particular issue, the issue may be resolved in the district court according to the constitutional grant of general jurisdiction in the district court.
11. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
12. **Contracts: Actions.** A suit on a contract is an action at law.
13. **Insurance: Contracts.** An insurance policy is a contract, and its terms provide the scope of the policy's coverage.
14. **Workers' Compensation: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 48-114(2) (Reissue 2004), an employer is every person, firm, or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession as described in Neb. Rev. Stat. § 48-106 (Cum. Supp. 2008), and who has any person in service under any contract of hire, express or implied, oral or written.
15. ____: ____. Pursuant to Neb. Rev. Stat. § 48-115(2) (Cum. Supp. 2008), an employee is defined as every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in Neb. Rev. Stat. § 48-106 (Cum. Supp. 2008) under any contract of hire, expressed or implied, oral or written.
16. **Workers' Compensation.** If an employee subject to the Nebraska Workers' Compensation Act suffers an injury on account of which he or she would otherwise have been entitled to the benefits provided by such act, the employee shall be entitled to the benefits provided under such act, if the injury occurred within this state, or if at the time of such injury (1) the employment was principally localized within this state, (2) the employer was performing work within this state, or (3) the contract for hire was made within this state.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Reversed and remanded for further proceedings.

George H. Moyer, of Moyer, Egley, Fullner & Montag, for appellant.

Anne E. Winner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and CASSEL, Judge.

CASSEL, Judge.

INTRODUCTION

John Kruid filed a declaratory action seeking a judgment that his Nebraska workers' compensation insurance policy

covered an employee working solely at Kruid's South Dakota business location. The district court granted the insurers' motion for summary judgment on the basis that the terms of the policy did not cover such an employee. Because the Nebraska Workers' Compensation Act (the Act) mandates that workers' compensation insurance policies cover all employees who fall within the purview of the Act, we conclude that the district court erred in finding that the terms of the policy limited coverage to employees located in Nebraska and in granting summary judgment.

BACKGROUND

Because the only motion for summary judgment filed was that of the insurers, we state the facts in the light most favorable to Kruid, the nonmoving party.

At some time during the spring of 2004, Bruce Knutson claimed to have suffered a sciatic nerve injury while he was employed by Kruid. Knutson worked at Kruid's business location in Sioux Falls, South Dakota, called Pax Equipment. Knutson worked for Kruid only in South Dakota. Kruid's workers' compensation insurance carriers, Farm Bureau Mutual Insurance Company and Western Agricultural Insurance Company (collectively Farm Bureau), denied coverage.

Kruid owned Madison Farm Supply (Farm Supply) in Madison, Nebraska. Farm Supply sells livestock feeding equipment, assembles feed bins, and functions as a warehouse that distributes Pax brand equipment to dealers. Kruid has employees in Madison who help him run the business.

In 1999, Kruid purchased the Pax Equipment location to serve as a warehouse. Kruid's purpose in purchasing Pax Equipment was to provide his customers in South Dakota, Minnesota, and Iowa with a more convenient location to pick up the Pax merchandise they had ordered.

In Kruid's deposition, he testified that Knutson was a full-time employee of Farm Supply in 2004. Kruid also responded affirmatively to the statement that in "2004, . . . Knutson . . . came on board, allegedly originally intended to be a full-time employee, but actually turned out [to be] a part-time employee of Pax Equipment."

Kruid owned both business locations personally and did not transact business through any form of business entity. Kruid conducted the administrative functions for both Farm Supply and Pax Equipment in Madison and maintained all business records there. Further, Kruid ran both locations in conjunction with his sales job with the distributing company that manufactured Pax brand equipment. In Kruid's deposition, he specifically denied that he considered Farm Supply and Pax Equipment as separate businesses. He explained:

> The only reason we kept Pax Equipment o[r] Pax on the building in Sioux Falls was to identify what the company was. . . . Our feed bins, our brand names. We could easily have called it Madison Farm Supply, Sioux Falls warehouse, but our dealers and customers would have no idea what that was. We needed to keep the Pax logo on the building.

Kruid's workers' compensation insurance policy with Farm Bureau listed "John Kruid D/B/A Madison Farm Supply" as the insured and typically listed "604 Industrial Pkw Rd Madison NE 68748" (one year's policy had minor immaterial variations in the address) as the location of the business insured. The policy provided as follows regarding the locations it covered: "**E. Locations** This policy covers all of your workplaces listed in Items 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. states unless you have other insurance or are self-insured for such workplaces." No workplaces other than the Madison location were listed, and the only state listed under 3.A. was Nebraska. No other portion of the policy provided coverage in states not listed.

After Farm Bureau denied Knutson's claim, Kruid filed a complaint in the district court for Madison County, Nebraska, in which he alleged that the policy covered "his employees in South Dakota and, in particular, the claim of . . . Knutson." Kruid requested a judgment in the amount of the attorney fees he had expended in defending Knutson's subsequent workers' compensation claim in South Dakota and a declaration that the policy covered his South Dakota employees. Kruid also alleged a second cause of action for reformation of the insurance contract. Farm Bureau filed an amended answer

denying that coverage was provided under the policy and alleging that Kruid made misrepresentations on his application for insurance.

Farm Bureau moved for summary judgment on Kruid's first cause of action only, which sought a declaratory judgment that the policy provided coverage. Kruid did not file a motion for summary judgment.

The district court granted Farm Bureau's motion for summary judgment. The court reasoned that the terms of the policy did not provide coverage for Kruid's employees in South Dakota. Kruid then appealed to this court in case No. A-08-443, which we summarily dismissed on June 2, 2008, because of the unresolved second cause of action. After the district court granted Kruid's motion to voluntarily dismiss his second cause of action, he timely appealed to this court.

ASSIGNMENTS OF ERROR

Kruid assigns that the district court erred in (1) finding that Farm Bureau's workers' compensation policies did not cover employees working in South Dakota and (2) sustaining Farm Bureau's motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

We find that the district court erred in granting Farm Bureau's motion for summary judgment. Although in the instant case the terms of the insurance policy cover only workplaces in Nebraska, the Act mandates additional coverage and, to the extent of any conflict, overrides the insurance contract.

[3] Kruid does not contend that the applicable policy, on its face, covers employees located solely outside of Nebraska. The plain language of the policy made it clear that the terms of the policy did not cover employees working solely outside of Nebraska. When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

[4,5] Kruid instead argues that even though the language of the policy would exclude Knutson's claim, the policy necessarily provides all coverage that is mandated by the Act. We agree. An insurer may limit its liability and impose restrictions and conditions upon its obligations under an insurance contract as long as the restrictions and conditions are not inconsistent with public policy or statute. See *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008). However, when an applicable statutory provision conflicts with the provisions of an insurance policy, the statute and not the insurance policy controls. *Danner v. State Farm Mut. Auto. Ins. Co.*, 7 Neb. App. 47, 578 N.W.2d 902 (1998). See *Rudder v. American Standard Ins. Co. of Wisconsin*, 187 Neb. 778, 194 N.W.2d 175 (1972). In *Rudder*, an automobile insurance company denied a claim because a clause in the policy excluded coverage in certain circumstances where the policy holder was not driving his own car. The Nebraska Supreme Court held that because a statute required a motor vehicle liability policy to provide coverage under the circumstances, the policy provided coverage even though the policy language excluded coverage. Therefore, if the Act requires coverage under the applicable facts, it would override the insurance policy.

[6-8] The Act mandates that insurers cover all of the employees for which the employer is liable under the Act. Pursuant to Neb. Rev. Stat. § 48-146 (Reissue 2004), all workers' compensation insurance policies "shall include within their terms the payment of compensation to all employees, officers, or workers who are within the scope and purview of the . . . Act." Statutory interpretation presents a question of law. *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008). Absent anything to the contrary, statutory language is

to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous. *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007). The plain language of the statute requires that a workers' compensation insurance policy cover all employees that fall within the purview of the Act.

As a respected commentator has explained, statutes similar to the Act—which statutes purport to provide full coverage—generally require "coverage of all employees of the assured in all occupations and all businesses." 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 151.02 at 151-3 (2007). Thus, under Nebraska's full coverage statute, Farm Bureau's policy covers all of Kruid's employees—including Knutson—so long as the employee falls within the scope of the Act.

At oral argument, Farm Bureau's counsel conceded that the Act is a "full coverage" statute, but asserted that the Nebraska Workers' Compensation Court had exclusive, original jurisdiction to determine whether Knutson was covered under the Act. We disagree with counsel's assertion that the compensation court's jurisdiction is exclusive. Due to the nature of Kruid's claim, the district court had jurisdiction to determine the extent of the insurance coverage afforded to Kruid.

[9] The Nebraska Supreme Court's decision in *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999), explained the principles which support the conclusion that the district court had jurisdiction to hear the instant case. The Supreme Court described the effect of a 1990 amendment to Neb. Rev. Stat. § 48-161 (Reissue 2004). Prior to the 1990 amendment, § 48-161 did not confer jurisdiction over workers' compensation insurance coverage disputes upon the Workers' Compensation Court. Thus, until the 1990 amendment, only the district court had jurisdiction of issues of insurance coverage pursuant to its general grant of jurisdiction under Neb. Const. art. V, § 9. The 1990 amendment granted ancillary jurisdiction of such disputes to the compensation court. The Supreme Court then discussed the situation after the 1990 amendment and stated that although the existence of insurance

may be decided in the Workers' Compensation Court in a claim before it pursuant to § 48-161, such jurisdiction is not exclusive. The Supreme Court explained that the 1990 amendment of § 48-161 did not destroy the district court's jurisdiction over coverage disputes because the district court's general jurisdiction emanates from the Nebraska Constitution itself and that therefore the Legislature cannot limit or control the jurisdiction of the district court. See *Schweitzer v. American Nat. Red Cross, supra*. Additionally, the Supreme Court observed that if the Legislature had designated the Workers' Compensation Court as the exclusive forum for resolution of coverage disputes, the parties would be required to submit the dispute to the Workers' Compensation Court in order to obtain relief. However, the Supreme Court concluded that this was not the case because there was no such requirement in § 48-161. The Supreme Court emphasized that the district court's jurisdiction was appropriate because the underlying claim in the suit before the district court was not derived from the Act. In *Schweitzer*, the plaintiff had asserted a common-law negligence claim.

[10-13] In the instant case, Kruid asserted a claim founded on breach of an insurance contract, and because the district court has the constitutional authority to decide common-law actions for breach of contract, the court had the power to decide the insurance coverage dispute presented in the instant case. Where the law does not mandate an exclusive forum for a particular issue, the issue may be resolved in the district court according to the constitutional grant of general jurisdiction in the district court. *Schweitzer v. American Nat. Red Cross, supra*. Of course, an action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006). A suit on a contract is an action at law. *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 633 N.W.2d 102 (2001). An insurance policy is a contract, and its terms provide the scope of the policy's coverage. *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009). Thus, the

district court was empowered to determine whether the insurance contract at issue in the case before us afforded coverage to Kruid for Knutson's alleged injury.

Therefore, the pertinent question becomes whether the Act could be applicable to Knutson's claim. Bearing in mind that this matter is before us on summary judgment, we do not resolve factual disputes. If the facts viewed most favorably to Kruid would require coverage under the Act, the summary judgment granted below cannot stand.

We conclude Kruid has presented sufficient evidence to create a question of material fact as to whether the Act applied. The Act applies to "every resident employer in this state and nonresident employer performing work in this state who employs one or more employees in the regular trade, business, profession, or vocation of such employer." Neb. Rev. Stat. § 48-106(1) (Cum. Supp. 2008). Section 48-106 sets forth certain exclusions, none of which are applicable to the instant case.

[14] The record contains evidence which can be viewed as showing that Kruid is an "employer" within the meaning of the Act. Pursuant to Neb. Rev. Stat. § 48-114(2) (Reissue 2004), an "employer" is "every person, firm, or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession as described in section 48-106, and who has any person in service under any contract of hire, express or implied, oral or written." Kruid has created a question of material fact as to whether he is an employer that has contracted to hire employees to work in his "business . . . as described in section 48-106" by adducing evidence that he has employed one or more employees in his regular business in Madison.

[15] The record also contains evidence suggesting that Knutson qualified as an "employee" under the Act. Pursuant to Neb. Rev. Stat. § 48-115(2) (Cum. Supp. 2008), an employee is defined as "[e]very person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106 under any contract of hire, expressed or implied, oral or written." Kruid adduced evidence

that he employed Knutson to work for his business. Certainly, viewed in the light most favorable to Kruid, this is sufficient to raise an issue of fact as to whether Knutson thereby fell within the Act's definition of an employee.

[16] The third paragraph of § 48-115(2) imposes an additional prerequisite to coverage under the Act, and provides as follows:

> If an employee subject to the . . . Act suffers an injury on account of which he or she . . . would otherwise have been entitled to the benefits provided by such act, the employee . . . shall be entitled to the benefits provided under such act, if the injury . . . occurred within this state, or if at the time of such injury (a) the employment was principally localized within this state, (b) the employer was performing work within this state, or (c) the contract of hire was made within this state.

Clearly, Kruid adduced evidence that he fell within subsection (b) by showing that he operated a business in Madison. Further, Kruid's testimony that he hired Knutson as an employee of Farm Supply, which is located in Madison, raises at least an inference that the contract of hire was made in Nebraska. On summary judgment, the court does not resolve issues of material fact. Because Kruid has demonstrated that Farm Bureau is not entitled to summary judgment as to whether the Act required coverage, the district court erred in granting summary judgment for Farm Bureau. On the other hand, Kruid did not move for summary judgment on his first cause of action. Therefore, we express no opinion whether he would have been entitled to judgment as a matter of law. Because of the narrow scope of this opinion, which holds only that the district court erred in granting summary judgment in favor of Farm Bureau, numerous issues may have to be addressed in the first instance by the district court on remand.

CONCLUSION

Because Kruid adduced evidence sufficient to create a question of material fact as to whether the Act covered Knutson at Kruid's South Dakota location, the district court erred in

granting summary judgment. We therefore reverse the judgment and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IRWIN, Judge, participating on briefs.

IN RE ESTATE OF ERMA R. SEHI, DECEASED. MERLE SEHI ET AL., APPELLANTS, V. JOHN SEHI, PERSONAL REPRESENTATIVE, APPELLEE.

772 N.W.2d 103

Filed June 16, 2009. No. A-08-1239.

1. **Statutes.** Statutory interpretation is a question of law.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Supersedeas Bonds: Words and Phrases: Appeal and Error.** A supersedeas bond is an appellant's bond to stay execution on a judgment during the pendency of the appeal.
4. **Supersedeas Bonds: Appeal and Error.** Where the court has discretion to set the amount of a supersedeas bond, the court should do so in a manner that will give full protection to the appellee.
5. **Decedents' Estates: Appeal and Error.** In all matters arising under the Nebraska Probate Code, appeals may be taken to the Nebraska Court of Appeals in the same manner as an appeal from district court to the Court of Appeals.
6. **Decedents' Estates: Supersedeas Bonds: Appeal and Error.** When an appeal under the Nebraska Probate Code is by someone other than a personal representative, conservator, trustee, guardian, or guardian ad litem, the appealing party shall, within 30 days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond or undertaking in such sum as the court shall direct, with at least one good and sufficient surety approved by the court, conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her, unless the court directs that no bond or undertaking need be deposited.
7. **Decedents' Estates.** A will contest proceeding in the district court constitutes a matter arising under the Nebraska Probate Code.
8. **Jurisdiction: Legislature.** Where the district court's jurisdiction arises out of legislative grant, it is inherently limited by that grant.
9. **Decedents' Estates: Wills: Courts: Jurisdiction.** The district court's jurisdiction to hear a will contest pursuant to Neb. Rev. Stat. § 30-2429.01 (Reissue 2008) is limited to determining that matter alone, and the rest of the probate proceeding remains in the jurisdiction of the county court.

Appeal from the District Court for Antelope County: PATRICK G. ROGERS, Judge. Motion sustained.

James G. Egley, of Moyer, Egley, Fullner & Montag, for appellants.

Bradley C. Easland, of Johnson, Morland, Easland & Lohrberg, P.C., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

We consider an interlocutory motion to require the appellants, Merle Sehi, Patricia Hruby, and Kathleen Dubas, to file a supersedeas bond. To decide the motion, we must determine whether a party appealing from a district court's resolution of a will contest, after a transfer to such court pursuant to Neb. Rev. Stat. § 30-2429.01 (Reissue 2008), must provide the supersedeas bond required by Neb. Rev. Stat. § 30-1601(3) (Reissue 2008). Because the district court's jurisdiction to adjudicate the will contest arises solely under the Nebraska Probate Code, we conclude that the appellants must file a supersedeas bond.

BACKGROUND

On August 7, 2007, the appellants filed a petition in county court to set aside an informal probate proceeding to probate the 1996 will of Erma R. Sehi. The appellants claimed that (1) the will was not validly executed, (2) the will was the result of undue influence, and (3) the will was the result of fraud, duress, and the mistake of the decedent. The appellants transferred the proceeding from county court to district court pursuant to § 30-2429.01.

Although we do not have the motion in our record, the personal representative, John Sehi, moved for summary judgment on the appellants' claims. The district court granted summary judgment against the appellants on the issues of valid execution and undue influence, but denied the motion as to the issues of fraud, duress, and mistake. The parties waived a jury

trial, and the matter was tried to the bench. After the trial, the court dismissed the appellants' remaining claim. The appellants moved for a new trial, which the district court denied. Subsequently, the appellants filed a notice of appeal and a $75 cash bond with the district court.

John filed a "Motion for Supersedeas Bond" with this court in which he requested that we enter an order requiring the appellants to deposit a supersedeas bond pursuant to § 30-1601(3). John requested that the bond be set at $500,000 and attached an inventory of the estate and an appraisal of the estate's real property to substantiate that $500,000 was the approximate value of the estate. In the instant opinion, we dispose only of John's "Motion for Supersedeas Bond."

STANDARD OF REVIEW

[1,2] Statutory interpretation is a question of law. *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009). When reviewing questions of law in a probate matter, we reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

[3,4] We begin by recalling the basic function of a supersedeas bond. A supersedeas bond is "[a]n appellant's bond to stay execution on a judgment during the pendency of the appeal." Black's Law Dictionary 190 (8th ed. 2004). It suspends further proceedings on the judgment from which the appeal is taken. See, Neb. Rev. Stat. § 25-1916 (Reissue 2008); *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001). In an appeal from a typical case arising in the district court, the supersedeas bond is set pursuant to the requirements of § 25-1916. Except in cases where the judgment is a specified dollar amount, § 25-1916 accords the judge discretion in setting the bond—except the bond cannot exceed the lesser of $50 million or 50 percent of the appellant's net worth. Where the court has discretion to set the amount of the supersedeas bond, the court "should do so in a manner that will give full protection to the appellee." 4 C.J.S. *Appeal and Error* § 542 at 498 (2007). Where the judgment is for a specified dollar amount, the bond amount is further limited by

the total of the amount of the judgment, interest, and cost of the appeal.

Normally, where a case originates in the district court and a party desires to appeal from the district court's judgment, the party is not required to post a supersedeas bond in order to take the appeal. If the appellant chooses not to seek a supersedeas, the judgment may be enforced during the pendency of the appeal. Where the appellant does not obtain a supersedeas, Neb. Rev. Stat. § 25-1914 (Reissue 2008) requires the appellant to file a cost bond or cash deposit of at least $75. Unlike a supersedeas bond, however, the cost bond does not stay the enforcement of the judgment. See § 25-1916. Thus, in an ordinary appeal from a judgment in a case originating in the district court, the appellant may choose whether to seek a supersedeas bond.

However, in appeals from probate cases, the law in some instances imposes a mandatory requirement of supersedeas. Below, we discuss six aspects of the question. First, we find that § 30-1601 applies to appeals "[i]n all matters arising under the Nebraska Probate Code." § 30-1601(1). Second, we observe that a supersedeas bond is mandatory in a probate appeal unless the appellant is a party specifically exempted from the requirement pursuant to § 30-1601(3). Third, we note that some language in § 30-1601 does not seem to apply to decisions of the district court. Fourth, we recognize that the historical development of § 30-1601, as well as the laws governing appeals from the county court in probate matters, demonstrates a legislative intent to subject appeals of will contests transferred to district courts to the mandatory supersedeas requirement of § 30-1601(3) in probate appeals. Fifth, the jurisdictional status of a will contest proceeding in the district court indicates that it is part of the larger county court probate proceeding and subject to the same requirements. Finally, we conclude that a contrary rule would lead to absurd results.

[5,6] We first consider the specific language of § 30-1601. Section 30-1601, in the relevant portion, provides as follows:

> (1) In all matters arising under the Nebraska Probate Code and in all matters in county court arising under the Nebraska Uniform Trust Code, appeals may be taken to

> the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals.
>
> . . . .
>
> (3) When the appeal is by someone other than a personal representative, conservator, trustee, guardian, or guardian ad litem, the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond or undertaking in such sum as the court shall direct, with at least one good and sufficient surety approved by the court, conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her, including costs under subsection (6) of this section, unless the court directs that no bond or undertaking need be deposited. If an appellant fails to comply with this subsection, the Court of Appeals on motion and notice may take such action, including dismissal of the appeal, as is just.
>
> (4) The appeal shall be a supersedeas for the matter from which the appeal is specifically taken, but not for any other matter. . . .
>
> (5) The judgment of the Court of Appeals shall not vacate the judgment in the county court. The judgment of the Court of Appeals shall be certified without cost to the county court for further proceedings consistent with the determination of the Court of Appeals.

[7] In the statutory scheme, a will contest proceeding in the district court constitutes a matter "arising under the Nebraska Probate Code." See § 30-1601(1). The statute authorizing the transfer of a will contest proceeding to the district court is found at § 30-2429.01. This statute falls within the range of statutes specifically described as composing the Nebraska Probate Code. See Neb. Rev. Stat. § 30-2201 (Reissue 2008) ("[s]ections 30-2201 to 30-2902 shall be known and may be cited as the Nebraska Probate Code"). Thus, a will contest transferred to the district court would appear to be subject to § 30-1601.

Second, it is clear that the appellants are not among the individuals exempted from the bond requirement pursuant to

§ 30-1601(3). The appellants have not resisted their apparent status as "someone other than a personal representative, conservator, trustee, guardian, or guardian ad litem." See *id.*

Third, we concede that the language of the current version of § 30-1601 generates some confusion as to whether the appeal procedure contained therein—and thus the supersedeas bond requirement—is applicable to a will contest transferred to the district court. Although § 30-1601(1) states that it applies to "all matters arising under the Nebraska Probate Code," other language suggests that § 30-1601 pertains expressly to appeals from county court probate proceedings. Subsection 30-1601(1) provides that an appeal is taken "in the same manner as an appeal from district court." This language may be read as indicative that an appeal pursuant to this statute is not an appeal from district court. Subsection 30-1601(3) provides that the bond is submitted to the "clerk of the county court." Usually, an appeal bond or cost deposit is posted or deposited with the court from which the appeal is taken. See, §§ 25-1914 and 25-1916 (district court); Neb. Rev. Stat. §§ 25-2729 and 25-2730 (Reissue 2008) (county court). In addition, § 30-1601(5) states that "[t]he judgment of the Court of Appeals shall not vacate the judgment in the county court" and "shall be certified without cost to the county court" but does not mention a district court judgment. Again, this suggests that § 30-1601 pertains particularly to appeals from county court.

However, turning to our fourth point, the history of previous enactments of § 30-1601 and related statutes demonstrates that the Legislature intended the supersedeas bond requirement contained in § 30-1601(3) to apply in a will contest heard in district court.

Historically, an appeal from a will contest always required a supersedeas bond. Originally, all appeals in probate matters, including will contests, required a supersedeas bond due to the statutory framework governing the appeal process. Probate matters—including will contests—were first heard in county court, and all appeals were taken from county court to district court and governed by the supersedeas bond requirement now contained in § 30-1601.

Prior to 1970, Neb. Const. art. V, § 16 (repealed 1970), placed original jurisdiction of all probate matters with the county court. Section 30-1601 (Reissue 1956) provided as follows regarding appeals: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." Neb. Rev. Stat. § 30-1603 (Reissue 1956) imposed a supersedeas bond requirement in all appeals governed by § 30-1601. Neb. Rev. Stat. § 30-1604 (Reissue 1956) limited the effect of the supersedeas bond to the specific matter appealed only. Section 30-1603 was similar in content to the current § 30-1601(3) (Reissue 2008). Prior to 1972, appeals to the district court in probate matters were tried de novo. See, *In re Estate of Hagan*, 143 Neb. 459, 9 N.W.2d 794 (1943); Neb. Rev. Stat. §§ 24-544, 27-1305, and 30-1606 (Reissue 1956). Under the procedures then existing, all will contests were necessarily heard in county court in the first instance and became subject to the supersedeas bond requirement on appeal to the district court. There was no mechanism for transfer of a will contest to the district court, because an appeal de novo automatically ran to such court. Because the appeal was a true de novo proceeding in the district court, there was an entirely new trial and all issues pertaining to the will would be tried afresh in the district court. Under such scheme, a transfer procedure would have made no sense.

But as a result of legislation enacted in 1969 and intended to accomplish a complete restructuring of the county courts and to eliminate all justice of the peace courts, a constitutional amendment was placed before the voters at the 1970 general election, which measure included the repeal of article V, § 16. The voters approved the measure. In 1972, the Legislature implemented the constitutional revisions and adopted Neb. Rev. Stat. § 24-517 (Cum. Supp. 1972) to define the jurisdiction of the county court. See 1972 Neb. Laws, L.B. 1032, § 17. We observe that this did not modify the county court's jurisdiction substantively in any way that pertains to the instant case.

After the 1972 reorganization of county courts, appeals in probate matters continued to be heard de novo on appeal to the district court. Neb. Rev. Stat. § 24-541 (Reissue 1975). In 1974, the Legislature adopted the Nebraska Probate Code, to become effective on January 1, 1977. See *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980). However, the probate code revisions did not affect the appeal statutes codified in chapter 30, article 16, of the Nebraska Revised Statutes.

In 1981, the Legislature revised the probate appeal procedure pursuant to 1981 Neb. Laws, L.B. 42, § 6, so that the district court reviewed appeals from county court in probate (and other civil) matters "for error appearing on the record." Neb. Rev. Stat. § 24-541.06(1) (Cum. Supp. 1982). Pursuant to L.B. 42, the Legislature consolidated the probate appeal procedure with the appeal procedure for appeals from county court, thereby imposing a uniform standard of review on appeal. See Neb. Rev. Stat. §§ 24-541.01 to 24-541.10 (Cum. Supp. 1982) and 24-551 (Reissue 1985). However, the Legislature simultaneously enacted § 30-2429.01 (Cum. Supp. 1982), which permitted the parties to transfer a will contest from county court to district court so that it could be heard in the first instance in district court. See 1981 Neb. Laws, L.B. 42, § 18. This in essence preserved the old appeal "de novo" procedure for will contests inasmuch as a will contest could be tried in district court on the merits. Further, although the supersedeas bond requirement for probate appeals changed location, a supersedeas bond was still required for appeals "[i]n matters arising under the Nebraska Probate Code." § 24-541.02(4)(a).

From the plain language of L.B. 42, we conclude that the Legislature did not intend to modify the appeal procedure in a will contest by permitting parties to remove it from county court to district court. The Legislature instead sought only to preserve the district court's ability to serve as a trial court in a will contest. We reach this conclusion because L.B. 42 contains no language that sets forth a separate appeal procedure or purports to abolish the supersedeas bond requirement for a will contest heard in district court.

Further revisions to the probate appeal procedure have not modified the applicability of the appeal procedure. In 1995, the Legislature modified the probate appeal procedure so that appeals in "matters arising under the Nebraska Probate Code" were taken in the first instance to the Court of Appeals, and not to the district court. 1995 Neb. Laws, L.B. 538, § 7. L.B. 538 also moved the entire probate appeal procedure back to § 30-1601 (Reissue 1995) and thus separated probate appeals from other appeals from county court proceedings. However, L.B. 538 appears to be derived from the previous appeal statutes (Neb. Rev. Stat. § 25-2728 et seq. (Reissue 1989 & Cum. Supp. 1994)), and it imposed a nearly identical supersedeas bond requirement.

We conclude that the current version of § 30-1601 (Reissue 2008) was not enacted with the intent to exclude will contests heard in district court from the supersedeas bond requirement contained in § 30-1601(3). It is important to note that in enacting § 30-2429.01, the Legislature sought to preserve a procedure in which the district court served as a trial court and in which a supersedeas bond was necessarily required in an appeal. Further, pursuant to pre-1981 procedure, a supersedeas bond was already in place prior to any further appeal from the district court's de novo determination to the Nebraska Supreme Court. Because a supersedeas bond was required in the initial appeal to a district court, it remained in effect as a supersedeas during the pendency of any subsequent appeal to the Nebraska Supreme Court. See *In re Estate of Mathews*, 125 Neb. 737, 252 N.W. 210 (1933). We can find no evidence of any legislative intent to destroy this requirement.

[8,9] Fifth, the nature of the district court's jurisdiction to hear a will contest indicates a will contest is an inseverable part of the county court probate proceeding and thus cannot be treated differently from matters decided in county court for purposes of appeal. The district court's jurisdiction over a will contest stems from Neb. Const. art. V, § 9. Article V, § 9, provides that in addition to "chancery and common law jurisdiction," which has been termed the district court's "general" jurisdiction, the district court has "such other jurisdiction as the Legislature may provide." Because the district court's

general jurisdiction, by its very nature, does not extend to probate matters, its jurisdiction over probate matters is limited to instances where the Legislature has created a statutory grant of jurisdiction. Where the district court's jurisdiction arises out of legislative grant, it is inherently limited by that grant. See *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). Therefore, the district court's jurisdiction to hear a will contest pursuant to § 30-2429.01 is limited to determining that matter alone and the rest of the probate proceeding remains in the jurisdiction of the county court. Further, pursuant to the operation of § 30-2429.01, a will contest heard in district court is actually part of the overall probate proceeding in county court. This is evidenced by the fact that once the district court's decision in the will contest becomes final, it is incorporated into the county court's probate proceedings. As § 30-2429.01(5) provides, "[t]he final decision and judgment in the matter transferred shall be certified to the county court, and proceedings shall be had thereon necessary to carry the final decision and judgment into execution." Thus, a will contest is an integral part of a county court probate proceeding. This is distinguishable from a situation where an appeal is taken from the district court's general jurisdiction to hear an entire case or controversy. Therefore, it makes little sense to characterize one part of a probate proceeding—a will contest—as distinct from any other part for purposes of appeal and treat it like an appeal from the district court's general jurisdiction.

Finally, any alternative construction of the supersedeas bond requirement in § 30-1601(3) would lead to an absurd result. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result. *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008). If we adopted a contrary interpretation, we would be required to determine that a supersedeas bond was mandatory in an appeal from a will contest heard in county court but not in a will contest heard in district court. Because we can find no language in the statute which indicates that this was the Legislature's intent, we refrain from doing so.

We therefore conclude that the appellants in the instant case are subject to the supersedeas bond requirement of

§ 30-1601(3). John has requested that the supersedeas bond be set in the amount of $500,000, stating that "this is the approximate amount of value of this estate [which] has not been distributed due to the [w]ill contest and subsequent appeal filed by the appellants." The appellants have not filed any response to the motion. John's motion includes a copy of the inventory of the estate. The estate is composed almost entirely of real estate. While such real estate is not liable to loss by destruction, it is susceptible of loss in value during the pendency of the appeal. In addition, the costs on appeal potentially include attorney fees. We conclude that a bond of $100,000 is sufficient to give full protection to John. We also observe that the appellants' failure to respond to the motion necessarily means that they have failed to show that the supersedeas bond amounts to a sum in excess of 50 percent of their net worth—thus, this limitation prescribed by § 25-1916 has no application to the instant case.

CONCLUSION

Because the appellants appeal from a matter "arising under the Nebraska Probate Code," see § 30-1601(1), and are not among those specifically exempted from filing a supersedeas bond pursuant to § 30-1601(3), we find that the appellants must file a supersedeas bond to pursue this appeal. We therefore sustain John's motion to require a supersedeas bond and direct the appellants to file a supersedeas bond or undertaking in the sum of $100,000 with the clerk of the county court, conditioned that the appellants will satisfy any judgment and costs that may be adjudged against them, including costs and attorney fees, within 14 days of the date of this opinion. If the appellants fail to comply, on motion and notice, the appeal shall be subject to dismissal.

MOTION SUSTAINED.

ASHLEY ADAMS, APPELLEE, V. CARGILL MEAT SOLUTIONS, APPELLANT.
774 N.W.2d 761

Filed June 23, 2009. No. A-08-975.

1. **Workers' Compensation.** Workers' compensation law authorizes an award of future medical expenses, including necessary medication.
2. **Workers' Compensation: Stipulations.** Before an order for future medical benefits may be entered in a workers' compensation case, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury.
3. **Workers' Compensation: Evidence.** An award of future medical expenses in a workers' compensation case requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

James D. Hamilton and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Jon Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Cargill Meat Solutions (Cargill) appeals an order of a three-judge review panel for the Nebraska Workers' Compensation Court. Cargill argues that the review panel erred in affirming the trial court's determination that Ashley Adams was entitled to certain benefits as a result of her work-related injury. Specifically, Cargill argues that the trial court's award of future medical expenses to Adams was not supported by sufficient evidence.

Upon our review, we find that Adams failed to present sufficient evidence to prove that future medical treatment will be reasonably necessary to relieve the effects of her work-related injury. As such, we find that the review panel erred in

affirming the trial court's award of future medical expenses. We reverse, and remand to the review panel with directions to reverse the award of future medical expenses and remand the matter to the trial court to modify the award in accordance with this opinion.

II. BACKGROUND

On March 18, 2005, Adams was working at Cargill as a scale operator when several boxes fell off of a pallet and hit her. As a result of this incident, Adams suffered injuries to the right side of her back.

On December 7, 2006, Adams filed a petition alleging that she had been injured in the scope and course of her employment with Cargill. She indicated that she injured her "lower right back" and that she continues to experience pain in her back and pain and numbness in her right leg. Adams requested temporary disability benefits; permanent disability benefits; payment of medical expenses; vocational rehabilitation benefits; and waiting-time penalties, attorney fees, and interest.

On December 22, 2006, Cargill filed an answer. Cargill alleged that if Adams suffered any disability, it did not arise out of or in the course of her employment at Cargill. Cargill stated that payments had been made to Adams for all medical, surgical, and hospital expenses and for all compensation benefits to which Adams was entitled.

On September 18, 2007, a trial was held. Prior to the admission of evidence, the parties informed the trial court that they would stipulate that on March 18, 2005, Adams did sustain an accident arising out of and in the course and scope of her employment with Cargill. The parties then presented evidence concerning Adams' medical treatment since the time of the accident, the degree of Adams' impairment, and the cause of Adams' ongoing pain.

On December 7, 2007, the trial court entered an award of benefits. The court found that Adams suffered a "chronic sprain of her lower back" as a result of her work-related accident. The court also found that Adams sustained a 5-percent loss of earning power as a result of the accident and ordered Cargill to pay Adams permanent disability benefits. The court also ordered

Cargill to pay Adams for medical expenses she had incurred prior to the time of trial and for future medical expenses.

In awarding Adams payment for future medical expenses, the trial court noted: "[A] review of the evidence indicates that [Adams] has carried her burden of proof and persuasion and is, thus, entitled to such an award. Specifically the Court relies upon the fact that [Adams] continues to take various prescription medications for her ongoing back pain."

On December 21, 2007, Cargill filed an application for review before a three-judge review panel of the Nebraska Workers' Compensation Court, seeking a reversal of the trial court's award. Cargill alleged, among other things, that the trial court erred in finding that Adams was entitled to an award of future medical expenses.

In its August 19, 2008, order, the review panel affirmed the trial court's award of future medical expenses. The panel pointed to evidence in the record which suggested that Adams continued to take medication for her back injury at the time of the trial. The panel then concluded:

> Because that medication is a prescription medication, [the trial court] inferred that at least one of [Adams'] physicians was continuing to prescribe it for her and [the trial court] also inferred from [Adams'] continued use of the medication that it would continue into the future. The review panel believes that such an inference is permissible and the finding of an entitlement to future medical care may be made without specific expert testimony on the subject.

Cargill appeals from the order of the review panel here.

III. ASSIGNMENT OF ERROR

On appeal, Cargill argues that the review panel erred in affirming the trial court's award of payment for future medical expenses associated with Adams' work-related injury.

IV. STANDARD OF REVIEW

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. *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 746 N.W.2d 698 (2008).

On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

V. ANALYSIS

The trial court awarded Adams payment for future medical expenses associated with her work-related injury. The court indicated that in awarding payment of future medical expenses, it relied upon evidence that Adams "continues to take various prescription medications for her ongoing back pain" and a medical report which stated that Adams "has been taking . . . medications." On appeal, Cargill argues that this evidence is insufficient to establish that future medical treatment will be reasonably necessary to relieve the effects of Adams' work-related back injury. We agree.

[1] Neb. Rev. Stat. § 48-120(1)(a) (Cum. Supp. 2008) authorizes an award of future medical expenses, including necessary medication. Section 48-120(1)(a) provides, "The employer is liable for all reasonable, medical, surgical, and hospital services, including . . . medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . ."

[2] In construing § 48-120(1)(a), the Nebraska Supreme Court has emphasized that before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury. See *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

In this case, the parties did not stipulate to an award of future medical expenses. As such, there must be evidence in the record to support the trial court's determination that future medical treatment will be reasonably necessary to relieve the effects of Adams' back injury. Upon our review of the record, we find insufficient evidence to support the trial court's award of future medical expenses to Adams.

At trial, there was no evidence presented to demonstrate that Adams' back injury required any future medical treatment. Adams' medical records indicate that her treating doctors could provide no further treatment options.

Dr. Phillip Essay, who was employed at Nebraska Pain Consultants, began treating Adams in December 2005. Dr. Essay conducted numerous tests on Adams' back, including an MRI and a CT scan. Additionally, Dr. Essay provided Adams with multiple pain medications, treatments, and referrals to physical therapy. Medical records from Dr. Essay's office indicate that Adams last visited the clinic in March 2007. Dr. Essay's notes from this last visit indicate that Adams' "pain and symptoms are described as severe and yet I have no explanation for them." Dr. Essay stated his belief that a neurologic disorder should be ruled out, but "[o]therwise, at this time I don't know what else to do for her either from a diagnostic or therapeutic standpoint."

Adams saw Dr. Lewiston Birkmann, a neurologist, in late March 2007. During this visit, Dr. Birkmann recommended that Adams undergo additional x rays and scans. He indicated that if the scans were negative, "then I probably do not have much else to offer." Evidence in the record reveals that the additional scans and x rays recommended by Dr. Birkmann were completed in April 2007. The results were negative.

Dr. Rajesh Kumar conducted an independent medical examination of Adams in May 2007. Dr. Kumar found that Adams had reached maximum medical improvement by the time of his appointment with her. He noted that she has "a permanent partial disability of 1% because of her back pain and restriction of spine motion." He also noted that Adams is allowed to do all physical activities as tolerated. Dr. Kumar did not provide any

indication that Adams would require any future medical treatment for her injury.

At trial, Adams testified that she was currently taking prescription medication for her back pain. She did not provide any other testimony concerning the necessity of future medical treatment. She did not testify as to whether or how long she would have to continue to take the prescription medication, and she did not testify that she would have to continue regular treatment with any of her physicians. Additionally, Adams did not testify that her pain medication was effective in treating her injury. Rather, Adams testified that despite the pain medication she was taking, her back was "sore" at the time of trial. She also indicated that she continued to be unable to complete basic household duties because of her ongoing pain, and she testified that her "pain has increased from the day I got hurt." Adams' medical records reveal that no medication or treatment had ever completely relieved Adams of her pain.

The evidence does not support the trial court's determination that Adams required further medical treatment for her back injury. In awarding future medical expenses, the trial court relied on Adams' testimony that she was taking medication at the time of trial and notations in Adams' medical records indicating her history of taking prescription pain medication. Evidence that Adams currently takes pain medication or that she has a history of taking such medication is not enough to demonstrate that she requires future medical treatment to relieve the effects of her injury. As such, the trial court's finding that Adams "carried her burden of proof and persuasion" as to an award of future medical expenses is not supported by sufficient evidence.

The review panel affirmed the trial court's award of future medical expenses after concluding that the evidence presented at trial was sufficient to support an "inference" that Adams will continue to take pain medication after the time of trial. Such an inference is simply not supported by the evidence in the record. There is no evidence that Adams intends to continue to take her prescription pain medication. In fact, there is no indication that Adams finds the medication to be beneficial. She testified

that even when she took the medication, she was in constant pain and she could not complete basic daily tasks. In addition, she testified that her pain had increased, rather than decreased, since the time of the accident.

[3] Simply stated, an award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury. Here, there is no evidence that Adams requires any future medical treatment or that future medical treatment would be in any way beneficial in relieving the effects of her back injury.

Because there is no evidence to support the trial court's finding that future medical treatment will be reasonably necessary to relieve the effects of Adams' back injury, we find that the trial court erred in awarding to Adams future medical expenses incurred as a result of her work-related injury. Accordingly, we conclude that the review panel erred in affirming the trial court's award.

VI. CONCLUSION

We find that Adams failed to present sufficient evidence to prove that future medical treatment will be reasonably necessary to relieve the effects of her work-related injury. For this reason, we conclude that the review panel erred in affirming the trial court's award of future medical expenses. We reverse, and remand to the review panel with directions to reverse the award of future medical expenses and remand the matter to the trial court to modify the award in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

THIRTY LLC ET AL., APPELLANTS, V. OMAHA HOUSING AUTHORITY, APPELLEE.

771 N.W.2d 165

Filed June 23, 2009. No. A-08-1201.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Contracts.** When a dispute sounds in contract, the action is to be treated as one at law.
3. **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 independently of the conclusion reached by the trial court.
4. ____: ____. Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong.
5. **Contracts: Breach of Contract: Stipulations.** Parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to a reasonable sum to be paid in the event of a breach.
6. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts.** A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract.

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

Douglas W. Ruge for appellants.

George B. Achola for appellee.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Thirty LLC; GNO Properties LLC; JRG LLC; Theiss LLC; Marion General Partnership; First Real Estate Group, Inc. (FREG); and Ruben Cortez (collectively the Appellants) appeal from the decision of the district court for Douglas County in this declaratory judgment action brought by the Appellants

against the Omaha Housing Authority (OHA). Because we find no error in the district court's interpretation of the contract at issue in this appeal, we affirm.

BACKGROUND

The OHA is a public housing agency (PHA) established pursuant to state and federal housing programs. The OHA operates two major housing programs: a public housing program and a housing choice voucher program commonly referred to as the "Section 8" program. The OHA's Section 8 program is the center of the dispute in this lawsuit.

The Section 8 housing choice voucher program is a federal program created by the U.S. Department of Housing and Urban Development. One goal of the program is to provide low-income families with rent subsidies that can be applied to a home of their choice in the private sector. The money for the housing choice vouchers is allocated by the U.S. Department of Housing and Urban Development to local PHA's, such as the OHA, which administer the program in their respective areas. Under the Section 8 housing choice voucher program, an individual applies to a PHA, such as the OHA, for Section 8 benefits. A family that qualifies for the Section 8 program is issued a housing voucher and is responsible for finding a suitable housing unit of the family's choice, which the owner agrees to rent under the program. Once a PHA approves an eligible family's housing unit, the family and the landlord sign a lease and, at the same time, the landlord and the PHA sign a "Housing Assistance Payments" contract (HAP contract) that runs for the same term as the lease. Owner participation in the Section 8 program in Nebraska is voluntary.

Thirty, GNO Properties, JRG, Theiss, Marion General Partnership, and FREG are Nebraska companies and are landlord participants in the Section 8 program administered by the OHA. Each of the appellants other than FREG has a separate HAP contract with the OHA. Robert Stevens is a minority owner of Thirty and the president and sole owner of FREG. FREG manages real estate rental units for various owners, including those of Thirty and the other appellants in this action.

Tammy Ray was an individual receiving Section 8 assistance from the OHA. On January 31, 2005, Ray entered into a lease agreement for the property in question for the monthly rental amount of $497. Around the same time, Thirty and Ray entered into a separate agreement, outside of the HAP contract and unbeknownst to the OHA, providing that Ray would pay $103 a month above the agreed-upon HAP contract amount from the initial term of the HAP contract until September 2005. Ray paid the additional $103 monthly amount from the initial term of the HAP contract until September 2005. On February 14, 2005, the OHA entered into an HAP contract with Thirty to assist Ray with her rent for the property. The monthly rent to the owner was established at $497. The HAP contract provides that the owner "may not charge or accept, from the family or from any other source, any payment for rent of the unit in addition to rent to owner." The HAP contract also provides that the tenant is not responsible for paying the portion of rent to the owner covered by the PHA housing assistance payment, that a PHA failure to pay the housing assistance payment is not a violation of the lease, and that the owner may not terminate the tenancy for nonpayment of the housing assistance payment. On January 31, 2005, Stevens, acting as "landlord/agent" for the property in question, signed a Section 8 landlord certification, which is required by the OHA. Within that document, Stevens agreed, "I understand . . . that it is illegal to charge any additional amounts for rent which have not been specifically approved by the [OHA]."

In April 2006, Thirty brought an eviction action against Ray in the county court for Douglas County after she fell behind in the $103 payments due under the outside agreement. This eviction action led to further litigation initiated by Ray and brought the outside agreement to the attention of the OHA. In subsequent hearings in the county court action, Ray and Thirty agreed that Ray would voluntarily move out of the property in question. When Ray still had not moved out, despite the stipulated agreement, the county court judge ordered a writ of restitution, granting restitution of the premises to Thirty.

In an action in the district court, brought while the county court case was still pending, Ray sued Thirty and FREG for, among other things, return of the monthly payments of $103 made over the amount stated in the HAP contract. In the district court case, the court determined that Thirty had breached the HAP contract by accepting payment for rent above what was agreed upon in the lease. In a memorandum opinion filed on June 23, 2009, in case No. A-08-1020, we decided the district court case.

After learning that Thirty was charging Ray rent above and beyond the contracted-for amount of $497 per month, the OHA began an investigation of Thirty. As a result of the investigation, the OHA determined that Thirty had breached the HAP contract for the property leased to Ray by charging Ray additional moneys beyond the contracted-for rent and by filing an eviction action against Ray.

In September 2006, the OHA informed Thirty that it had determined that Thirty had breached the HAP contract, that Thirty was not entitled to payments it received during the time in question (totaling $9,261), and that if Thirty did not remit this amount, the OHA would begin recoupment from other properties Thirty had in the Section 8 program. In November, the OHA recouped or deducted the $9,261 from two main sources. First, it recouped or deducted $1,801 from contracts on which Thirty was the owner. Second, the OHA recouped or deducted $7,460 from contracts on which FREG was the managing agent. This second group included contracts on which GNO Properties, JRG, Theiss, Marion General Partnership, and Cortez were listed as owners.

The Appellants filed the present declaratory judgment action in the district court on February 22, 2007. The Appellants asked the court to determine whether, under the terms of the HAP contract, the OHA has the right to retroactively deduct agreed payments made while a tenant occupies the property even when any overage payments were refunded to the tenant. The Appellants sought $7,883 in damages and attached an exhibit showing the amounts recouped by the OHA from each owner, which amounts totaled $7,883.

The OHA answered, admitting and denying various allegations of the complaint. Specifically, the OHA alleged that on January 12, 2006, it notified Thirty by letter that Thirty could not collect payments in excess of the amount specified in the Ray HAP contract and that the OHA had the option to recoup all HAP contract payments for violations of the HAP contract. The OHA denied that it took the position that it could deduct payments from other landlords whose property was managed by FREG but asserted that it had the right to deduct payments from contracts held between the OHA and "any company or person that appears to maintain or have an ownership interest in Thirty . . . as set forth in paragraph 7(f) of the HAP contract."

The Appellants filed a motion for summary judgment or partial summary judgment on April 23, 2007. The Appellants asked the district court for summary judgment "for amounts withheld for their benefit from [the OHA] at [the OHA's] cost, or, in the alternative, for partial summary judgment determining which [of the Appellants] are entitled to a refund of HAP [contract] payments withheld, if any."

The district court entered an order on July 31, 2007, overruling the summary judgment motion. The court found no dispute that Thirty overcharged Ray in the amount of $103 per month, but it concluded that there was a genuine issue of material fact concerning the rights and liabilities of the parties under the HAP contract.

Trial was held before the district court on July 16, 2008. The court received the parties' stipulations as to the facts, which we have summarized above. Exhibits referenced in and attached to the parties' stipulation include a copy of the HAP contract benefiting Ray, the Section 8 landlord certification signed by Stevens, the lease agreement between JRG and Ray, and a document setting forth a breakdown of amounts recouped by the OHA from FREG contracts ($7,460) and a breakdown of amounts recouped from Thirty contracts ($1,801).

The district court entered an order on October 17, 2008, concluding that the OHA was entitled to offset $9,261 paid to Thirty "during which time Thirty was not in compliance with

[the] OHA with regard to the lease agreement with . . . Ray," and that the OHA was entitled to offset amounts owed to Thirty under other contracts for payment of the $9,261, but that the OHA could not offset any amounts owed to Thirty's coappellants and that such amounts must be refunded to the coappellants. We have set forth the specific details of the court's reasoning in the analysis section below.

ASSIGNMENT OF ERROR

The Appellants assert, consolidated and restated, that the district court erred in its interpretation of the HAP contract.

STANDARD OF REVIEW

[1-4] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006). When a dispute sounds in contract, the action is to be treated as one at law. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004). Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong. *Id.*

ANALYSIS

Relevant Provisions of HAP Contract.

We first set forth the provisions of the HAP contract relevant to our analysis. Part B, paragraph 4b(8), provides: "The PHA may terminate the HAP contract if the PHA determines that the unit does not meet all requirements of the [housing quality survey], or determines that the owner has otherwise breached the HAP contract."

Part B, paragraph 7b, provides: "**Owner compliance with HAP contract.** Unless the owner has complied with all provisions of the HAP contract, the owner does not have

a right to receive housing assistance payments under the HAP contract."

Part B, paragraph 7f, provides:

> **Overpayment to owner.** If the PHA determines that the owner is not entitled to the housing assistance payment or any part of it, the PHA, in addition to other remedies, may deduct the amount of the overpayment from any amounts due the owner (including amounts due under any other Section 8 assistance contract).

Part B, paragraph 10a, provides, in part:

> Any of the following actions by the owner (including a principal or other interested party) is a breach of the HAP contract by the owner:
>
> (1) If the owner has violated any obligation under the HAP contract, including the owner's obligation to maintain the unit in accordance with the [housing quality survey].
>
> (2) If the owner has violated any obligation under any other [HAP] contract under Section 8.

Part B, paragraph 10c, provides: "The PHA's rights and remedies for owner breach of the HAP contract include recovery of overpayments, suspension of housing assistance payments, abatement or other reduction of housing assistance payments, termination of housing assistance payments, and termination of the HAP contract."

Part C, paragraph 5, concerns payments to the owner by the family receiving housing assistance and provides:

> d. The tenant is not responsible for paying the portion of rent to owner covered by the PHA housing assistance payment under the HAP contract between the owner and the PHA. A PHA failure to pay the housing assistance payment to the owner is not a violation of the lease. The owner may not terminate the tenancy for nonpayment of the PHA housing assistance payment.
>
> e. The owner may not charge or accept, from the family or from any other source, any payment for rent of the unit in addition to the rent to owner. Rent to owner includes all housing services, maintenance, utilities and appliances

> to be provided and paid by the owner in accordance with the lease.
>
> f. The owner must immediately return any excess payment to the tenant.

Meaning of "Overpayments."

The question presented for our consideration is whether the district court properly construed the meaning of the term "overpayments" in the HAP contract.

The district court summarized the OHA's argument as follows: "If Thirty is in breach of the [HAP contract, the] OHA may terminate the [HAP contract], and in the case of a breach, Thirty is not entitled to housing payments it received." The court noted that the OHA relied primarily on part B, paragraphs 7f, 10a, and, in particular, 10c, which the OHA interpreted to mean that if there is a breach, the owner, Thirty, was not entitled to any of the payments it received, such payments then being considered "overpayments" that the OHA could recoup by deducting amounts not due to the OHA from any other payment the OHA might owe the owner.

The district court stated Thirty's argument to be that the term "overpayment" means only the amount which the owner "overcharged" the tenant, i.e., the monthly charge to Ray of $103, and not all amounts paid to Thirty under the HAP contract. Thirty also argued that the OHA was not damaged, because Ray received the benefit of the housing for the amount approved by Thirty and the OHA. The court observed that Thirty's argument was based on the legal theory of damages, that is, the OHA is only entitled to be placed in the same position it would have occupied. See *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008) (in breach of contract case, ultimate objective of damages award is to put injured party in same position injured party would have occupied if contract had been performed, that is, to make injured party whole).

[5] In finding Thirty's arguments to be without merit, the district court relied on *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 483 N.W.2d 114 (1992). *Kozlik* was a declaratory judgment action to determine the rights of the parties under an employment

contract. The contract in question contained a provision that in the event the employee was terminated from his employment without cause, the employer would pay the employee his regular salary until the expiration of the term of employment specified in the contract. Following a jury trial, the jury determined that the employer had discharged the employee without cause and the trial judge assessed the employee's damages. On appeal, the employer urged that language in the contract concerning termination without cause was inapplicable and, if applicable, imposed an unenforceable penalty. The Nebraska Supreme Court observed that parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to a reasonable sum to be paid in the event of a breach. *Id*.

In the present case, the district court concluded that Thirty's failure to provide the rental unit to Ray at the agreed-upon rate constituted a material, not minor, breach of the HAP contract. The court stated that the very thing bargained for in the HAP contract was that the OHA would pay Ray's rent and that Thirty would charge Ray only that amount for the rental unit. The court found that the intent of the HAP contract was to provide suitable housing for tenants in the OHA's program at a certain rental rate set out in the HAP contract. The court reasoned that the remedies provided in the HAP contract were designed to ensure that the OHA's assistance program could be administered in a way that is fair and just, allowing for a reasonable deterrent against owners who would attempt to charge tenants more than the amount contractually agreed. The court noted part C, paragraph 5f, of the HAP contract, which provides with respect to payment by the family receiving assistance to the owner of the rental unit, "The owner must immediately return any excess rent payment to the tenant." The court reasoned, in essence, that if the owner is only contractually bound to return the "excess rent" to the tenant under part B, paragraph 7f, the provision of the HAP contract which provides that the OHA may deduct the "overpayments" from amounts owed by the OHA would be meaningless.

The district court concluded that the HAP contract, when read in its entirety, means that for the owner to be eligible to

receive the housing assistance payments, the owner must comply with all of the provisions of the HAP contract, including the provision requiring it not to charge additional rent to a tenant under part C, paragraph 5e. The court further concluded that if the owner is not eligible to receive the housing assistance payments, then the owner has been overpaid by the OHA, and that the OHA may, as one of several remedies, deduct the amounts of housing assistance payments that were overpaid to the owner from other amounts the OHA owes to the owner. The court determined that as used in the HAP contract, "overpayments" do not refer to the excess rent paid by a tenant to the owner, but, rather, to the amount of housing assistance payments overpaid to the owner by the OHA for the time period the owner was not in compliance with the HAP contract. The court found that the HAP contract must be interpreted to mean that "not only must the overcharged amount [of excess rent] be returned [to the tenant] but also that Thirty is not eligible for any of the assistance payments and the entire amount [of assistance payments] paid under the [HAP contract] must be returned to [the] OHA."

[6-8] We agree with the district court's reading of the HAP contract. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract. *Id.* The district court's reading of the HAP contract construes it as a whole and gives effect to all of its parts. We agree that the "overpayments" referenced in part B, paragraphs 7 and 10, refer to housing assistance payments received by the owner for which the owner was not eligible, that the owner is not eligible for housing assistance payments when it is in breach of the HAP contract, and that "overpayments" in that portion of the HAP contract means something other than the "excess" payments from the tenant to the owner referenced in

part C, paragraph 5. The HAP contract clearly provides that an owner is not eligible for housing assistance payments if it is in breach of the HAP contract, and the record shows that Thirty was in breach relative to the lease with Ray from the inception of the lease in that it charged her an additional $103 over and above the $497 housing assistance payment agreed to by the OHA and Thirty. Because Thirty was not eligible for the housing assistance payments by virtue of its breach, the payments made by the OHA to Thirty were "overpayments" and the entire amount of the overpayment was properly recouped by the OHA under part B, paragraph 7f, of the HAP contract. We find no error in the district court's interpretation of the term "overpayments" found in the HAP contract. Thirty's arguments to the contrary are without merit.

CONCLUSION

The district court correctly interpreted the HAP contract.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
TURNER R. McDANIEL, APPELLANT.
771 N.W.2d 173

Filed June 30, 2009. No. A-08-779.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Rules of Evidence.** According to Neb. Rev. Stat. § 27-403 (Reissue 2008), although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

5. **Assault: Intent.** A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person.
6. **Trial: Waiver: Appeal and Error.** The failure to make a timely objection waives the right to assert prejudicial error on appeal.
7. **Criminal Law: Trial: Evidence: Stipulations.** Refusal of a trial court to accept an offer by the defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial.
8. **Criminal Law.** The State is allowed to present a coherent picture of the facts of the crimes charged.
9. **Criminal Law: Proof.** A defendant's tactical decision not to contest an essential element of the crime does not remove the prosecution's burden to prove that element.
10. **Jury Instructions: Appeal and Error.** The failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
11. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
12. **Jury Instructions: Appeal and Error.** Although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.
13. **Jury Instructions: Waiver.** All jury instructions are to be in writing, unless the written instruction is waived by counsel in open court.
14. **Jury Instructions: Appeal and Error.** Failure to reduce an instruction to writing shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.
15. ____: ____. In order to obtain relief concerning oral instructions, the appellant must demonstrate that it was prejudiced by the trial court's actions.
16. **Effectiveness of Counsel: Records: 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.
17. **Effectiveness of Counsel: Appeal and Error.** When the issue of effectiveness of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
18. ____: ____. To establish that he or she was denied effective assistance of counsel, the defendant must show (1) that counsel was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area, and (2) that he or she was prejudiced by the actions or inactions of his or her counsel by demonstrating with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
19. ____: ____. The two-part test for ineffective assistance of counsel may be addressed in any order; if it is easier to dispose of the ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Jeffery A. Pickens, of Commission on Public Advocacy, for appellant.

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

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Turner R. McDaniel appeals the decision of the district court for Lancaster County which, after a jury trial, convicted him of first degree assault, a Class III felony. McDaniel was sentenced to 8 to 14 years' imprisonment. We affirm.

FACTUAL AND PROCUDURAL BACKGROUND

We begin with a brief summary of the factual and procedural background at the outset, which will be supplemented as necessary in our analysis.

After the downtown bars in Lincoln, Nebraska, closed in the early morning hours of May 27, 2006, McDaniel got into a scuffle with Aaron Obermier. McDaniel started to walk away, but when Obermier continued making comments toward McDaniel, McDaniel walked back to Obermier and punched him in the head, although he testified that he did so because he thought Obermier was about to hit him. Obermier fell back, striking his head on the cement. Obermier suffered substantial head and brain injuries and required a decompressive craniectomy to relieve swelling in his brain. Obermier spent 10 days in the hospital, 3 weeks at a rehabilitation hospital, and then nearly a year in an assisted living facility.

McDaniel was charged with assault in the first degree, a Class III felony. Prior to trial, McDaniel filed numerous motions in limine. One such motion in limine sought to prohibit any and all photographs depicting Obermier or his injuries taken after the assault of May 27, 2006. Another motion in limine sought to prohibit any evidence that Obermier suffered "serious bodily injury," in exchange for McDaniel's

stipulation that Obermier had sustained "serious bodily injury," an element of the charged offense. Both motions in limine were overruled.

After a jury trial, McDaniel was convicted of assault in the first degree, a Class III felony. McDaniel was sentenced to 8 to 14 years' imprisonment. He now appeals with new counsel.

ASSIGNMENTS OF ERROR

McDaniel alleges that the district court erred in (1) giving an erroneous "submission" instruction to the jury, in violation of McDaniel's right to have his case decided by an impartial and uncoerced jury; (2) giving the jury an erroneous instruction after the jury announced it was at a stalemate and unable to reach a verdict, thus violating McDaniel's right to have his case decided by an impartial and uncoerced jury; and (3) refusing to direct the prosecution to accept McDaniel's offer to stipulate that Obermier suffered a serious bodily injury and, in violation of Neb. Rev. Stat. § 27-403 (Reissue 2008), allowing the prosecution to present evidence of Obermier's injury. McDaniel also alleges that he was denied his right to effective assistance of counsel because of his trial counsel's failure to object to (1) the erroneous jury instructions referenced above and (2) the evidence concerning Obermier's injury.

STANDARD OF REVIEW

[1,2] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Id.*

[3] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008).

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. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

ANALYSIS

Evidence of Obermier's Injuries.

[4] McDaniel argues that the district court erred in refusing to direct the prosecution to accept McDaniel's offer to stipulate that Obermier suffered a serious bodily injury and in turn by then allowing the prosecution to present evidence of Obermier's injury, in violation of § 27-403. Section 27-403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[5] A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person. Neb. Rev. Stat. § 28-308(1) (Reissue 2008). There was no dispute that McDaniel intended to, and did, hit Obermier. And McDaniel was willing to stipulate that Obermier suffered a serious bodily injury. McDaniel simply argued that he should not be held accountable, because he acted in self-defense.

Prior to trial, McDaniel filed motions in limine to prohibit evidence of Obermier's injuries, stating in one that he was willing to stipulate that Obermier suffered "serious bodily injury" as contemplated by § 28-308(1). However, the district court overruled McDaniel's motions. During opening arguments, the State discussed Obermier's injuries and McDaniel did not object. During the testimony of a police officer, a picture of Obermier lying on a stretcher and wearing a neck collar was offered and received into evidence with McDaniel's counsel affirmatively stating, "No objection." A prosecution witness

testified, without objection, that when Obermier fell and hit his head on the cement, "[h]e looked like he was kind of going into a seizure, his eyes were rolled back."

Midway through trial, McDaniel again offered to stipulate as to medical testimony that Obermier was "seriously injured" within the meaning of the charging statute, but the State was not willing to stipulate to such fact and thereby dispense with its evidence of such. McDaniel then renewed his motion in limine, which was overruled. Next, Obermier testified that he remembers nothing between being with a friend on the night of the incident and waking up in the hospital with the left side of his head "missing." He testified that a piece taken from his skull was sewn into his abdomen and that he had to wear a helmet for protection for 8 to 12 months. Obermier testified that he was at a rehabilitation hospital for 3 weeks and then spent approximately 1 year in an assisted living facility. Obermier testified that since the accident, he has had memory problems, seizures, and no sense of taste or smell and that his hearing on the left side has been affected. McDaniel did not object to this testimony from Obermier**.** A picture of Obermier with a misshapen head was offered and received into evidence with McDaniel's counsel stating, "No objection."

Dr. Reginald Burton, the trauma director and director of surgical critical care at the hospital where Obermier was treated, testified that when he arrived at the hospital, Obermier was listed as "Category 1," meaning that he had a life-threatening injury. Dr. Burton testified that Obermier's initial CT scans showed bleeding on both the outside and the inside of the brain. A second CT scan showed increased swelling and shift, so Obermier underwent a craniectomy. Dr. Burton testified that part of Obermier's skull was removed to allow the brain to swell and that that piece of skull was put in Obermier's abdomen to keep it sterile and alive so that it could be put back into place later. Dr. Burton testified that Obermier had a tracheotomy and a feeding tube and that he was at the hospital for approximately 10 days. After this testimony by Dr. Burton, McDaniel renewed his objection to the use of evidence and again offered to stipulate that Obermier suffered "serious bodily injury." The court overruled McDaniel's objection, and

the State was not willing to stipulate. McDaniel was allowed a continuing objection, but it was overruled. Next, Obermier's CT scan images were offered and received into evidence with McDaniel's counsel affirmatively stating, "I have no objection to those exhibits." And Dr. Burton testified, without objection, as to what the CT scans showed.

[6] Based on the foregoing account of how the evidence of the injury was adduced, it is clear that McDaniel did not properly preserve the issue of allegedly wrongful admission of the evidence of Obermier's injuries for appeal. McDaniel did make two motions in limine, which were later renewed, to prevent evidence of Obermier's injuries, and those motions were overruled. (We note that each time McDaniel made a motion in limine and offered to stipulate that Obermier had sustained serious bodily injury, he cited to *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), which we will discuss shortly.) But when specific testimony regarding Obermier's injuries was offered, McDaniel did not object. Furthermore, when pictures of Obermier or his CT scans were offered into evidence, McDaniel specifically stated that he had no objection to such exhibits. McDaniel's continuing objection was not made until nearly the end of the State's case, when the nature and seriousness of the injury were already in evidence. Thus, McDaniel did not timely object to the evidence relating to Obermier's injuries. And "[t]he failure to make a timely objection waives the right to assert prejudicial error on appeal." *State v. Schreiner*, 276 Neb. 393, 418, 754 N.W.2d 742, 762 (2008).

[7] Even if McDaniel had preserved the issue for appeal by proper and timely objections, we would still find that this assignment of error is without merit. "[R]efusal of a trial court to accept an offer by the defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial." *State v. Perrigo*, 244 Neb. 990, 1002, 510 N.W.2d 304, 312 (1994).

McDaniel cites us to *Perrigo, supra*, and *Old Chief, supra*, for the proposition that a court should require the State to stipulate when the probative value of the evidence is outweighed by the danger of unfair prejudice. See, also, § 27-403.

However, McDaniel reads *Perrigo* and *Old Chief* too broadly, plus they are distinguishable in that both cases involved possession of a firearm by a convicted felon. The stipulation offered in those cases simply went to the defendant's legal status as a convicted felon. The U.S. Supreme Court found that the general rule, that the State may choose its evidence, does not apply to stipulations regarding prior felony convictions, stating:

> The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions. Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.
>
> . . . What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a [Fed. R. Evid.] 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.

Old Chief v. United States, 519 U.S. 172, 190-92, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Thus, the "forced acceptance" of a stipulation of convicted felon status is a narrow exception to the general rule that the State is allowed to choose how it proves the elements of the charges it has lodged against the defendant.

[8] "The State is allowed to present a coherent picture of the facts of the crimes charged." *State v. McPherson*, 266 Neb. 734, 743, 668 N.W.2d 504, 513 (2003). And this notion of course extends to McDaniel's self-defense claim, which has the following elements: (1) The belief that force is necessary must be reasonable and in good faith, (2) the force must be immediately necessary, and (3) the force used must be justified under the circumstances. See *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990). Depriving the jurors of knowledge of the nature of the injury leaves them to speculate about these aspects of self-defense upon which they were instructed**.** On the other hand, knowing what happened and the result thereof makes for a "coherent picture" of the State's case as well as being significant with respect to the claim of self-defense.

[9] The dissent in *Old Chief, supra*, sets out an additional rationale behind this general rule that the State need not accept stipulations:

> The Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of every element of the crime of which he is charged beyond a reasonable doubt. . . . [A] defendant's tactical decision not to contest an essential element of the crime does not remove the prosecution's burden to prove that element. . . .
>
> . . . The usual instruction regarding stipulations in a criminal case reflects as much: "When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts."

519 U.S. at 199-200 (O'Connor, J., dissenting; Rehnquist, C.J., and Scalia and Thomas, JJ., join).

Whether Obermier suffered a serious bodily injury is a material element which the State had to prove beyond a reasonable doubt. And Obermier's injury was part of the natural sequence of events relating to the assault—as opposed to felon status, where the specifics of the previous felony are unrelated to the current charge. Thus, the State was entitled to choose its

evidence and "present a coherent picture of the facts of the crimes charged." See *McPherson*, 266 Neb. at 743, 668 N.W.2d at 513. The State was not required to stipulate to Obermier's injuries, and thus, the district court did not err by not requiring the State to enter into the stipulation and forgo introduction of evidence of the nature and extent of the injury. This assignment is without merit.

Jury Instruction No. 15—"Submission" Instruction.

[10,11] McDaniel alleges that the district court erred in giving an erroneous "submission" instruction to the jury, in violation of McDaniel's right to have his case decided by an impartial and uncoerced jury. At the core of this argument is instruction No. 15, which stated:

> This case is now ready to be submitted to you for your consideration. As I said to you at the beginning of the trial, it is your duty to determine what the facts are. You must approach this task with open minds - consulting with one another, freely and honestly exchanging your views concerning this case, and respectfully considering the views of the other jurors. Do not hesitate to re-examine your own views and to change your minds, if reason and logic so dictate.
>
> When you get to the jury room, the first thing you must do is select one of you to be foreman or forewoman, the person who will preside over your deliberations. It is the foreman or forewoman's job to see that a verdict is fairly reached and that each juror has a chance to speak fully and freely on the issues in this case.
>
> Your verdict must be unanimous and will be signed by your foreman or forewoman only.
>
> . . . .
>
> When each of you has agreed upon a verdict, your foreman or forewoman will fill in the verdict form, sign and date it.

At the instruction conference, prior to instruction of the jury, McDaniel did not object to instruction No. 15. And the failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal

absent plain error. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). Therefore, we simply review the instruction for plain error. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[12] Instruction No. 15 differs from the pattern instruction NJI2d Crim. 9.0, "Submission to the Jury," because instruction No. 15 did not include the following sentence thereof: "But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors or for the mere purpose of returning a verdict." However, the Supreme Court has said, "Although we have stated that the Nebraska pattern jury instructions are to be used whenever applicable, we have recognized that a failure to follow the pattern jury instructions does not automatically require reversal." *State v. Fischer*, 272 Neb. 963, 974, 726 N.W.2d 176, 184 (2007). Instruction No. 15 does not expressly encourage jurors to change their minds, as McDaniel argues; rather, the instruction clearly states that each juror should be allowed to speak freely and fully and that jurors may change their minds "if reason and logic so dictate." Given this language, we conclude that while pattern instruction NJI2d Crim. 9.0 should ordinarily be used, the instruction given in this case embodies the concepts found therein. Instruction No. 15 did not misstate the law; nor is it misleading. See *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008). As a result, we find that the instruction as given did not constitute plain error.

Supplemental Jury Instruction Upon Jury Stalemate.

McDaniel argues that the district court erred in giving the jury an erroneous instruction after the jury foreperson informed the court that the jury was at a "stalemate" and unable to reach a verdict. McDaniel argues that the trial court's response to the

jury, given orally, violated McDaniel's right to have his case decided by an impartial and uncoerced jury.

After being informed that the jury was at a stalemate, counsel for the defense and the State discussed a supplemental instruction with the court. The jury was brought back into the courtroom and orally instructed as follows:

> THE COURT: Okay. I know that — I'm sure that all of you have worked very hard to try to reach a verdict in this case but apparently you have not been able or not been successful.
>
> If you are not able to reach a verdict in the case, it is possible that the case would be tried again. There are two things that [the jurors] can do and they can agree on a verdict or disagree on what the facts of the case may actually be. Hopefully, there is nothing to disagree about on the law. The law is as I have stated it to you and instructed you. If you have any disagreements or questions about the law, I may be able to clarify those, if you should submit a written question to me other than the one you submitted before. Any issues on the law should be my problem, not yours. If you disagree over what the evidence showed, then only you can resolve that conflict, if it is to be resolved.
>
> I am going to ask and, frankly, we are not going to hold you hostage or — forever. But I am going to ask you to return to the jury room and go over the evidence some more to see if you can reach a verdict. If you find after this short explanation by me that you are unable to reach a verdict, then if you would again let [the bailiff] know.
>
> So I am going to ask you to do that and you are excused and you may return to the jury room.

Again, McDaniel did not object to the supplemental instruction either outside or in the presence of the jury. And "[t]he failure to make a timely objection waives the right to assert prejudicial error on appeal." *State v. Schreiner*, 276 Neb. 393, 418, 754 N.W.2d 742, 762 (2008). Therefore, as with the other instruction discussed above, we simply review the instruction for plain error.

[13-15] First, we note that all jury instructions are to be in writing, unless the written instruction is waived by counsel in open court. Neb. Rev. Stat. § 25-1111 (Reissue 2008). And failure to reduce the instruction to writing "shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein." Neb. Rev. Stat. § 25-1115 (Reissue 2008). However, in order to obtain relief concerning oral instructions, the appellant must demonstrate that it was prejudiced by the trial court's actions. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). McDaniel argues that he was prejudiced only because the district court's instruction and explanation were incorrect and tended to coerce dissenting jurors into agreeing with the majority for the sake of reaching a verdict. He does not point to prejudice by virtue of the fact that the instruction was given orally.

In support of his claim of prejudice, McDaniel argues that this instruction given by the district court was improper because it was similar to an "*Allen* charge." The *Allen* charge is a well-known and discussed supplemental instruction which tells a deadlocked jury, in effect,

> "that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

State v. Garza, 185 Neb. 445, 447, 176 N.W.2d 664, 665-66 (1970) (quoting *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896)). The purpose of an *Allen* charge is to direct an agreement among jurors, be it acquittal or conviction, and is thus coercive, and its use has been long rejected in Nebraska. See *Potard v. State*, 140 Neb. 116, 299 N.W. 362 (1941). In *Garza, supra*, the Supreme Court said that the determining factor concerning supplemental charges to deadlocked juries was whether the instruction tended to coerce a dissenting juror or jurors.

Unlike in other cases, such as *Garza, supra*, the district court here did not know how the jury was split; nor did it direct its instructions to the minority. Instead, the district court directed the jurors to simply continue deliberations to see *if* they could reach a verdict. In no way did the district court instruct them that they had to reach a verdict. Additionally, while the court told the jurors that if they could not reach a verdict, then it was possible the case could be tried again, that phrase was discussed with trial counsel and McDaniel's counsel wanted it in the instruction. The district court's supplemental instruction was not plain error and did not prejudice McDaniel.

McDaniel also argues that the supplemental instruction contradicted the previous written instructions. Instruction No. 1 stated: "It now becomes my duty to instruct you in the law. All questions of fact are to be decided by you, the jury, and to these facts you will apply the law given to you in all these instructions, even though you believe the law should be otherwise." And the supplemental instruction stated:

> The law is as I have stated it to you and instructed you. If you have any disagreements or questions about the law, I may be able to clarify those, if you should submit a written question to me other than the one you submitted before. Any issues on the law should be my problem, not yours. If you disagree over what the evidence showed, then only you can resolve that conflict, if it is to be resolved.

Both instructions state that the judge will instruct on the law and that the jury is the fact finder. When read together, the instructions state that the jury is to apply the law, as given

by the court, to the facts. We find no contradiction between instruction No. 1 and the supplemental instruction.

In summary, although the supplemental instruction should have been written rather than oral, McDaniel is prejudiced thereby only if the instruction was improper. We have reviewed the instruction for plain error, given the lack of an objection thereto, and we do not find plain error, for the reasons detailed above. This assignment of error is without merit.

Ineffective Assistance of Counsel.

McDaniel argues that he was denied his right to effective assistance of counsel because of his trial counsel's failure to object to (1) the erroneous jury instructions referenced above and (2) the evidence concerning Obermier's injury.

[16,17] 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. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

[18,19] The Nebraska Supreme Court has adopted the two-part test for proving a claim of ineffective assistance of counsel, as set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). To establish that he or she was denied effective assistance of counsel, the defendant must show that counsel was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *Strickland, supra*. Second, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel by demonstrating with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *id.* The two-part test for ineffective assistance of counsel may be addressed in any order. See *Nielsen, supra*. If it is easier to dispose of the ineffectiveness claim on the

ground of lack of sufficient prejudice, that course should be followed. *Id.*

With respect to the issue of trial counsel's failure to timely object to evidence of the nature and extent of the injury suffered by Obermier on the ground that the trial court should have made the State accept the stipulation, we have already found that any such objections, even if timely made, would have been properly overruled. Thus, the record is adequate to review and resolve this claim. McDaniel was not prejudiced, and this claim of ineffectiveness of trial counsel is resolved against McDaniel.

With respect to the issues of the jury instructions and trial counsel's failure to object to them, while questions of counsel's trial tactics may be involved and such are not in this record, we find that the record before us is adequate to address such claims on the prejudice prong of the test for ineffective assistance of counsel. Given our resolution of the jury instruction issues above, it naturally follows that McDaniel was not prejudiced by any shortcoming of trial counsel concerning the instruction. Thus, this claim of ineffectiveness is without merit.

CONCLUSION

For the reasons stated above, we find that the State was not required to stipulate to the nature or seriousness of Obermier's injuries. Furthermore, we find no plain error with regard to either written instruction No. 15 or the supplemental instruction as given to the jury.

The record is sufficient for us to determine that McDaniel was not deprived of effective assistance of counsel concerning the admission of the evidence of the nature and extent of the injury suffered by Obermier, that any unmade objections to such evidence would have been without merit, and that as a result, McDaniel could not have been prejudiced and this ineffectiveness claim is without merit. We find that the record is sufficient to address trial counsel's alleged ineffectiveness at this time with respect to the jury instructions and that such claims fail for lack of prejudice. Therefore, we affirm the conviction and sentence.

AFFIRMED.

BARBARA A. CLOETER, APPELLEE, V. KURT D. CLOETER, APPELLANT.

770 N.W.2d 660

Filed June 30, 2009. No. A-08-1079.

1. **Injunction.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2008) is analogous to an injunction.
2. **Judgments: Appeal and Error.** The grant or denial of a protection order is reviewed de novo on the record.
3. ____: ____. In a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Legislature: Words and Phrases.** The Nebraska Legislature specifically limited the definition of abuse within Neb. Rev. Stat. § 42-903(1)(b) (Reissue 2008) to instances involving physical menace.
5. **Words and Phrases.** Physical menace as used in Neb. Rev. Stat. § 42-903(1)(b) (Reissue 2008) means a physical threat or act and requires more than mere words.
6. ____. Imminent bodily injury within the context of Neb. Rev. Stat. § 42-903(1)(b) (Reissue 2008) means a certain, immediate, and real threat to one's safety which places one in immediate danger of bodily injury, that is, bodily injury is likely to occur at any moment.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded with directions.

Dana M. London for appellant.

B. Gail Steen, of Steen Law Office, for appellee.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Barbara A. Cloeter filed a petition for a domestic abuse protection order against her ex-husband, Kurt D. Cloeter. The Lancaster County District Court entered an ex parte order granting the request. Kurt requested a hearing to show cause why the order should not remain in effect, following which, the court affirmed the protection order. This case was submitted without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(B)(1). For the reasons set forth herein, we reverse,

and remand with directions to vacate the protection order and dismiss the action.

BACKGROUND

Barbara and Kurt are divorced and have two children: a daughter who was born in 1990 and resides with Kurt and a daughter who was born in 2003 and resides with Barbara. Kurt has visitation with the younger daughter every other weekend from 6 p.m. on Friday to 6 p.m. on Sunday and every other Wednesday from 6 p.m. to the following Thursday morning at 8 a.m.

On July 11, 2008, Barbara filed a petition requesting a domestic abuse protection order against Kurt and an affidavit containing allegations supporting the request. Barbara's affidavit described the three most recent incidents of domestic abuse which occurred on June 6, 18, and 20, 2008. Barbara alleged that on June 6 at approximately 6:45 a.m., she received a text message from Kurt with the letters "E," "A," and "D." She sent him a text message which asked what that meant and received no response. Barbara alleged that Kurt then began sending one-letter text messages, and she reported this to the police. A police officer who responded noted that when the letters in the text messages were combined, they spelled out the word "behead." Barbara stated that she was very frightened by this threat and was afraid Kurt would behead her or her children.

Barbara's affidavit alleged the second incident occurred on June 18, 2008, at about 6:15 p.m. Kurt arrived at her home to take the younger daughter for visitation and sent Barbara a text message with the letters "B" and "E." She stated that on June 11, Kurt sent her the text messages which spelled out the word "behead" and she notified the police and understood that the police contacted Kurt regarding the message. It is unclear from the record whether the June 11 incident was the same or a different incident from that which Barbara described as occurring on June 6. Barbara stated again that she feared he would attempt to behead her or her daughter. Barbara also stated that she was concerned that Kurt had abused animals in the younger daughter's presence during visitation and that this was harmful to her.

The final incident that Barbara described in her affidavit occurred on June 20, 2008. She stated that she found a 2- by 4-inch piece of wood (2 by 4) in her driveway. This was significant to her because previously, when she expressed to Kurt her fear that he would hurt her with a baseball bat, he allegedly responded: "'Why would I buy baseball bats when I could do the same with a 2 [by] 4?'" Barbara stated that Kurt had been released from jail the day before she found the 2 by 4 in her driveway and that therefore she viewed this as a threat.

The district court entered an ex parte domestic abuse protection order. The court found that Barbara had stated facts showing that Kurt attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to Barbara, or by physical menace, placed Barbara in fear of imminent bodily injury. The order excluded Kurt from Barbara's residence, the hospital where Barbara worked, and a specific church. On July 11, 2008, Kurt was served with a copy of the protection order, and on July 14, he requested a hearing to show cause why the order should not remain in effect.

On September 12, 2008, the district court entered an amended domestic abuse protection order which allowed Kurt to be present at the younger daughter's school for school purposes and the hospital where Barbara worked to attend any medical appointments or treatments of the children.

On September 22, 2008, the district court held a hearing at Kurt's request allowing him to show cause why the protection order should not remain in effect. Both Kurt and Barbara testified at the hearing.

Kurt testified that during the past year when he had visitation with the younger daughter, he would normally pick her up at Barbara's home and would communicate that he had arrived by sending Barbara a text message. Kurt testified that to send Barbara a text message, he would usually select her telephone number and then "hit a couple letters or something." Kurt testified that he was "not an avid text messager," so his text messages had no words in them, "just randomly selected letters." Kurt testified that he never intended to send Barbara a text message, either at one time or in a series over a period of time, which would spell out the word "behead." With regard

to the text message Barbara alleged she received from him on June 6, 2008, Kurt testified that there was no significance to the letters "E," "A," and "D," that he would have no reason to send her a text message at 6:45 a.m., that normally he would only send Barbara a text message right before he picked up his younger daughter, and that he would not have picked her up on that date at that time. With regard to the 2 by 4 that Barbara found in her driveway on June 20, Kurt offered into evidence four photographs, taken by the older daughter. Those photographs depict Barbara's home, as well as the home directly across the street from hers, which was undergoing construction and demolition work. Kurt testified that he did not place the 2 by 4 in Barbara's driveway, did not have anything to do with a 2 by 4's being placed in her driveway, and believed that it could have come from the demolition project across the street. Kurt also denied killing animals in front of the younger daughter.

Barbara also testified at the hearing. She testified that she received Kurt's comment, "why would I use baseball bats when I could do the same thing with a [2 by 4]," in an e-mail approximately 2 years earlier. She could not recall what the rest of the e-mail said. Barbara also testified that the house across the street from her had been in that condition for more than a year and that there had been no other incidents in which a 2 by 4 or other spare building materials appeared in her driveway. According to Barbara, the 2 by 4 appeared in her driveway the day after Kurt was released from jail for violating a previous protection order against him. However, she did not see anyone put the 2 by 4 in her driveway. Barbara also testified that Child Protective Services was still investigating her allegation that Kurt killed animals in the younger daughter's presence and that she was still concerned for her and her children's safety. With regard to the text messages Kurt would send to her when he arrived to pick up the younger daughter, Barbara testified that he had previously sent a text message with the letter "A," and she did not remember him ever sending a text message with any other letter. On cross-examination, Kurt's attorney asked Barbara, "[I]s it correct that you didn't know if those text messages even spelled out the word 'behead'

until [a police] officer brought it to your attention?" Barbara responded, "I wasn't sure what he was trying to say." Barbara was also not sure whether the days on which those text messages were sent were the same days as Kurt had scheduled visitation with Rachel, but she acknowledged that if she received the messages on an alternating Friday or Wednesday, it would have been on the day of his visitation.

On September 22, 2008, the court entered an order which affirmed the domestic abuse protection order as amended on September 12. The district court made no specific factual findings, but concluded that Barbara had shown that Kurt "(1) attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to [Barbara], or (2) by physical menace, placed [Barbara] in fear of imminent bodily injury." Kurt now appeals.

ASSIGNMENT OF ERROR

Kurt asserts, restated, that the trial court erred in affirming the domestic abuse protection order based on the evidence adduced at the hearing.

STANDARD OF REVIEW

[1-3] A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2008) is analogous to an injunction. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Id.* In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. *Id.* However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

The Protection from Domestic Abuse Act, Neb. Rev. Stat. § 42-901 et seq. (Reissue 2008), allows any victim of domestic abuse to file a petition and affidavit for a protection order pursuant to § 42-924. Abuse is defined under § 42-903(1) as follows:

> the occurrence of one or more of the following acts between household members:
>
> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) Placing, by physical menace, another person in fear of imminent bodily injury; or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

The act defines "household member" to include a former spouse. § 42-903(3).

In the present case, the district court's form order states that Barbara showed that Kurt "(1) attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to [Barbara], or (2) by physical menace, placed [Barbara] in fear of imminent bodily injury." However, Barbara did not allege, nor does the record show, that Kurt had caused her bodily injury. Accordingly, we limit our consideration to whether Barbara has shown that Kurt, by physical menace, placed her in fear of imminent bodily injury as required by §§ 42-903(1)(b) and 42-924. Kurt argues that there is no credible evidence that he engaged in any conduct constituting abuse as defined in § 42-903. He submits that even if Barbara's allegations are assumed to be true, the alleged conduct does not rise to the level of abuse within the meaning of the statute.

The terms "physical menace" and "imminent" as used in § 42-903(1)(b) are not defined within the statute. Two other Nebraska statutes contain the same terms as § 42-903: Neb. Rev. Stat. § 28-323(1)(b) (Reissue 2008), which proscribes third degree domestic assault, and Neb. Rev. Stat. § 29-404.02(1)(c)(ii) (Reissue 2008), which sets forth the instances in which a police officer may make a warrantless arrest; however, our research reveals no Nebraska case law construing the term "physical menace."

[4,5] Case law construing "menace" is most common in the context of an assault cause of action. Kurt points to a Nebraska Supreme Court decision in which the court held that the term "menacing," as used in Neb. Rev. Stat. § 28-310 (Reissue 2008), which proscribes third degree assault, "commonly includes

the showing of an intention to do harm." *In re Interest of Siebert*, 223 Neb. 454, 456, 390 N.W.2d 522, 524 (1986) (citing Webster's Third New International Dictionary, Unabridged 1409 (1981)). See *State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004). Webster's Third New International Dictionary, Unabridged, *supra*, defines "menace" as "to make a show of intention to harm: make a threatening gesture, statement, or act against." In its noun form, the word "menace" generally means a threat. See Webster's Encyclopedic Unabridged Dictionary of the English Language 894 (1983) ("something that threatens to cause evil, harm, injury, etc."); American Heritage Dictionary of the English Language, 4th ed. 1096 (2000) ("[t]he act of threatening"). However, in § 42-903(1)(b) the Nebraska Legislature specifically limited the definition of abuse to instances involving "*physical* menace." Other courts that have construed "physical menace" in the context of statutes proscribing assault have determined that the term necessarily requires more than words, that is, there must be some physical act on the part of the defendant. See, *People ex rel. R.L.G.*, 707 N.W.2d 258 (S.D. 2005); *People v. Sylla*, 7 Misc. 3d 8, 792 N.Y.S.2d 764 (2005); *McDonald v. State*, 784 So. 2d 261 (Miss. App. 2001) (Southwick, Presiding Judge, concurring; McMillin, Chief Judge, and Thomas, Judge, join). We agree and therefore conclude that "physical menace" as used in § 42-903(1)(b) means a physical threat or act and requires more than mere words.

[6] The facts presented here also require us to construe the word "imminent," which neither § 42-903(1)(b) nor Nebraska case law defines. Black's Law Dictionary defines "imminent danger" as "an immediate, real threat to one's safety that justifies the use of force in self-defense" or "[t]he danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself." Black's Law Dictionary 421 (8th ed. 2004). See, also, *Loyd v. Moore*, 390 S.W.2d 951, 955 (Mo. App. 1965) ("imminent peril" as used in humanitarian doctrine requires peril to be "imminent, that is to say, certain, immediate and impending. A likelihood or a bare possibility of injury is not sufficient to create imminent peril"); Webster's Encyclopedic Unabridged

Dictionary of the English Language, *supra* at 712 ("likely to occur at any moment"). We conclude that "imminent" bodily injury within the context of § 42-903(1)(b) means a certain, immediate, and real threat to one's safety which places one in immediate danger of bodily injury, that is, bodily injury is likely to occur at any moment.

We now turn to the facts to determine whether Barbara suffered abuse within the meaning of § 42-903(1)(b), specifically whether Kurt, by physical menace, placed Barbara in fear of imminent bodily injury. Barbara alleges several incidents in which Kurt sent her text messages containing letters that combine to form the word "behead." However, these text messages cannot be construed to be within the meaning of physical menace, as words alone are not a physical threat or act within the purview of the statute. Therefore, the text messages are not instances of abuse which could sustain the entry of a domestic abuse protection order within the meaning of §§ 42-903 and 42-924.

Barbara also alleges that Kurt placed a 2 by 4 in her driveway to threaten her. We assume without deciding that such allegation satisfies the meaning of "physical menace" within § 42-903(1)(b). However, even if we allow Barbara the benefit of that assumption, the record does not support a conclusion that, as a result of this incident, Barbara was placed in fear of *imminent* bodily injury. Barbara testified that the comment Kurt made regarding a 2 by 4 occurred 2 years prior to the incident and that she did not see anyone place the 2 by 4 in her driveway. Kurt denied placing the 2 by 4 or having anything to do with its appearance in Barbara's driveway. There is no evidence that Kurt was on or near the premises at the time Barbara noticed the 2 by 4; therefore, we cannot conclude that Barbara was placed in fear of an immediate, real threat to her safety which placed her in immediate danger of bodily injury, because bodily injury was not likely to occur at any moment. Barbara testified that she viewed this incident as a threat, but there is no evidence to support that either Kurt or the 2 by 4 was an immediate, real threat to Barbara's safety which placed her in immediate danger of bodily injury. As such, this incident is not an instance of abuse which could sustain the entry

of a domestic abuse protection order within the meaning of §§ 42-903 and 42-924.

With regard to the allegations regarding animal abuse, we likewise conclude that the record is insufficient to support that this is an instance of abuse.

We note that in 1998, the Legislature enacted 1998 Neb. Laws, L.B. 218, which created a cause of action for a harassment protection order pursuant to Neb. Rev. Stat. § 28-311.09 (Cum. Supp. 1998) separate from a cause of action for a domestic abuse protection order pursuant to § 42-924 (Reissue 1998). Prior to the enactment of L.B. 218, §§ 42-903 and 42-924 included language which provided a means by which a victim of stalking, harassment, or domestic abuse could file a petition for a protection order. See, § 42-903 (Cum. Supp. 1996); § 42-924 (Supp. 1997). L.B. 218 essentially transferred the language relating to stalking and harassment from §§ 42-903 and 42-924 to §§ 28-311.02 and 28-311.09. See, § 42-903 (Reissue 1998); § 42-924 (Reissue 1998); § 28-311.02 (Cum. Supp. 1998); § 28-311.09 (Cum. Supp. 1998). Some states' statutes which provide a cause of action for obtaining a protection order include more expansive language similar to that which was contained in §§ 42-903 and 42-924 prior to L.B. 218. See, 750 Ill. Comp. Stat. Ann. 60/203(a) (LexisNexis 2009) (petition for order of protection shall allege that petitioner has been abused by respondent); 750 Ill. Comp. Stat. Ann. 60/103(1) (LexisNexis 2009) ("[a]buse" means physical abuse, harassment, intimidation of dependent, interference with personal liberty or willful deprivation). We note that under § 28-311.09(1) (Reissue 2008) (formerly § 42-924(1)), a victim who has been harassed as defined by § 28-311.02 (Reissue 2008), may seek a harassment protection order. Section 28-311.02 defines "harass" as "to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose." We do not speculate, however, as to the result in the instant case if Barbara had pursued a harassment protection order pursuant to § 28-311.09 instead of a domestic abuse protection order pursuant to § 42-924 (Reissue 2008). Rather, we point out this legislative history only to indicate that we are

bound by the language contained in the specific statutes under which Barbara sought a protection order.

In our de novo review, we find that the facts Barbara alleged in the present case do not constitute abuse within the contemplation of § 42-903 (Reissue 2008). As such, the record does not support the district court's entry of a protection order pursuant to § 42-924. Accordingly, we conclude that the district court's order affirming the domestic abuse protection order should be reversed, and we direct the district court to enter an order dismissing the domestic abuse protection order against Kurt.

CONCLUSION

For the aforementioned reasons, we reverse, and remand with directions to vacate the protection order against Kurt and dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

JOSHUA M. JONES, APPELLANT, V.
JILLIAN Z. BELGUM, APPELLEE.
770 N.W.2d 667

Filed June 30, 2009. No. A-09-200.

1. **Child Support: Rules of the Supreme Court: Records: Appeal and Error.** The record on appeal from an order imposing or modifying child support shall include any applicable Nebraska Child Support Guidelines worksheets with the trial court's order. Failure to include such worksheets in the record will result in summary remand of the trial court's order.
2. **Jurisdiction: Appeal and Error.** After an appeal to an appellate court has been perfected in a civil case, a lower court is without jurisdiction to hear a case involving the same matter between the same parties.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Motion overruled, and cause remanded with direction.

Kelly T. Shattuck, of Vacanti Shattuck, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

This matter comes before us on Joshua M. Jones' motion requesting a second extension of his brief due date. He seeks an extension so that he may obtain a child support calculation worksheet from the district court, because the court did not include such a worksheet with its order.

[1] Recently, in *Rutherford v. Rutherford*, 277 Neb. 301, 308, 761 N.W.2d 922, 927 (2009), the Nebraska Supreme Court declared that "effective upon the filing of this opinion, the record on appeal from an order imposing or modifying child support shall include any applicable worksheets with the trial court's order. Failure to include such worksheets in the record will result in summary remand of the trial court's order." Jones' motion asserts that the court's order—entered prior to release of *Rutherford*—failed to include a child support worksheet. We are bound by *Rutherford* to summarily remand the matter to the district court.

[2] Jones' motion seeks to save the appeal by obtaining the necessary worksheet from the district court, including the worksheet in the appellate record, and then making arguments before this court. Generally, after an appeal to an appellate court has been perfected in a civil case, a lower court is without jurisdiction to hear a case involving the same matter between the same parties. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004). Because the filing of the notice of appeal divests the district court of jurisdiction—with some exceptions which do not appear applicable to the situation here—we overrule Jones' motion and remand the matter to the district court with direction to prepare the applicable child support worksheet. Once the district court has completed the worksheet, filing a new appeal will be necessary.

While the delay and additional expense associated with this remand are unfortunate, there is a procedural tool—a motion to alter or amend a judgment—readily available to "avoid an expensive and time-consuming remand from the appellate court for preparation of child support worksheets." *Moore v. Bauer*,

11 Neb. App. 572, 581, 657 N.W.2d 25, 33 (2003) (Sievers, Judge, concurring). We emphasize the importance of using this procedural device in the future.

MOTION OVERRULED, AND CAUSE REMANDED WITH DIRECTION.

IN RE GUARDIANSHIP OF ELIZABETH H., A MINOR. BETH R., APPELLANT, V. THOMAS H. AND SUSAN H., APPELLEES.

771 N.W.2d 185

Filed July 14, 2009. No. A-08-830.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings.
4. ____: ____. On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
5. **Guardians and Conservators.** A guardianship is no more than a temporary custody arrangement established for the well-being of a child.
6. **Guardians and Conservators: Parental Rights.** The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights. Rather, guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future.
7. **Guardians and Conservators: Child Custody.** Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time.
8. **Guardians and Conservators.** Guardianships are temporary and depend upon the circumstances existing at the time.
9. **Guardians and Conservators: Child Custody: Parental Rights.** The parental preference principle applies in guardianship proceedings that affect child custody.
10. **Child Custody: Parental Rights: Presumptions.** The parental preference principle establishes a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.

11. **Child Custody: Parental Rights.** The parental preference principle provides that a parent has a natural right to the custody of his or her child which trumps the interest of strangers to the parent-child relationship and the preferences of the child.
12. **Guardians and Conservators: Parental Rights: Proof.** An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
13. **Guardians and Conservators: Parental Rights.** The parental preference principle must be applied to initially determine whether to appoint a guardian over a parent's objection.
14. **Guardians and Conservators: Parental Rights: Proof.** An individual who seeks appointment as a guardian over the objection of a biological or adoptive parent bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require a court to deny the request for a guardianship.
15. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
16. **Guardians and Conservators.** The "fitness" standard applied in guardianship appointment under Neb. Rev. Stat. § 30-2608 (Reissue 2008) is analogous to a juvenile court finding that it would be contrary to a juvenile's welfare to return home.
17. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Affirmed.

Sandra Stern for appellant.

C.G. (Dooley) Jolly, of Forsberg & Jolly Law, P.C., L.L.O., for appellees.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Thomas H. and Susan H. filed a petition for guardianship of their granddaughter, Elizabeth H. Elizabeth's natural mother, Beth R., objected to the guardianship. Following a trial, the Douglas County Court found Beth to be unfit and granted the

amended petition for guardianship. Beth now appeals, and for the reasons set forth herein, we affirm.

BACKGROUND

Thomas and Susan filed this action to establish guardianship of their granddaughter, Elizabeth. Thomas and Susan's daughter and Elizabeth's natural mother is Beth. Elizabeth's father was incarcerated at the time of the hearing on this matter, but received notice and appeared telephonically for some of the proceedings. Elizabeth was born in April 2002, and Beth thereafter gave birth to three sons, born in April 2005, May 2006, and January 2008.

On January 22, 2008, Thomas and Susan filed a petition for guardianship of Elizabeth alleging that both Beth and Elizabeth's father were unable or unwilling to provide the requisite care and supervision that Elizabeth required. They also asked the court to appoint a temporary guardian, pending notice and hearing on permanent guardianship, asserting that Beth had abandoned Elizabeth and that Elizabeth's father was incarcerated. On February 26, the county court issued letters of temporary coguardianship to Thomas and Susan, and they filed acceptances the same day.

On March 7, 2008, Beth filed an answer to the petition for guardianship, stating that she was willing, able, and competent to care for Elizabeth, had not abandoned her, and had requested Elizabeth's return on numerous occasions. Beth asked the court to deny the guardianship and order Elizabeth to be returned to her.

On April 15, 2008, Beth moved to set aside the temporary guardianship. A hearing on that motion was held on May 21. The record does not reflect that the court explicitly ruled on the motion, but in an order dated May 21, 2008, the court ordered a permanent guardianship hearing and therefore implicitly denied it. The order also allowed visitation, but set forth no specific visitation requirements.

On May 21, 2008, Thomas and Susan filed an amended petition for guardianship, which the court heard on June 30. Thomas and Susan called five witnesses to testify: Beth; Susan; Thomas; Sonya R., who is Beth's former mother-in-law;

and an employee at the daycare that Elizabeth attended in 2004. Beth testified in her own behalf and called two additional witnesses: a family support worker and visitation specialist, who had observed her recent visits with Elizabeth, and a family friend.

Beth was 24 years old at the time of the trial and has four children—Elizabeth, who was then 6 years old, and three sons who were then 3 years old, 2 years old, and 5 months old. Each of the four children has a different father. Beth was in a relationship with Elizabeth's father for approximately 2 or 3 weeks. He was incarcerated for attempted murder at the time of the trial. Beth had had some contact with him since Elizabeth's birth; she had sent him pictures of her children, and he had sent her letters, although she rarely ever sent a letter back to him.

After Elizabeth was born, Beth lived with her parents until Elizabeth was 2 or 2½ years old. While they were living with Thomas and Susan, Beth worked and Elizabeth went to daycare during Beth's work hours. Susan testified that for the first year of Elizabeth's life, Beth was a good mother, but then she became more interested in "doing things" with her friends. Susan said Beth also took Elizabeth to daycare when Beth had the day off from work instead of spending time with her. Susan described the upstairs portion of the house where Beth lived with Elizabeth as "shocking" and stated that there were soiled diapers on the floor in all of the rooms, the crib sheet was so dirty that it was stiff, and there were several old bottles "all over the floor."

In approximately January 2004, Beth moved out of Thomas and Susan's home and she and Elizabeth moved in with a man, with whom Beth lived for approximately 4 or 5 months. During her deposition, Beth was unable to remember the man's last name. Beth took Elizabeth to live with Thomas and Susan on March 7. Susan testified that Beth contacted her and Thomas and asked if Elizabeth could stay with them while she got back on her feet. Beth acknowledged that she "wasn't in a good spot for a long time." Elizabeth has not returned to live with Beth, and Beth has not returned to live at Thomas and Susan's home with Elizabeth since that time.

During the first few weeks that Elizabeth lived with Thomas and Susan, they kept Elizabeth during the week and Beth picked her up from daycare on Friday afternoon, kept her over the weekend, and returned her on Sunday afternoon. Susan stated that they suggested that arrangement because Beth was partying and they did not want to give her free rein, because they felt she needed to take time to take care of her child.

On March 21, 2004, after a weekend visit, Beth returned Elizabeth with an injury, which Susan and Beth both described as a burn, to her nose and upper lip. A photograph of the injury appears in the record. Beth testified that Elizabeth received the injury while visiting Elizabeth's father. Beth testified that she dropped Elizabeth off with Elizabeth's father for an hour and that when she returned to pick her up, she had the injury. Beth also testified that she took Elizabeth to get medical treatment, paid for the medical appointment, and filed a police report regarding the incident. Susan testified, however, that when she asked Beth how the injury occurred, Beth responded that she was in the next room for a couple of hours and that when she came out, Elizabeth's nose was burned. Susan also said Beth told her that she took Elizabeth to the emergency room, but that she was told they would not treat Elizabeth because Beth could not tell them how Elizabeth sustained the injury. Elizabeth has not seen her father since the injury.

On March 24, 2004, following the injury, Susan suggested to Beth that Susan and Thomas keep Elizabeth full time so Elizabeth would have more stability. Beth quickly agreed. Susan recalled that Beth did not see Elizabeth for 6 months after that. Beth called once during that timeframe to visit, but because it was going to be late in the evening, Susan suggested that Beth come when she had a day off. Susan testified that Beth knew where Elizabeth was living with Thomas and Susan, their telephone number had not changed, they did not attempt to hide Elizabeth or interfere in the mother-daughter relationship, and they never indicated that Beth was not welcome in their home.

Beth was convicted of driving under the influence in 2005. In April 2005, Beth gave birth to a son. In May 2006, she gave

birth to another son. Beth married Nick R., that son's father, in July 2005. The couple separated in July 2006 and divorced thereafter. While they were married, Beth filed a petition for a protection order against Nick and assault charges were also filed against him. Beth stated that during the time she was married, she was in a position to take Elizabeth back. She stated that she prepared a room for Elizabeth and was saving to buy clothes for her. Beth requested that Thomas and Susan return Elizabeth to her in April 2006 while she was still married, but reunification did not occur. Susan testified that she and Thomas encouraged Beth to establish a relationship with Elizabeth before she took her back because they were essentially strangers to one another at that time. However, Beth did not follow up by spending time with Elizabeth. Beth's request in April 2006 was the only instance in which Beth asked Thomas and Susan to return Elizabeth, aside from the present case.

Sonya, Nick's mother, testified regarding a home where Nick and Beth lived with Beth's two older sons during their marriage. This was the same home to which Beth testified she made preparations to bring Elizabeth to live with her. Sonya testified that the home was a mess with clutter and that there were numerous broken beer bottles on the step and in the driveway. At one point, Beth left her two older sons with Sonya for a period of less than 2 weeks. During that time, Nick was in jail and Beth spent time in the hospital because Nick had abused her. In August 2006, Beth moved out of the house she shared with Nick and moved into an apartment with her two older sons.

In February or March 2007, Beth moved in with her current boyfriend, Mike M., who was then 45 years old. A son was born to Mike and Beth in January 2008. Beth was still living at that residence at the time of the hearing. The household includes eight people: Mike, Beth, Beth's three sons, and Mike's two children and grandson. Mike was recently charged with criminally assaulting Nick. Beth testified that Mike fully supports her and her children and that she is a stay-at-home mother who does not work outside of the home. She acknowledged that if she and Mike were to separate, she was unsure

where she would live, but testified that she had friends with whom she could stay.

For Easter in April 2007, Beth, Mike, and the two older sons visited Elizabeth at Thomas and Susan's home. They took two stuffed animals to Elizabeth. Susan recalled that Beth took several pictures of herself with Elizabeth and of Elizabeth with her half brothers and that because this had never happened before, it confused Elizabeth. Susan stated that at that time, she did not know where Beth was living and did not have her telephone number. Beth acknowledged that she did not give Thomas and Susan her telephone number for a period of time, but stated that she did give them Mike's telephone number.

Susan testified that in her opinion, Beth had abandoned Elizabeth. She reasoned that during the past 4 years, Beth had seen Elizabeth less than a dozen times. Prior to Beth's visits resulting from the present guardianship case, which are discussed below, it had been approximately 14 months since Beth had had any contact with Elizabeth. Beth acknowledged that the only contact, including telephone calls, she had had with Elizabeth in the year prior to the hearing was the Easter 2007 visit. Susan testified that over the years, Beth did make a couple of calls, had once asked to take Elizabeth to a zoo, and had taken her to see the movie "Cars." Susan recalled that Beth would give only about an hour's notice of her request to see Elizabeth, while Beth said that she usually tried to give notice the day before she wanted to visit. Beth admitted that she should have called Elizabeth more often.

Beth did not contribute financially to Elizabeth's upbringing. Although she was ordered to pay child support for Elizabeth on February 14, 2008, Beth did not make any child support payments until a couple of weeks prior to the June 30 hearing. Susan testified that she and Thomas carry health insurance on Elizabeth, pay for her school tuition, and receive $222 per month in "ADC" for Elizabeth.

Beth did not know who Elizabeth's first grade teacher was and admitted that she did not attend parent-teacher conferences for Elizabeth during the previous year and did not make an effort to find out when they were held. Beth stated that she

did not send any gifts for Elizabeth to Thomas and Susan's house and acknowledged that the only gift she had given Elizabeth in the previous year was a stuffed animal for Easter in 2007.

Beth stated that she did not simply take Elizabeth from Thomas and Susan, her parents, because she did not want to scare Elizabeth. She also stated that she had a tense relationship with her parents and was uncomfortable confronting them regarding visitation and taking Elizabeth back. Beth stated that "every time I did try to get [into] contact with them over the years, it just seem[ed] like there [were] all kinds of excuses. . . . I don't have a relationship with them, so it's hard for me to go and be with them just to see my daughter." Beth acknowledged that Thomas and Susan had taken good care of Elizabeth but stated that she opposed the guardianship because she was capable of taking care of her. She also acknowledged that Elizabeth had a stronger bond with Beth's parents because Beth had not spent as much time with Elizabeth. When asked why she wanted her daughter back now, Beth stated, "I just kind of think every child should be with their mother. I have friends that work in places like Boys Town and — with kids like that, and I just heard some real nasty stories, and I — I don't want my kids to turn out like that."

A family support worker and visitation specialist testified on Beth's behalf. The worker supervised the six 2-hour visits between Elizabeth and Beth from June 11 to 27, 2008, just prior to the hearing. She testified that the visits occurred at a zoo, a park, Beth's home, a skating rink, a restaurant, and a children's museum. The worker was not concerned for Elizabeth's safety during the visits that she observed. She testified that Elizabeth and Beth appeared to have a regular mother-daughter relationship and that she observed normal interaction between Elizabeth and her half siblings.

Beth's family friend testified that she and Beth had been friends for approximately 3 years and that she had observed Beth and Mike with Beth's sons, but not with Elizabeth. She stated that she spent time with the family about one or two times per week and that they were a typical family. She testified

that they had steady meals, a clean home, clean clothes, and a roof over their heads and that the children had consistent bedtimes. She stated that Beth told her that she intended to bring Elizabeth back into her life and into her home.

Following the testimony at the hearing, the county judge ruled from the bench, finding that Beth was unfit, and awarded permanent guardianship to Thomas and Susan. On July 1, 2008, the county court entered a written order finding that Beth was unfit to have the care, custody, and control of Elizabeth; granted Thomas and Susan's amended petition for guardianship; and ordered letters of guardianship to be issued. Beth now appeals.

ASSIGNMENT OF ERROR

Beth asserts, restated, that the county court erred when it appointed Thomas and Susan as coguardians of Elizabeth over her objection because there was not competent, clear, and convincing evidence that Beth was unfit or that she had forfeited her rights.

STANDARD OF REVIEW

[1-3] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. See, *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2008). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Guardianship of D.J., supra*. An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings. *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W.2d 586 (2005).

[4] On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *In re Guardianship of Lavone M.*, 9 Neb. App. 245, 610 N.W.2d 29 (2000).

ANALYSIS

Beth asserts that the county court erred when it appointed Thomas and Susan as coguardians of Elizabeth over Beth's objection because there was not competent, clear, and convincing evidence that Beth was unfit or that she had forfeited her rights to Elizabeth.

Section 30-2608 provides, in relevant part:

> (a) The father and mother are the natural guardians of their minor children and are duly entitled to their custody . . . being themselves . . . not otherwise unsuitable. . . .
>
> . . . .
>
> (d) The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by prior or current circumstances or prior court order.

Further, § 30-2611(b) provides in part:

> Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 30-2608 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment.

[5-8] A guardianship is no more than a temporary custody arrangement established for the well-being of a child. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights. Rather, guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future. *Id.* Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time. *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). In that sense, guardianships are temporary and depend upon the circumstances existing at the time. *Id.*

[9-12] The Nebraska Supreme Court held in *In re Guardianship of D.J., supra*, that the parental preference principle applies in guardianship proceedings that affect child custody. The parental preference principle establishes a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent. *Id.* The principle provides that a parent has a natural right to the custody of his or her child which trumps the interest of strangers to the parent-child relationship and the preferences of the child. *Id.* An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent. *Id.*

[13-16] Our research reveals no Nebraska case law involving the application of the parental preference principle to the initial appointment of a guardian as opposed to a guardianship termination proceeding. However, it is axiomatic that the parental preference principle must also be applied to initially determine whether to appoint a guardian over a parent's objection. It follows that an individual who seeks appointment as a guardian over the objection of a biological or adoptive parent bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require a court to deny the request for a guardianship. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W.2d 586 (2005). The "fitness" standard applied in guardianship appointment under § 30-2608 is analogous to a juvenile court finding that it would be contrary to a juvenile's welfare to return home. See *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

[17] We now apply the law to the facts of the present case to determine whether Thomas and Susan have proved by clear and convincing evidence that Beth is unfit or has forfeited her right to custody of Elizabeth. The county court found only that Beth was unfit and did not determine whether she had forfeited her right to custody of Elizabeth, and as such, we limit our review to the issue of whether Beth is unfit to retain custody of Elizabeth. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). We review for error on the record the county court's decision to appoint Thomas and Susan as Elizabeth's coguardians. That is, we consider whether the court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. We do not substitute our factual findings for those of the county court where competent evidence supports those findings.

At the trial, the county court judge stated that the main issue in this case was whether Beth was a fit person to have the custody of her daughter, Elizabeth. The court then made oral factual findings before announcing its determination that Beth was unfit. The court noted that Beth had shown she was deficient at making proper choices in her life and that those choices had a negative effect on Elizabeth's well-being. The court stated:

> Now a part of being a fit parent is making proper choices, or at leas[t] not making bad ones. . . . Having children you can't take care of financially or emotionally is not a proper choice. When you do this continually, it indicates that you are not a person who can make proper choices. Choosing mates who are going to be responsible for the care and custody of these children, along with you as their parent, is also something that is indicative of whether or not you make proper choices. . . . Choosing somebody who assaults you repeatedly [or] somebody who's put in jail for attempted murder is not making proper choices. . . .
>
> Now, this doesn't seem to bother you at all, but it certainly bothers me. You have absolutely had no stability

> in your relationships with the men. In fact, you've also indicated the men that you have had sex with and had children with, some of [them] you don't even hardly know. . . . You have no . . . connection with these people. You just go have babies. Those are not proper choices. You are unemployed. . . . Your newest boyfriend [was] just recently convicted of assaulting your ex-husband [and that] doesn't indicate a very good choice. If you leave your current boyfriend, you have no visible means of support. . . . These are not proper choices for somebody who wants to be a fit parent to a child.
>
> Now, there's more than ample evidence that you have had minimal, and I mean minimal, contact with this little girl for the last four years. Now that's a lot of time. . . . [W]hen events [occur] so occasionally that you can remember them vividly, like taking her to the movie Cars[,] [t]hey happen so sporadically that they can't be termed as anything but momentous because they very seldom ever happen. Those are things you shouldn't be able to remember at all because you do them so often they just blur together. But now these are the things that I'm supposed to take and find that you are a fit parent.
>
> [F]rom the evidence, I believe the outcome is absolutely clear. By your own actions or the lack thereof, it is clear to me that you were and still are unfit to have custody of Elizabeth. . . . It's clear that you were not able to care for Elizabeth financially or emotionally many years ago. And you made the choice to have more children that you can't financial[ly] take care [of]; with three other men, all out of wedlock. . . . I think you are unfit to have the custody of the child and if you ever wish to have custody of her, you're going to have to do a[n] awful lot of changing as far as I'm concerned.

Because the court ultimately appointed Thomas and Susan as Elizabeth's permanent coguardians, it implicitly determined that the requirements of § 30-2611(b) had been met, including that Elizabeth's welfare and best interests would be served by granting the requested appointment.

The record before us provides competent evidence to support the court's determination that Beth was unfit to retain custody of Elizabeth at the time of the hearing. Beth has shown a pattern of poor decisionmaking which has been and probably would be detrimental to Elizabeth's well-being if Elizabeth were to live with Beth at this time. Beth has made many choices that have adversely affected her relationship with Elizabeth. Beth has had very minimal contact with Elizabeth in the 4 years that Elizabeth has lived with Thomas and Susan. Beth admitted that she should have called more often and that she did not see Elizabeth for extended periods of time. The only explanation that Beth has given for her absence from Elizabeth's life is that it was difficult for her to be around her parents "just to see [her] daughter." Beth's decision to forgo a relationship with Elizabeth so that she could avoid her parents is an example of Beth's unwillingness to put her parental responsibilities before her own interests, and it also indicates an indifference toward her child's welfare over a long period of time, which is undoubtedly a detriment to Elizabeth's well-being.

Beth's history over the last 4 years has certainly shown a lack of stability and maturity. Beth's present situation is that she is unemployed and lives in a three-bedroom home with her boyfriend, his two children and grandson, and Beth's three sons. It is unclear how Elizabeth would fit into this scenario. The evidence shows that Elizabeth is confused over Beth's present family situation. We are mindful that we are not to consider that Thomas and Susan may provide a more economically advantageous home situation to Elizabeth. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). We also note that there is no evidence to suggest that Beth has not been a fit parent to her three younger sons.

We conclude that at the time of the hearing, the evidence clearly and convincingly supported a finding that placing Elizabeth with Beth would result in detriment to Elizabeth and would be contrary to her welfare. This conclusion is primarily supported by the fact that Beth has not had a parental relationship with Elizabeth until shortly before the hearing. However, recognizing the temporary nature of guardianships, this is not

to say that Beth could not place herself in a position in the future to regain custody of Elizabeth after a satisfactory period of regular visitation and establishment of a parental relationship, together with a showing of stability in Beth's life.

We find that the county court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. As such, we find that the county court did not err when it found that Beth was unfit and granted the amended petition for guardianship.

CONCLUSION

For the aforementioned reasons, we find that the county court did not err when it granted the amended petition for guardianship, and accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
KEVIN A. SIMNICK, APPELLANT.
771 N.W.2d 196

Filed July 21, 2009. No. A-08-959.

1. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** While a criminal defendant has a Sixth Amendment right to effective assistance of counsel, when counsel is court appointed, the defendant does not have a constitutional right to counsel of his or her choice.
2. **Right to Counsel: Appeal and Error.** A trial court's denial of a defendant's motion to dismiss his or her court-appointed counsel and to appoint substitute counsel is reviewed on an abuse of discretion standard.
3. **Convicted Sex Offender: Pleas.** A trial court's failure to advise a defendant of the registration requirements of Nebraska's Sex Offender Registration Act does not render a no contest plea involuntary or unintelligent.
4. ____: ____. Nebraska's Sex Offender Registration Act registration requirements are collateral consequences of convictions, and a trial court is not required to inform a defendant of such collateral consequences before accepting a plea of no contest.
5. **Convicted Sex Offender: Judgments.** A finding that a sexual offense is an aggravated offense is part of the trial court's judgment.
6. **Convicted Sex Offender: Legislature: Intent.** The Legislature's civil regulatory scheme to protect the public from the danger imposed by sex offenders, including lifetime registration for aggravated offenses, was not intended to be punitive.

7. **Effectiveness of Counsel: Records: 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 the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
8. **Effectiveness of Counsel: Proof.** Nebraska follows the two-prong test for determination of the question of whether a criminal defendant received ineffective assistance of counsel. The first prong is whether counsel performed deficiently, that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area; and the second is whether the deficient performance actually prejudiced the criminal defendant in making his or her defense.
9. ____: ____. The prejudice prong of the ineffective assistance of counsel test requires that the criminal defendant show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different.
10. ____: ____. The two-prong test for an ineffective assistance of counsel claim need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
11. **Convicted Sex Offender: Words and Phrases.** An aggravated offense is defined by Neb. Rev. Stat. § 29-4005(4)(a) (Reissue 2008) as any registrable offense under Neb. Rev. Stat. § 29-4003 (Reissue 2008) which involves the penetration of (1) a victim age 12 years or more through the use of force or the threat of serious violence or (2) a victim under the age of 12 years.
12. **Pleas.** The difference between a plea of nolo contendere and a plea of guilty is that while the latter is a confession or admission of guilt binding the accused in other proceedings, the former has no effect beyond the particular case.
13. **Convicted Sex Offender: Pleas: Presentence Reports.** The factual predicates for lifetime registration under Nebraska's Sex Offender Registration Act can come from the factual basis recited at the time of the plea and the presentence report.
14. **Sentences: Legislature: Juries.** The Legislature cannot remove from the jury the task of assessing facts which could increase the range of penalties to which a criminal defendant is exposed, and such enhancing facts must be found to exist beyond a reasonable doubt.
15. **Sentences: Statutes: Verdicts.** The statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.
16. **Convicted Sex Offender: Legislature: Intent.** The Legislature's intent in providing for lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) was to establish an additional form of punishment for certain sex offenders.
17. **Convicted Sex Offender: Sentences: Juries.** Where the facts necessary to establish an aggravated offense as defined by Nebraska's Sex Offender Registration Act are not specifically included in the elements of the offense of which the defendant is convicted, such facts must be specifically found by a jury in order

to impose lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) as a term of the sentence.

18. **Sentences: Juries: Appeal and Error.** The failure to submit a sentencing factor to the jury is not structural error and is subject to a harmless error analysis.
19. ____: ____: ____. Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, the appropriate harmless error standard is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.
20. **Sentences: Pleas: Jury Trials.** While a criminal defendant can plead to the underlying charge, and still have a jury trial on penalty-enhancing facts, that is not true if there is a plea which admits the enhancing facts.
21. **Convicted Sex Offender: Pleas.** What a defendant admits by his or her no contest plea can be used in determining whether he or she is subject to lifetime community supervision.
22. **Convicted Sex Offender: Sentences: Constitutional Law: Appeal and Error.** The operation of Neb. Rev. Stat. § 83-174.03 (Reissue 2008) is entirely independent from the sentence imposed upon a defendant for first degree sexual assault, and, as such, any claim the defendant might have concerning the constitutional implications of § 83-174.03 should be raised if and when he or she becomes subject to its provisions, but not on a direct appeal from his or her underlying sexual assault conviction.
23. **Convicted Sex Offender: Sentences: Constitutional Law.** The uncertainty of whether a defendant will in fact be affected at all by the provisions of lifetime community supervision counsels against weighing their constitutionality before their effects are known.
24. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in a case before it, the Court of Appeals has jurisdiction to determine whether a constitutional challenge has properly been raised.
25. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Webb E. Bancroft, and Yohance L. Christie, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

By an information filed October 5, 2007, in the district court for Lancaster County, Nebraska, Kevin A. Simnick was charged with count I, first degree sexual assault of a child, see Neb. Rev. Stat. § 28-319.01 (Reissue 2008), a Class IB felony, and with count II, first degree sexual assault on a child, see Neb. Rev. Stat. § 28-319 (Reissue 2008), a Class II felony. Although there were various pretrial and preplea matters, we will not detail such except to the extent necessary to address the issues presented by this appeal.

On June 16, 2008, Simnick entered a no contest plea to count II in exchange for dismissal of count I and the written agreement of the Scotts Bluff County Attorney not to prosecute a potential offense involving the same child in that jurisdiction. On August 11, the matter came before the district court for sentencing, at which time the court imposed a sentence of 20 to 35 years' incarceration. Additionally, the court found the offense made Simnick subject to Nebraska's Sex Offender Registration Act (SORA). The court further found that count II was an aggravated offense as defined in Neb. Rev. Stat. § 29-4005 (Reissue 2008) and that therefore, Simnick was required to register under SORA for the remainder of his life. Simnick has timely appealed.

The parties have completed briefing, and under Neb. Ct. R. App. P. § 2-111(E)(5)(a), the cause is submitted for decision without oral argument.

FACTUAL BACKGROUND

The victim, A.M., was born October 24, 1996, and she was the daughter of Simnick's wife. The child reported a number of instances of sexual abuse, and Simnick admitted to police that he had penetrated A.M.'s vagina with his penis, which occurred when A.M. was less than 12 years of age and living in Lancaster County.

ASSIGNMENTS OF ERROR

Simnick asserts seven assignments of error, which are as follows: (1) The district court erred in denying his counsel's motion to withdraw; (2) the district court erred in accepting the

no contest plea, because it was not entered into freely, voluntarily, knowingly, and intelligently; (3) the district court erred in failing to inform him regarding the nature of the charge to which he entered a plea; (4) he received ineffective assistance of counsel; (5) the district court erred in determining that the offense was an aggravated offense for purposes of SORA; (6) the district court erred in determining that he was "subject to lifetime parole pursuant to Neb. Rev. Stat. §83-174.03, as such statute violates the ex post facto clause"; and (7) the sentence imposed was excessive.

STANDARD OF REVIEW

We will set forth the particular standard of review applicable to each assignment of error in our discussion thereof.

ANALYSIS

Denial of Trial Counsel's Motion to Withdraw.

Simnick's trial counsel filed a motion to withdraw approximately 3½ months after the information was filed in district court. The motion asserted that Simnick was unable to pay the remaining attorney fees necessary for counsel to proceed, nor could he pay for expert witnesses that may be necessary. When the district court took up the motion, counsel also asserted that Simnick would be unable to pay for discovery depositions. The district court denied the motion, commenting that in the district court, there has been reluctance "to allow attorneys to withdraw in criminal cases because of the fact that the appropriate financial arrangements were not made initially," and that there was an obligation on the part of counsel when becoming involved in a case to make financial arrangements at the time of the involvement. The court did indicate that if appropriate, the court might authorize expenses from the county. Accordingly, trial counsel proceeded through sentencing, and then the district court appointed a public defender for this appeal.

Simnick argues that "[i]t is clearly an abuse of discretion to fail to determine what financial arrangements have been made, what resources are left, and what potential expenses are left to be incurred to ensure that a criminal defendant receives, in all stages of his or her case, effective assistance of counsel."

Brief for appellant at 15. No authority for this proposition is cited, and we know of none, at least when the trial court does not have before it a motion to proceed in forma pauperis and a poverty affidavit, which it did not in this instance. Accordingly, we reject the proposition quoted above because, as stated, it is without supporting authority and it is clearly overly broad.

[1] Simnick also argues that the financial interests of the attorney and those of the defendant were conflicting and that as a result, counsel had a conflict of interest. Thus, Simnick argues that the trial court should have employed its broad discretion in determining whether a conflict warranting disqualification of counsel existed, citing *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987). *El-Tabech* is not very helpful to Simnick, because it involved a defendant's claim of error when the trial court disqualified his counsel. The Nebraska Supreme Court in *El-Tabech* pointed out that while a criminal defendant has a Sixth Amendment right to effective assistance of counsel, when counsel is court appointed, the defendant does not have a constitutional right to counsel of his choice. In this instance, Simnick chose his trial attorney, and there was no indication in the record that he wanted a different attorney. The trial court simply denied trial counsel's motion to withdraw, which was premised solely on the representation of trial counsel that his client was unable to pay fees or costs of defense that might be incurred. No showing by affidavit of Simnick's financial status at that time was made. Simnick's assertion in his brief that it was an abuse of discretion to deny the motion to withdraw "without holding an evidentiary hearing to determine the resources available to [Simnick]" rings somewhat hollow, given the failure of Simnick, and by extension his trial counsel, to make any evidentiary showing in support of the motion. Brief for appellant at 16.

[2] Additionally, a claim of error in denying an attorney's motion to withdraw as counsel, as opposed to the defendant's request for such relief, can only be characterized as unique. With respect to the applicable standard of review, we hold that our review of the trial court's decision is for an abuse of discretion by analogy to similar issues. See *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988) (trial court's denial of

defendant's motion to dismiss his court-appointed counsel and to appoint substitute counsel is reviewed on abuse of discretion standard).

The State directs us to authority that courts generally presume that counsel will subordinate his or her pecuniary interests in order to honor his or her professional responsibility to a client. See *Caderno v. U.S.*, 256 F.3d 1213 (11th Cir. 2001). Any other rule would potentially create havoc in our criminal justice system, and use of this presumption does not foreclose a showing of an actual conflict—which is completely absent here.

Accordingly, reviewing this matter for an abuse of discretion, we do not find any conflict of interest on this record to require the court to disqualify trial counsel, nor did the trial court abuse its discretion in denying trial counsel's request that he be allowed to withdraw. This assignment of error is without merit.

Was Simnick's No Contest Plea Entered Voluntarily?

Simnick asserts that the trial court erred in advising him of the consequences of his plea and that as a result, the plea was not entered freely, voluntarily, knowingly, and intelligently. The specific shortcoming alleged in the advisory to Simnick before the acceptance of his plea was that he was not advised by the court that the charge to which he was pleading would subject him to lifetime SORA registration.

Simnick argues that the legal underpinning for the necessity of such an advisement derives from *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), where the Nebraska Supreme Court set forth a number of preconditions by way of advisements to the defendant that must occur before the plea is valid and voluntary. In *Irish*, one of those preconditions is that the "defendant knew the range of penalties for the crime with which he or she is charged." 223 Neb. at 820, 394 N.W.2d at 883.

[3-5] Simnick acknowledges that in *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002), the court concluded that the trial court's failure to advise the defendant of the registration requirements of SORA did not render the no contest plea

involuntary or unintelligent. In so concluding, the *Schneider* court relied upon *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998), which held that SORA registration requirements are collateral consequences and that thus, the trial court is not required to inform the defendant of such collateral consequences before accepting a plea of no contest. *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004), involved a case in which James Worm, rather than being subject to the 10-year registration requirement as in *Schneider*, was subject to the lifetime registration requirement associated with an aggravated offense. The court pointed out that Worm's lifetime SORA registration did not arise solely and independently from his conviction, but, rather, from the fact that the trial court had been required, as part of the sentence, to determine whether the offense was aggravated, and that thus, such finding was part of the trial court's judgment.

[6] Accordingly, in *Worm*, the Nebraska Supreme Court determined that because the finding that the offense was aggravated was part of the judgment for purposes of an appeal, the constitutional challenge to SORA on the merits was ripe for appellate review. However, the court did find that Worm's constitutional challenge to SORA's notification provisions was not yet ripe for appellate review, and in discussing the possibility of a high-risk assessment for persons who have committed an aggravated offense, the court noted that the Nebraska State Patrol is to assess a registrant based on many factors, including the offender's response to treatment and behavior while confined. Thus, in Worm's case, because he was still incarcerated, this assessment had not been made, nor had the State Patrol assigned a notification level. Worm further argued that the finding that he had committed an aggravated offense violated the ex post facto clause, because an aggravated offense and its attendant consequences did not exist when he committed the registrable offense. Worm further argued that the ex post facto clause was violated because the legislative amendment establishing "aggravated offenses" resulting in lifetime registration is punitive, given that he must register for life, rather than 10 years. After a comprehensive analysis of various factors that we will not set forth here, the *Worm* court found that

the Legislature's civil regulatory scheme to protect the public from the danger imposed by sex offenders, including lifetime registration for aggravated offenses, was not intended to be punitive.

The *Worm* court also analyzed the question of whether the effect of the lifetime registration requirement was so punitive as to negate the Legislature's intent. The *Worm* court answered that question in the negative. Thus, because the *Worm* court found the lifetime registration requirements not to be punitive, we conclude that the advisement of such is not required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), which requires the defendant to know the range of penalties for the crime with which he is charged. In short, being subject to lifetime registration is not part of the potential penalties about which a criminal defendant must be advised under *Irish, supra*, in order for the plea to be deemed voluntary and valid. That being said, at the time of the taking of Simnick's plea of no contest during the arraignment process on the amended information, the prosecutor described the statutory range of incarceration as 1 to 50 years, said that Simnick could be ordered to pay restitution, and told Simnick that he "would be subjected to [SORA,] which would require a lifetime registration." Simnick was then asked if he understood "the charge and the possible penalty," to which he responded, "Yes, I do." Accordingly, although under *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004), advisement of the possibility of lifetime registration is not required to satisfy *Irish, supra*, Simnick cannot now claim that he was not aware of, and had not been advised about, lifetime registration. This assignment of error is without merit.

Was Simnick Improperly Advised of Nature of Charges to Which He Was Pleading?

Citing *Irish, supra*, again, Simnick argues that there was no adequate advisement regarding the nature of the charges and that the record did not reveal his understanding thereof. Although without direct citation of authority, Simnick more specifically asserts that the district court was required to have made inquiry "and determine[d] that [Simnick] understood the

material elements of the offense that the [S]tate must prove beyond a reasonable doubt to convict him." Brief for appellant at 28. We are not persuaded. First, this is not required by *Irish, supra.* In any event, it seems rather elementary that the recitation of the charged offense during the plea hearing does in fact include advisement of the elements that the State must prove. We have found no authority requiring advisement of each and every element that must be proved by the State. Rather, *Irish, supra*, holds simply that the court must inform the defendant concerning "the nature of the charge" and that the record must show the defendant understands such. Here, the record reveals that during the plea hearing, after amendment of the charges pursuant to the plea agreement, Simnick was told by the county attorney that the amended information

> charges you with first-degree sexual assault, a Class II felony.
>
> It does allege that on, about, or between January 1, 2003, and July 31, 2006, in Lancaster County, Nebraska, you did, being a person nineteen years of age or older, subject A.M., otherwise known as [A.M.], date of birth October [2]4, 1996, and thus a person less than sixteen years of age, to sexual penetration.

After an extensive examination of factors bearing on Simnick's ability to understand, such as medications being taken, education level, and work history, as well as full and complete advisement of the various rights possessed and protected during a trial that are being surrendered by entering a plea, the court asked: "Do you have any questions about the charge itself?" Simnick responded: "No, Your Honor." The court also inquired as to whether Simnick had had sufficient time to discuss the matter with counsel and offered him additional time to do so. Significantly, the court advised Simnick that he was "presumed to be innocent . . . and that presumption . . . would continue . . . throughout a trial until the State would prove you guilty beyond a reasonable doubt. By pleading no contest, you are waiving and not having that presumption of innocence in your favor. Do you understand that?" Simnick responded affirmatively. This assignment of error has no merit.

Simnick's Claims of Denial of Effective Assistance of Counsel.

[7] Simnick claims seven instances of denial of effective assistance of counsel. The law is clear that 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. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004). When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

The following five claims of ineffective assistance of counsel are obviously not ripe for review on direct appeal, because the record simply is lacking information, particularly from trial counsel, upon which to determine such claims:

- Trial counsel did not prepare to defend the case.
- Trial counsel never informed Simnick of the lifetime parole supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) prior to the plea.
- Trial counsel never informed Simnick of his obligation to submit to a civil commitment evaluation under Neb. Rev. Stat. § 29-4018 (Reissue 2008) before he would be released from incarceration.
- Trial counsel failed to move to withdraw Simnick's plea prior to sentencing after being advised that the court had found the offense to be an aggravated offense.
- Trial counsel failed to inform Simnick of the consequences of entering his plea of no contest.

The foregoing matters fundamentally involve attorney-client communications and what counsel did or did not do in investigating and preparing any potential defenses to the charges, as well as the considerations involved in pleading to one count of the information rather than proceeding to trial. Resolution of such claims requires factual allegations, rather than the conclusionary claims set forth in Simnick's brief, and then supporting evidence for such claims. For these reasons, the five claims of ineffectiveness of counsel listed above cannot be reviewed on direct appeal, and we discuss them no further.

Next, Simnick alleges that at the hearing on the motion to suppress, his trial counsel failed to adduce expert testimony regarding sleep deprivation, although counsel indicated at the time of the motion to withdraw that an expert witness on such issue may be necessary. The record does not reveal whether any expert on sleep deprivation could or would have testified that Simnick was sleep deprived at the time of his incriminating statement to the police so as to render such statement involuntary and therefore inadmissible. Without such evidence, the claim cannot be considered in this direct appeal.

[8-10] The final claim that counsel was ineffective is that he failed to object to the State's request and the court's determination that the offense for which Simnick was convicted was an aggravated offense. Nebraska follows the two-prong test for determination of the question of whether a criminal defendant received ineffective assistance of counsel. The first prong is whether counsel performed deficiently, that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area; and the second is whether the deficient performance actually prejudiced the criminal defendant in making his or her defense. See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). The prejudice prong requires that the criminal defendant show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different. *Id*. The two-prong test need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009). Accordingly, with respect to this particular claim, if the trial court did not err in finding that the offense was an aggravated offense, Simnick could not be prejudiced by a failure to object or otherwise contest the trial court's finding. Because Simnick assigns as a separate error the trial court's finding that the offense was an aggravated offense, a contention we ultimately reject, we now turn to our discussion of that assignment of error. Because, as explained below, the finding of an aggravated offense was correct, Simnick could not have suffered prejudice from any inaction on the part of his trial counsel in this regard. Accordingly,

this particular claim of ineffectiveness of counsel is ripe for determination and is adjudicated against Simnick as being without merit.

Was Offense Aggravated Offense for Purposes of SORA?

Simnick argues that the trial court's determination that this offense was an aggravated offense requiring lifetime registration under SORA was incorrect. His argument relies largely upon our decision in *State v. Mastne*, 15 Neb. App. 280, 725 N.W.2d 862 (2006). The State asserts that if *Mastne* is correct, then Simnick's assignment of error is well taken—but that the *Mastne* decision is incorrect. The State's brief also directs us to the pendency of an appeal in the Nebraska Supreme Court which challenges the correctness of our decision in *Mastne*. That decision, *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009), was handed down after the parties completed their briefing. *Mastne, supra*, held that the Legislature did not intend for the trial court to make a factual finding or determination regarding whether an offense is an aggravated offense under § 29-4005(2), but, rather, that the trial court's consideration is limited to whether the statutory elements of the conviction at issue fell within the language of § 29-4005(2) and (4)(a).

The *Hamilton* court agreed with our reasoning in *Mastne* that § 29-4005(2) and (3)(a) should be read together, because both relate to lifetime registration for certain sex offenders. However, rejecting the reasoning of *Mastne*, the Nebraska Supreme Court found:

> The use of the word "fact" in the second sentence of § 29-4005(2) read in conjunction with the word "also" in the first sentence of § 29-4005(3)(a) indicates a legislative intent that there be a factual determination by the sentencing judge under both statutory provisions.
>
> Applying the reasoning of *Mastne* to § 29-4005(2) would, in our view, lead to an absurd result. Sexual penetration is an element in only three of the registrable offenses currently listed in § 29-4003: first degree sexual assault, first degree sexual assault on a child, and incest of a minor. None of these include an element of "use of force or the threat of serious violence," and thus, applying

> the reasoning of *Mastne*, only first degree sexual assault of a child as currently defined in § 28-319.01 would meet all requirements for an aggravated offense under § 29-4005(4)(a). However, § 28-319.01 was first enacted in 2006. Prior to that time, the offense of sexual assault of a child did not include penetration as an element. Thus, in 2002, when the Legislature amended SORA to provide a lifetime registration requirement for those committing aggravated offenses, there were no existing offenses with elements strictly corresponding to the definition of an aggravated offense in § 29-4005(4)(a)(ii). This indicates that the Legislature intended the existence of an aggravated offense to be determined on the basis of actual facts, not statutory elements.

Hamilton, 277 Neb. at 601-02, 763 N.W.2d at 737-38. As a result, to this extent, the Supreme Court disapproved the holding of *Mastne*.

Hamilton is additionally noteworthy because the Supreme Court noted that the factual basis received at the time of the defendant's pleas, as well as "the information included in the presentence investigation report, supports the finding of the district court" that the defendant committed aggravated offenses and that such subjected him to lifetime registration under SORA. 277 Neb. at 602, 763 N.W.2d at 738.

[11,12] Obviously, *Hamilton, supra*, eviscerates Simnick's argument premised on *Mastne.* Thus, the only question for us in this case is simply whether the factual basis and the presentence investigation report (PSR) support the trial court's finding of an aggravated offense, which is defined by § 29-4005(4)(a) as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years." The first element, a conviction of a registrable offense, is clearly satisfied. See Neb. Rev. Stat. § 29-4003 (Reissue 2008). The other two elements necessary for a finding that this was an aggravated offense, penetration and a victim under age 12, are a bit more nuanced, given that this case involves a no contest plea. The rule is that the difference between a plea of nolo contendere and a plea of guilty

is that while the latter is a confession or admission of guilt binding the accused in other proceedings, the former has no effect beyond the particular case. See *State v. Wiemer*, 15 Neb. App. 260, 725 N.W.2d 416 (2006). In *State v. Worm*, 268 Neb. 74, 80, 680 N.W.2d 151, 158 (2004), the Supreme Court held that "the registration requirement for an offender convicted of an aggravated offense under [SORA's] amended provisions is part of the sentencing court's judgment for purposes of filing an appeal." The charge, as stated at the plea hearing, was that Simnick had subjected A.M., who was under age 16 between the dates of January 1, 2003, and July 31, 2006, and had a birth date of October 24, 1996, to "sexual penetration."

[13] *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009), clearly allows the factual predicates for lifetime SORA registration to come from the factual basis recited at the time of the plea and the PSR. According to the factual basis and the PSR, A.M. was under the age of 12 during the timeframe encompassed by the charge. Turning to the matter of penetration, such is described by Neb. Rev. Stat. § 28-318(6) (Reissue 2008) as

> sexual intercourse in its ordinary meaning . . . or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

The PSR reveals ample evidence of penetration, as statutorily defined, on at least two occasions while A.M. was under age 12. The PSR reveals that A.M. related to investigators that Simnick had put his "personal thing" into her "personal thing," and she identified her meaning of such terms through anatomical diagrams and her own drawings, including her drawing of a penis on which she indicated how far Simnick's penis had penetrated her vagina. Simnick's own statement to police, also found in the PSR, admits penetrating A.M.'s vagina with his penis during the course of "tickling and wrestling." He further admits that under the guise of showing her how to cleanse herself, he used his hands to spread her vulva and sprayed

a hand-held shower head in that area and that he "may" have touched her vagina with it. There is little question after review of the voluminous PSR that penetration as statutorily defined occurred.

Accordingly, the predicates for a finding that the offense is an aggravated offense under § 29-4005(4)(a) are present, and thus, the trial court did not err in finding that the offense was aggravated.

Did District Court Err in Ordering That Simnick Is Subject to Lifetime Community Supervision Upon His Release From Incarceration or Civil Commitment?

Simnick argues that the district court's order pursuant to § 83-174.03 that upon his release from incarceration or civil commitment he be subject to lifetime community supervision by the Office of Parole Administration is error because "such statute violates the ex post facto clause." In support of this argument, Simnick cites us to *State v. Worm*, 268 Neb. 74, 82, 680 N.W.2d 151, 159 (2004), where the court held that "[a] law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts." The *Worm* court determined that the lifetime registration requirements of SORA did not impose a criminal punishment, and thus Worm's constitutional challenge based on due process and the ex post facto clause failed. However, the assignment of error now under discussion in the instant case involves the lifetime community supervision required for aggravated sexual offenses under § 83-174.03, and since the parties completed their briefing, the Nebraska Supreme Court has decided *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

Payan is directly and significantly applicable to this case. Abram Payan was convicted by a jury of first degree sexual assault, and then the trial judge made a finding that the offense was an aggravated offense, making him subject to lifetime registration under SORA as well as lifetime community supervision under § 83-174.03. In his appeal, Payan contended that

the trial court erred in determining that he had committed an aggravated offense. The State alleged that Payan committed oral and anal penetration of C.N., a 14-year-old female, using a knife and threats to kill her if she did not comply with his instructions. The Supreme Court noted:

> The jury heard two distinct versions of the facts. C.N. and one eyewitness testified that the assault occurred after Payan displayed a knife and threatened to kill C.N. if she did not submit to his sexual advances. Payan and one other witness testified that the assault never occurred.

Payan, 277 Neb. at 677, 765 N.W.2d at 204.

[14,15] The key issue was Payan's contention that the factual finding of an aggravated offense must be made by a jury, citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), rather than by the court, as was done in *Apprendi*—and as was done in Simnick's case. *Apprendi* holds that legislatures cannot remove from the jury the task of assessing facts which could increase the range of penalties to which a criminal defendant is exposed, and that such enhancing facts must be found to exist beyond a reasonable doubt. The U.S. Supreme Court later held in *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), that under *Apprendi*, the statutory maximum is the maximum sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis omitted.) As a result, the *Payan* court turned to the question of whether lifetime registration and lifetime community supervision are punitive, and thus enhancing penalties to which *Apprendi* applies.

[16,17] The *Payan* court reiterated its holding in *Worm, supra*, that lifetime registration under SORA is not punitive and that therefore, the constitutional principles of *Apprendi* and *Blakely* were not applicable to such. However, citing authority from other jurisdictions that had considered the issue, and equating lifetime community supervision to "parole," the *Payan* court held that the Legislature's intent in providing for lifetime community supervision under § 83-174.03 was to establish an additional form of punishment for certain sex offenders. As a result, the court held:

> In this case, the imposition of lifetime community supervision was triggered by the finding of the trial judge, not the jury, that Payan had committed an aggravated offense as defined by SORA. This constitutes error under *Apprendi* and *Blakely*, because the punishment imposed on the basis of this finding is beyond that which would have been permissible on the basis of the jury verdict alone, i.e., imprisonment for a maximum of 50 years. We hold that where the facts necessary to establish an aggravated offense as defined by SORA are not specifically included in the elements of the offense of which the defendant is convicted, such facts must be specifically found by the jury in order to impose lifetime community supervision under § 83-174.03 as a term of the sentence.

State v. Payan, 277 Neb. 663, 675-76, 765 N.W.2d 192, 204 (2009).

[18,19] In Payan's case, the trial court therefore erred in making the finding that the offense was aggravated, which, given that the victim was older than age 12, had to be based on penetration through the use of force or the threat of serious violence. Nonetheless, recalling that most constitutional errors can be harmless, and citing the U.S. Supreme Court's holding in *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), that an *Apprendi/Blakely* error in failing to submit a sentencing factor to the jury is not structural error and is subject to a harmless error analysis, the Nebraska Supreme Court did a harmless error analysis in *Payan*. The court defined the standard for such analysis as follows: "We hold that the appropriate harmless error standard in this circumstance is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor." *Payan*, 277 Neb. at 676, 765 N.W.2d at 204.

We referenced earlier the fact that the *Payan* jury heard two different material versions of the events. In the State's evidence, the victim and a witness testified that the victim was sexually assaulted as result of threats of death with a knife. In Payan's defense, he and his supporting witness claimed that no assault took place whatsoever. Therefore, the *Payan* court

found there was no evidence that if the assault occurred, it was done without violence or the threat thereof. Accordingly, the *Payan* court concluded:

> On this record, any rational jury which convicted Payan of the sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Accordingly, we conclude that the making of this finding by the trial judge instead of the jury was harmless error.

277 Neb. at 677, 765 N.W.2d at 204-05.

[20,21] When we apply *Payan* to Simnick's challenge to the requirement that he is subject, by operation of § 83-174.03, to lifetime community supervision upon his release from incarceration, there are two glaring differences. First, Simnick pled no contest to the charge, and second, his exposure to a finding of an aggravated offense flows from an immutable fact, that A.M. was under age 12 at the time of the offense. These differences are important, because while a criminal defendant can plead to the underlying charge, and still have a jury trial on penalty-enhancing facts, that is not true if there is a plea which admits the enhancing facts. See *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *Blakely* holds that the maximum statutory sentence for the purposes of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is the maximum which the judge can impose based on facts admitted in the guilty plea. Here, there is a no contest plea, but as discussed earlier, the facts admitted via a no contest plea can be used only in the proceeding involving the no contest plea. And because under *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004), lifetime community supervision is part of the judgment and sentence, it is clear that what Simnick admitted by his no contest plea can be used in determining whether he is subject to lifetime community supervision.

There are two factual admissions necessarily included in his plea—that he sexually penetrated A.M. and that, at the time, she was under 16 years of age. However, Simnick's plea did not admit that A.M. was under 12 years of age at the time he sexually penetrated her. Accordingly, Simnick was entitled to

an *Apprendi* "mini trial" to a jury on whether the offense to which he pled no contest was an aggravated offense.

It is clear under *State v. Payan*, 277 Neb. 633, 765 N.W.2d 192 (2009), that the failure to have a jury decide a factual question to support the imposition of lifetime community supervision is subject to harmless error analysis. Here, the record demonstrates beyond a reasonable doubt that any rational jury would have found the existence of the sentencing enhancement factor, i.e., that A.M. was under the age of 12 at the times of the offense. Based on A.M.'s recited date of birth, which was never disputed at any time, no rational jury could conclude that she was anything but under 12 years of age at the times of the offense.

Finally, Simnick challenges lifetime community supervision as a violation of the ex post facto clause. In this regard, *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008), informs our decision. Paul Schreiner was convicted of first degree sexual assault on a child, based on a sexual encounter that occurred with K.G., a 14-year-old girl, when Schreiner was 22 years old; but unlike *Payan* and the instant case, the offense was not an aggravated offense. Schreiner was convicted after a jury trial, and in addition to his sentence of 6 to 9 years' imprisonment, he was given a "'Notice of Lifetime Parole Supervision'" informing him that he was subject to lifetime community supervision by the Office of Parole Administration. *Id.* at 398, 754 N.W.2d at 750. Schreiner assigned as error the finding that he was subject to lifetime community supervision under § 83-174.03, because such statute was an ex post facto law and violated his right of due process. The *Schreiner* court first said that the issue presented a question of law, on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. We apply that standard of review here.

After noting that Schreiner argued the application of § 83-174.03(1) to him was unconstitutional, the court noted that the initial question was whether the issue was properly before the court upon direct appeal. The *Schreiner* court noted its decision in *Worm, supra*, which found that lifetime SORA

registration was part of the sentence and that such was subject to challenge on direct appeal.

[22] The *Schreiner* court then noted Schreiner was "automatically" subject to § 83-174.03 because he had been previously convicted of an offense requiring registration under § 29-4003. 276 Neb. at 423, 754 N.W.2d at 765. The *Schreiner* court found that the operation of § 83-174.03 was "entirely independent from the sentence imposed upon Schreiner" for first degree sexual assault and that as such, any claim Schreiner might have concerning the constitutional implications of § 83-174.03

> should be raised if and when he becomes subject to its provisions, but not on a direct appeal from his underlying sexual assault conviction. Any individual who is subject to lifetime community supervision may, whenever a determination or revision of the conditions of community supervision is made, appeal to the district court.

Schreiner, 276 Neb. at 423-24, 754 N.W.2d at 765-66.

[23] The *Schreiner* court also cited prudential reasons for finding that Schreiner's challenge was unripe. The court said that while the provisions of SORA are mandatory, the effects of lifetime community supervision are uncertain until the defendant is released from incarceration. The court noted that while conditions of community supervision are imposed to best protect the public from the risk of reoffense, those conditions are based on the risk assessment made at the time of release and can be rather onerous, up to and including electronic monitoring. But, there is no requirement that the Office of Parole Supervision monitor the defendant at all. Thus, the *Schreiner* court said that the uncertainty of whether the defendant will in fact be affected at all by the provisions of lifetime community supervision counsels against weighing their constitutionality before their effects are known. In conclusion, the court found that because the issues were not ripe, Schreiner was under no obligation to object on that basis in the district court and had not waived his constitutional claims "if and when they become ripe." *State v. Schreiner*, 276 Neb. 393, 424, 754 N.W.2d 742, 766 (2008). Thus, the court did not consider the

ex post facto clause challenge to the application of § 83-174.03 to Schreiner.

[24] Therefore, under *Schreiner*, we need not examine or comment on the State's assertions in this direct appeal, given that Simnick's constitutional challenge is unripe. We do note for the sake of completeness that this court cannot determine the constitutionality of a statute, yet when necessary to a decision in a case before us, we do have jurisdiction to determine whether a constitutional challenge has properly been raised. See *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). Although it appears that Simnick's challenge is to the application of § 83-174.03 to him, rather than the unconstitutionality of the statute, in any event, we determine, consistent with *Bartunek*, that the challenge is prematurely raised in accord with *Schreiner, supra*.

Did Trial Court Impose Excessive Sentence?

[25] The law is well established that an appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Simnick was sentenced to 20 to 35 years' incarceration. While there is considerable positive information in the PSR, such as his education, work history, and lack of a criminal record, the offense here was committed against his wife's child. As the child's stepfather, he was in a position of trust that he violated in the worst way. Although the sentence is substantial, it is within the statutory limits, and considering good time, he actually could be released in 10 years. Such a sentence is not an abuse of discretion.

CONCLUSION

Although we did not hear oral argument in this case, we have fully considered the extensive briefing of the parties, the applicable authority, including that released since the parties' briefs were filed, as well as the trial court record. We find that all but one of Simnick's assignments of error are without merit. We conclude that the finding that Simnick committed an aggravated offense for the purpose of lifetime community

supervision should have been submitted to a jury, but that this error was harmless. Therefore, we affirm the conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JEREMY J. HAMMEL, APPELLANT.
769 N.W.2d 413

Filed July 21, 2009. No. A-08-1061.

1. **Pleas.** 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.

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

Mary Leanne Wells Kendall for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

This case comes before this court as Jeremy J. Hammel appeals the sentence imposed by the Douglas County District Court, prior to which Hammel pled no contest to one count of child abuse. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a), this case was submitted without oral argument.

STATEMENT OF FACTS

On June 13, 2008, the State filed an amended information charging Hammel with one count of child abuse, a Class III felony. Hammel initially pled not guilty but eventually filed a motion to withdraw that plea and entered a plea of no contest.

At the plea hearing, the district court engaged in a lengthy discussion with Hammel about his rights, the charge, and the penalty for said charge. Upon inquiring as to any plea bargains, the following discussion was had:

> THE COURT: And are there any plea bargains involved in this case?
>
> [Counsel for the State:] Yes, there are, Your Honor. It's my understanding that [Hammel is] pleading straight as he is today, that the State does not have any objection to a minimum of four years['], maximum of six years['] —
>
> THE COURT: All right.
>
> [Counsel for the State:] — incarceration.
>
> THE COURT: Is it my understanding that your counsel . . . will request a sentence of no greater than the four to six that was just — four to six years that was just discussed by the prosecutor?
>
> [Counsel for Hammel:] Yes, sir, respectfully.

A factual basis was given by the State, and the district court found that the factual basis was sufficient, that Hammel understood the possible penalties, and that the plea was entered freely, knowingly, intelligently, and voluntarily.

At the sentencing hearing, the district court heard statements from the child's mother and grandmother and indicated that the presentence report had been completed and reviewed. The district court then inquired of Hammel and his counsel whether "the plea bargain was no more than six years." Hammel's counsel answered in the affirmative, and then the district court sentenced Hammel to a term of 6 to 6 years' imprisonment with credit for 218 days served. After the sentence was pronounced, the following was stated on the record, "[Counsel for Hammel:] Excuse me Judge. It was — the agreement was four to six years. THE COURT: No, the agreement was in the range of four to six years." No other objections were made,

and the hearing was adjourned. Hammel has timely appealed to this court.

ASSIGNMENTS OF ERROR

Hammel contends that the district court erred by not fully informing him of the consequences of his plea and by abusing its discretion by imposing an excessive sentence.

ANALYSIS

Hammel argues that the district court erred by not fully informing him of the consequences of his plea when it did not advise him that the district court was not bound by the sentencing negotiations and prosecutor's recommendation.

[1] 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. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *State v. Wiemer*, 15 Neb. App. 260, 725 N.W.2d 416 (2006). 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. *State v. Irish, supra.*

In the instant case, the district court informed Hammel as to the nature of the charge and the constitutional rights given up by entering a plea. Hammel was advised that child abuse was a Class III felony, punishable by a potential sentence of 1 to 20 years' imprisonment, a $25,000 fine, or both. The State indicated that, pursuant to the plea agreement, there would be no objection to a sentence of a "minimum four years['], maximum six years['] . . . incarceration." A factual basis was then

given by the State; however, the district court did not inform Hammel, at any time, that the court was not bound by any sentencing recommendation.

Under the specific facts of this particular case, because the district court failed to accurately advise Hammel of the range of penalties for the crime, i.e., that the district court was not bound by the plea agreement made with the State, we find that Hammel was not adequately advised as to the complete range of penalties available to the district court for sentencing. Therefore, Hammel's no contest plea could not have been entered freely, voluntarily, knowingly, and intelligently. See *State v. Irish, supra.* Consequently, we must remand the cause to the district court with directions to vacate Hammel's conviction and sentence and to hold further proceedings.

Given our resolution of this assignment of error, we need not address Hammel's remaining assignment of error regarding excessive sentence. See *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF SYLVESTER L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SYLVESTER L., APPELLEE, AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

770 N.W.2d 669

Filed July 21, 2009. No. A-08-1188.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Juvenile Courts: Jurisdiction: Probation and Parole.** Under Neb. Rev. Stat. § 43-416 (Reissue 2008), the Office of Juvenile Services has authority over the parole function for juveniles committed to a youth rehabilitation and treatment center and may revoke a juvenile's parole.

3. ____: ____: ____. The Nebraska statutes make it clear that only the Office of Juvenile Services has the authority to revoke a juvenile's parole. If a juvenile court revokes a juvenile's parole, rather than the Office of Juvenile Services, a juvenile is not granted all of the rights to which he or she was entitled.

Appeal from the County Court for Lincoln County: KENT D. TURNBULL, Judge. Reversed and vacated.

Eric M. Stott, Special Assistant Attorney General, for appellant.

Amanda M. Speichert, Deputy Lincoln County Public Defender, guardian ad litem.

IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. The Nebraska Department of Health and Human Services (Department) appeals from an order of the county court for Lincoln County, sitting as a juvenile court. In its order, the court recommitted Sylvester L. to the Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska. On appeal, the Department argues that the court erred in sending Sylvester back to YRTC pursuant to a motion for new disposition while Sylvester was on parole. For the reasons set forth below, we reverse and vacate.

BACKGROUND

Sylvester was born on February 16, 1994. On July 22, 2005, the Lincoln County Attorney's office filed a petition alleging that Sylvester came within the meaning of Neb. Rev. Stat. § 43-247(1) (Reissue 2004) because of his recent theft of merchandise. On November 16, the court found that it was in Sylvester's best interests to be placed in the care, custody, and control of the Department for placement in a suitable foster or group home.

On July 26, 2007, the county attorney filed a motion for new disposition. The county attorney stated that on July 23,

Sylvester was found to have taken property of another client at the group home where he was staying. On October 10, a dispositional hearing was held. The court found that Sylvester should be committed to the Department's Office of Juvenile Services (OJS) for placement at YRTC in Kearney.

The record shows that Sylvester was paroled from YRTC on March 18, 2008. On October 15, the county attorney filed another motion for new disposition. The county attorney stated that on two recent occasions, Sylvester had been cited with disturbing the peace. The county attorney also stated that Sylvester had been aggressive in school and had threatened harm to school staff. When confronted regarding his behavior in school, Sylvester used profanity and was defiant.

A hearing was held on October 15, 2008. At the hearing, Sylvester voluntarily admitted to the allegations contained in the motion for new disposition. The court then committed Sylvester to OJS for placement at YRTC. The Department appeals.

ASSIGNMENT OF ERROR

The Department alleges the juvenile court erred by recommitting Sylvester to YRTC pursuant to a motion for new disposition while Sylvester was already on parole status.

STANDARD OF REVIEW

[1] We review juvenile cases de novo on the record, and we reach our conclusions independently of the juvenile court's findings. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

ANALYSIS

The Department argues that the juvenile court erred by recommitting Sylvester to YRTC pursuant to a motion for new disposition while Sylvester was already on parole status. The Department contends that in essence, the court revoked Sylvester's parole, and that under Nebraska law, only OJS has the power to revoke a juvenile's parole.

[2] Neb. Rev. Stat. § 43-404 (Reissue 2008) defines OJS as a division within the Department that is charged with

oversight, administration, and control of state juvenile correctional facilities and programs for juveniles who have violated the law. In addition, Neb. Rev. Stat. § 43-416 (Reissue 2008) states:

> [OJS] shall have administrative authority over the parole function for juveniles committed to [YRTC] and may (1) determine the time of release on parole of committed juveniles eligible for such release, (2) fix the conditions of parole, revoke parole, issue or authorize the issuance of detainers for the apprehension and detention of parole violators, and impose other sanctions short of revocation for violation of conditions of parole, and (3) determine the time of discharge from parole.

The Nebraska statutes, specifically Neb. Rev. Stat. §§ 43-419 to 43-423 (Reissue 2008), go on to provide an outline of the parole revocation process for a juvenile. This process includes the following: a preliminary hearing by an impartial hearing officer; notice of the preliminary hearing, including its purpose and the alleged violations; a written decision regarding probable cause; a hearing within 14 days after the preliminary hearing if the juvenile is being held pending the hearing; the right to compel witnesses to attend and testify on his or her behalf; and the opportunity to present a statement in his or her own behalf. Section 43-422 states that a juvenile may admit the parole violations in writing after being notified of the possible consequences and his or her rights pertaining to the hearing. The record shows that Sylvester was not granted all of the rights that he was entitled to if his parole had been revoked by OJS.

Sylvester argues that the court did not violate OJS' authority, because the court recommitted Sylvester on the new charges and did not revoke his parole. The record does not support this conclusion. Although the county attorney filed a motion requesting a new disposition for Sylvester, the county attorney did not file a petition setting out new allegations or charges against Sylvester. If the county attorney had filed a petition setting out new law violations and Sylvester had been adjudicated under § 43-247(1) (Reissue 2008) based on these new charges, the juvenile court would have had the authority

to recommit Sylvester to YRTC under these new allegations. That is not what happened in the instant case. By sending Sylvester back to YRTC on a motion for new disposition while Sylvester was on parole, the juvenile court in effect revoked Sylvester's parole.

[3] The Nebraska statutes make it clear that only OJS has the authority to revoke Sylvester's parole. And because the juvenile court revoked Sylvester's parole, rather than OJS, Sylvester was not granted all of the rights to which he was entitled. For these reasons, we reverse and vacate the juvenile court's order recommitting Sylvester to YRTC.

CONCLUSION

After reviewing the record, we conclude that the juvenile court lacked authority to recommit Sylvester to YRTC pursuant to a motion for new disposition while Sylvester was already on parole. Therefore, we reverse and vacate the juvenile court's order recommitting Sylvester to YRTC.

REVERSED AND VACATED.

INBODY, Chief Judge, participating on briefs.

JARYD D. BARNETT, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

770 N.W.2d 672

Filed July 28, 2009. No. A-08-211.

1. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence: Jurisdiction.** The sworn report of the arresting officer is received into the record by the hearing officer as the jurisdictional document of a license revocation hearing, and upon receipt of the sworn report, the order of revocation by the director of the Department of Motor Vehicles has prima facie validity.
2. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs.** The Department of Motor Vehicles makes a prima facie case for license revocation once the department establishes that the arresting officer provided his or her sworn report containing the required recitations to the director of the department.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Drunk Driving: Blood, Breath, and Urine Tests.** Under Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004), the required recitations in the sworn report in an administrative license revocation proceeding are that

(1) the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004)—reasonable grounds to believe such person was driving under the influence—and the reasons for such arrest, (2) the person was requested to submit to the required test, and (3) the person refused to submit to the required test.

4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Statutes: Appeal and Error.** The administrative license revocation statutes and the proceedings thereunder are tightly scrutinized by the appellate courts.

Appeal from the District Court for Adams County: TERRI S. HARDER, Judge. Reversed and remanded with directions.

Gregory G. Jensen, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Andee G. Penn for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. Jaryd D. Barnett appeals an order of the district court for Adams County, Nebraska, which affirmed an order of the director of the Nebraska Department of Motor Vehicles (Department) revoking Barnett's motor vehicle operator's license. On appeal, Barnett challenges the sufficiency of the sworn report offered at his administrative hearing to establish a prima facie case for administrative license revocation and to confer jurisdiction on the Department, and also asserts that the court erred in finding that he failed to disprove any prima facie case established by the sworn report. We find that the sworn report in this case was insufficient to confer jurisdiction on the Department, and we reverse, and remand with directions.

II. BACKGROUND

On May 12, 2007, the arresting officer assisted in the investigation of a single-vehicle motor vehicle accident and ultimately arrested Barnett for suspicion of driving under the influence and for refusal to submit to a preliminary breath test. The vehicle involved in the accident apparently belonged to Barnett. The arresting officer testified that he did not observe

Barnett driving the vehicle, seated in the vehicle, or with any keys to the vehicle. According to the arresting officer, when he arrived on the scene, there was an additional vehicle present that had not been involved in the accident. The arresting officer testified that Barnett advised him "numerous times" that Barnett had not been driving the vehicle involved in the accident and testified that Barnett indicated that he had arrived at the scene as a passenger in the second vehicle.

The arresting officer testified that he observed that Barnett had bloodshot and watery eyes, slurred speech, and a strong odor of an alcoholic beverage. During the arresting officer's investigation of the single-vehicle accident, he asked Barnett to submit to field sobriety tests, which Barnett refused. Barnett also refused to submit to a blood alcohol test and a urine sample test.

The arresting officer completed a "Notice/Sworn Report/Temporary License" form (hereinafter Sworn Report). The form includes the preprinted language that "[t]he undersigned officer(s) hereby swear(s) that the above-named individual was arrested pursuant to Neb. Rev. Stat. § 60-6,197, and the reasons for the arrest are:" and then includes approximately 2½ blank lines where the officer is to include the reasons for arresting Barnett. On those blank lines, the arresting officer wrote: "1 vehicle accident, odor of Alcoholic beverage Bloodshot watery eyes, Slurred Speech, Refused Field Sobriety. Refused PBT Refused Legal Blood, Refused Urine sample test."

On June 6, 2007, a hearing was held before a hearing officer. When the Department offered the arresting officer's Sworn Report, Barnett objected on the basis that the Sworn Report contained no statement indicating that Barnett had been the driver or had been in actual physical possession or operation of the vehicle. The hearing officer overruled the objection and received the Sworn Report.

On June 7, 2007, the hearing officer issued proposed findings and a recommendation that Barnett's operator's license be revoked. The hearing officer found that the Sworn Report "was complete on its face" and found that Barnett had failed to prove that the recitations in the Sworn Report were false. The hearing officer recommended revocation of Barnett's operator's license.

On June 11, the director of the Department adopted the hearing officer's proposed findings and recommendation and revoked Barnett's operator's license for 1 year.

Barnett appealed the revocation of his operator's license to the district court. Before the district court, Barnett argued, again, that the Sworn Report offered by the Department had been insufficient. He argued that the arresting officer is required to include facts demonstrating the defendant was driving or in physical control of the vehicle and that the arresting officer in the present case failed to do so. Barnett argued that the Department lacked jurisdiction to proceed without a sufficient Sworn Report. Barnett also argued that he had sufficiently rebutted the allegations of the Sworn Report. On February 7, 2008, the district court entered an order affirming the Department's revocation of Barnett's operator's license. This appeal followed.

III. ASSIGNMENTS OF ERROR

Barnett has assigned four errors on appeal in which he challenges the sufficiency of the Sworn Report to confer jurisdiction on the Department and challenges the Department's conclusion that he had failed to rebut any prima facie case established by the Sworn Report.

IV. ANALYSIS

The primary issue raised by Barnett, and the one upon which we resolve this appeal, is that the factual information provided by the arresting officer on the Sworn Report was insufficient to confer jurisdiction on the Department to revoke Barnett's motor vehicle operator's license. After reviewing the Sworn Report and comparing the factual information provided therein to the information discussed in established case law, we conclude that the arresting officer failed to allege sufficient facts to allow an inference that Barnett had been driving or in physical control of the vehicle involved in the accident and that the Sworn Report is, therefore, insufficient to confer jurisdiction on the Department.

[1-3] The sworn report of the arresting officer is received into the record by the hearing officer as the jurisdictional document of the hearing, and upon receipt of the sworn report, the

director's order of revocation has prima facie validity. 247 Neb. Admin. Code, ch. 1, § 006.01 (2005); *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007). The Department makes a prima facie case for license revocation once it establishes that the arresting officer provided his or her sworn report containing the required recitations. *Yenney v. Nebraska Dept. of Motor Vehicles, supra*. The required recitations in the sworn report are that (1) the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004)—reasonable grounds to believe such person was driving under the influence—and the reasons for such arrest, (2) the person was requested to submit to the required test, and (3) the person refused to submit to the required test. Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004); *Yenney v. Nebraska Dept. of Motor Vehicles, supra*.

The appellate courts in Nebraska have recently addressed the first required recitation and elaborated on what the arresting officer must include for the sworn report to be sufficient to confer jurisdiction on the Department. See, *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Yenney v. Nebraska Dept. of Motor Vehicles, supra*.

In *Betterman v. Department of Motor Vehicles, supra*, the Nebraska Supreme Court noted that the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute to confer jurisdiction on the Department. In that case, the handwritten list of reasons for the arresting officer's arrest of W. Patrick Betterman stated: "'[R]eckless driving. Driver displayed signs of alcohol intoxication. Refused all SFST and later breath test.'" *Id.* at 182, 728 N.W.2d at 578. The Supreme Court concluded that the allegations were sufficient to establish a valid reason for the stop of Betterman's vehicle and to allege that Betterman had been driving while under the influence.

In *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. at 451, 729 N.W.2d at 99, this court addressed the sufficiency of a sworn report wherein the handwritten list of reasons for the arrest stated: "'[P]assed out in front of [the gas] Station,

near front doors. Signs of alcohol intoxication.'" (Emphasis omitted.) This court concluded that the allegations were insufficient to confer jurisdiction on the Department, because the stated reasons for the arrest included no facts allowing an inference that Steven R. Yenney had driven to the location in a drunken condition; the allegations did not even allege the presence of a motor vehicle, let alone that Yenney was located in or near the vehicle at the time of the arresting officer's arrival.

In *Snyder v. Department of Motor Vehicles*, 274 Neb. at 169, 736 N.W.2d at 733, the handwritten list of reasons for the arrest stated: "'Speeding (20 OVER)/D.U.I.'" The Nebraska Supreme Court concluded that the handwritten allegations were sufficient to explain an initial traffic stop but did not, standing alone, constitute a reason for the arrest. The Supreme Court concluded that the allegations were insufficient to provide factual reasons upon which the arresting officer's suspicion of driving under the influence was based.

[4] We have noted that the administrative license revocation statutes and the proceedings thereunder have been tightly scrutinized by the appellate courts. *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007). The Nebraska Supreme Court has noted that completion of a 1-page sworn report form is not an onerous task. *Snyder v. Department of Motor Vehicles, supra*. With that in mind, and in light of the relatively recent discussions of the requirements in the cases just discussed, we conclude that the handwritten reasons for the arrest in the present case are insufficient.

Like the handwritten notations in *Yenney v. Nebraska Dept. of Motor Vehicles, supra*, the arresting officer's notations in the present case do not indicate, or allow an inference, that Barnett was ever operating a motor vehicle. The arresting officer indicated that he responded to a single-vehicle accident, but made no factual allegation suggesting that Barnett was the driver of that vehicle. In contrast, the handwritten assertions in *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007), indicated that the officer actually made a traffic stop of Betterman for reckless driving and noted that the driver displayed signs of intoxication. Similarly, in *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d

731 (2007), the handwritten assertions indicated that the officer made a traffic stop of the driver for speeding, but failed to sufficiently indicate what caused the officer to suspect intoxication. In the present case, the arresting officer did not make a traffic stop and failed to include sufficient factual allegations in the Sworn Report to indicate an allowable inference that Barnett, of the people on the scene at the time of the officer's arrival, was the one who had been driving the vehicle. As such, the Sworn Report in the present case was insufficient to confer jurisdiction on the Department, and we need not address Barnett's remaining assignments of error.

V. CONCLUSION

We find that the Sworn Report in this case was insufficient to confer jurisdiction on the Department to revoke Barnett's operator's license. We reverse the decision of the district court and remand the matter with directions to reverse the order of the director.

REVERSED AND REMANDED WITH DIRECTIONS.

DENNIS P. McCAUL, APPELLANT, V. BRANDIE N. McCAUL, APPELLEE.

771 N.W.2d 222

Filed July 28, 2009. No. A-08-615.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.

5. **Actions: Modification of Decree.** Proceedings regarding modification of a marital dissolution, which are controlled by Neb. Rev. Stat. § 42-364 (Reissue 2008), are special proceedings. Likewise, custody determinations, which are also controlled by § 42-364, are considered special proceedings.
6. **Juvenile Courts: Parental Rights: Final Orders.** Whether a substantial right of a parent has been affected by an order is dependent upon both the object of the order and the length of time over which the parent's relationship with the child may reasonably be expected to be disturbed.
7. **Final Orders: Appeal and Error.** When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
8. **Judgments: Costs: Guardians Ad Litem.** Pursuant to Neb. Rev. Stat. § 42-358 (Reissue 2008), guardian ad litem fees are costs. Costs are considered part of the judgment.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Appeal dismissed.

Christopher A. Pfanstiel, of Lewis & Pfanstiel, P.C., L.L.O., for appellant.

Jill R. Cunningham, of Howard F. Ach Law Office, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Brandie N. McCaul sought modification of custody of the parties' minor child, claiming that Dennis P. McCaul, the child's father and initial custodial parent, wrongfully denied visitation. Dennis appeals from the district court's order placing custody with Brandie. Because the issue of guardian ad litem (GAL) fees was unresolved as of the date Dennis appealed, Dennis did not appeal from a final order, and we therefore lack jurisdiction to consider this appeal.

BACKROUND

Dennis and Brandie were previously married and are the parents of a minor child. Pursuant to a divorce decree entered on May 16, 2006, custody of the minor child was placed with Dennis subject to Brandie's reasonable rights of visitation.

On May 31, 2007, Brandie filed a "Complaint to Modify Decree." In an amended complaint, Brandie requested that she receive primary custody of the minor child because Dennis had denied visitation. After a trial on December 11, 2007, and January 31 and April 28, 2008, the court placed permanent custody of the minor child with Brandie.

While the proceedings were ongoing, on January 31, 2008, the court on its own motion appointed a GAL for the minor child to conduct an investigation. The order provided as follows regarding payment of the GAL:

> The costs of the appointment shall be borne as follows. Each party shall deposit the sum of $200.00 with the clerk of the court for Saunders County, not later than March 1, 2008. Saunders County will pay the remainder of the GAL fees, subject to an order in which the court shall apportion those fees for reimbursement to Saunders County, between the parties.

Subsequently, pursuant to a May 5, 2008, order, the district court placed permanent custody of the minor child with Brandie. Neither the May 5 order nor any previous order disposed of the issue of GAL fees. On May 6, the GAL filed an "Application for Attorney Fees." On May 8, the court ordered that Saunders County pay the GAL $1,972.50, which included the $400 the parties had previously deposited, and further ordered that "Saunders County shall be reimbursed by the parties in an amount and manner to be determined by the [c]ourt until paid in full." The May 8 order also set a hearing on reimbursement for June 30. Dennis filed this appeal on June 4. At the June 30 hearing, the court ordered that each party pay $500 in GAL fees.

ASSIGNMENTS OF ERROR

Because we resolve this appeal on jurisdictional grounds, we do not reach Dennis' assignments of error. However, we note that Dennis assigns, reordered and consolidated, that the district court erred in (1) granting Brandie's complaint to modify the decree "prior to the conclusion of [his] case in chief" or "granting . . . any temporary custody motion . . . after only approximately 15 minutes of cross-examination of [Brandie]

by [Dennis'] counsel," (2) failing to apply the standard applicable to a consent decree, (3) granting Brandie's first amended complaint to modify at the conclusion of the evidence, and (4) finding that there was a material change in circumstances.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

ANALYSIS

[2] Brandie argues that this court does not have jurisdiction to consider the instant appeal because Dennis appealed from an order which failed to dispose of the issue of GAL fees. 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. *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009). Brandie insists that Dennis' appeal filed on June 4, 2008, was premature because the district court did not make a final determination regarding the payment of GAL fees until June 30. We agree. Although Dennis appealed from a type of order which can be final and appealable, the specific order from which Dennis appealed was not a final, appealable order because the issue of GAL fees had not yet been resolved.

[3-6] Ordinarily, an order modifying a dissolution decree to grant a permanent change of child custody would be final and appealable as an order affecting a substantial right made during a special proceeding. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Kilgore v. Nebraska Dept. of Health & Human Servs., supra*. This appeal falls within

the second category. Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 732 N.W.2d 347 (2007). Modification of child custody does not fall within chapter 25. Proceedings regarding modification of a marital dissolution, which are controlled by Neb. Rev. Stat. § 42-364 (Reissue 2008), are special proceedings. Likewise, custody determinations, which are also controlled by § 42-364, are considered special proceedings. *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009). Whether a substantial right of a parent has been affected by an order is dependent upon both the object of the order and the length of time over which the parent's relationship with the child may reasonably be expected to be disturbed. See *id*. Where child custody is modified on a permanent basis, the order clearly affects a substantial right.

[7] However, an order affecting a substantial right made during a special proceeding is not a final order unless it disposes of all issues implicated. When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008). See, *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990) (divorce decree resolving issue of permanent custody but reserving issue of visitation is not final order); *Johnson v. Johnson*, 15 Neb. App. 292, 726 N.W.2d 194 (2006) (order modifying child custody but failing to resolve closely related issue of child support is not final order). Although this principle has been applied most often in the context of a special proceeding, the same principle is also generally true for other orders which are normally final and appealable. See, *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003) (order which affects substantial right in action which determines action and prevents judgment); *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800, 69 N.W. 104 (1896) (order which affects substantial right made on summary application in action after judgment is rendered).

[8] The order from which Dennis appeals is not a final, appealable order because it failed to resolve the issue of GAL fees, which, where they are implicated, are costs that must be determined prior to the entry of a final order. Pursuant to Neb. Rev. Stat. § 42-358 (Reissue 2008), GAL fees are "costs." Costs are considered part of the judgment. *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006). When a trial court has failed to resolve the issue of costs where it has been raised, there can be no final, appealable order. See *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997). Most often, this issue arises in the context of attorney fees, which are usually also considered as costs. In *State ex rel. Fick v. Miller*, the Nebraska Supreme Court determined that a district court's order which reserved the issue of attorney fees for a supplementary proceeding was not a final, appealable order. Similarly, in *In re Application of SID No. 384*, 256 Neb. 299, 303, 589 N.W.2d 542, 545 (1999), the Nebraska Supreme Court determined that the district court's failure to rule on a motion for attorney fees "left a portion of the judgment unresolved" and was therefore not a final, appealable order. Thus, the remaining question is whether the issue of GAL fees was implicated.

In the instant case, we conclude that the court's January 31, 2008, order raised the issue of GAL fees and required the court to take further action to resolve the issue. The January 31 order stated that the county would pay the GAL fees but that the court would later determine the parties' obligation to reimburse the county. The plain language of § 42-358 makes it clear that, in light of this order, the district court could not fully resolve the issue of GAL fees without entering a further order that determined the obligations of the parties. Section 42-358(1) provides in part as follows regarding the trial court's duty to fix and apportion GAL fees: "The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. If the court finds that the party responsible is indigent, the court may order the county to pay the costs." Thus, the court was required to determine the total amount of the fee to be taxed to each party or make a finding that the

parties could not afford to pay the fee. In the instant case, the district court did not complete this process until June 30, when it fixed the fee that each party would pay. Thus, there was no final, appealable order until June 30, which was after Dennis filed his appeal. Because the May 5 order from which Dennis appeals was not a final, appealable order, we lack jurisdiction over the instant appeal.

CONCLUSION

Because the order from which Dennis attempted to appeal was not a final, appealable order, we lack jurisdiction to consider the merits of this appeal.

APPEAL DISMISSED.

BARRY A. DONSCHESKI, APPELLANT AND CROSS-APPELLEE, v. SHERRY A. DONSCHESKI, NOW KNOWN AS SHERRY A. NORRIS, APPELLEE AND CROSS-APPELLANT.

771 N.W.2d 213

Filed July 28, 2009. No. A-08-1131.

1. **Child Custody: Appeal and Error.** Child custody determinations are 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. **Final Orders: Words and Phrases.** An order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory.
3. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
4. **Modification of Decree: Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a change in circumstances.
5. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
6. **Child Custody.** When parents are unable or unwilling to execute parenting duties jointly, the result is that one or the other must be given primary responsibility for the child's care.

7. ____. According to Neb. Rev. Stat. § 43-2923(1) (Reissue 2008), the best interests of the child require a parenting arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress.
8. ____. While the wishes of the child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration.
9. **Attorney Fees: Appeal and Error.** The district court's decision on a request for attorney fees is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stephanie Weber Milone for appellant.

Stephen D. Stroh and Ryan D. Caldwell, of Bianco, Perrone & Stroh, L.L.C., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Barry A. Donscheski appeals, and Sherry A. Donscheski, now known as Sherry A. Norris, cross-appeals from the decision of the district court for Douglas County denying both parties' requests for modification of child custody—including Sherry's request to remove the minor child to Georgia. The result of the district court's order was the continuation of a June 2007 modification order in which the parties had agreed to a joint custody arrangement. Because the parties are no longer able to work together as needed for a joint custody arrangement, particularly one at this distance, we find that there has been a material change in circumstances warranting a modification of the joint custody arrangement. We therefore reverse the decision of the district court and remand the cause to such court with directions to consider the best interests of the child, including the child's in camera testimony regarding preference, which was error for the trial court not to hear and consider, and then to award sole custody to either Barry or Sherry and to make the other appropriate determinations that necessarily follow from its determination.

FACTUAL AND PROCEDURAL BACKGROUND

Barry and Sherry were married on May 22, 1992, and are the parents of Miller Donscheski, born May 8, 1996. A decree dissolving the parties' marriage was filed on September 29, 1998. In the decree, the district court adopted the parties' "Property Settlement and Custody Agreement" and ordered that Barry and Sherry were to have joint custody of Miller, with Miller's primary residence being with Sherry, subject to Barry's rights to reasonable and liberal parenting time. Barry was ordered to pay child support in the amount of $400 per month.

In April 2006, Barry filed an application to modify the decree regarding child custody, alleging a material change in circumstances and asking the court to specifically set out parenting time. Sherry filed her answer and cross-petition in May 2006, also alleging a material change in circumstances, in that her husband obtained a job in Georgia. Sherry requested permission to remove Miller from Nebraska and asked the district court to award Barry reasonable visitation. In an amended application to modify, Barry asked the court to award him sole custody of Miller, subject to Sherry's reasonable rights of visitation. And in an amended answer and cross-petition, Sherry asked the district court to award her sole custody of Miller, subject to Barry's reasonable rights of visitation. Prior to trial, Barry and Sherry reached an agreement, which was adopted by the district court in its order of modification filed on June 4, 2007.

The June 2007 order of modification provided that Sherry's move to Georgia constituted a material change in circumstances sufficient to warrant a modification of the decree. The order also stated: (1) Miller shall not be removed from Nebraska; (2) Barry and Sherry shall have "shared custody and parenting time"; and (3) no child support shall be paid by either party, because the parties agreed to share custody and travel expenses for Miller between Nebraska and Georgia. Other terms of the order are not relevant in this appeal, and we omit such.

The parenting plan adopted by the district court at that time provided: (1) Miller shall attend school in Nebraska; (2) Sherry

shall have Miller one weekend per month, preferably when there is an extended weekend when the child is out of school; (3) each party shall have specified holiday visitation; (4) Sherry shall have Miller for the school spring break each year; (5) beginning in 2008, Barry shall have exclusive possession of Miller for up to 3 weeks each summer, and Sherry shall have exclusive possession of Miller the remainder of the summer; (6) the parties shall equally divide Miller's Christmas break, alternating that portion of the break which contains Christmas Day; and (7) each party shall have reasonable telephone visitation with Miller.

Five months later, on November 2, 2007, Sherry filed an application to modify the June order. Sherry alleged that since the June order, there has been a material change in circumstances, in that (1) Barry has assumed the position of determining all contact by Sherry with Miller; (2) the parties have been experiencing ongoing conflict and disputes concerning Sherry's contact and parenting time with Miller; (3) Sherry, her husband, and her stepdaughters reside in Georgia; and (4) Miller has expressed his desire and preference to reside with Sherry on a full-time basis. Sherry asked the court to award her full custody of Miller, to allow her to remove Miller to Georgia, and to award her child support. She also asked that the district court's order specify Barry's parenting time with Miller.

Barry filed his answer and counterclaim on December 18, 2007, also alleging that there has been a material change in circumstances since the June order, such material change relating to communication, arrangements for parenting-time exchanges, the parties' respective parenting time, financial provisions, and the contact between Barry and Miller while Miller is in Sherry's care. Barry asked the court to award him full custody of Miller, to specify Sherry's parenting time, and to determine child support issues. On May 29, 2008, Barry filed an application and affidavit for citation in contempt, alleging that Sherry has refused to pay certain travel, medical, and activity expenses for Miller pursuant to the June 2007 order.

Trial was held on July 31, 2008. Barry, Sherry, and their new spouses all testified. All parties agree that Barry and Sherry

can no longer communicate effectively. Barry and Sherry do not speak to each other, and all communications go through Barry's wife. The parties cannot agree on when Miller should visit Georgia. Sherry accuses Barry of interfering with her contact with Miller when Miller is with Barry, and Barry accuses Sherry of the same when Miller is with her. In sum, the parties agree that the joint custody arrangement is no longer working. The district court denied Sherry's request that Miller be interviewed in camera, and thus Miller did not testify at trial.

The district court's unsigned and unfiled journal entry dated July 31, 2008, states in relevant part: "Court denies [Sherry's] motion for removal and change of custody. Court grants [Barry's] motion and awards sole custody of [Miller] to [Barry]. Court's determination as to parenting time and child support taken under advisement."

In its order signed on September 8, 2008, and filed on September 9, the district court found that there had been no material change in circumstances since the June 2007 modification and therefore denied Sherry's application to modify. The district court's journal entry dated September 8, 2008, stated: "Nothing further under advisement." On September 9, Barry filed a motion to alter or amend judgment, alleging that the court failed to rule on Barry's applications to modify and for contempt.

In its order filed on October 15, 2008, the district court found that in its September order, it failed to address (1) Barry's counterclaim seeking modification and (2) Barry's contempt citation and request for fees. The district court again found that there had been no material change in circumstances since the June 2007 modification and therefore denied Barry's application to modify. The district court stated that "the stipulated modification of June 4, 2007 remains in full force and effect and is otherwise unchanged by these proceedings." The district court ordered Sherry to pay $292.18 for Miller's expenses and $250 as reasonable attorney fees relating to the contempt citation. The district court ordered that except as modified, the September order remains otherwise in full force and effect. Barry appeals, and Sherry cross-appeals, the October 15, 2008, order.

ASSIGNMENTS OF ERROR

Barry alleges that the district court erred in (1) entering a written order that deviated from, and directly contradicted, the order the court previously had made in the form of a journal entry at the conclusion of trial; (2) not further modifying the decree to award sole custody to Barry and in not further modifying the decree to adjust parenting time to coordinate with Miller's school calendar; and (3) not awarding Barry attorney fees.

On cross-appeal, Sherry alleges that the district court erred in (1) not allowing Miller to testify through an in camera interview and/or in open court, (2) denying a modification of the district court's previous order of June 2007 modifying the decree, and (3) denying removal of Miller to Georgia.

STANDARD OF REVIEW

[1] Child custody determinations are 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. *Mann v. Rich*, 16 Neb. App. 848, 755 N.W.2d 410 (2008).

ANALYSIS

Effect of Difference Between Journal Entry and Final Order.

Barry argues that the district court's written orders of September 9 and October 15, 2008, maintaining joint custody, deviated from, and directly contradicted, the order the court previously had made in the form of a docket entry dated July 31, 2008, at the conclusion of trial granting sole custody to Barry. Barry argues that the July 31 docket entry is an order that cannot be arbitrarily modified.

In support of his argument, Barry cites Neb. Rev. Stat. § 25-914 (Reissue 2008) ("[e]very direction of a court or judge, made or entered in writing and not included in a judgment, is an order"). This statute has been in effect for well over a century, but no appellate decision has ever discussed it. Neb. Rev. Stat. § 25-1301(1) (Reissue 2008) provides that a judgment is "the final determination of the rights of the parties in an action." Section 25-1301(2) and (3) respectively provide

that a judgment is not rendered until it is signed by the court, or a judge thereof, and that a judgment is not entered until it is file stamped and dated by the clerk of the court. This court, in *Ebert v. Nebraska Dept. of Corr. Servs.*, 11 Neb. App. 553, 558-59, 656 N.W.2d 634, 639 (2003), said: "The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible."

[2] Consequently, §§ 25-914 and 25-1301 specify the range of actions available to a judge by defining, first, an order—which, by definition, is not part of a judgment—and second, a judgment—which must be a final determination of the rights of the parties in an action, as well as being both rendered and entered, before it is a final, appealable order. See *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004). Because the July 31, 2008, journal entry was neither signed nor file stamped, it did not constitute either a rendition of judgment or an entry of judgment. Furthermore, the July 31 journal entry was also not a final order, because it did not dispose of all issues—the district court specifically left the issues of parenting time and child support under advisement. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000) (order is final when no further action of court is required to dispose of pending cause; however, if cause is retained for further action, order is interlocutory). Thus, Barry's argument is without merit, because the journal entry is quite meaningless for our purposes; it is the final order of October 15 which we review, and which superseded the interlocutory order contained in the journal entry.

Did District Court Err in Denying Removal to Georgia?

Sherry argues that the district court erred in denying the removal of Miller to Georgia. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. *Wild v. Wild*, 15 Neb. App. 717,

737 N.W.2d 882 (2007). 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.*

Sherry suggests that because she already lives in Georgia, and because such was contemplated at the time of the June 2007 agreed-upon modification, the "legitimate reason" prong of a removal case is no longer at issue. We agree because the parties effectively agreed in June 2007 that there was a legitimate reason for her move to Georgia. However, Sherry is not the only "custodial" parent, because currently Barry and Sherry have "shared custody" although they are in different states—a considerable distance apart. We take the term "shared custody and parenting time," as used in the June 2007 order, to encompass both legal and physical custody. Both parents agree that the current arrangement is not working. Thus, we find that the question is now whether a material change in circumstances has occurred that requires modification of the joint custody arrangement. If such modification is warranted, the district court would necessarily need to "pick a parent" for Miller, after considering his best interests. Thus, in order for Sherry to be able to take Miller to Georgia, she would have to establish that it is in Miller's best interests that she be his custodial parent, because the legitimate reason prong of the test for removal has already been established by way of the earlier modification.

Therefore, the analytical framework for this case, assuming that there is a material change in circumstances, is that the factors used in removal cases now come into play—which, at their core, all go to the child's best interests. In short, we acknowledge that the factors for determining a child's best interests are functionally similar in both removal and modification cases, although each type of case has a different predicate—a legitimate reason for the move in the former and a material change in circumstances or parental unfitness in the latter. That said, we turn to the question of whether there is a material change in circumstances.

Is Joint Custody Still Appropriate?

Both Barry and Sherry argue that the district court erred in denying a modification of the June 2007 order, and each

argues that he or she should have been awarded sole custody of Miller.

[3-5] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). The party seeking modification of child custody bears the burden of showing a change in circumstances. *Id.* A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.* Neither party in this case accuses the other of being unfit; therefore, the question is whether there has been a material change in circumstances. The district court found no material change in circumstances warranting a modification of the joint custody arrangement. We disagree.

[6] Both parties agree that they can no longer communicate effectively. Barry and Sherry do not speak to each other, and all communications go through Barry's wife. The parties cannot agree on when Miller should visit Georgia. Sherry accuses Barry of interfering with her contact with Miller when Miller is with Barry, and Barry accuses Sherry of the same when Miller is with her. Thus, there has clearly been a material change in circumstances that was not anticipated when the court approved the June 2007 modification, because no court would approve joint custody under circumstances that the parties describe. We have said that when parents are unable or unwilling to execute parenting duties jointly, the result is that one or the other must be given primary responsibility for the child's care. See *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003). This is quite clearly such a case. Accordingly, the trial court abused its discretion in failing to find that there was a material change in circumstances.

Absence of Evidence of Miller's Preference.

[7] In determining which parent should be awarded custody, the district court is to consider the child's best interests. The best interests of the child require a parenting arrangement

which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress. Neb. Rev. Stat. § 43-2923(1) (Reissue 2008). Based on our review of the record, it is unclear which custodial arrangement would be in Miller's best interests. However, the determination of this would likely have been aided by Miller's testimony, and Sherry has assigned error to the trial court's refusal to allow such testimony.

Sherry alleged in her application to modify, and again in her answer to an interrogatory which was in evidence, that Miller's preference was to live in Georgia—and while these allegations do not prove that such is the fact, they do put the trial court on notice of what the nature of the evidence might be. The record indicates that Sherry filed a motion to have the court conduct an in camera interview with Miller. While such motion is not in our record, there is no dispute that such motion was filed. Part way through the trial, and pursuant to her motion, Sherry asked the court to conduct an in camera interview with Miller. Barry opposed the motion, arguing that Sherry had not met the threshold requirement of a legitimate reason for the move or shown a material change in circumstances since the June 2007 order. As said above, proof of a legitimate reason was not needed, and there quite clearly was a material change in circumstances, and thus Barry's objections on these grounds were not well taken—particularly after all the other evidence had been adduced. The district court stated that it would not rule on the motion until it heard all of the evidence. At the end of the trial, Sherry again requested that the court conduct an in camera interview with Miller. The court declined to interview Miller, stating:

> [B]ased on all of the evidence that I've heard from both sides, . . . the Court finds no reasonable basis to interview the child at this point. So I will not interview the child. I'm not going to bring him in any more in the middle than he already is. It's not necessary.

[8] The Nebraska Supreme Court has said that "[w]hile the wishes of the child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, his preference is entitled to

consideration." *Miles v. Miles*, 231 Neb. 782, 785, 438 N.W.2d 139, 142 (1989). Sherry has alleged that Miller's preference is to live in Georgia. At the time of the trial, Miller was 12 years old and was going to be a seventh grader in the fall. The evidence was that he received mostly A's and B's in school. Miller is of sufficient age and intelligence to be heard, and his preference, whatever that may be, as well as his reasoning should have been heard and considered. Although we are not anxious to see children dragged into custody battles, in some cases, it may be necessary, and not inappropriate, particularly when a child is of Miller's age and apparent intelligence. The trial court's decision on Sherry's motion to interview Miller was an abuse of discretion.

Attorney Fees.

[9] Barry argues that the district court erred in not awarding him attorney fees. The district court's decision on a request for attorney fees is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008).

The district court did order Sherry to pay Barry $250 in attorney fees regarding the contempt citation. However, Barry was not awarded any attorney fees in connection with the modification proceeding. Having reviewed the record in this case, and taking into consideration our result in this appeal, we find no abuse of discretion by the district court. We affirm this portion of the district court's order.

Resolution.

Because the parties are no longer able to work together, we find that there has been a material change in circumstances warranting a modification of the joint custody arrangement, and the evidence shows that an award of custody to one of the parents is required. We therefore reverse the decision of the district court and remand the cause back to the district court with directions to consider the best interests of the child, including the child's in camera testimony regarding his preference and his reasoning for such, and to award sole custody to either Barry or Sherry. Because the parties have had considerable difficulty in agreeing on visitation times, as well as the

travel arrangements, the district court should set out a specific visitation schedule for the noncustodial parent, taking into consideration Miller's school calendar. And of course, since one parent will get sole custody, the district court should also make child support determinations.

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

STATE OF NEBRASKA, APPELLEE, V.
NICHOLAS A. CERNY, APPELLANT.
770 N.W.2d 676

Filed July 28, 2009. No. A-08-1316.

1. **Restitution.** A restitution order is improper where there was no restitution hearing, there was no evidence adduced to demonstrate the propriety of the amount included in the order, and there was no mention of restitution in the oral pronouncement of sentence.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed as modified.

Eric J. Williams, York County Public Defender, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Nicholas A. Cerny appeals the sentence imposed by the district court for York County, Nebraska, upon his no contest plea to attempted first degree sexual assault. On appeal, Cerny alleges that the period of incarceration imposed, 5 to 10 years, was excessive and that there was no basis for imposing a restitution order of $666.78. We find no merit to the first assertion, but strike the restitution order in accordance with the State's agreement that such order was improperly included in the written sentencing order.

II. BACKGROUND

This case arises out of an incident in which Cerny, then 20 years of age, engaged in oral and vaginal sexual penetration with the victim, then 15 years of age. Cerny pled no contest to an amended charge of attempted first degree sexual assault. The district court sentenced Cerny to 5 to 10 years' imprisonment. In addition, although the oral pronouncement of sentence made no mention of restitution, the court included in its written judgment an order of restitution in the amount of $666.78 "for distribution to the victim's mother." This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Cerny has assigned two errors. First, Cerny asserts that the term of incarceration imposed was excessive. Second, Cerny asserts that the restitution order was improper.

IV. ANALYSIS

1. Excessive Sentence

We find no merit to Cerny's assertion that the sentence imposed was excessive. Cerny pled no contest to a Class III felony offense, punishable by a minimum of 1 year's imprisonment and a maximum of 20 years' imprisonment, a $25,000 fine, or both. See Neb. Rev. Stat. §§ 28-319, 28-201(4)(b), and 28-105 (Reissue 2008). The underlying offense involved sexual penetration between Cerny, who was then 20 years of age, and a victim, who was then 15 years of age.

Although Cerny had a minimal criminal record prior to this offense and although the presentence investigation report indicated that Cerny was at a low risk to reoffend, in light of the nature of the offense we do not find any abuse of discretion by the court in imposing a sentence that was well within the statutory limits. This assignment of error is without merit.

2. Restitution Order

[1] We modify the written order of sentence to strike the order of restitution in the amount of $666.78. There was no restitution hearing, there was no evidence adduced to demonstrate the propriety of the amount included in the order, and there was no mention of restitution in the oral pronouncement

of sentence. The State agrees on appeal that the restitution portion of the order was improper and has joined Cerny in requesting that it be stricken from the written sentencing order.

V. CONCLUSION

We find no merit to Cerny's assertion that the term of incarceration imposed was excessive. We modify the written sentencing order to strike the order of restitution in the amount of $666.78.

AFFIRMED AS MODIFIED.

JOHN SZAWICKI, APPELLEE, V. GENEVIEVE C. SZAWICKI ET AL., APPELLANTS.

772 N.W.2d 110

Filed August 4, 2009. No. A-08-746.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **Homesteads: Contracts: Conveyances.** Neb. Rev. Stat. § 40-104 (Reissue 2008) provides that the homestead of a married person cannot be conveyed unless the instrument by which it is conveyed is executed and acknowledged by both the husband and wife. This section applies to contracts for sale as well as to conveyances or encumbrances.
3. **Homesteads: Deeds.** A deed purporting to convey a homestead is void if not executed by both husband and wife.
4. **Deeds.** A deed from husband to wife need not be signed by the wife.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
6. **Rules of the Supreme Court: Appeal and Error.** A party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.
7. ____: ____. The cross-appeal section of a party's brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of facts.
8. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and vacated, and cause remanded for further proceedings.

Martin A. Cannon, of Cannon Law Office, for appellants.

Thomas R. Ostdiek, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Genevieve C. Szawicki, Richard McShane, and Frances Johnston appeal the decision of the Douglas County District Court determining that Genevieve had no property interest in real estate purportedly conveyed by Florian Szawicki to her and her stepson, John Szawicki, as joint tenants with Florian, who was her husband and John's father.

STATEMENT OF FACTS

Florian became the fee simple absolute record owner of the property located in the northeast quarter of Section 8, Township 16 North, Range 13 East of the 6th P.M., also referred to as 3616 Ponca Road, Omaha, Douglas County, Nebraska, upon the death of his first wife in 1978. In 1979, Florian conveyed the property to himself and his son, John, as joint tenants with right of survivorship. In 1981, Florian married Genevieve and she moved into the residence.

On September 23, 1983, Florian and John conveyed the property to Florian, John, and Genevieve as joint tenants with right of survivorship. That deed, hereinafter referred to as the "1983 deed," was signed and acknowledged only by Florian and John; it was not signed or acknowledged by Genevieve. After Florian died in 1985, Genevieve continued to live on the property. In 1986, Genevieve conveyed the property herself in an attempt to sever the joint tenancy. Genevieve continued to live at the home until the summer of 2000, when she suffered a stroke. After her hospitalization, Genevieve was moved to an assisted living facility and Genevieve's two children, McShane and Johnston, then moved into the home to assist with its continued care and maintenance.

In June 2005, John filed a complaint against Genevieve, McShane, and Johnston, requesting that he be declared sole

owner of the property in question, that McShane and Johnston be ejected from the property, or, in the alternative, that the property be partitioned. On November 16, John filed a motion for summary judgment and a hearing was held thereon. Posthearing, the district court granted leave to Genevieve to file an affidavit, to which John filed an objection on the basis of relevancy, foundation, and hearsay. After taking the matter under advisement, the district court granted the motion for summary judgment, finding that the 1983 deed was void because the document did not comply with Neb. Rev. Stat. § 40-104 (Reissue 2004) in that Genevieve had not signed the document. The district court further determined that John was the fee simple absolute owner of the property in question and ordered that Genevieve, McShane, and Johnston be ejected from the property. The district court determined that Genevieve had an equitable interest in the property and should receive reimbursement as such. The district court found that there was a genuine issue as to the amount Genevieve was to be reimbursed and set that matter for trial.

Genevieve filed a motion for a new trial and, at the hearing, requested that a December 15, 2005, affidavit of Genevieve be submitted. On May 11, 2006, the district court entered an order nunc pro tunc correcting clerical errors and clarifying the previous order, in addition to sustaining John's objections to Genevieve's affidavit as to paragraphs 3, 4, and 6 through 9. From that order, Genevieve appealed to this court in case No. A-06-576, which we summarily dismissed on July 13, 2006, in accordance with Neb. Rev. Stat. § 25-1315 (Reissue 2008), for lack of jurisdiction.

In February 2007, John filed a supplemental complaint requesting that the district court award him fair market value rent in the amount of $67,450 for the property from May 2000 through June 2006, the time period during which Genevieve's two children occupied the residence. Trial was held on the supplemental complaint, in addition to the amount of reimbursement due to Genevieve.

Genevieve testified that prior to her marriage to Florian, she had owned her own home which she planned on leaving to her children upon her death. However, when she married

Florian, she sold that home and used the money, approximately $24,000, on Florian's home for repairs and improvements completed while Florian was still alive. She testified that even though she had been staying at the assisted living facility since her stroke, she did not ever intend to abandon the property and continued to make weekly trips to the property, in addition to holding family celebrations and holiday dinners there.

John testified that from April 1985 through May 2006, he had been in the home only one time for the reading of Florian's will and that, during that time, he had never offered to pay for any expenses associated with the property and had never been asked by Genevieve or her children to contribute.

Genevieve's son, McShane, testified that he had paid the property taxes and insurance on the property since 2000 and that prior to that time, Genevieve had paid all the property taxes and expenses. McShane submitted evidence that the property taxes had not been delinquent since 1981.

The district court determined that the previous ruling as to ownership would not be reconsidered; concluded that, due to John's lack of action or interest in the property until 2006, Genevieve's children were not trespassing; and dismissed John's supplemental claim for rent. The district court further determined that Genevieve be reimbursed for a portion of the expenses she submitted to the court as evidence of the moneys spent on the property, ordering that she be reimbursed $20,389.31.

John filed a motion for new trial, which was overruled after a hearing on the matter. Genevieve has timely appealed to this court.

ASSIGNMENTS OF ERROR

Genevieve assigns that the district court erred in finding that the 1983 deed was void and by excluding certain paragraphs within her affidavit submitted to the court. John, on cross-appeal, argues that the district court erred in failing to award rental fees and damages, in ordering John to pay Genevieve reimbursement for real estate taxes paid, and in finding that the 1986 deed did not sever the joint tenancy.

STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

ANALYSIS

Deeds.

Genevieve asserts that the district court erred in determining that the 1983 deed was void due to Genevieve's lack of signature and acknowledgment. The district court granted John's motion for summary judgment finding that, under § 40-104, the deed was void.

[2-4] Section 40-104 provides that "[t]he homestead of a married person cannot be conveyed . . . unless the instrument by which it is conveyed . . . is executed and acknowledged by both husband and wife . . . ." This section applies to contracts for sale as well as to conveyances or encumbrances. *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989). A deed purporting to convey a homestead is void if not executed by both husband and wife. *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973). However, a deed from husband to wife need not be signed by the wife. *Furrow v. Athey*, 21 Neb. 671, 33 N.W. 208 (1887).

This particular case presents an interesting question as a result of the particular facts surrounding the deeds in question. The record shows that in 1979, a deed was filed which conveyed the property in question to Florian and John as joint tenants with right of survivorship; thus, at the outset, John and Florian have a legal interest in the property. Then, Florian married Genevieve, Genevieve moved into the property, and in 1983, Florian and John conveyed the deed to Florian, John, and Genevieve, as joint tenants with right of survivorship—the catch being that the 1983 deed was not signed or acknowledged by Genevieve.

In his argument that the district court was correct in determining that the 1983 deed was void, John relies on *Krueger v. Callies, supra*, which involved an action for specific

performance of an alleged agreement for the sale of a homestead, where the husband listed the property for sale and made arrangements and executed a sale agreement to a third party. Neither husband nor wife acknowledged the sale agreement, but both acknowledged a warranty deed. However, the deed failed to describe any land. The Nebraska Supreme Court held that a deed purporting to convey a homestead is void if not executed by both husband and wife.

On the other hand, in her argument that the district court erred in finding that the 1983 deed was void, Genevieve relies upon *Furrow v. Athey, supra*, wherein a deed of conveyance of real estate was executed by the husband directly to the wife and wherein the Nebraska Supreme Court held that where the husband and wife occupy the homestead, the title to which is in the name of the husband, a deed of conveyance from the husband to the wife, signed and acknowledged by the husband alone, is valid. The court reasoned as follows:

> Statutes creating the homestead right were enacted for the protection of the family of the husband or wife, if the head of the family were a debtor, and for the protection of the husband or wife against a conveyance or encumbrance by the other. Both can join in a conveyance, and by it the right of the children or other members of the family may be entirely destroyed; but where the title is held by the husband, he cannot sell without the consent of the wife expressed by signing and acknowledging the deed. . . . In effect, an estate or interest in the land is created, of which the party not named in the deed cannot be divested by the sole act of the other.

Furrow v. Athey, 21 Neb. at 672-73, 33 N.W. at 209.

We agree with Genevieve that the application of *Furrow v. Athey, supra*, is appropriate to the present case. Once Florian and Genevieve were married, Genevieve retained a marital interest in the home, which became a legal interest in the property as conveyed by the 1983 deed from Florian and John to Florian, John, and Genevieve as joint tenants with rights of survivorship. The record in this case illustrates that Florian was not attempting to divest Genevieve of her interest in the property by conveying the property to an outside party

or debtor without her knowledge or consent, but that he was conveying the property directly to her, just as in *Furrow v. Athey.* Accordingly, the deed of conveyance from Florian and John to Genevieve, signed and acknowledged by Florian and John alone, is valid although not signed and acknowledged by Genevieve.

We find that the district court erred in determining that the 1983 deed was void and that John owned the property in fee simple absolute, and therefore, we reverse and vacate the district court's orders and remand the cause for further proceedings. Having determined that the 1983 deed was not void for lack of Genevieve's acknowledgment, it follows that the 1986 deed filed by Genevieve conveying the deed to herself for the purposes of severing the joint tenancy was valid. See, Neb. Rev. Stat. § 76-118 (Reissue 2003); *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007) (existing estate in joint tenancy can be destroyed by act of one joint tenant which is inconsistent with joint tenancy and that such act has effect of destroying right of survivorship incidental to it).

As a result of the severance, Genevieve and John hold the property as tenants in common, and since joint title has been established, partition may be had as a matter of law. See, Neb. Rev. Stat. §§ 25-2170 and 25-2170.01 (Reissue 2008); *Malcom v. White*, 210 Neb. 724, 316 N.W.2d 752 (1982). It is evident from the record that the parties are not in agreement as to the status of the property, and as such, John's request contained in his complaint for a judgment of partition should be granted by the district court and a referee should be appointed for the sale of the property and division of the proceeds.

Genevieve's Affidavit.

[5] Genevieve contends that the district court erred in excluding paragraphs 3, 4, and 6 through 9 of her affidavit submitted in conjunction with the motion for new trial; however, having determined that the 1983 deed was valid, we need not address this assignment of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007);

Sand Livestock Sys. v. Svoboda, 17 Neb. App. 28, 756 N.W.2d 299 (2008).

Cross-Appeal.

[6,7] John also argues various errors by the trial court in a section of his brief entitled "Cross Appeal." We will not address the arguments set forth in that section, because John has failed to properly set forth any assignment of error in his cross-appeal. A party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant. See, Neb. Ct. R. App. P. § 2-109(D)(4); *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009); *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). Therefore, the cross-appeal section of a party's brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of facts. See, § 2-109(D)(1); *Vokal v. Nebraska Acct. & Disclosure Comm., supra*.

[8] As in *Vokal v. Nebraska Acct. & Disclosure Comm., supra*, John's separate section entitled "Cross Appeal" contains only argument, and the Nebraska Supreme Court has found time and again that errors argued but not assigned will not be considered on appeal. See, also, *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008).

CONCLUSION

In conclusion, we find that the district court erred in determining that the 1983 deed conveying the property to Genevieve was void due to a lack of Genevieve's signature and acknowledgment. Therefore, we reverse and vacate the district court's orders and remand the cause for further proceedings consistent with this opinion.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF LESLIE S. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. FRANCIS C., APPELLANT.

770 N.W.2d 678

Filed August 4, 2009. No. A-09-070.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court is reviewed for an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Indian Child Welfare Act: Jurisdiction: Good Cause.** The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists.
4. **Indian Child Welfare Act: Jurisdiction.** That a state court may take jurisdiction under the Indian Child Welfare Act does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed.

Susan L. Kirchmann for appellant.

Gary E. Lacey, Lancaster County Attorney, Jenna L. Venema, and Richard Grabow, Senior Certified Law Student, for appellee.

James L. Beckmann, of Beckmann Law Offices, guardian ad litem.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Francis C. appeals from the decision of the separate juvenile court of Lancaster County which denied his motion to transfer this juvenile case to the Omaha Tribal Court. Because the juvenile court did not abuse its discretion in denying Francis' motion, we affirm.

BACKGROUND

Kinda S. is the natural mother of Raeanne S., Leslie S., Glory S., Crystal S., Iyn C., and Rena C. Francis is the natural father of Iyn and Rena. As Raeanne has turned 19 and is no longer under the juvenile court's jurisdiction, references throughout this opinion to "the children," unless otherwise indicated, refer to Francis and Kinda's children other than Raeanne. Francis and Kinda are both enrolled as members of the Omaha Tribe of Nebraska (the Tribe). The children are also members of the Tribe.

On July 11, 2006, the State filed a petition in the juvenile court alleging that the children, including Raeanne, came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) in that they lacked proper parental care by reason of the fault or habits of their parents or custodians, Francis and Kinda, or that the children were all in a situation dangerous to life or limb or injurious to their health or morals.

On November 27, 2006, the Tribe filed a notice of intent to transfer the case to the tribal court pursuant to the Nebraska Indian Child Welfare Act. The juvenile court heard the Tribe's motion on January 22, 2007. Based on Kinda's objection at the hearing, the juvenile court denied the motion.

Since the filing of the original juvenile petition in July 2006, several additional petitions have been filed in the juvenile court involving some of the children. First, in a case filed under § 43-247(3)(b) (Cum. Supp. 2006), Leslie has been determined to have been habitually truant from school. Leslie has been a ward of the State since April 13, 2007. As of December 11, 2008, Leslie was being held at the Lancaster County Youth Services Center, Staff Secure, awaiting an assessment and recommendations as to what placement level was in her best interests. The Tribe has not made a request to transfer Leslie's truancy case to the tribal court. Second, the State has filed a delinquency petition involving Glory. In that case, the court has determined that Glory committed a law violation which, if committed by an adult, would be deemed a crime. Glory has been committed to the Office of Juvenile Services, making her a ward of the State at the agency-based foster care level. Finally, a case has been filed involving Leslie's child, who has

been made a ward of the State in that case. The record before us shows that Leslie's child is not eligible for enrollment in the Tribe.

On October 2, 2008, Francis filed a motion to transfer the present juvenile case to the tribal court. On October 3, the Tribe filed a second notice of intent to transfer.

On December 11, 2008, the juvenile court heard the motion to transfer the case to the tribal court and took the motion to transfer under advisement. The record shows that sometime before the hearing, a motion was filed seeking to terminate Francis' and Kinda's parental rights. The record does not contain a copy of the termination motion or show when the termination motion was filed in relation to the filing of Francis' motion to transfer.

At the December 11, 2008, hearing, Francis testified that he sought the present transfer because he wanted his children to have a greater involvement with the Tribe. Francis read a prepared statement in which he stated, among other things, that he had wanted to transfer the case to the tribal court since the inception of the case, because he wanted to work with Native American counselors, attorneys, and judges. Francis acknowledged that he has an addiction to drugs and alcohol, but he insisted that he is taking responsibility and will continue to be responsible. Francis had not seen his children since March. He has disagreements with the caseworker assigned by the State and refuses to work with her. At the time of the hearing, Francis had pending criminal charges for assault, carrying a concealed weapon, and possession of a controlled substance. Francis acknowledged that if the case were transferred to the tribal court, he would be expected to participate in the same programs which he has failed to participate in while the case has been under the juvenile court's jurisdiction.

Kinda testified that she supported the motion to transfer and that she felt the transfer was in the children's best interests. Kinda had not seen the children since approximately March 2008, even though she was allowed visitation by the court. Kinda testified that she had objected to the previous motion to transfer because at that time, she felt that she would be

reunified with her children more quickly if the case remained in the juvenile court.

The caseworker assigned to this case by the State testified that she and the children's foster parents have developed a plan to help the children become more involved with tribal culture. As part of the plan, the children and foster parents have attended functions on the reservation and have read books about the Tribe. The caseworker testified that she spoke with Leslie, Glory, and Crystal about their wishes regarding transfer of the case and that all three would like the case to be transferred to the tribal court. At the time of the hearing, Leslie and Glory were both at least 15 years old and Crystal was 12 years old.

On December 12, 2008, the juvenile court issued an order denying Francis' motion to transfer the case to the tribal court. The court found that good cause had been shown to prevent the matter from being transferred to the tribal court in that the issue had been previously litigated and overruled and that the court would continue to have jurisdiction over the separate cases involving Glory, Leslie, and Leslie's child even if the present case were transferred. The court stated that "the [T]ribe and the parents delayed nearly two years in expressing an intent to intervene after the prior effort of the [T]ribe was not successful." The court found that it was not in the children's best interests to transfer the case to the tribal court "at this advanced stage of the proceeding." Francis subsequently perfected his appeal to this court.

ASSIGNMENT OF ERROR

Francis asserts, consolidated and restated, that the juvenile court abused its discretion in denying his motion to transfer the case to the tribal court.

STANDARD OF REVIEW

[1,2] A denial of a transfer to tribal court is reviewed for an abuse of discretion. *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but

the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

ANALYSIS

Francis asserts that the juvenile court abused its discretion in denying his motion to transfer the case to the tribal court. Francis argues that good cause did not exist to deny the transfer, that the earlier request to transfer was not fully and fairly litigated, that the proceeding was not at an advanced stage, and that continued jurisdiction over part of the family after transfer to the tribal court was not an appropriate basis for the denial of his motion.

Neb. Rev. Stat. § 43-1504(2) (Reissue 2008) provides:

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

See, also, 25 U.S.C. § 1911(b) (2006) (corresponding federal Indian Child Welfare Act provision regarding transfer of proceedings).

[3,4] The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists. *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). That a state court may take jurisdiction under the Indian Child Welfare Act does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe. *In re Interest of Lawrence H., supra.*

The federal Indian Child Welfare Act does not define "good cause," but the Bureau of Indian Affairs has published

nonbinding guidelines for determining whether good cause exists. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) (not codified), states in part:

> C.3. Determination of Good Cause to the Contrary
>
> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the [federal Indian Child Welfare] Act to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
>
> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (ii) The Indian child is over twelve years of age and objects to the transfer.
>
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
>
> (c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

The juvenile court found good cause to deny the motion to transfer, relying on the facts that a previous motion to transfer had been denied, that the case had advanced to the stage where a motion for termination of parental rights had been filed, and that the court had jurisdiction over multiple cases involving several of the children. The court also found that the transfer would not be in the children's best interests.

Upon our de novo review, we are unable to say that the juvenile court abused its discretion in denying the motion to transfer. One of the stated circumstances set forth in the nonbinding regulations noted above is clearly present in this case; namely, the advanced stage of the proceeding. Francis did not

file the motion to transfer until well after 2 years following the filing of the juvenile petition, during which time Francis did very little to participate in the case. At the time of the hearing on this motion to transfer, proceedings had begun to terminate both parents' parental rights. In addition, the fact that other cases involving some of the children were to remain in the juvenile court is essentially a forum non conveniens matter, which is a valid basis for good cause to deny transfer. See *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). We observe that because Francis is the biological father of only Iyn and Rena, he did not have standing to seek a transfer relative to Leslie, Glory, and Crystal. Neither the Tribe nor Kinda has appealed from the juvenile court's decision. Accordingly, our opinion applies only to the ruling relative to Iyn and Rena.

CONCLUSION

The juvenile court did not abuse its discretion in denying the motion to transfer.

AFFIRMED.

CHERYL L. SIMON, APPELLANT, V.
RICHARD SIMON, APPELLEE.
770 N.W.2d 683

Filed August 11, 2009. No. A-08-1292.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Divorce: Property Division.** All property, other than gifts or inheritance acquired by one spouse during the marriage, accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
3. ____: ____. Property owned by one party before the marriage is set off to such party if it is traceable, unless the other party has significantly cared for the property during the marriage.
4. **Divorce: Property Division: Pensions.** According to Neb. Rev. Stat. § 42-366(8) (Reissue 2008), the court shall include as part of the marital estate, for purposes

of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.

5. ____: ____: ____. Benefits received from a former employer only upon retirement were earned as a result of past employment—not future services or a future inability to work—during the course of the marriage as a result of the joint efforts of the parties and therefore are considered marital property.
6. **Divorce: Property Division.** Early retirement incentives that result from employment during the marriage are included in the marital estate.
7. **Alimony: Appeal and Error.** The ultimate test for determining the correctness of the alimony award is reasonableness as determined by the facts of each case.
8. **Divorce: Alimony: Property Division.** According to Neb. Rev. Stat. § 42-365 (Reissue 2008), when dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed as modified, and cause remanded with directions.

Michael B. Lustgarten and Justin A. Roberts, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Benjamin M. Belmont, Jason C. Demman, and Jessica Levine, Senior Certified Law Student, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

After 30 years of marriage, Cheryl L. Simon and Richard Simon were divorced by a decree of dissolution entered by the district court for Douglas County on August 1, 2008, that was followed by an order ruling on a motion for new trial and motion to alter or amend on November 4, from which Cheryl files this timely appeal. The principal issue is the proper treatment of Richard's "Early Leaving Incentive Program" (ELIP)

moneys that he is entitled to receive as a result of taking early retirement from the Omaha Public Schools (OPS).

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the trial, Cheryl was 51 years of age and Richard was 54 years of age. Richard had three income sources: from OPS in the amount of $58,800 per year for his work as a mathematics teacher; from working for a family business, which was involved in the installation of underground sprinkler systems; and from teaching on an occasional basis at the University of Nebraska at Omaha and a community college. Richard has a bachelor's degree and a master's degree and has taught mathematics for 30 years at Omaha Northwest High School. Richard is eligible to retire from OPS and was set to retire shortly after the trial, effective September 1, 2008. Richard expected to receive his first OPS pension payment on October 1. At the time of his retirement, Richard and Cheryl will divide on an equal basis his OPS pension of $2,940 per month. Richard testified that after his retirement, he will continue to work part time at Brownell-Talbot School, earning $32,000 per year. He testified that he is no longer going to work in the family business, where he has worked since 1987, earning between $4,500 and $7,800 per year.

The parties raised three children, all of whom are now over the age of majority. Cheryl also worked throughout the marriage for various employers as a licensed practical nurse. She last worked providing home health care services, but the exact date such employment ceased is not in the record. Cheryl suffers from diabetes as well as a genetic condition, pseudoxanthoma elasticum, which manifested itself in the 4 years preceding trial and caused her to become nearly blind. Cheryl testified that she cannot drive or read, cannot see anyone's face, and can see only the color yellow and "a few shapes." Cheryl testified that the condition is getting progressively worse and that ultimately she will be completely blind. At the time of trial, Cheryl's income sources were $350 per month temporary alimony plus Social Security disability benefits of $1,239 per month.

The trial court divided the parties' debts and assets equally. The parties did not accumulate a marital estate of consequence after considering debt. Neither party complains about any aspect of the property division, other than discussed below, and the net value of the marital estate would not impact our resolution of the issues presented on appeal. Thus, it is not necessary to detail the fine points of the property division.

The ELIP from OPS provides a benefit of $1,162.12 per month to Richard for 83 months for a total of $96,455.96. The payments will begin September 15, 2008, up to his 62d birthday, when he will become eligible to begin drawing Social Security benefits, if he so elects. The trial court awarded Richard all of the ELIP payments.

The trial court awarded Cheryl alimony of $600 per month, which is reduced to $1 per month upon Richard's retirement, at which point she would begin receiving her agreed-upon 50 percent of his OPS pension, or $1,470 per month. The net effect is that Cheryl will receive the $600 payment from Richard for 1 month.

ASSIGNMENTS OF ERROR

Cheryl assigns two errors: The trial court erred (1) in failing to equally divide the ELIP moneys and (2) in its alimony award to Cheryl.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

ANAYLSIS

Award of OPS ELIP Benefits.

The ELIP payments that were awarded in their entirety to Richard begin September 15, 2008, and continue through July 15, 2015, at the rate of $1,162.12 per month for a total of $96,455.96. Cheryl argues that she should receive half of

such payments, whereas Richard argues that such are future "income" to which he is solely entitled.

The only documentation concerning the ELIP payments in the record is Richard's application to OPS for such. While the application refers to "eligibility requirements" for ELIP payments, and Richard, via his signature on the application, acknowledges his understanding of such, the actual eligibility requirements are not in the record. However, Richard admitted in his testimony that he is getting the ELIP payments "because of [his] work for OPS during the course of the marriage" and that such is a "perk" resulting from his work for OPS—all of which occurred during the marriage. OPS approved his ELIP application on June 3, 2008. However, Richard did not disclose the existence of the ELIP benefits until the day of trial—June 16.

[2,3] Cheryl notes that all assets and debts were divided essentially 50-50. She concedes that other than the ELIP moneys, all of the marital assets and debts were divided in a fair and equitable manner. However, she asserts that the award of the ELIP moneys solely to Richard is unquestionably an abuse of discretion. The trial court did not provide a rationale for the award of the ELIP moneys to Richard. Cheryl's argument for a division of the ELIP payments is based on the general rule that all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). The exceptions that come immediately to mind are property acquired during the course of the marriage by one party through either gift or inheritance. See *Heald, supra.* And property owned by one party before the marriage is set off to such party if it is traceable, unless the other party has significantly cared for the property during the marriage. See *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005). None of these exceptions to the general rule are involved in this case.

Richard argues the ELIP payments are "an early retirement incentive plan as a replacement for post-separation wages and therefore is separate property or income from wages, not to be

included in the equitable division of the marital estate." Brief for appellee at 12.

In arguing for the notion that the ELIP moneys are excluded from the marital estate, Richard begins with the general concept found in *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998), that the marital estate should only include property created by the marital partnership and that the ELIP benefits do not meet this criteria. However, Richard ignores the holding of *Davidson*, that to the extent that the husband's "unvested employee stock options and stock retention shares were accumulated and acquired during the marriage, they were accumulated and acquired through the joint efforts of the parties." 254 Neb. at 663, 578 N.W.2d at 855.

The *Davidson* court then turned to the question of when stock options and retention shares "are accumulated and acquired." *Id.* The *Davidson* court said that most courts recognize that employee stock options may be granted for "past, present, or future services, or some combination thereof." *Id.* (citing *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984)). There can be no doubt from the evidence that the ELIP benefits were completely earned and granted for past performance—in this case, Richard's 30 years of work for OPS, all of which time he was married to Cheryl. Moreover, Richard's choosing to terminate his employment with OPS is the precondition to his obtaining such benefits. Thus, in no sense can the ELIP payments be deemed a reward for future services, because his OPS employment has ended. Finally, we observe that the permutations commented upon by the *Davidson* court regarding the valuation and acquisition dates of the husband's stock options and retention shares are simply not present here. Corporate stock is subject to the vagaries of the marketplace and the economy, whereas Richard is receiving a fixed amount, $96,455.96 paid in 83 equal installments, and such is not affected by future events as stock options or retention shares would be.

[4] *Davidson, supra*, clearly reaffirms the basic "time rule" that assets acquired during the marriage are marital property. Thus, in the instant case, to the extent that the ELIP benefits are deemed "property," the right to such was undisputedly

acquired during the marriage. And none of the aforementioned exceptions to exclude property from the marital estate apply. The record is clear that the ELIP benefits are a direct result of Richard's work for OPS over the 30-year course of the marriage. Thus, we have little hesitancy in concluding that if the ELIP benefits are considered property, such should have been included in the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 2008) provides substantial guidance on the question of whether the ELIP benefits are "property." The statute provides, "The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." § 42-366(8).

The statute clearly sweeps quite broadly in requiring retirement or deferred compensation plans to be included in the division of property. On the basis of the statutory language alone, it is difficult to reach any conclusion other than that the ELIP benefits should have been divided as marital property, given that it clearly is part and parcel of Richard's "retirement benefits package" that he accumulated while married to Cheryl.

[5] Our decision in *Bandy v. Bandy*, 17 Neb. App. 97, 756 N.W.2d 751 (2008), is instructive in the sense that it discusses a pension that we determined was outside of the broad language of § 42-366(8). In *Bandy*, the husband sustained an on-the-job injury that qualified him for workers' compensation benefits as well as a disability pension from the city of Omaha, his employer when he was injured. On appeal, the wife argued that the trial court erred in excluding the disability pension from the property division because the court found the pension was a nonmarital asset. We affirmed the trial judge's decision awarding the disability pension solely to the husband, reasoning that the husband's disability pension was distinct from any retirement benefits he may receive from the city and the disability pension appeared to be compensation for his loss of earning capacity, noting the evidence that he had not been able to obtain and hold regular employment since the injury. In this case, the ELIP benefits do not

compensate Richard for a future inability to work—even though the benefits are payable in the future, nor do such benefits pay him for future work.

In *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003), the court considered the division of a nonvested military pension in a dissolution action. The *Longo* court's observations about such seem analogous to Richard's retirement package, including the ELIP payments. The *Longo* court stated as follows:

> [Section] 42-366(8) logically requires that a nonvested military pension be treated as marital property in a dissolution proceeding. While military personnel do not make monetary investments in a pension plan, they invest time and personal sacrifice in order to qualify for a nondisability military pension. Spouses of such personnel share in this investment to the extent that the duration of the marriage coincides with the period of military service. As one court has noted, the future retirement pay of a career military service member who is not yet eligible to retire "is a contractual right, subject to a contingency, and is a form of property." *Jackson v. Jackson*, 656 So. 2d 875, 877 (Ala. Civ. App. 1995). Because § 42-366(8) specifically requires the inclusion of retirement benefits "whether vested or not vested" in the marital estate, we conclude that the district court did not err in awarding [the wife] a share of [the husband's] future nondisability military pension entitlement, payable only if and when such benefits become payable to [the husband].

266 Neb. at 179, 663 N.W.2d at 610.

We see little difference between the "investment" a teacher and his or her spouse make in a teaching career and what a military service member and his or her spouse make in a military career.

[6] With the foregoing "background" law in place, which seems to compel the conclusion that the trial court erred in its treatment of the ELIP moneys, we turn to Richard's argument that the trial court award should be upheld. Richard asserts the following: "Whether early retirement incentive plans are marital property is an issue of first impression in Nebraska." Brief for appellee at 13. That is not exactly true, and we note

that neither party cites us to *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). *Shockley* is more mathematically complicated because while the husband worked for U S West for a total of 26.5833 years, only 5.5 years were during the marriage before he took early retirement on March 1, 1990. He retired on an incentive plan, which added 5 years to his age and 5 years to his years of service to compute the lump-sum settlement he received when he retired. The husband in *Shockley* argued, in the words of the Supreme Court, that "Wife contributed nothing to the early retirement incentives and his actual years of employment did not include the 5+5 enhancement." 251 Neb. at 901, 560 N.W.2d at 781. However, the Supreme Court agreed with the wife's argument that the trial court should have added the 5 extra years from the early retirement incentive to his 5.5 years of employment in order to get the percentage attributable to marriage. Thus, 5 years were added to the 5.5 years worked during the marriage, as well as to the total actually worked, producing 31.5833 total years, divided by 10.5 marital years, to produce a figure of 33.25 percent. Therefore, the court found, "The marital portion of Husband's pension, including the buyout incentives, should be increased by $23,574.20." *Id.* Accordingly, while *Shockley* is more nuanced than the instant situation, it clearly stands for the proposition that early retirement incentives that result from employment during the marriage are included in the marital estate. Although § 42-366(8) was then effective, the *Shockley* court did not cite to it; nonetheless, we suggest the result in *Shockley* is not only driven by equity and reasonableness, but by the unambiguous language of that statute.

Richard also cites decisions from Virginia, Ohio, and Pennsylvania in support of his argument that the ELIP benefits were properly excluded from the marital estate. We do not dissect or attempt to distinguish those cases, because § 42-366(8) and the Nebraska authority we have cited above is determinative. Therefore, we hold that the trial court abused its discretion in awarding all of the ELIP benefits solely to Richard, because such should have been included in the property division as marital property.

Perhaps because Richard did not disclose the ELIP until the day of trial, the details of this program in our record are a bit sketchy. We do not know for certain that the payments are taxable, nor do we know if a qualified domestic relations order is needed to have Cheryl receive one-half of the ELIP moneys, which we determine is proper and reasonable, as part of the property division. Therefore, we remand the cause to the district court for further proceedings to determine if a qualified domestic relations order is needed and, if so, for the execution and approval of such. The trial court shall award Cheryl a percentage of the payments that have not yet been made—remembering that such were to start on August 15, 2008—so that in the end, she receives that percentage of the remaining payments, once the payments to her begin, which will equal 50 percent of the total ELIP benefit of $96,455.96 over the timespan of the then remaining payments. In this way, Richard will not be obligated to pay Cheryl out of pocket for her share of the ELIP benefits he has already received, but she will end up receiving a total of $48,227.98—one-half of the total ELIP payments.

Award of Alimony to Cheryl.

We now turn to the issue of the alimony award to Cheryl. It is apparent that this case is appropriate for an award of alimony, given the 30 years of marriage and Cheryl's unfortunate circumstances. The trial court awarded her $600 a month beginning on the first day of the month following the entry of the decree, which occurred on August 1, 2008, but such payment was ordered reduced to $1 a month when Cheryl begins "receiving her 50% portion of [Richard's OPS] Pension." However, in the November 4 order on the motion to alter or amend, the court amended the alimony provision

> in that at such time as [Richard] retires from his employment with [OPS], he shall file . . . an Affidavit, with back up documentation, setting forth his retirement start date and the Clerk will then adjust its records to show the reduction in [Richard's] alimony obligation from $600.00 per month to $1.00 per month.

Another provision of the November 4, 2008, order provides that until Cheryl receives her 50 percent of the monthly OPS pension payment directly from OPS ($1,470 at the time of trial), Richard will be obligated to pay her 50 percent of what he receives. Richard testified that his effective retirement date is September 1, 2008, and that he will get the first payment on October 1—meaning the $600 per month will be paid only 1 month, September 2008, and thereafter alimony will be $1 per month. The alimony is to run for 60 months, or until Richard's death or Cheryl's remarriage, whichever occurs first.

Cheryl asks that we order the alimony extended for 10 years and not reduce it below $600 per month or only "slightly reduce the obligation." Brief for appellant at 20.

[7,8] The ultimate test for determining the correctness of the alimony award is reasonableness as determined by the facts of each case. *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). Neb. Rev. Stat. § 42-365 (Reissue 2008) provides in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Cheryl's education is limited to certification for licensed practical nursing, and she is no longer able to work in that capacity because of her near complete blindness, which the evidence shows will only worsen. She cannot read, drive a car, distinguish faces, colors, or most shapes. Her opportunities for employment are clearly severely limited. Her monthly income is composed of Social Security benefits of $1,239 and taxable income of $1,470 from her share of Richard's OPS retirement. Thus, her income is $2,709 pretax per month. Additionally, she will get cost-of-living increases both from OPS and from Social

Security. Thus, at this time, Cheryl's pretax yearly income is $32,508, and by a rough estimate, the ELIP benefit will increase her annual income by $7,000 once she begins receiving such.

Richard's projected yearly income as the alimony and property division currently stand is $32,000 from Brownell-Talbot School, $17,640 from OPS for his pension, and $13,945.44 in ELIP benefits for a total of $63,585.44 annually. However, given our modification concerning the ELIP benefit, his income will be closer to $56,000. The ELIP benefit terminates when Richard turns 62 and he becomes eligible to draw Social Security. Although the evidence was not complete on the point, it is implicit that Richard's Social Security benefits at age 62 will approximate the ELIP benefits he is receiving until that time.

Given the length of the marriage, Cheryl's severe disability, Richard's educational level and residual earning capacity despite his retirement from OPS, and the parties' relatively young ages at 51 for Cheryl and 54 for Richard, we find that the alimony term of a mere 60 months is significantly inadequate and was an abuse of discretion. Therefore, the term of alimony should be 120 months. The monthly amount awarded by the trial court is de minimus because of Richard's agreement to arrange for payment of one-half of his OPS pension to Cheryl, but such was allowed for modification purposes in the event of a material change of circumstances. However, we find that such opportunity should not be limited to such a brief timeframe, given the parties' situations as summarized above. That said, we decline to modify the amount of the alimony as it is reasonable and appropriate considering the income and resources available to each party and our treatment of the ELIP moneys set forth above. Thus, we affirm the alimony award in all respects, except that the term thereof shall be 120 months.

CONCLUSION

For the reasons discussed above, the ELIP benefits should have been considered marital property and included in the property division. Thus, the trial court abused its discretion by

awarding all of the ELIP benefits to Richard. Second, given the circumstances of this case, the term of Richard's alimony obligation is hereby extended from 60 months to 120 months. In all other respects, we affirm the trial court's decision.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
PHOEBE WILSON, APPELLANT.
771 N.W.2d 228

Filed August 18, 2009. No. A-08-1337.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Constitutional Law: Sentences: Prior Convictions: Right to Counsel: Proof.** The State has the burden to prove the constitutional validity of the defendant's prior plea-based conviction in relation to the defendant's right to counsel before the State may use the prior plea-based conviction for an enhanced penalty.
5. ____: ____: ____: ____: ____. If the State fails to show the constitutional validity of the prior conviction and such conviction is based on a defendant's plea of guilty but obtained in violation of the defendant's right to counsel, then such conviction is unconstitutional and void and, consequently, cannot be used to enhance the sentence for the defendant's subsequent conviction.
6. **Sentences: Prior Convictions: Right to Counsel: Waiver: Misdemeanors.** The State is not required to show that the defendant had counsel or waived counsel, with regard to a prior misdemeanor conviction, in order to use that prior conviction for sentence enhancement if, as a result of that prior conviction, the defendant was ordered only to pay a fine.
7. **Sentences: Right to Counsel: Waiver.** Actual imprisonment triggers the right to counsel, and a sentence of stand-alone probation does not require that the defendant had or waived counsel.

8. **Sentences: Prior Convictions: Right to Counsel: Waiver: Probation and Parole.** A prior conviction resulting in a sentence of probation, and not actual imprisonment, can be used for enhancement in subsequent proceedings without a showing that the defendant had or waived counsel in the prior proceeding.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Korey L. Reiman, of Reiman Law Firm, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Phoebe Wilson pled guilty in the county court for Lancaster County to second-offense driving under the influence (DUI) with an alcohol concentration of over .15 of 1 gram per 210 liters of her breath and was sentenced to 100 days in jail and ordered to pay a $100 fine. Wilson appealed to the district court for Lancaster County, which affirmed the order of the county court. Wilson timely appealed to this court. The appeal presents the issue of a misdemeanant's right to counsel when the sentence imposed is probation, although the conviction would allow for imprisonment, in connection with the use of such a prior conviction for sentence enhancement purposes upon a later conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Wilson was stopped by law enforcement on November 16, 2007, because of a motor vehicle accident and cited for negligent driving. At the time, her breath alcohol content was .215 grams per 210 liters of her breath. Wilson was charged by complaint with second-offense DUI more than .15, under Neb. Rev. Stat. § 60-6,196 (Reissue 2004), which is a Class I misdemeanor under Neb. Rev. Stat. § 60-6,197.03(5) (Supp. 2007).

On April 10, 2008, the county court received Wilson's guilty plea to second-offense DUI more than .15 breath alcohol content, finding beyond a reasonable doubt that Wilson was acting voluntarily, understood the nature of the charge, and knowingly and freely waived her constitutional rights. On July 11, the county court filed its order. The county court found that Wilson's prior conviction for DUI more than .15 breath alcohol content in 2003 was valid for sentence enhancement. Wilson was sentenced to 100 days' imprisonment, she was ordered to pay a $100 fine, and her driver's license was suspended for 3 years.

Wilson appealed the order of the county court to the district court for Lancaster County on July 14, 2008. The district court held a hearing on November 6, at which it received as evidence the bill of exceptions from the county court proceedings, including the record of Wilson's 2003 DUI conviction. In its order filed December 10, the district court affirmed the order of the county court. The district court found that the county court did not err in finding the 2003 DUI conviction was a valid prior offense to enhance the current DUI to a second offense. In deciding such, the district court relied on *State v. Jackson*, 4 Neb. App. 413, 544 N.W.2d 379 (1996), in which we held that a prior uncounseled misdemeanor conviction could be used to enhance a subsequent misdemeanor conviction to a felony offense. Wilson timely appealed the district court's order. Additional facts will be discussed in the analysis section below as necessary.

ASSIGNMENTS OF ERROR

Wilson assigns, restated, that the district court erred in (1) finding a prior uncounseled and constitutionally inadequate sentencing proceeding could be used to enhance a subsequent DUI based upon the finding that Wilson was not incarcerated on the prior offense and (2) not finding the prior offense to be clearly inadequate for enhancement because a valid waiver of counsel did not occur.

STANDARD OF REVIEW

[1] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than

as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Brown*, 14 Neb. App. 508, 710 N.W.2d 337 (2006).

[2] A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous. *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

[3] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

ANALYSIS

Wilson's two assignments of error relate to whether her prior offense, a DUI conviction more than .15 breath alcohol content in 2003, was a valid prior offense for the purpose of sentence enhancement for the current offense. The resolution of this issue is determined by whether Wilson had a right to counsel at that time. Because we ultimately determine that she did not have a right to counsel at the time of the 2003 conviction, we need not discuss the issue of whether the evidence shows that Wilson validly waived counsel at the time of the 2003 conviction. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issues unnecessary to its decision). Therefore, we turn to the right to counsel where, as here, the conviction was a misdemeanor resulting in a sentence of probation.

[4,5] The State has the burden to prove the constitutional validity of the defendant's prior plea-based conviction in relation to the defendant's right to counsel before the State may use the prior plea-based conviction for an enhanced penalty. *Reimers, supra*. If the State fails to show the constitutional validity of the prior conviction and such conviction is based on a defendant's plea of guilty but obtained in violation of the defendant's right to counsel, then such conviction is unconstitutional and void and, consequently, cannot be used to

enhance the sentence for the defendant's subsequent conviction. See *id*. Conversely, if the constitutional validity of the prior offense is shown, the prior conviction can be used for sentence enhancement.

[6] However, we have held that the State is not required to show that the defendant had counsel or waived counsel, with regard to a prior misdemeanor conviction, in order to use that prior conviction for sentence enhancement if, as a result of that prior conviction, the defendant was ordered only to pay a fine. See *State v. Jackson*, 4 Neb. App. 413, 544 N.W.2d 379 (1996). This proposition is based on *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), and *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). In *Argersinger, supra*, the U.S. Supreme Court held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. In *Scott, supra*, the U.S. Supreme Court affirmed a defendant's uncounseled misdemeanor conviction for which no imprisonment had been imposed, finding no violation of the defendant's Sixth Amendment right to counsel because the right to counsel only applies where the defendant is sentenced to imprisonment, not merely where imprisonment is an authorized penalty. The Court specifically stated, "[T]he central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373. *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), extended these principles to the use of a prior misdemeanor conviction for use in an enhancement proceeding. *Nichols* held that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction. The Nebraska Supreme Court, following *Argersinger*, *Scott*, and *Nichols*, has held that a misdemeanor conviction is valid, even when the State does not demonstrate that the defendant was afforded the opportunity to have

appointed counsel or that the defendant waived counsel, when the defendant is fined rather than imprisoned as a result of the conviction. See *State v. Austin*, 219 Neb. 420, 363 N.W.2d 397 (1985). See, also, *Jackson, supra*. In *State v. Dean*, 2 Neb. App. 396, 510 N.W.2d 87 (1993), we held that a nonfelony criminal defendant, penalized only by a fine even though the penalty could have included imprisonment, is not entitled to be advised of his right to obtain private counsel or obtain a waiver of counsel before trial. We summarized and explained in *Dean* as follows:

> The U.S. Supreme Court discussed in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), the circumstances under which counsel was constitutionally required to represent criminal defendants. After a conflict developed among state and lower federal courts regarding application of *Argersinger* to misdemeanor cases, the Court granted certiorari to an Illinois case. See *People v. Scott*, 68 Ill. 2d 269, 369 N.E.2d 881 (1977), *cert. granted* 436 U.S. 925, 98 S. Ct. 2817, 56 L. Ed. 2d 767 (1978). In *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), the Court affirmed the Illinois Supreme Court's judgment and held that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. at 373-74. This holding has been specifically applied in Nebraska. *State v. Austin*, 219 Neb. 420, 363 N.W.2d 397 (1985). See, also, *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990) (holding that a defendant's unrepresented prior conviction for giving false information resulting in a fine of $25 was valid and could therefore be used to impeach the defendant's credibility in a subsequent proceeding). Elsewhere, it has been succinctly observed that "Argersinger forbids imprisonment without representation. It does not forbid trial without representation." *Sweeten v. Sneddon*, 463 F.2d 713, 716 (10th Cir. 1972).

2 Neb. App. at 397-98, 510 N.W.2d at 89.

In this case, the possible penalty for Wilson's first offense DUI misdemeanor in 2003 was a $500 fine and 7 to 60 days' imprisonment. See Omaha Mun. Code, ch. 36, art. III, § 36-115(a) (2001). However, although imprisonment was a possible sentence when Wilson pled guilty to DUI in 2003, she was not sentenced to imprisonment, either to be served immediately or suspended. She was fined and sentenced to and successfully released from probation. Wilson was not actually incarcerated at any time for the 2003 DUI offense. The question presented, therefore, is whether the fact that Wilson was sentenced to probation, albeit without any prison sentence, gives her a right to counsel—which she clearly would not have had under the above authority had she just been fined—and thereby prevents the use of the 2003 uncounseled conviction for sentence enhancement.

Wilson argues that *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002), applies and prevents the use of the 2003 conviction for enhancement purposes. In *Shelton*, the U.S. Supreme Court held that the Sixth Amendment right to appointed counsel applies to a defendant who receives a suspended sentence. Wilson argues that her sentence of probation, like a suspended sentence or a sentence of imprisonment, requires that the State show that the Sixth Amendment right to counsel was satisfied for the prior conviction to be used for sentence enhancement. In *Shelton*, the defendant appeared pro se and was convicted of misdemeanor assault. The defendant was sentenced to 30 days in prison, which the court suspended, and he was placed on probation for 2 years. The defendant was also ordered to pay a $500 fine and reparations and restitution. The U.S. Supreme Court held that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded the 'guiding hand of counsel' in the prosecution of the crime charged." *Shelton*, 535 U.S. at 658. The Court reasoned that "a suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point 'result[s] in imprisonment' . . . ." 535 U.S. at 662.

The Court in *Shelton* limited its review, however, to "'[a] defendant who receives a suspended or probated sentence *to imprisonment* has a constitutional right to counsel'" and declined to address the State of Alabama's argument that the probation sentence, if uncoupled from the suspended jail sentence, would be valid even if the defendant did not have counsel or effectively waived counsel because a freestanding probation sentence could be enforced in a contempt hearing, rather than with imprisonment. 535 U.S. at 674 (emphasis in original). Consequently, *Shelton* does not provide a definitive answer to the issue presented in this appeal.

Some federal courts have addressed *Shelton* and declined to extend its holding to prior misdemeanor convictions that resulted in stand alone probation rather than a suspended jail sentence. In *U.S. v. Wilson*, 281 F. Supp. 2d 827 (E.D. Va. 2003), three defendants had each been sentenced to probation for alcohol-related driving offenses and each challenged the validity of those prior convictions absent a waiver of counsel under *Shelton, supra*, arguing that probation is the equivalent of a suspended sentence. The court disagreed, finding that probation is an independent sentence and not a suspended sentence because probation does not involve the imposition of any term of incarceration. In *U.S. v. Pollard*, 389 F.3d 101 (4th Cir. 2004), the Fourth Circuit Court of Appeals affirmed the district court's ruling in an appeal of one of the defendants in *Wilson, supra*. The court rejected the defendant's argument in *Pollard* that *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002), should be read broadly to hold that the right to counsel attaches whenever a defendant would be vulnerable to imprisonment as a result of a sentence. The court in *Pollard* noted some general similarities between a suspended sentence and stand alone probation, but found that such a broad reading of *Shelton* would imply that the U.S. Supreme Court had abandoned the principles set forth in *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). The court further explained that any penalty, including a fine, ensures the defendant is "subject to conditions that render him vulnerable to imprisonment should he disobey those conditions," *Pollard*, 389 F.3d at 105, and that

adopting such a broad rule requires ignoring *Scott*, in which the U.S. Supreme Court held that the mere threat of imprisonment is insufficient to trigger the right to counsel. The court in *Pollard* also noted that *Shelton* expressly reserved the question of whether uncounseled defendants may receive stand alone sentences of probation, and as such, *Shelton* did not directly apply.

In *U.S. v. Perez-Macias*, 335 F.3d 421 (5th Cir. 2003), the court specifically addressed the use of uncounseled prior convictions that resulted in a sentence of probation in a subsequent enhancement proceeding. The court followed the rule that imprisonment is the line defining the constitutional right to appointment of counsel, and a defendant who receives a suspended sentence is given a term of imprisonment, while a defendant who received a stand alone sentence of probation is not. The defendant had been convicted of the misdemeanor offense of illegal entry into the United States, appeared pro se, and was sentenced to 3 years of unsupervised probation and a $10 special assessment. The Fifth Circuit Court of Appeals held that *Shelton* followed the rule set out in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), and *Scott, supra*, that actual imprisonment is the standard for right to counsel and found a suspended sentence was conceptually different from probation because the defendant actually receives a sentence of imprisonment with a suspended sentence but does not with probation. The court went on to explain that there may be Sixth Amendment concerns if actual imposition of a term of imprisonment occurred due to probation revocation, but that the defendant did not and cannot receive a term of imprisonment for the prior offense; and as such, the prior offense could be used for sentence enhancement.

Wilson points us to several other state cases in her brief. However, we do not find any of these cases persuasive. In *State v. Long*, 203 P.3d 45, 51 (Kan. App. 2009), the Kansas Court of Appeals found that the defendant's "sentence in each case referred to a 1-year probation, which was more akin to a suspended sentence since the court never imposed jail time. Under *Shelton*, [the defendant's] misdemeanor convictions and his fines remain valid even though the probation aspect of

[the defendant's] sentence is invalid." We do not find *Long, supra*, persuasive, given that the Kansas Court of Appeals did not delineate why probation was more akin to a suspended sentence than a fine and that it departs from the "prison is the line" concept, laid down by the U.S. Supreme Court in *Scott, supra*, and *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), which has been adopted by the Nebraska Supreme Court.

Wilson also cites *Talley v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007), and *State v. Von Ferguson*, 169 P.3d 423 (Utah 2007). These cases are distinguishable from the present case because the sentence imposed on the prior conviction in each instance was a suspended sentence, not stand alone probation. Wilson also cites *State v. Kelly*, 999 So. 2d 1029 (Fla. 2008), and *State v. Hrycak*, 184 N.J. 351, 877 A.2d 1209 (2005). Again, these cases are distinguishable because both the Florida Supreme Court and the New Jersey Supreme Court specifically discuss that their state constitutions or jurisprudence allow for greater protections for indigent defendants in regard to right to counsel than the U.S. Constitution. In *Kelly, supra*, the Florida Supreme Court held that indigent criminal defendants have a right to appointed counsel for misdemeanor offenses when imprisonment is a possible punishment, rather than just those when the defendant was actually punished with imprisonment under *Argersinger, supra*, and *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). In *Hrycak, supra*, the New Jersey Supreme Court held that despite the holding in *Nichols, supra*, an uncounseled indigent defendant should not be subjected to a conviction entailing imprisonment in the face of other consequences of magnitude, and therefore, a prior uncounseled DUI conviction of an indigent is not sufficiently reliable to permit increased jail sanctions under the enhancement statute. Nebraska law does not include such additional protections, and therefore, these cases are not instructive to the issues presented here. We recognize, as noted in *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997), that states are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal Constitution. But

our Supreme Court has followed the *Scott* and *Nichols* rule that the line for the right to counsel for misdemeanants is drawn at the jail cell door. See *State v. Stott*, 255 Neb. 438, 586 N.W.2d 436 (1998). We follow that rule here and, therefore, reject the Florida and New Jersey authority that Wilson argues for.

[7,8] We find the reasoning of *U.S. v. Perez-Macias*, 335 F.3d 421 (5th Cir. 2003); *U.S. v. Wilson*, 281 F. Supp. 2d 827 (E.D. Va. 2003); and *U.S. v. Pollard*, 389 F.3d 101 (4th Cir. 2004), convincing. These cases all follow the rule articulated in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Scott, supra*; and *Nichols, supra*, that actual imprisonment triggers the right to counsel and that a sentence of stand-alone probation does not require that the defendant had or waived counsel, unlike a suspended sentence as in *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002). Therefore, we hold that a prior conviction resulting in a sentence of probation, and not actual imprisonment, can be used for enhancement in subsequent proceedings without a showing that the defendant had or waived counsel in the prior proceeding. Because Wilson was sentenced to probation and a fine and no term of imprisonment was actually imposed, Wilson was clearly not entitled to counsel for her misdemeanor conviction for DUI in 2003—on constitutional or any other grounds. As such, the State was not required to show that Wilson had counsel or knowingly, intelligently, and voluntarily waived counsel as is normally required for a prior conviction to be used for sentence enhancement. See, *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993); *State v. Jackson*, 4 Neb. App. 413, 544 N.W.2d 379 (1996). Therefore, Wilson's first assignment of error lacks merit. We disposed of the lack of waiver assignment at the outset of our analysis.

CONCLUSION

We find that Wilson was not entitled to counsel in the 2003 DUI misdemeanor conviction when she neither was sentenced to prison nor served any prison sentence. Therefore, that prior

conviction could properly be used for enhancement purposes, and as a result, we affirm the judgment of the district court, which affirmed the conviction and sentence imposed by the county court.

AFFIRMED.

ANNETTE I. MACE-MAIN, APPELLANT, V. CITY OF OMAHA, A NEBRASKA MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION, AND METROPOLITAN UTILITIES DISTRICT OF OMAHA, A NEBRASKA POLITICAL SUBDIVISION AND MUNICIPAL CORPORATION, APPELLEES.

773 N.W.2d 152

Filed September 1, 2009. No. A-08-1026.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Pleadings: Appeal and Error.** Whether a complaint states a cause of action is a question of law, to be reviewed on appeal de novo.
3. **Pleadings: Proof: Dismissal and Nonsuit.** A motion seeking dismissal of a complaint for failure to state a cause of action should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **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.
6. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
7. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
8. **Limitations of Actions: Negligence: Torts.** It has generally been stated that in a negligence action, a statute of limitations begins to run as soon as the cause

of action accrues, and an action in tort accrues as soon as the act or omission occurs.

9. **Limitations of Actions: Negligence.** It has been determined that the discovery rule applies in certain categories of cases. The rationale behind the discovery rule is that in certain categories of cases, the injury is not obvious and the individual is wholly unaware that he or she has suffered an injury or damage.
10. ____: ____. When the discovery rule is applicable, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.
11. **Political Subdivisions Tort Claims Act: Limitations of Actions.** The discovery rule is applicable to the statute of limitations provisions in Neb. Rev. Stat. § 13-919(1) (Reissue 2007).
12. **Limitations of Actions.** The discovery rule does not operate to toll the statute of limitations until a potential plaintiff discovers the negligent party.
13. **Political Subdivisions Tort Claims Act.** Neb. Rev. Stat. § 13-919(3) (Reissue 2007) does not extend the time for filing a claim under the Political Subdivisions Tort Claims Act against a different or additional political subdivision after one political subdivision denies the claim.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Marvin O. Kieckhafer, of Smith Peterson Law Firm, L.L.P., for appellant.

Alan M. Thelen, Deputy Omaha City Attorney, for appellee City of Omaha.

Susan E. Prazan for appellee Metropolitan Utilities District of Omaha.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Annette I. Mace-Main brought a negligence action under Nebraska's Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2007) (the Act) against the City of Omaha (City) and Metropolitan Utilities District of Omaha (MUD), seeking damages for injuries she suffered in a fall. The district court for Douglas County granted MUD's motion to dismiss and granted the City's motion for summary judgment. Mace-Main appeals the granting of both motions. Based on the reasons that follow, we affirm.

BACKGROUND

On February 2, 2007, Mace-Main filed a complaint in the district court against the City and MUD pursuant to the Act. The complaint indicated that proper notice of Mace-Main's claim was provided to the City and MUD and that both denied her claim. The complaint alleged that on August 6, 2005, Mace-Main was walking on a public sidewalk owned by the City and maintained by the City "and/or" MUD, located along Harney Street, and stepped on a defective manhole cover which suddenly and without warning shifted and gave way as she stepped on it, causing her to fall as her foot and leg descended forcefully into the manhole, resulting in severe and painful injuries to Mace-Main. The complaint alleged that the direct and proximate cause of the fall and resulting injuries was the negligence of the City and MUD. The complaint stated that as a result of the fall, Mace-Main suffered severe and painful bodily injuries which included a broken toe, a dislocated shoulder, and injuries to her elbow, knee, neck, and arms, as well as other bumps, bruises, and abrasions.

On February 12, 2007, MUD filed a motion to dismiss, contending that Mace-Main's complaint failed to state a claim upon which relief could be granted because Mace-Main had failed to make a claim to MUD within the 1-year period mandated by § 13-919(1). On March 16, the trial court granted MUD's motion to dismiss.

The City filed an amended answer to Mace-Main's complaint on January 18, 2008. In its amended answer, the City admitted Mace-Main's compliance with the notice provisions of the Act and asserted numerous affirmative defenses. The City subsequently filed a motion for summary judgment, on the ground that it did not have any duty in regard to the manhole cover in question because the manhole cover and the underlying watermeter pit belonged to MUD and it was MUD's duty to repair and maintain the manhole cover. A hearing was held on March 12. The evidence presented at the hearing showed as follows:

There are many different types of manholes in the City belonging to many different entities, including the City and MUD. MUD is the sole and exclusive provider of water service

to private properties in Omaha. The City does not provide any water and does not participate in the provision of water services in any respect. When the City receives a complaint regarding a condition in a sidewalk or a manhole, it sends an employee out to inspect the location of the complaint. If the complaint is related to MUD's water distribution, the City immediately notifies an MUD dispatcher of the condition. MUD then takes action to remedy the problem. The City takes no further action after notifying MUD.

On August 7, 2005, the day after Mace-Main's accident, James Brandt, a sewer maintenance foreman for the City, received a call to go inspect a complaint of a defective manhole cover at or near a specific address on Harney Street. Brandt went to the site and found that the manhole cover was a cover for an MUD watermeter pit. A watermeter pit is a small brick-lined vault in the ground containing a watermeter that registers the accumulating waterflow provided to the property. Watermeter pits are located along water service lines that serve adjacent properties and are mostly found in older parts of Omaha. MUD checks the watermeter readings on a regular basis to determine how much to bill the adjacent property owner for water provided. Watermeter pits are covered with metal covers that resemble other manhole covers. If a watermeter pit requires repair, MUD typically informs the adjacent property owner that it needs to make the repair. If the property owner fails to make the repair, MUD performs the repair and bills the property owner for the costs. The City does not own, maintain, or repair watermeter pits serving private properties.

Brandt found that the ring surrounding the manhole cover at issue was loose and had broken away from its foundation. While at the site, Brandt reported the watermeter pit to an MUD dispatcher and ordered barricades to be placed at the location as a matter of public safety. He testified that whenever he goes to the location of a complaint and there is a problem that needs followup, he secures the location if it presents a danger to someone coming upon it, whether it is the City's problem to fix or not. In the instant case, Brandt placed cones on the manhole cover until the barricades arrived.

On August 8, 2005, MUD sent an employee out to investigate the manhole cover at issue and identify the work to be done. On August 24, an MUD utility worker explored the watermeter pit and determined that it was abandoned. He then removed the ring of the watermeter pit, capped the inactive water service, and filled the hole to grade so that the sidewalk could be repoured over the area where the manhole cover and watermeter pit had been. Pursuant to City ordinances and the usual practice between the City and MUD, the City poured the new concrete at the location and billed MUD for the cost of restoring the sidewalk.

Following the hearing, the trial court entered an order on July 17, 2008, granting the City's motion for summary judgment and dismissing Mace-Main's complaint with prejudice. The trial court found that there was no evidence that the City had the obligation or the duty of repairing, servicing, or maintaining watermeter pits or their manhole covers. It found that it was MUD's watermeter pit and manhole cover and, thus, that it was MUD's responsibility to maintain the manhole cover which caused Mace-Main's accident. It further found that although the sidewalk surrounding the manhole cover is the City's responsibility to maintain, the obligation does not extend to the manhole cover itself. It concluded that there is no compelling evidence that the sidewalk was the proximate cause of any injury Mace-Main suffered.

On July 24, 2008, Mace-Main filed a motion to alter or amend the court's July 17 order, granting the City's motion for summary judgment. On November 13, the trial court denied Mace-Main's motion.

ASSIGNMENTS OF ERROR

Mace-Main assigns that the trial court erred in granting MUD's motion to dismiss and erred in granting the City's motion for summary judgment.

STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of

the nonmoving party. *Tolbert v. Omaha Housing Authority*, 16 Neb. App. 618, 747 N.W.2d 452 (2008). Whether a complaint states a cause of action is a question of law, to be reviewed on appeal de novo. *Id.* A motion seeking dismissal of a complaint for failure to state a cause of action should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief. *Id.*

[4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[5] 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.*

ANALYSIS

MUD's Motion to Dismiss.

[6,7] Mace-Main first assigns that the trial court erred in granting MUD's motion to dismiss, finding that the complaint fails to state a claim upon which relief can be granted because Mace-Main failed to comply with § 13-919(1). The Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Act. *Keller v. Tavarone, supra.* Section 13-919(1) requires that notice of a claim be made to the political subdivision within 1 year after the claim accrued: "Every claim against a political subdivision permitted under the . . . Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body."

Mace-Main's complaint states that she was injured during an incident that occurred on August 6, 2005. The complaint and its attached exhibits show that Mace-Main sent notice

of her claim to the City on August 1, 2006. The City denied Mace-Main's claim in a letter dated August 30, 2006, advising her that the manhole cover involved in the fall and injury belonged to MUD and was not the property of the City. On December 29, Mace-Main sent MUD notice of her claim, more than 16 months after the incident occurred. MUD responded by a letter dated January 3, 2007, denying Mace-Main's claim on the basis that it had not been made in writing to MUD within 1 year after the claim accrued. It is clear from the face of the complaint and attached exhibits that Mace-Main did not give MUD notice of her claim within 1 year of the date she was injured.

However, Mace-Main argues that her claim did not accrue on the date her injury occurred. Rather, Mace-Main contends that pursuant to the discovery rule, her claim did not accrue until she discovered that MUD may be the entity responsible for her injuries. She alleges that this occurred on August 30, 2006, when the City denied her claim and implicated MUD. She contends that before receiving the letter from the City stating that the manhole cover belonged to MUD, she had no reason to believe that MUD was involved in the matter.

[8-11] It has generally been stated that in a negligence action, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. See *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002). It has been determined, however, that the discovery rule applies in certain categories of cases. The rationale behind the discovery rule is that in certain categories of cases, the injury is not obvious and the individual is wholly unaware that he or she has suffered an injury or damage. *Id.* Thus, when the discovery rule is applicable, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury. *Id.* The discovery rule is applicable to the statute of limitations provisions in § 13-919(1). See *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W.2d 636 (1996).

[12] The discovery rule applies when an individual's injury is not obvious and the individual is wholly unaware that he

or she has suffered an injury or damage. Such is not the case here. Mace-Main's accident occurred on August 6, 2005, and she was aware of her injuries at that time. The discovery rule does not operate to toll the statute of limitations until a potential plaintiff discovers the negligent party. Accordingly, because Mace-Main's injuries occurred on August 6, 2005, that is the date on which her claim accrued and the 1-year notice requirement set forth in § 13-919(1) started. Thus, the notice of claim sent to MUD on December 29, 2006, did not comply with § 13-919(1).

Mace-Main also argues that the trial court erred in granting MUD's motion to dismiss because the court failed to consider § 13-919(3), which Mace-Main alleges extends her time to give MUD notice of her claim. Subsection (3) of § 13-919 provides:

> If a claim is made or a suit is begun under the [A]ct and a determination is made by the political subdivision or by the court that the claim or suit is not permitted under the [A]ct for any other reason than lapse of time, the time to make a claim or to begin a suit *under any other applicable law of this state* shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim or begin the suit under such other law would otherwise expire before the end of such period.

(Emphasis supplied.) Mace-Main contends that when the City alleged or determined that Mace-Main's claim is not permitted against it under the Act because the manhole cover was not the City's property, Mace-Main should have been afforded the benefit of the 6-month extension of time under § 13-919(3) to make a claim against MUD. She alleges that the 6-month extension would begin on August 30, 2006, the day the City denied her claim for a reason other than lapse of time, and that her notice to MUD was within that 6-month period.

[13] We determine that § 13-919(3) is inapplicable to the instant case. The subsection extends the time to file claims brought "under any other applicable law of the state" against

a political subdivision after it is determined that a claim is not permitted under the Act against that political subdivision. After the City denied Mace-Main's complaint under the Act, Mace-Main brought her claim against MUD, a different political subdivision, under the Act and not "under any other applicable law of this state." Section 13-919(3) does not extend the time for filing a claim under the Act against a different or additional political subdivision after one political subdivision denies the claim, as Mace-Main suggests.

Because Mace-Main failed to give MUD written notice of her claim within 1 year after her claim accrued as required by § 13-919(1), her complaint fails to state a claim upon which relief can be granted. The trial court did not err in granting MUD's motion to dismiss.

City's Motion for Summary Judgment.

Mace-Main next assigns that the trial court erred in granting the City's motion for summary judgment, finding that there was no evidence that the City had any duty to maintain and repair the manhole cover at issue and that such duty belonged to MUD. The evidence is undisputed that the manhole cover that caused Mace-Main's accident was covering a watermeter pit and that a watermeter pit is part of the water distribution system in Omaha. The City does not participate in the water distribution system in any respect. Rather, it is MUD that is responsible for the water distribution system. Neb. Rev. Stat. § 14-2113 (Reissue 2007) grants MUD "general charge, supervision, and control of all matters pertaining to the natural gas supply and the water supply of the district for domestic, mechanical, public, and fire purposes." Accordingly, it is MUD's duty to maintain the watermeter pit and the manhole cover that caused Mace-Main's injuries. There was no evidence that the City had any duty to repair, service, or maintain any element of the water distribution system, including the watermeter pit and manhole cover at issue.

After Mace-Main's accident, the City referred the matter to MUD upon determining that the manhole cover belonged to MUD. MUD demonstrated its ownership and control over the watermeter pit and manhole cover by responding to the City's

referral, determining that the watermeter pit was abandoned, filling in the hole, and paying to have the concrete poured over the area. The duty to maintain the watermeter pit and its manhole cover falls on MUD. Although the City took precautions to protect the public after it determined the manhole cover was defective and it contacted MUD, that in and of itself does not show that it was the City's duty to maintain the manhole cover.

Mace-Main argues that there are genuine issues of material fact as to whether the City is liable for her injuries based on the City's duty to keep its streets and sidewalks in a reasonably safe condition. Mace-Main contends that because the manhole cover was located on the sidewalk where she was walking, the City is liable for her injuries. The City may have a duty to maintain its sidewalks, but such duty does not extend to the manhole cover itself. This is apparent based on statutory law which authorizes MUD to place facilities within City streets, but also provides that liability arising out of operation of the water system lies solely with MUD, and not with the City. Specifically, § 14-2113 grants MUD the authority to enter upon and utilize streets, alleys, and public grounds. Neb. Rev. Stat. § 14-814 (Reissue 2007) states that the City is not to be liable "for any tort or act of negligence of the metropolitan utilities district . . . which may in any way result from, grow out of, or be connected with the maintenance, management, control, or operation of any water system."

Further, there is no evidence that the sidewalk contributed in any way to Mace-Main's fall and injuries. There is no evidence that a defective or dangerous condition existed in the sidewalk. Mace-Main's complaint and testimony only target the manhole cover as causing her fall, and not the sidewalk. Mace-Main's complaint alleges that she slipped and fell on what she characterized as a "defective manhole cover." Mace-Main testified that the accident happened when she stepped on the manhole cover and it moved, causing her to fall. She did not plead or testify that any problem with the sidewalk caused her injuries. Rather, it was the defective manhole cover on the watermeter pit that caused the fall, a manhole cover which the City has no duty to maintain.

In summary, the evidence shows that the watermeter pit and its manhole cover at issue belonged to MUD; that it was MUD's duty to maintain, repair, and service them; and that the City had no duty or responsibility in regard to the watermeter pit and its manhole cover. Accordingly, the trial court did not err in granting summary judgment in favor of the City.

CONCLUSION

For the reasons stated above, we conclude that the trial court did not err in granting MUD's motion to dismiss and did not err in granting the City's motion for summary judgment. Accordingly, the judgments of the trial court granting MUD's motion to dismiss and granting the City's motion for summary judgment are affirmed.

AFFIRMED.

IN RE INTEREST OF LOUIS S. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. CHAD S., SR., APPELLANT AND CROSS-APPELLEE, AND CARMELA F., APPELLEE AND CROSS-APPELLANT.

774 N.W.2d 416

Filed September 1, 2009. No. A-09-105.

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 juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling.
4. **Indian Child Welfare Act: Parental Rights: Jurisdiction.** According to Neb. Rev. Stat. § 43-1504(2) (Reissue 2008), in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

5. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court is reviewed for an abuse of discretion.
6. **Parental Rights: Proof.** To terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2008) exists and that termination is in the child's best interests.
7. **Indian Child Welfare Act: Parental Rights: Proof.** The Indian Child Welfare Act adds two additional elements the State must prove before terminating parental rights in cases involving Indian children: the "active efforts" element and the "serious emotional or physical damage" element.
8. ____: ____: ____. Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) provides that any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
9. **Indian Child Welfare Act: Parental Rights: Proof: Expert Witnesses.** Neb. Rev. Stat. § 43-1505(6) (Reissue 2008) provides that no termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
10. **Parental Rights.** According to Neb. Rev. Stat. § 43-292(2) (Reissue 2008), parental rights may be terminated when the parent has substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.
11. ____. In a termination of parental rights proceeding, a parent's failure to provide an environment to which his or her children can return can establish neglect.
12. **Indian Child Welfare Act: Parental Rights: Proof.** The Indian Child Welfare Act requirement of "active efforts" requires more than the "reasonable efforts" standard applicable in non-Indian Child Welfare Act cases, and at least some efforts should be culturally relevant.
13. ____: ____: ____. In a termination of parental rights proceeding under the Indian Child Welfare Act, the notion of culturally relevant active efforts applies to the parents, to the children, and to the family.
14. ____: ____: ____. The "active efforts" standard under Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) requires a case-by-case analysis.
15. **Indian Child Welfare Act: Parental Rights: Words and Phrases.** In a termination of parental rights proceeding under the Indian Child Welfare Act, passive efforts are where a plan is drawn up and the client must develop his or her own resources toward bringing it to fruition. Active efforts are where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own.
16. **Indian Child Welfare Act: Parental Rights: Proof.** Although the State should make active efforts in a termination of parental rights proceeding under the Indian

Child Welfare Act, if further efforts would be futile, the requirement of active efforts is satisfied.

17. **Indian Child Welfare Act: Parental Rights: Proof: Expert Witnesses.** Pursuant to the Indian Child Welfare Act, qualified expert testimony is required in a parental rights termination case on the issue of whether serious harm to the Indian child is likely to occur if the child is not removed from the home.
18. **Indian Child Welfare Act: Parental Rights: Expert Witnesses.** The Bureau of Indian Affairs sets forth guidelines under which expert witnesses most likely will meet the requirements of the Indian Child Welfare Act: (1) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices; (2) a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe; and (3) a professional person having substantial education and experience in the area of his or her specialty.
19. **Rules of Evidence: Parental Rights: Expert Witnesses: Appeal and Error.** Whether a witness is qualified to testify as an expert under the Nebraska Evidence Rules, which serve as a guidepost in termination of parental rights cases, is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 2008), and such a determination will be upheld on appeal unless the trial court's finding is clearly erroneous.
20. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Affirmed.

Rex J. Moats, of Moats Law Firm, P.C., L.L.O., and Douglas D. Dexter for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer Chrystal-Clark, and Sean Lavery, Senior Certified Law Student, for appellee State of Nebraska.

Anthony W. Liakos, of Govier & Milone, L.L.P., for appellee Carmela F.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Chad S., Sr. (Chad), appeals, and Carmela F. cross-appeals, from the decision of the separate juvenile court of Douglas County terminating their parental rights to their minor children

in a case in which the Nebraska Indian Child Welfare Act (ICWA) is applicable. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case is governed by the Nebraska ICWA, Neb. Rev. Stat. §§ 43-1501 through 43-1516 (Reissue 2008), and involves seven children: Alicia F., born in October 1995; Louis S., born in September 1999; Chad S., Jr. (Chad Jr.), born in October 2001; Unique S., born in October 2002; Heaven S., born in September 2003; Henry S., born in January 2005; and Charlotte S., born in June 2006. Carmela is the biological mother of all seven children. Chad is the biological father of Louis, Chad Jr., Unique, Heaven, Henry, and Charlotte. The biological father of Alicia is not a party to this appeal, and thus his participation in this case will not be discussed further.

The six older children—Charlotte was not born yet—were removed from the home of Chad and Carmela on October 18, 2005, due to the living conditions in the home. At the time of removal, there was no running water in the home; the toilet was not working and was full of feces and urine; the children were dirty and wearing filthy, soiled clothing; and all of the children had severe head lice. A methamphetamine pipe was also found in the home. The children were placed in emergency protective custody. The State initially filed a petition with the juvenile court on October 20, alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). A motion for temporary custody was filed and granted that same day. The children have been in the custody of Nebraska's Department of Health and Human Services (DHHS) since that time.

The State filed an ICWA notice with the juvenile court on October 24, 2005, and such notice was also sent to the Omaha Tribe of Nebraska. The notice was for the purpose of determining whether the children were members of, or eligible for membership in, the Omaha Tribe, thereby making the ICWA applicable.

By an order filed by the juvenile court on February 23, 2006, the six older children were adjudicated to be within the meaning of § 43-247(3)(a) insofar as Chad and Carmela were

concerned. Sometime between the children's initial removal from the home and September 19, 2006, Chad was arrested and incarcerated in a federal penal institution located in Colorado. We also note that the children were returned to Carmela's care for approximately 6 months from November 2006 to May 2007. In May 2007, the children, including Charlotte, were returned to foster care because Carmela had been evicted from her home and had an admitted drug relapse—the evidence shows that Carmela has a methamphetamine addiction. Numerous amended petitions, disposition orders, and a motion to terminate parental rights were filed between the time of removal on October 18, 2005, and a hearing on June 30, 2008. However, we will not discuss these pleadings and orders, because such are not necessary for resolution of this appeal.

On June 25, 2008, Carmela filed a motion to transfer the case to tribal court. A hearing was held on June 30. Chad did not object to the transfer. The State objected to the transfer, alleging that it did not get proper notice, and the guardian ad litem joined the State's objection. For the first time, evidence was presented that all seven children were members of, or eligible to be members of, the Omaha Tribe. The juvenile court found that the ICWA was applicable to the proceedings, but orally denied the transfer, stating that "there is good cause not to transfer this case because it's been a great many years that it is before this Court, and it would not be in the best interests of these children to transfer the matter." The State moved to dismiss certain supplemental petitions and its motion to terminate parental rights, because such pleadings did not conform to ICWA requirements. The juvenile court dismissed such without prejudice.

On June 30, 2008, the State filed a fourth supplemental petition, alleging that the youngest child, Charlotte, was a child within the meaning of § 43-247(3)(a) (Cum. Supp. 2006) as far as Chad was concerned, in that Chad was incarcerated and unable to care for Charlotte or provide Charlotte with stable and adequate housing. The petition also alleged that Chad's parental rights to Charlotte should be terminated pursuant to Neb. Rev. Stat. § 43-292(1) and (2) (Reissue 2008). The State specifically alleged that active efforts, pursuant to § 43-1505(4)

of the ICWA, had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, but that said efforts had proved unsuccessful. The State also alleged that continuing the custody of Charlotte by Chad would likely result in serious emotional or physical damage to the child and that it was in Charlotte's best interests that Chad's parental rights be terminated.

A fifth supplemental petition regarding Alicia was also filed, but we will not discuss such, because it is not necessary to this opinion.

The State also filed a second motion for termination of parental rights, alleging that all seven children were enrolled, or eligible to be enrolled, in the Omaha Tribe. The State filed a motion to terminate Carmela's parental rights to all seven children under § 43-292(2) and (6). The State also sought to terminate her parental rights to Alicia, Louis, Chad Jr., Unique, Heaven, and Henry under § 43-292(7). The State filed a motion to terminate Chad's parental rights to Louis, Chad Jr., Unique, Heaven, and Henry under § 43-292(2), (6), and (7). (Charlotte was not named in this motion insofar as Chad was concerned, but she had previously been named in the fourth supplemental petition seeking termination of Chad's rights as to her.) The State also specifically alleged with regard to Chad and Carmela that active efforts, pursuant to § 43-1505(4) of the ICWA, had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, but that said efforts had proved unsuccessful. The State also alleged that continuing the custody of the children by Carmela and Chad would likely result in serious emotional or physical damage to the children and that it was in the children's best interests that Carmela's and Chad's parental rights be terminated.

The termination hearing was held on October 8 and 16 and November 5 and 6, 2008. Several witnesses testified, and such testimony will be discussed as necessary in our analysis.

The juvenile court filed its order on January 9, 2009. The juvenile court found that grounds for termination of Carmela's rights to Alicia, Louis, Chad Jr., Unique, Heaven, Henry, and Charlotte existed under § 43-292(2) and (6). The juvenile court also found that grounds existed to terminate Carmela's rights

to all of the children except Charlotte under § 43-292(7). The juvenile court found that grounds for termination of Chad's rights to Louis, Chad Jr., Unique, Heaven, and Henry existed under § 43-292(2), (6), and (7). The juvenile court found that grounds existed to terminate Chad's rights to Charlotte under § 43-292(1) and (2). The juvenile court found that active efforts, pursuant to § 43-1505(4) of the ICWA, had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, but that said efforts had proved unsuccessful. The juvenile court also found that continuing the custody of the children by Carmela and Chad would likely result in serious emotional or physical damage to the children and that it was in the children's best interests that Carmela's and Chad's parental rights be terminated. The juvenile court terminated Chad's and Carmela's parental rights to the children after finding that grounds for termination existed and that such was in the children's best interests. Chad has timely appealed, and Carmela cross-appeals.

II. ASSIGNMENTS OF ERROR

Chad alleges that the juvenile court erred in (1) finding that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, (2) admitting the opinion of an ICWA expert that continued custody of the children by Chad would likely result in serious emotional or physical damage to the children, and (3) terminating Chad's parental rights when there was insufficient evidence to prove that the continued custody of the children by Chad would likely result in serious emotional or physical damage to the children.

On cross-appeal, Carmela alleges that the juvenile court erred in (1) overruling her motion to transfer the proceeding to the jurisdiction of the Omaha Tribe of Nebraska; (2) finding that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, but that said efforts proved unsuccessful; (3) finding that the minor children came within the meaning of § 43-292(2) with respect to Carmela; (4) finding that the minor children came within the meaning of § 43-292(6) with respect

to Carmela; (5) finding that termination of Carmela's parental rights was in the best interests of the minor children; (6) finding that continued custody of the children by Carmela would likely result in serious emotional or physical damage to the children; (7) finding that it is in the best interests and welfare of the minor children to remain in the custody of DHHS for adoptive planning and placement; and (8) terminating Carmela's parental rights.

III. STANDARD OF REVIEW

[1-3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008). However, when the evidence is in conflict, the appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.* In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling. *Id.*

IV. ANALYSIS

1. Transfer of Proceedings

[4] Carmela argues that the juvenile court erred in overruling her motion to transfer the proceedings to the jurisdiction of the Omaha Tribe of Nebraska. Section 43-1504 states in part:

> (2) In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, *the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe*, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

(Emphasis supplied.)

[5] A denial of a transfer to tribal court is reviewed for an abuse of discretion. *In re Interest of Lawrence H.*, 16 Neb. App. 246, 743 N.W.2d 91 (2007).

On June 25, 2008, Carmela filed a motion to transfer the case to tribal court. A hearing was held on June 30. Chad did not object to the transfer. The State objected to the transfer, alleging that it did not get proper notice, and the guardian ad litem joined the State's objection. The district court found that the ICWA was applicable to the proceedings, but orally denied the transfer, stating that "there is good cause not to transfer this case because it's been a great many years that it is before this Court, and it would not be in the best interests of these children to transfer the matter." The court also noted that the tribe had not intervened in the matter. No written order reflects the juvenile court's denial of the transfer.

By the time of the June 30, 2008, hearing, when proof of the children's membership or eligibility for membership in the Omaha Tribe was offered to the juvenile court, this case had been before the juvenile court for more than 2½ years. The Omaha Tribe had not intervened. These are valid and logical reasons for the trial court to maintain jurisdiction. Therefore, we cannot say that the juvenile court abused its discretion in declining to transfer jurisdiction of these proceedings to tribal court. Accordingly, the assignment of error lacks merit.

2. Termination of Parental Rights

[6-9] Carmela argues that the juvenile court erred in finding that grounds for termination of parental rights existed under § 43-292(2) and (6). "We have held that the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. 'Thus, only one ground for termination need be proved in order [to terminate] parental rights . . . .'" *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 173, 655 N.W.2d 672, 691 (2003) (quoting *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000)). The ICWA, however, adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). First, § 43-1505(4) provides an "active efforts" element:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under

> state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Second, § 43-1505(6) provides a "serious emotional or physical damage" element:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(a) Grounds Under § 43-292

[10,11] Section 43-292(2) provides that parental rights may be terminated when the parent has "substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection." The Nebraska Supreme Court has said: "[P]arents may as surely neglect a child of whom they do not have possession by failing to put themselves in a position to acquire possession as by not properly caring for a child of whom they do have possession." *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 713, 457 N.W.2d 274, 281 (1990). A parent's failure to provide an environment to which his or her children can return can establish neglect. See *id.*

The six older children were removed from the home in October 2005 because of inadequate housing conditions. The home was filthy, there was no running water, and the toilet was not working. Furthermore, the children were wearing filthy, soiled clothing and had severe head lice. The children were returned to Carmela in November 2006, because she had cleaned up her home and the utilities were reestablished. However, in May 2007, the children, including Charlotte, were returned to foster care, because Carmela had been evicted and the family had been living in her car. Carmela also admitted to a drug relapse. And while the children were in foster care, Carmela was inconsistent with her visits and would often not show up for visits, upsetting the children. At the time of the

termination hearing, Carmela was unable to parent the children. She was in a chemical dependency treatment program and unable to provide a home for the children at that time. While Carmela's beginning efforts at rehabilitation are laudable, the record reflects that she has repeatedly started treatment programs only to quit such programs prematurely. It is apparent that she has not conquered her methamphetamine addiction. Thus, not only was Carmela unable to provide a home for her children at the time of the hearing, there was no evidence as to when she would be able to provide a home for her children. And "[c]hildren cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity." *In re Interest of Walter W.*, 274 Neb. 859, 872, 744 N.W.2d 55, 65 (2008).

We find that grounds existed to terminate Carmela's parental rights under § 43-292(2). Thus, we would not ordinarily address the juvenile court's finding of grounds for termination under § 43-292(6) (parental rights may be terminated when "reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination"). However, because this is an ICWA case, we do address whether the requisite active efforts were made.

(b) § 43-1505(4)—Active Efforts

[12] Both Chad and Carmela argue that the juvenile court erred in finding that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. Section 43-1505 requires in part:

> (4) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

The Nebraska Supreme Court has said that the ICWA requirement of "active efforts" requires more than the "reasonable efforts" standard applicable in non-ICWA cases and that "at

least some efforts should be 'culturally relevant.'" *In re Interest of Walter W.*, 274 Neb. at 865, 744 N.W.2d at 61. The term "culturally relevant" is not defined by Nebraska's administrative regulations, by the court in *In re Interest of Walter W.*, or by any other appellate decision, Nebraska or elsewhere, that we can find. The evidence before us is that the oldest child, Alicia, attended a camp in Arizona for Native American children, but the problem with this family was the parents, not the children. While we realize that with seven children, this may seem a "nominal" effort, there is no real guidance in Nebraska case law as to what efforts are required. In *In re Interest of Walter W.*, the Nebraska Supreme Court found that a "cultural plan" discussed with the foster mother—without further elaboration about such—constituted a sufficient active effort. 274 Neb. at 867, 744 N.W.2d at 62. *In re Interest of Walter W.* does not state what the threshold requirement is for a sufficient culturally relevant active effort. However, a recent decision from the Nebraska Supreme Court provides some additional context in which to assess focus and what the "target" of culturally relevant active efforts should be. The court said the following about the ICWA in *In re Interest of Elias L.*, 277 Neb. 1023, 1029-30, 767 N.W.2d 98, 103 (2009):

> Congress passed ICWA in response to the alarmingly high number of Indian children being removed from their families and placed in non-Indian adoptive or foster homes by state welfare agencies and courts. At the time of ICWA's enactment, 25 to 35 percent of all Indian children were removed and separated from their tribes and families to be placed in adoptive or foster homes. To make matters worse, about 90 percent of Indian adoption placements occurred in non-Indian homes away from their culture and community.
>
> Commenting on the loss of Indian culture, Congress noted that "[c]ontributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." Ultimately, Congress

> enacted ICWA in response to the looming crisis facing Indian tribes—namely, that they would face extinction through the removal of their children through state court child custody proceedings. Congress concluded that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." Thus, Congress designed the procedural and substantive standards of ICWA to "'protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'"

[13] In assessing the notion of culturally relevant active efforts in this case, we think it important to distill the application thereof to the parents, to the children, and to the family. Thus, beginning with the parents, the core problems of the parents—filthy, unhealthy, and unsuitable living conditions, coupled with Carmela's addiction and Chad's incarceration—cannot be fairly characterized as arising from their Native American background. To characterize these parents' shortcomings as "cultural" shortcomings that can be addressed by "culturally relevant" active efforts smacks of stereotyping at best and racism at worst. Put another way, we see no nexus between Native American culture and either the parental shortcomings or the solution thereto.

Turning to the children and the family, there is some evidence that Carmela lived on a reservation at some point in her life. But, the children have never lived on a reservation, nor has the family unit, and according to the testimony of Evelyn Labode, the ICWA expert, the children's involvement with their Native culture was very limited. And, it is worth recalling that their tribe did not care to be involved in the case. The observation by the court in *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008), that the cultural plan was discussed with the foster mother could be seen as suggesting that the required active efforts be directed at the children. However, it is the parental shortcomings that place the family at risk for breakup. Thus, while it may well be desirable to acquaint the children with their Native heritage, doing so seems unlikely to prevent the breakup of the family when it is the parents' shortcomings that caused the family to become involved in the

juvenile justice system, and their failure to remedy such, that, in the end, caused the breakup of the family.

[14,15] The Nebraska Supreme Court in *In re Interest of Walter W.* did hold that the "active efforts" standard requires a case-by-case analysis. As a prelude to that analysis, we find the Alaska Supreme Court's opinion in *A.A. v. State*, 982 P.2d 256 (Alaska 1999), helpful. That court, after noting the federal ICWA did not define "active efforts," distinguished between active and passive services:

> "Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the [ICWA], is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the [ICWA] would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child."

982 P.2d at 261.

The Oklahoma Court of Civil Appeals said that "active efforts" requires more than pointing the parent in the right direction, it requires "'leading the horse to water.'" See *In re J.S.*, 177 P.3d 590, 594 (Okla. Civ. App. 2008). Using the above concepts, it is apparent that Chad, Carmela, and the children were provided with a variety of active, as well as passive, efforts which were all aimed at preventing the breakup of this Native family, and which went far beyond merely pointing the parents in a certain direction. We now detail the efforts undertaken to prevent the breakup of this family.

When the six older children were initially removed from the home in October 2005, the State sent a notice to the Omaha Tribe within 1 week of such removal, inquiring whether the children were members of, or eligible for membership in, the tribe. DHHS provided Chad and Carmela with utility bill assistance for water and gas; a family support worker who helped them clean their home; pretreatment assessment and followup;

a psychological evaluation for Carmela; a psychological evaluation for Chad, although such was only partial because Chad did not return to complete it; foster care placement for the children; chemical dependency evaluations; and bus tickets. Additionally, the children were provided with services: Alicia was provided tutoring, Louis was given a referral for tutoring, and Louis was diagnosed with a hearing problem for which a hearing aid was ordered.

When the six older children were returned to Carmela in November 2006, and all seven children were in Carmela's home, DHHS provided her with individual therapy, although Carmela was not consistent in attending her therapy sessions. Again, the children were also provided with services: Alicia and Louis received tutoring, and Unique was given a referral to early education services.

Beginning in May 2007, when all seven children were again placed in foster care, DHHS provided Carmela with assistance in locating housing, foster care placement for her children, supervised visitation, access to "Specialized Treatment and Recovery Court" (STAR Court), a chemical dependency evaluation, drug screening through urinalysis (UA), and individual therapy. We note that there were numerous times when DHHS and the service providers could not locate Carmela; however, when Carmela would resume contact, services were continued. The children were also provided with services: Alicia and Louis received tutoring; Henry received speech therapy; Alicia, Louis, Chad Jr., and Unique were evaluated for mental status examinations; and sibling visitation was provided. Thus, Carmela was clearly provided with active efforts throughout this case.

There was some evidence offered that supports Chad's and Carmela's argument that the performance of the family's social worker, Laurie Hultgren, was deficient at times. The evidence shows that Hultgren was at times difficult to contact for service referrals and that, at least for a time, she failed to make the required monthly visits with the children. On the record before us, it can be said that Hultgren's performance was less than ideal. However, the record is also clear that numerous service referrals were made by Hultgren on behalf of Carmela and that

Hultgren would oftentimes make new referrals for Carmela when Carmela was discharged for failure to participate in previous referrals or rehabilitation programs. Even though this is an ICWA case requiring "active efforts," which *In re Interest of Walter W.*, 274 Neb. 859, 865, 744 N.W.2d 55, 61 (2008), says is "more than . . . 'reasonable efforts,'" that notion does not mean that Carmela is absolved of all responsibility to help herself. She must still avail herself of the services that are arranged for her. And after some period of time, she must, as a result of her engagement with and dedication to the effort being made for her by DHHS, become a functioning parent who can nurture her children and keep them healthy and safe. That she failed repeatedly to do so is clear from the record. Thus, it is hard to envision that better performance by Hultgren would have made a difference, given that the services provided to Carmela had little lasting impact on Carmela's ability to be an appropriate parent. Despite Hultgren's shortcomings, we find that Carmela was provided with active efforts as required by the ICWA.

[16] Although the record does not disclose an exact date, Chad was arrested and incarcerated sometime between the children's initial removal from the home and September 19, 2006. Chad is housed at a federal penal institution on drug- and weapons-related convictions. Testimony indicates that Chad was sentenced to somewhere between 7 and 12 years' imprisonment. The evidence in our record shows that during his incarceration, the only service Chad was provided was therapeutic telephone visitation with the children, although it was unknown whether such visitation actually occurred. Pam Curry, a DHHS supervisor, testified that for incarcerated persons, any services would be offered through the institution. And Labode, the ICWA expert, testified that from the documentation she reviewed, parenting programs were available to Chad in the federal institution in which he is incarcerated. As said above, the "active efforts" standard requires a case-by-case analysis. *In re Interest of Walter W., supra*. Given that Chad is in a federal prison for 7 to 12 years, and that active efforts were clearly undertaken for the family before his incarceration and for the mother and children after Chad's incarceration, we

find that under a "case-by-case" standard, the rehabilitative efforts with respect to Chad were sufficient under the ICWA. In so concluding, we rely on a substantial body of case law holding that if further efforts would be futile, the requirement of active efforts is satisfied. See, *Wilson W. v. State*, 185 P.3d 94 (Alaska 2008) (in child in need of care proceeding brought under ICWA, state is not required to keep up its active efforts to provide remedial services designed to prevent breakup of family once it is clear that these efforts would be futile); *State ex rel. C.D.*, 200 P.3d 194 (Utah App. 2008). See, also, *People ex rel. K.D.*, 155 P.3d 634 (Colo. App. 2007) (although state must make "active efforts" under ICWA, it need not persist with futile efforts); *Letitia V. v. Superior Court*, 81 Cal. App. 4th 1009, 97 Cal. Rptr. 2d 303 (2000) (additional remedial programs not required where prior efforts became futile and proved unsuccessful).

Curry testified that in her opinion, no additional services could be offered to this family in order to provide a possible reunification. And Labode testified that DHHS provided both parents with active efforts to prevent the breakup of the family. We agree and find that the evidence was sufficient to prove by the requisite standard, clear and convincing evidence, that active efforts were undertaken to prevent the breakup of the family and that further efforts would be futile and are not required under the ICWA.

(c) § 43-1505(6)—Serious Emotional or Physical Damage

(i) Continued Custody With Chad

[17,18] Chad argues that the juvenile court erred in admitting witness Labode's opinion that continued custody of the children by Chad would likely result in serious emotional or physical damage to the children. The Nebraska Supreme Court has set forth the standard for qualified expert testimony in ICWA cases:

> Pursuant to the ICWA, qualified expert testimony is required in a parental rights termination case on the issue of whether serious harm to the Indian child is likely to occur if the child is not removed from the home. See Guidelines for State Courts; Indian Child

> Custody Proceedings, 44 Fed. Reg. 67,584,67,593 (1979) (not codified).
>
> The Bureau of Indian Affairs sets forth guidelines under which expert witnesses most likely will meet the requirements of the ICWA: "(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices. (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe. (iii) A professional person having substantial education and experience in the area of his or her specialty." *Id.*

In re Interest of C.W. et al., 239 Neb. 817, 823-24, 479 N.W.2d 105, 111 (1992), *disapproved on other grounds, In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). See, also, *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. 919, 664 N.W.2d 470 (2003).

Labode earned bachelor's and master's degrees in French and education. She also has a juris doctor degree from Creighton University School of Law. Labode is a retired assistant professor at the University of Nebraska-Lincoln Center on Children, Families, and the Law. While she was an assistant professor, Labode developed curriculum for the training of protection and safety workers in the areas of child welfare and juvenile justice, specializing in Indian child welfare, adoption, cultural issues, and permanency planning; delivered training on child welfare and juvenile justice issues for state and private agencies such as DHHS, the Nebraska Children's Home Society, the Lincoln Commission on Human Rights, and the Anti-Defamation League; and researched child welfare and juvenile justice issues, particularly Indian child welfare, adoption, cultural competency, and permanency.

After retiring from the University of Nebraska in January 2005, Labode continued working as a training consultant and curriculum developer. In such work, she trained protection and safety workers on ICWA, adoption, and cultural issues; developed a curriculum for protection and safety workers on ICWA,

adoption, and cultural issues; and was a resource for state and private agencies in the area of Indian child welfare. Labode is a member of the Nebraska State Bar Association, Midlands Bar Association, and the National Indian Child Welfare Association. She is also affiliated with the permanency planning task force, charged by the Nebraska Supreme Court with promoting permanency for children. Labode was also a founding member of the Native American Foster and Adoptive Coalition, now defunct. Additionally, Labode has given numerous presentations on the "Native American cultural plan" and the ICWA. Labode also testified that she has been an ICWA witness in several cases.

[19] "Whether a witness is qualified to testify as an expert under the Nebraska Evidence Rules, which serve as a guidepost in termination of parental rights cases, is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1995)." *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. at 935, 664 N.W.2d at 482. Such a determination will be upheld on appeal unless the trial court's finding is clearly erroneous. *Id*. Clearly, Labode has substantial education and experience that makes her qualified to render the opinions she offered in the trial of this matter which proceeded under the ICWA. Thus, the trial court's admission of her testimony was not clearly erroneous.

We note that Chad's arguments indicate an incorrect reading of the operative statute, § 43-1505(6), which provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

While the statute does require proof beyond a reasonable doubt and also requires "testimony of qualified expert witnesses," this heightened standard of proof is not extended to all elements of an ICWA parental rights termination case, see *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008), and

specifically, the heightened standard of § 43-1505(6) does not apply to the state law elements under § 43-292 for terminating parental rights. Nor must the State prove the best interests element of an ICWA parental rights termination case beyond a reasonable doubt. *Id*. Rather, the State must prove by clear and convincing evidence that terminating parental rights is in the child's best interests, but such evidence need not include testimony of a qualified expert witness. *Id.* But, such evidence can, of course, include the testimony of a qualified expert such as Labode.

Labode testified that Chad has not had much contact with the children since his incarceration and that, in fact, it appears that he has written only one letter to each child, excluding Charlotte. Labode testified that in her opinion, if the children were returned to Chad, they would endure emotional and physical harm, because it appears that the children were exposed to the drug culture (the police found drug pipes in the home where the children were) and because Chad's psychological evaluation was not very informative (he gave "very curt" responses to parenting questions), causing the therapist to be unable to form opinions about Chad's parenting style and his willingness to parent his children. Labode also noted that Chad has had opportunities to contact his children, but the only letters were written 2 years prior to the termination hearing.

Nikki Conner, a licensed mental health practitioner, testified that in November 2005, she worked for a mental health services facility and did a pretreatment assessment of Chad. Her pretreatment assessment report, which was received into evidence, stated that Chad was referred for services following the removal of his six children due to chronic unsanitary living conditions, chronic head lice of all the children, chronic unemployment, and possible methamphetamine use. Conner testified that the ultimate goal for Chad was reunification and to address mental health and substance abuse issues. She recommended family therapy and outpatient substance abuse treatment. Conner stated that a "red flag" regarding Chad was that he denied any substance abuse. She stated she was concerned

that without treatment, the behavior and patterns in the family would remain the same.

[20] Based on the totality of the evidence presented at the termination hearing, it is clear beyond a reasonable doubt that custody of the children by Chad, after he would be released from incarceration, whenever that might occur, is likely to result in serious emotional or physical harm to the children. Chad is currently incarcerated, and obviously, it will be a number of years before he would be in a position to physically have custody of the children, putting aside for the moment his past serious neglect of the health and safety of the children—which hardly bodes well for the future. Additionally, at the time of the termination hearing, the children had already been in foster care for 30 of the previous 36 months. And "[c]hildren cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity." *In re Interest of Walter W.*, 274 Neb. 859, 872, 744 N.W.2d 55, 65 (2008). This concept is fully applicable in an ICWA parental rights termination case. We find after our de novo review that the evidentiary requirements of § 43-1505(6) have been satisfied and that Chad's parental rights to all of his children involved herein should be terminated.

(ii) Continued Custody With Carmela

Carmela argues that the juvenile court erred in finding that her continued custody of the children would likely result in serious emotional or physical damage to the children. Labode testified that in her opinion, if the children were returned to Carmela, they would endure emotional and physical harm, because at the time of removal, the children had head lice, the school-age children had been absent 50 days and tardy more than 20 days, and two of the children had hearing or communication difficulties. Labode testified that while Carmela did "wonderful things" to get the children returned, within 6 months, the children's welfare had deteriorated, Carmela was not able to maintain a home, and Carmela called DHHS to take the children because she had been evicted. At this point, Carmela left counseling and residential treatment and has been

unable to keep a job; and Carmela has been inconsistent with her visitation.

Jennifer Lindner, a licensed psychologist, testified that she was Carmela's therapist from October 2006 until July 2007, when Lindner went on maternity leave. Lindner also tried to contact Carmela in October 2007, when Lindner returned to work, but was unsuccessful. Carmela contacted Lindner again in January 2008 to resume services, but Lindner needed payment approval from DHHS. Lindner testified that she has had no contact with Carmela since January 2008. Lindner testified that while seeing Carmela from October 2006 until July 2007, she wanted to meet with Carmela weekly. However, Carmela was inconsistent in meeting with Lindner and missed a total of 14 appointments. Lindner was able to meet with Carmela 17 times. Lindner testified that Carmela would make progress, but then she would miss appointments and come back with new issues or Carmela's symptoms would worsen. Lindner testified that she was not sure Carmela would make enough progress to function effectively as a parent, be able to address her mental health symptoms, or be able to function in regular society.

Eva Abrams, a supervisor at Owens and Associates, testified that Owens and Associates provided Carmela with visitation and family support services. Abrams testified that Carmela was inconsistent with her participation with Owens and Associates and that in August 2007, Owens and Associates discharged Carmela for lack of participation. Between May and August 2007, there were 19 scheduled family support sessions, but Carmela attended only 5. Abrams testified that Owens and Associates received a new referral for Carmela on July 23, 2008, and supervised visits were scheduled but never took place—Carmela was again discharged on September 6 for not contacting Owens and Associates for 30 days.

Tayla Dickey, a child and family services supervisor for DHHS, testified that prior to being a supervisor, she was a protection and safety worker working specifically with STAR Court. Dickey testified that STAR Court is a voluntary program and has three phases. During phase one, participants go to court every week, attend Alcoholics Anonymous (AA) or

Narcotics Anonymous (NA) meetings, begin treatment or get evaluations, submit to UA's three times per week, and follow other court orders. During phase two, participants go to court every other week, continue UA's, and work toward graduating from treatment. During phase three, which occurs after they have graduated from treatment, participants go to court once per month.

Dickey testified that Carmela started with STAR Court on September 4, 2007, and had to immediately do a UA because of an admitted methamphetamine relapse. Carmela was ordered to attend seven AA or NA meetings each week because she was unemployed at the time. Carmela was also ordered to have an updated chemical dependency evaluation. Dickey testified that Carmela participated with STAR Court for 3 weeks, at which time she was unsuccessfully discharged, because she left her treatment program against medical advisement; after leaving the treatment program, her whereabouts were unknown; she missed court on September 18; she did only the initial UA even though she was supposed to do three each week; and she did not provide proof of attending AA or NA meetings.

The children's foster mothers testified that Carmela would frequently miss visits and that the children would be upset and disappointed. The foster mothers stated that some of the children would cry and others could not understand why they could not see Carmela.

Curry, a DHHS supervisor for child abuse cases, testified that the children were returned to Carmela's care from the fall of 2006 until May 2007. In May 2007, the children were returned to foster care. After May 2007, Carmela was not consistent with visitations, and as a result, the visitations were reduced. Curry testified that Carmela had begun drug treatment programs on more than one occasion, but did not successfully complete such programs. Curry also testified that Carmela was not consistent with individual therapy, had avoided UA's, and had had "scattered" employment.

Based on the totality of the evidence presented at the termination hearing, it is clear beyond a reasonable doubt that continued custody of the children by Carmela is likely to result in serious emotional or physical harm to the children.

The cycle of starting and failing therapeutic programs, or withdrawal from such, plus the absence of the required UA's make it apparent either that Carmela has chosen methamphetamines over her children or that her addiction makes it impossible for her to choose her children rather than drugs. At the time of the termination hearing, the children had already been in foster care for 30 of the previous 36 months, and as we said with reference to Chad, we cannot suspend these children indefinitely in foster care while Carmela tries to gain what is obviously very uncertain parental maturity, abilities, and commitment. See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

3. Best Interests

The evidence is clear that it is in the best interests of the children that both Chad's and Carmela's parental rights be terminated. Chad is incarcerated, and will be incarcerated for quite some time, on drug- and weapons-related convictions, and he has had little contact with the children since his incarceration. And Carmela, after initially getting her children back, has relapsed with drug use. She has failed to complete therapy or treatment programs, has avoided UA's, and has not been consistent in visiting her children. Labode and Curry both testified that it would be in the children's best interests that parental rights be terminated. We agree. At the time of the termination hearing, the children had already been in foster care for 2½ of the previous 3 years. And as we have said previously in this opinion, "[c]hildren cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity." *In re Interest of Walter W.*, 274 Neb. at 872, 744 N.W.2d at 65. These children need a safe, permanent home, and unfortunately, Chad and Carmela cannot provide them with such.

V. SUMMARY AND CONCLUSION

Chad does not appeal the § 43-292 statutory grounds for termination of parental rights, or that such termination was in the children's best interests. His grounds for appeal lie strictly with the additional requirements of the ICWA—active efforts and proof of serious emotional or physical harm. As

stated previously, we find that active efforts were made and that the children would suffer serious emotional or physical harm if Chad retained custody. Therefore, we affirm the decision of the juvenile court terminating Chad's parental rights to these children.

As for Carmela, we find that the State has proved the § 43-292 statutory grounds for termination of parental rights, that active efforts were made, that the children would suffer serious emotional or physical harm if she retained custody, and that termination of Carmela's parental rights is in the children's best interests. Therefore, we affirm the decision of the juvenile court terminating Carmela's parental rights to these children.

AFFIRMED.

BRIAN P. WALZ, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

773 N.W.2d 387

Filed September 8, 2009. No. A-08-486.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal which has jurisdiction, procedural due process requires the following: notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
5. **Arrests: Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Due Process.** There is no statutory requirement that an arrested person be given the reasons for his or her arrest, and the fact that an officer's sworn report, when completed, provides the arrested person with some information

concerning the reasons for arrest does not mean that he or she is deprived of due process simply because all of the additional information was not given to the person.

6. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time.** The 10-day time limit set forth in Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004) which states that an arresting officer shall forward a sworn report to the director of the Department of Motor Vehicles is directory rather than mandatory.
7. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.

Appeal from the District Court for Red Willow County: DAVID URBOM, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, Andee G. Penn, and Milissa Johnson-Wiles for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Brian P. Walz appeals from the decision of the district court for Red Willow County, which affirmed the order of the director of the Nebraska Department of Motor Vehicles, Beverly Neth (Director), revoking his driving privileges and driver's license for a period of 1 year pursuant to the administrative license revocation (ALR) statutes. For the reasons set forth below, we affirm.

BACKGROUND

The record shows that on December 22, 2007, at 1:25 a.m., Sgt. David Ortiz of the McCook Police Department stopped Walz for speeding and reckless driving. Ortiz stated that he stopped Walz' vehicle after Walz almost collided with another vehicle. Officer Keith Miner, also of the McCook Police Department, followed Ortiz in a second patrol car as Ortiz stopped Walz. As Ortiz approached Walz' vehicle, Ortiz smelled the strong odor of an alcoholic beverage on Walz'

person, and when Walz exited his vehicle, Walz appeared as if he was going to fall over.

Ortiz asked Walz if he would perform field sobriety tests, but Walz refused the tests. Ortiz also asked Walz to submit to a preliminary breath test, and Walz refused. Ortiz then placed Walz under arrest for suspicion of driving under the influence of alcohol, and Miner transported Walz to the McCook police station. When Walz arrived at the police station, Ortiz asked Walz to submit to a chemical blood test, which Walz refused. Ortiz then completed a sworn report detailing the incident, and both Ortiz and Miner signed the sworn report in the presence of a notary.

The sworn report states that Walz was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004), and the reasons listed for Walz' arrest were speeding, 39 m.p.h. in a 25-m.p.h. zone, and reckless driving. The Director received the sworn report on December 31, 2007. Subsequently, the Director sent a blank addendum to the sworn report to Ortiz and Miner. In the addendum, the Director stated, "The [D]irector has determined the reasons for arrest on the sworn report sent to you with this addendum may not confer jurisdiction to revoke the arrested person's operators license. . . . On the form be[low], please indicate how you determined the arrested person was driving while intoxicated."

Ortiz then filled out the addendum to the sworn report and listed the reasons for Walz' arrest as "Speeding 39 in 25; Reckless driving - near head on accident, strong odor of alcohol, slurred speech, refused SFST, PBT and chemical test." Ortiz signed the addendum in the presence of a notary and returned the addendum to the Director on January 4, 2008.

A hearing was held on January 18, 2008, and the sworn report and the addendum were received into evidence at the hearing. Following the hearing, the hearing officer recommended that Walz' driving privileges and license be suspended for 1 year. The Director then adopted the recommended order of the hearing officer and revoked Walz' driving privileges and license, effective January 21, 2008. Walz appealed to the district court, which affirmed. Walz appeals.

ASSIGNMENTS OF ERROR

Walz argues, condensed and restated, that the trial court erred in (1) determining that the Department of Motor Vehicles (hereinafter Department) had jurisdiction to initiate an ALR proceeding against him, because the original sworn report did not confer jurisdiction upon the Department and the addendum to the sworn report should not have been received as evidence; (2) failing to find that the Director denied him substantive due process of law by having an ex parte communication with a witness and suggesting that the sworn report be amended; (3) failing to find that the addendum to a sworn report need not be executed by the two officers who executed the original sworn report.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008). When reviewing an order of the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Stoetzel v. Neth, supra*. Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

Jurisdiction—Sworn Report.

Walz argues that the Department did not have jurisdiction, because Ortiz failed to testify he forwarded the addendum to Walz as required by law, and that the Department denied him substantive due process of law by having an ex parte communication with a witness and suggesting that the sworn report be amended.

[4] In proceedings before an administrative agency or tribunal which has jurisdiction, procedural due process requires the

following: notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Taylor v. Wimes*, 10 Neb. App. 432, 632 N.W.2d 366 (2001).

[5] In the instant case, the sworn report Ortiz gave to Walz clearly gave Walz notice that he was being accused of driving under the influence and refusing to submit to a chemical test. There is no statutory requirement that an arrested person be given the reasons for his or her arrest, and the fact that the officer's sworn report, when completed, provides the arrested person with some information concerning the reasons for arrest does not mean that he or she is deprived of due process simply because all of the additional information was not given to the person. See *Taylor v. Wimes, supra.* Therefore, we conclude that even though the addendum to the sworn report listed other reasons for Walz' arrest, the fact that Walz may not have been provided these reasons does not mean that Walz' due process rights were violated.

In regard to Walz' claim that the Department denied him substantive due process of law by having an ex parte communication with a witness, we conclude that the law does not support Walz' argument. Neb. Rev. Stat. § 84-914(6)(b) (Reissue 2008) states:

> No hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decision-making process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the agency having an interest in the contested case.

In the instant case, Ortiz and Miner were potential witnesses at Walz' ALR hearing; neither Ortiz nor Miner was a party in Walz' ALR proceeding or a person outside the Department having an interest in Walz' case. Therefore, the record fails to show that Walz' due process rights were violated by the Director's ex parte communication with Ortiz and Miner.

In *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008), this court addressed the question of whether a sworn

report that had been amended after the arresting officer submitted the report to the Director could be considered for purposes of establishing jurisdiction. We found that the Department lacked jurisdiction to initiate an ALR proceeding, because the original sworn report failed to include the date the arresting officer received the blood test results and because the amended sworn report was not received in a timely manner and was not properly sworn. We made no finding that a properly notarized and timely received amendment cannot be properly considered by the Director in determining whether the Department has jurisdiction to proceed with an ALR proceeding.

In the instant case, we find that the Department had jurisdiction to proceed with an ALR proceeding against Walz, because the addendum to the original sworn report was properly notarized and timely received. Walz argues that the sworn report was improper because only Ortiz executed the addendum to the sworn report. Walz contends that because the original sworn report was executed by two arresting officers, "it would seem that an addendum, in order to be valid, would also have to be executed by the original officers." Brief for appellant at 8.

Walz offers no support for his contention, and we see no reason why the addendum needed to be executed by more than one officer. Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004) states that a sworn report must be forwarded to the Director within 10 days of the arrest by an "arresting peace officer." The record clearly shows that Ortiz was an arresting peace officer, and there is no requirement that both Ortiz and Miner were required to sign the addendum.

[6] Regarding the requirement that the addendum be received in a timely manner, § 60-498.01(2) provides, "If a person arrested as described in subsection (2) of section 60-6,197 refuses to submit to the chemical test of blood, breath, or urine required by section 60-6,197, . . . [t]he arresting peace officer shall within ten days forward to the [D]irector a sworn report . . . ." In *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006), this court held that the 10-day time limit set forth in § 60-498.01(2) which states that an

arresting officer shall forward a sworn report to the Director of the Department is directory rather than mandatory. We further held that the violation of such time limit did not invalidate the ALR proceedings.

Therefore, even though the addendum to the sworn report was forwarded to the Director 13 days after Walz' arrest, we conclude that the Department had jurisdiction to initiate an ALR proceeding against Walz. The original sworn report alone did not confer jurisdiction upon the Department, but the addendum to the sworn report was properly received as evidence, and the addendum and the original sworn report together conferred jurisdiction upon the Department.

Jurisdiction—No Finding That Walz Was Arrested for Refusal to Submit.

[7] Walz also argues that the Department did not have jurisdiction to revoke his driver's license and/or operating privileges for 1 year, because the hearing officer did not make a finding that Walz was arrested for refusal to submit to a chemical test. Although Walz discusses this assignment, he did not assign it as error. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *Kirkwood v. State*, 16 Neb. App. 459, 748 N.W.2d 83 (2008). After reviewing the record, we find no plain error.

CONCLUSION

For the reasons set forth above, we conclude that the trial court did not err in determining that the Department had jurisdiction to initiate an ALR proceeding against Walz. The trial court did not err in receiving the sworn report into evidence, and such admission did not violate Walz' due process rights. Additionally, the trial court did not err in failing to find that the addendum to a sworn report need not be executed by both of the officers who executed the original sworn report. We do not discuss Walz' argument that the Department did not have jurisdiction to revoke his driver's license and/or operating privileges because the hearing officer failed to find that Walz was arrested for refusal to submit to a chemical test. Walz did not assign this argument as error. For these reasons, we affirm the order of the

district court for Red Willow County, affirming the revocation of Walz' driver's license and privileges for 1 year.

AFFIRMED.

IRWIN, Judge, dissenting.

I respectfully dissent from the decision of the majority affirming the practice of the Director of reviewing the sworn report prior to the ALR hearing, assessing its sufficiency to confer jurisdiction and prove the Department's prima facie case, ex parte advising the arresting officer of potential deficiencies, and then receiving an addendum at the ALR hearing remedying potential defects in accordance with the Director's concerns. I do not believe there is any authority for the Director to act in this fashion.

I find it troubling that the ultimate decisionmaker in this administrative action, the Director, in an ex parte fashion, previewed the document which both confers jurisdiction and amounts to prima facie proof of the Department's case and assessed its sufficiency, contacted the arresting officer, and sought to bolster the evidence prior to the ALR hearing. It is well established in Nebraska case law that administrative bodies have no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of an administrative act. See, *Brunk v. Nebraska State Racing Comm.*, 270 Neb. 186, 700 N.W.2d 594 (2005); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). In this case, there is no statute conferring authority on the Director to review the sworn report and seek to bolster its sufficiency prior to the hearing, without notice to the driver.

In addition, inasmuch as the sworn report acts both as the jurisdictional document and as the prima facie case for the Department, the Director's assessing and seeking to bolster the sufficiency of the sworn report without notice to the driver has an additional feel of impropriety and lack of impartiality. In my assessment, the Director is limited either to that authority specifically granted by the statutes or to those actions necessary to carry out the purposes of the ALR statutes; the majority's endorsement of this practice appears to take the approach that there is no statute prohibiting the action, which seems to me to turn the basic general rule about the authority of administrative

bodies upside down. I also note that there does not appear to be any authority from the Nebraska Supreme Court approving of or endorsing this practice.

Finally, I am also troubled by the potential due process implications of the sworn report's being substantively supplemented with an addendum that may not have ever been provided to Walz prior to the hearing. Although I recognize that, as the majority notes, *Taylor v. Wimes*, 10 Neb. App. 432, 632 N.W.2d 366 (2001), stands for the proposition that there is no statutory requirement that an arrested person be given the reasons for his or her arrest, I find the present case significantly distinguishable from *Taylor*. In that case, the sworn report specifically indicated that the more detailed reasons for the arrest were contained on a separate "'probable cause form,'" *id.* at 435, 632 N.W.2d at 370, and this court specifically noted in its rejection of the driver's due process challenge that the driver could have obtained a copy of the report through discovery, being aware of its existence, but made no apparent effort to do so. In the present case, the sworn report itself was arguably deficient to confer jurisdiction and there was nothing to indicate to Walz that an additional supplementary document was in existence.

The record suggests that the Director sent a true and accurate copy of the notice and exhibits for the hearing to Walz on January 3, 2008. The addendum, however, was not received by the Department until January 4. As such, the record presented suggests that the addendum was never provided to Walz prior to the hearing. The Department, in its brief on appeal, indicates that "[t]he Department's transcript also shows that on January 7, 2008, the Director mailed a copy of Sergeant Ortiz's completed addendum to both Walz and Walz's counsel" and cites to "(Department T15)." Brief for appellee at 12. The record presented to this court on appeal does not include the "Department's transcript" and does not include any such indication of mailing to Walz.

Unlike the sworn report in *Taylor v. Wimes, supra*, the sworn report presented to Walz was arguably insufficient to confer jurisdiction and included no reference to any other supplemental documents that would cure the jurisdictional defect.

Without notice of the existence of an addendum solicited by the Director, it is arguable that Walz would have been justified in preparing for the hearing by preparing to simply challenge the jurisdiction of the Director based on the deficiencies of the sworn report. The record presented to us does not indicate that Walz was provided notice prior to the hearing that there was any need to prepare a substantive case to challenge revocation, because the materials provided to Walz indicated a lack of jurisdiction.

For the foregoing reasons, I respectfully dissent from the decision of the majority.

WILLIAM MURRAY, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, AND THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEES.

773 N.W.2d 394

Filed September 8, 2009. No. A-08-806.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations 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.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Proof.** The Department of Motor Vehicles makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the statutorily required recitations.

6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence.** A sworn report which does not include information required by statute cannot be supplemented by evidence offered at a subsequent administrative license revocation hearing.
7. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Jurisdiction: Time.** If a sworn report falling under Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004) is submitted after the 10-day period, the Department of Motor Vehicles lacks jurisdiction to revoke a person's driver's license.
8. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time.** The 10-day time limit set forth in Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) is directory rather than mandatory.
9. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
10. **Administrative Law: Due Process.** In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.
11. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
12. **Administrative Law.** Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.
13. **Administrative Law: Recusal: Presumptions.** The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.

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

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Andee G. Penn, and Milissa Johnson-Wiles for appellees.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

William Murray appeals from the decision of the district court for Scotts Bluff County, which affirmed the decision of the director of the Nebraska Department of Motor Vehicles,

Beverly Neth (Director), to revoke Murray's driving privileges for 90 days. Because the district court's decision to affirm the revocation of Murray's operator's license conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we affirm.

BACKGROUND

On March 8, 2008, a Scottsbluff Police Department officer, Jed Combs, stopped a vehicle driven by Murray for driving with expired license plates and for driving the wrong way on a public highway. Upon contact with Murray, Combs smelled the odor of an alcoholic beverage coming from Murray, who showed signs of impairment upon completing field sobriety tests. Murray submitted to and failed a preliminary breath test. Murray also submitted to a chemical breath test, the results of which showed that Murray's blood alcohol content was .231 of a gram of alcohol per 210 liters of breath.

Combs arrested Murray, completed a sworn report, and provided Murray with a temporary license. On the sworn report, Combs filled in the reasons for his arrest of Murray, stating, "[R]eport of vehicle driving wrong way on Hwy 26 was advised that vehicle in question. I observed the vehicle described and observed the expired plate." The sworn report was signed by Combs and notarized by a notary public. The Department of Motor Vehicles (hereinafter Department) received the sworn report on March 11, 2008.

After receiving the sworn report, the Director determined that "the reasons for arrest on the sworn report . . . may not confer jurisdiction to revoke [Murray's] operators license because it does not explain how [Combs] determined [Murray] was intoxicated." The Department sent a blank "Addendum to Sworn Report" to Combs, which asked Combs to indicate on the addendum form "why you concluded the motorist was operating or in actual physical control of a motor vehicle while intoxicated." Combs completed the addendum by filling in his name and badge number, listing the reasons why he concluded Murray was driving while intoxicated, and signing it in front of a notary. As to the reasons for concluding that Murray was driving while intoxicated, Combs stated:

> Report of motor vehicle driving down the wrong lane of travel. Was also advised that vehicle had expired plates. I observed the vehicle matching that description traveling west on Hwy. 26. I conducted a stop on the vehicle and smelled the odor of an alcoholic beverage. Driver consented to SFST's and showed impairment. . . . Murray consented to PBT. PBT a failure.

The Department received the completed addendum on March 24, 2008, 16 days after Murray's arrest.

Murray filed a petition for administrative hearing, which was heard on April 2, 2008. At the hearing, the sworn report and addendum were received into evidence. The hearing officer also received testimony from Combs.

Following the hearing, the hearing officer recommended that Murray's driving privileges be suspended for the statutory period. The Director adopted the recommended order of the hearing officer and revoked Murray's driving privileges for 90 days, effective April 7, 2008.

Murray appealed to the district court, which affirmed the Director's revocation of Murray's driving privileges. Murray subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Murray asserts that the district court erred in (1) finding that the Department had jurisdiction to revoke his operator's license through an addendum to the sworn report and (2) failing to find a violation of his due process rights when the Director provided an addendum to the sworn report.

STANDARD OF REVIEW

[1,2] Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. *Berrington Corp. v. State*, 277 Neb. 765, 765 N.W.2d 448 (2009). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Berrington Corp. v. State, supra.*

[3] The interpretation of statutes and regulations 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. *Id.*

ANALYSIS

Department's Jurisdiction.

Murray asserts that the district court erred in finding that the Department had jurisdiction to revoke his operator's license through an addendum to the sworn report.

[4-6] In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). The Department makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the statutorily required recitations. *Id.* The applicable statute in this case is Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004), which provides:

> If a person arrested as described in subsection (2) of section 60-6,197 submits to the chemical test of blood or breath required by section 60-6,197, the test discloses the presence of alcohol in any of the concentrations specified in section 60-6,196, and the test results are available to the arresting peace officer while the arrested person is still in custody, the arresting peace officer, as agent for the director, shall verbally serve notice to the arrested person of the intention to immediately confiscate and revoke the operator's license of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days after the date of arrest as provided in subsection (6) of this section. The arresting peace officer shall within ten days forward to the director a sworn report stating (a) that the person was arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test

> to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196.

A sworn report which does not include information required by statute cannot be supplemented by evidence offered at a subsequent administrative license revocation hearing. *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007).

The present case is similar to but distinguishable from *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008), in which this court considered whether a sworn report that was amended after the arresting officer submitted the initial sworn report to the Department was sufficient and timely for purposes of establishing the Department's jurisdiction. In *Stoetzel*, Mark Stoetzel was arrested on February 18, 2006, for driving under the influence. Stoetzel submitted to a blood test, which was then sent to a laboratory to determine Stoetzel's blood alcohol content. The arresting officer received the test results on March 2, completed a sworn report, and sent the report to the Department. The Department received the report on March 6, but the report did not show the date on which the officer received the blood test results. The Department returned the report to the officer, asking him to provide the omitted information. On March 7, the Department sent Stoetzel a notice of administrative license revocation and temporary license, and Stoetzel requested a hearing. On March 17, the Department received an amended sworn report, which was the same as the original report except for having been altered to include the omitted date. Stoetzel's operator's license was subsequently revoked. Stoetzel challenged the revocation, and the revocation was reversed by the district court.

[7] On appeal, this court determined that the March 6, 2006, sworn report was not properly completed because the arresting officer omitted the date he obtained the blood test results. We found the amended report to be untimely and noted that it was not "sworn" because it was not properly renotarized. Section 60-498.01(5)(a), which applies when the results of a chemical test are not available to the officer while the arrested person is in custody, was applicable. Section 60-498.01(5)(a) explicitly

states, "If the sworn report is not received within ten days, the revocation shall not take effect." This court found the language of that subsection to be mandatory and held that if a sworn report falling under § 60-498.01(5)(a) is submitted after the 10-day period, the Department lacks jurisdiction to revoke a person's driver's license. *Stoetzel v. Neth, supra*. The court in *Stoetzel* also found the amended report was not a sworn report, because although the arresting officer signed his initials next to the new information and a notary affixed her seal and wrote the date above the new information, the notary did not sign the amended form. Neb. Rev. Stat. § 64-107 (Reissue 2003) mandates that a properly notarized document contain both the signature and the seal of the notary. Accordingly, the amended report in *Stoetzel* was not considered sworn as required by § 60-498.01(5)(a).

[8] Murray argues that the sworn report in this case was not timely, because the addendum thereto was received by the Department 16 days after his arrest. Unlike *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008), where this court found the amended report was not timely submitted to the Department, the present case is distinguishable. Because Murray submitted to a breath test and the result was immediately available, the requirements of § 60-498.01(3) rather than § 60-498.01(5) were applicable. This court has held that the 10-day time limit set forth in § 60-498.01(3) is directory rather than mandatory. *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007). We also note that, unlike *Stoetzel*, where the amended report was not "sworn" because it was not renotarized, both the original sworn report and the addendum thereto were properly notarized in this case. Murray's assignment of error is without merit.

There is nothing in this court's opinion in *Stoetzel* to suggest that the procedure followed by the Department in this case, in returning the original sworn report to the officer and asking him to include omitted information, was improper. A similar procedure was followed here, and we find no error. This is not a situation where the Department attempted to supplement a sworn report which did not include information required by statute by offering the missing information through testimony

from the arresting officer at the revocation hearing. See *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007) (Department did not acquire jurisdiction where sworn report omitted reasons for motorist's arrest, but reasons were provided through arresting officer's testimony at hearing). Here, the sworn report and the addendum thereto were sent to the Department prior to the revocation hearing, and when considered together, contained the required recitations and were thus sufficient to confer jurisdiction on the Department. See *Taylor v. Wimes*, 10 Neb. App. 432, 632 N.W.2d 366 (2001) (where sworn report which did not set forth specific reasons for arrest but referenced attached field observation and performance testing report was found sufficient to establish prima facie case).

Due Process.

Murray asserts that the district court erred in failing to find a violation of his due process rights when the Director provided an addendum to the sworn report. Murray argues that the actions of the Director—in sending an addendum for Combs to complete, informing Combs of the necessary information to be included, and explaining why the Director did not believe she could obtain jurisdiction based on the information found in the original sworn report—were not the actions of a fair and impartial board.

[9-13] In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008). In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker. *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). Administrative adjudicators serve with a presumption of honesty and integrity. *Id.* Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and

a failure by the adjudicator to disclose the suspect relationship. *Id.* The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. *Id.*

Murray's arguments are without merit and insufficient to overcome the presumption of impartiality. We observe that the sworn report form is essentially a fill-in-the-blank document provided by the Department to arresting officers, and we see no significant difference between the Department's provision of the sworn report documents and provision of the addendum form in the present case. Further, the evidence does not indicate that the Director instructed the officer how to fill out the form; rather, she only pointed out what information was missing. The addendum was sent to Murray prior to the hearing, and he had adequate notice of the factual basis for the revocation, as well as an opportunity to present evidence. Murray received procedural due process.

CONCLUSION

Because the district court's decision to affirm the revocation of Murray's operator's license conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we affirm.

AFFIRMED.

IRWIN, Judge, dissenting.

I respectfully dissent from the decision of the majority affirming the practice of the Director of reviewing the sworn report prior to the administrative license revocation hearing, assessing its sufficiency to confer jurisdiction and prove the Department's prima facie case, ex parte advising the arresting officer of potential deficiencies, and then receiving an addendum at the administrative hearing remedying potential defects in accordance with the Director's concerns. I do not believe there is any authority for the Director to act in this fashion.

I find it troubling that the ultimate decisionmaker in this administrative action, the Director, in an ex parte fashion, previewed the document which both confers jurisdiction and amounts to prima facie proof of the Department's case and assessed its sufficiency, contacted the arresting officer,

and sought to bolster the evidence prior to the administrative license revocation hearing. It is well established in Nebraska case law that administrative bodies have no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of an administrative act. See, *Brunk v. Nebraska State Racing Comm.*, 270 Neb. 186, 700 N.W.2d 594 (2005); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). In this case, there is no statute conferring authority on the Director to review the sworn report and seek to bolster its sufficiency prior to the hearing, without notice to the driver.

In addition, inasmuch as the sworn report acts both as the jurisdictional document and as the prima facie case for the Department, the Director's assessing and seeking to bolster the sufficiency of the sworn report without notice to the driver has an additional feel of impropriety and lack of impartiality. In my assessment, the Director is limited either to that authority specifically granted by the statutes or to those actions necessary to carry out the purposes of the administrative license revocation statutes; the majority's endorsement of this practice appears to take the approach that there is no statute prohibiting the action, which seems to me to turn the basic general rule about the authority of administrative bodies upside down. I also note that there does not appear to be any authority from the Nebraska Supreme Court approving of or endorsing this practice.

I also disagree with the majority's suggestion that the Director's actions in this case are comparable to the actions of the Director in *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008), where this court did not disapprove of the Director's action of noting that the sworn report was missing a date and sending it back to the arresting officer to have the date supplied. A missing date is much more akin to a scrivener's error and is not comparable to a report that lacks substantive allegations necessary to confer jurisdiction and prove the Department's prima facie case for revocation. Although the majority concludes that the Director did not instruct the officer how to fill out the form when completing the addendum, the evidence indicates that the Director specifically instructed

the officer to indicate "why you concluded the motorist was operating or in actual physical control of a motor vehicle while intoxicated" and, thus, did instruct the officer of precisely what substantive allegations the Director was predetermining to be insufficient. I cannot agree that there is no significant difference between this situation and requesting correction of the equivalent of a scrivener's error concerning a date, as was done in *Stoetzel v. Neth, supra*.

For the foregoing reasons, I respectfully dissent from the decision of the majority.

TIMOTHY J. BAZAR, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

774 N.W.2d 433

Filed September 8, 2009. No. A-08-898.

1. **Statutes: Appeal and Error.** Statutory interpretation presents questions of law, and an appellate court is obligated to reach a conclusion independent of that reached by the trial court.
2. **Statutes: Legislature: Intent.** The basic rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute.
3. **Statutes.** Where a statute is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed or proper.
4. **Statutes: Legislature: Intent: Presumptions: Appeal and Error.** Appellate courts will, if possible, give effect to every word, clause, and sentence of a statute, because the Legislature is presumed to have intended every provision of a statute to have meaning.
5. **Statutes: Legislature: Intent.** In considering a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
6. **Statutes.** It is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself.

Appeal from the District Court for Lancaster County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

Ronald E. Reagan, of Reagan Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Timothy J. Bazar appeals an order of the district court for Lancaster County, Nebraska, dismissing his petition for declaratory judgment. Bazar seeks a declaratory judgment that 247 Neb. Admin. Code, ch. 1, § 027.03 (2005) (Rule 027.03), which provides that any driver whose operator's license has been suspended for a period of 1 year pursuant to Neb. Rev. Stat. § 60-498.02 (Reissue 2004) is ineligible for an employment driving permit, is not in accord with Neb. Rev. Stat. § 60-4,129 (Reissue 2004), the version of the statute in effect at the time of Bazar's offense. We find that the district court erred in concluding that the rule was consistent with the legislative intent expressed in the statutes, and we reverse, and remand with directions.

II. BACKGROUND

The parties stipulated to the relevant facts in the district court. On November 25, 2007, Bazar's operator's license was revoked for a period of 1 year pursuant to § 60-498.02, because his license had previously been revoked within the prior 12-year period. Bazar applied to the Department of Motor Vehicles (the Department) for an employment driving permit, pursuant to § 60-4,129. On November 29, the Department denied the application for an employment driving permit pursuant to Rule 027.03.

On November 29, 2007, Bazar filed a petition in the district court seeking a declaratory judgment that Rule 027.03 is not consistent with § 60-4,129 and does not properly reflect the legislative intent expressed in §§ 60-4,129 and 60-498.02. On April 16, 2008, the district court entered an order dismissing Bazar's petition. The district court concluded that there was a conflict between the two statutes, that § 60-498.02(2) was the more specific statute, and that Rule 027.03 accurately reflected the legislative intent expressed in § 60-498.02 and did not

exceed the Department's statutory rulemaking authority. This appeal followed.

III. ASSIGNMENTS OF ERROR

Bazar assigns three errors on appeal challenging the district court's conclusion that the applicable statutes contradicted each other and that the Department's rule was consistent with the legislative intent expressed in the statutes.

IV. ANALYSIS

This case presents a question of statutory interpretation. The question presented to the court on appeal is whether Rule 027.03 accurately reflects the legislative intent expressed in §§ 60-4,129 and 60-498.02. We conclude that it does not.

1. Applicable Propositions of Law

[1] A declaratory judgment action is the proper judicial proceeding to determine a party's rights and obligations under a particular statute. *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 601 N.W.2d 508 (1999). Statutory interpretation presents questions of law, and an appellate court is obligated to reach a conclusion independent of that reached by the trial court. *Nelsen v. Grzywa*, 9 Neb. App. 702, 618 N.W.2d 472 (2000). See *Ameritas Life Ins. v. Balka, supra*. In construing the meaning of the relevant statutes in this case, we apply the following well-established principles:

[2,3] The basic rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. *Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957). It is a fundamental rule of statutory construction that the usual and ordinary meaning of words will be used in construing a statute. *Id.* Where a statute is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed or proper. *Id.* See, also, *Ameritas Life Ins. v. Balka, supra*. In considering the meaning of a statute, appellate courts will, if possible, discover the legislative intent from the language of the statute and give it effect. *Ameritas Life Ins. v. Balka, supra*.

[4] Appellate courts will, if possible, give effect to every word, clause, and sentence of a statute, because the Legislature

is presumed to have intended every provision of a statute to have meaning. *Iske v. Papio Nat. Resources Dist.*, 218 Neb. 39, 352 N.W.2d 172 (1984); *Bohm v. DMA Partnership*, 8 Neb. App. 1069, 607 N.W.2d 212 (2000). It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. *Ulbrick v. City of Nebraska City*, 180 Neb. 229, 141 N.W.2d 849 (1966). In other words, a statute must receive such construction as will make all its parts harmonize with each other, and render them consistent with its general scope and object. *Id.* In the construction of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided. *Id.*

[5,6] In considering a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. *Behrens v. State*, 140 Neb. 671, 1 N.W.2d 289 (1941). It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. *Id.* Therefore it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself. *Id.* See, also, *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002) (court will construe statutes relating to same subject matter together so as to maintain consistent, harmonious, sensible scheme).

2. Statutes and Rule in Question

The foregoing propositions of law guide our ascertainment of the meaning of §§ 60-4,129 and 60-498.02 and our determination of whether Rule 027.03 is consistent with the legislative intent expressed in the statutes.

Section 60-4,129, at the time of Bazar's offense, provided in relevant part as follows:

> (1) Any individual whose operator's license is revoked under section 60-498.02, 60-4,183, or 60-4,186 or

> suspended under section 43-3318 shall be eligible to operate any motor vehicle, except a commercial motor vehicle, in this state under an employment driving permit. An employment driving permit issued due to a revocation under section 60-498.02, 60-4,183, or 60-4,186 is valid for the period of revocation. An employment driving permit issued due to a suspension of an operator's license under section 43-3318 is valid for no more than three months and cannot be renewed.
>
> (2) Any person whose operator's license has been suspended or revoked pursuant to any law of this state, except such sections, shall not be eligible to receive an employment driving permit during the period of such suspension or revocation.

At the time of Bazar's offense, § 60-498.02, one of the provisions specifically referenced in § 60-4,129, provided in relevant part as follows:

> (1) At the expiration of thirty days after the date of arrest . . . the director shall (a) revoke the operator's license of a person arrested for refusal to submit to a chemical test . . . for a period of one year and (b) revoke the operator's license of a person who submits to a chemical test . . . which discloses the presence of [an impermissible concentration of alcohol] for a period of ninety days unless the person's driving record abstract . . . shows one or more prior administrative license revocations on which final orders have been issued during the immediately preceding twelve-year period . . . in which case the period of revocation shall be one year. . . .
>
> (2) At the expiration of thirty days after an order of revocation is entered under subsection (1) of this section, (a) any person whose operator's license has been administratively revoked for a period of ninety days . . . may make application to the director for issuance of an employment driving permit . . . and (b) any person who . . . has his or her operator's license revoked for ninety days . . . is eligible for an order . . . to operate a motor vehicle equipped with an ignition interlock device . . . .

Finally, Rule 027.03, provides as follows:

> **Not Available for Refusals or Subsequent Offenders.** A person whose license is revoked for a period of one (1) year either (a) for refusing a test or (b) for failure of the test for a second or subsequent time shall not be eligible to apply for a work permit.

3. Application

We conclude that the intention of the Legislature, as expressed by the plain meaning of the language used in the relevant provisions and reading the provisions together to give meaning to their entirety, was that drivers whose operator's licenses have been revoked for a period of 1 year are eligible for an employment driving permit, but are not eligible for an ignition interlock device, and that drivers whose operator's licenses have been revoked for a period of 90 days are eligible for an employment driving permit after a period of 30 days, and are eligible for an ignition interlock device. This construction is consistent with the plain language actually used and gives meaning to both statutes without reading any plain language out of the statutes. As such, Rule 027.03 is not consistent with the statutory provisions.

In § 60-4,129, the Legislature clearly and unambiguously provided that "[a]ny" drivers whose operator's licenses are revoked pursuant to § 60-498.02 "shall" be eligible for an employment driving permit. As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion. See *State v. Donner*, 13 Neb. App. 85, 690 N.W.2d 181 (2004). The plain meaning of § 60-4,129 is that drivers whose operator's licenses have been revoked for either 90 days or 1 year under § 60-498.02 are eligible for an employment driving permit.

In § 60-498.02(1), the Legislature provided for the Department to revoke an operator's license for a period of either 90 days or 1 year. An operator's license may be revoked for a period of 1 year either because of the operator's refusal to submit to a chemical test or because of the operator's having had his license previously revoked within the prior 12-year period. The plain meaning of § 60-4,129, as noted above, indicates that a

driver whose license is revoked for either period of time is eligible for an employment driving permit.

In § 60-498.02(2), the Legislature provided a specific limitation on the issuance of an employment driving permit and further addressed the eligibility for an ignition interlock device. In § 60-498.02(a), the Legislature provided that a driver whose operator's license has been revoked for a period of 90 days must wait a period of 30 days before applying for the employment driving permit referenced in § 60-4,129. In § 60-498.02(2)(b), the Legislature provided that a driver whose operator's license has been revoked for a period of 90 days is also eligible to apply for an ignition interlock device. Both subsections (2)(a) and (2)(b) of § 60-498.02 are clear and unambiguous, and there does not appear to be any dispute that the provisions provide as we have noted.

The real issue in the present case arises because, in the version of § 60-498.02(2) that was in effect at the time of Bazar's offense, the Legislature included language specifically indicating that "[t]his subsection shall not apply to nor shall any person be eligible for the benefit of this subsection during any period of time during which his or her operator's license" has been revoked for a period of 1 year pursuant to § 60-4,129. We conclude that the language is intended to apply to the entirety of § 60-498.02(2) and that, as a result, nothing in § 60-498.02(2) applies to drivers whose licenses have been revoked for a period of 1 year.

Section 60-498.02(2), by its plain and unambiguous terms, imposes a specific limitation on the right to apply for an employment driving permit that is conferred by the plain and unambiguous language of § 60-4,129. Section 60-498.02(2)(b) then provides a specific new benefit, the right to apply for an ignition interlock device, which is conferred only by this section. The final portion of § 60-498.02(2), by its plain and unambiguous terms, indicates that the subsection, including both its limitation related to the employment driving permit in § 60-498.02(2)(a) and the additional benefit of an ignition interlock device conferred in § 60-498.02(2)(b), is not applicable to drivers whose operator's licenses have been revoked for a period of 1 year.

Because § 60-498.02(2) is not applicable to drivers whose operator's licenses have been revoked for a period of 1 year, those drivers are not subject to the limitation imposed concerning application for an employment driving permit and are not awarded the benefit of an ignition interlock device. They are, however, still clearly and unambiguously within the plain language of § 60-4,129 and its grant of the right to apply for an employment driving permit. This reading is consistent with the plain meaning of the language actually used and gives meaning and effect to the entirety of both statutes. As such, we conclude that § 60-4,129 provides a general benefit to all drivers whose operator's licenses are revoked, and § 60-498.02(2) imposes a specific limitation upon a portion of those drivers and confers an additional benefit upon the same portion of those drivers, those whose operator's licenses are revoked for a period of 90 days.

The interpretation urged by the Department, and accepted by the district court, is that § 60-498.02(2) and its final provision are intended to indicate that only drivers whose licenses have been revoked for a period of 90 days are eligible to apply for an employment driving permit. Such an interpretation, however, would render meaningless the language chosen by the Legislature in § 60-4,129 that "[a]ny" drivers whose operator's licenses are revoked pursuant to § 60-498.02 "shall" be eligible for an employment driving permit; such an interpretation would suggest the Legislature actually meant that only those drivers whose operator's licenses are revoked for a period of 90 days pursuant to § 60-498.02 shall be so eligible, which is directly contrary to the plain language actually chosen. Such an interpretation directly contravenes the cardinal rules of statutory construction to give effect to the plain meaning of the language used and to give meaning to the entirety of the statutes.

We recognize the somewhat paradoxical result pointed out by the Department by this plain meaning interpretation: Drivers whose operator's licenses are revoked for only 90 days for a first offense must wait a period of 30 days before applying for an employment driving permit, while drivers whose operator's licenses are revoked for a period of 1 year either for refusal

to submit to a chemical test or for multiple offenses within a 12-year period may apply for an employment driving permit immediately. Although we acknowledge that this result seems unusual, it would be a greater offense to entirely disregard the plain language chosen by the Legislature to confer the benefit of an employment permit to all drivers whose licenses have been revoked.

In addition, although it does not guide our conclusion, which is reached and supported on the basis of the plain meaning rule and desire to give meaning to the entirety of the language chosen by the Legislature, we note that the Legislature has made recent changes in the language of § 60-498.02. In 2008 Neb. Laws, L.B. 736, the Legislature made amendments to the language of § 60-498.02. See § 60-498.02 (Cum. Supp. 2008). As a result of those changes, § 60-498.02(2) no longer has a part (a) and a part (b) and no longer has the final provision discussed above. Now, § 60-498.02(2) consists solely of the language previously quoted as part (a) above, requiring the right of drivers whose operator's licenses have been revoked for a period of 90 days to wait a period of 30 days before applying for an employment driving permit. In addition, the Legislature has now provided in § 60-498.02(3) that both drivers whose operator's licenses have been revoked for a period of 90 days and drivers whose operator's licenses have been revoked for a period of 1 year because of a prior offense within the previous 12-year period are eligible to apply for an ignition interlock device. In § 60-498.02(4), the Legislature has now provided specifically that drivers whose operator's licenses have been revoked for a period of 1 year because of the operator's refusal to submit to a chemical test are not eligible to apply for either an employment driving permit or an ignition interlock device. These changes do not factor into our conclusion today, but we note that under the present version of the statute, Bazar would also be eligible to apply for an employment driving permit, without having to wait the 30-day period imposed by § 60-498.02(2). The decision of the Legislature to specify in § 60-498.02(4) that drivers whose operator's licenses have been revoked for refusing to submit to a chemical test are not eligible to apply for an employment driving permit or an

ignition interlock device is, again, a clear indication that drivers whose operator's licenses have been revoked for 1 year for multiple offenses are eligible to apply for an employment driving permit; the Legislature could have easily, again, specified that only drivers whose operator's licenses have been revoked for a period of 90 days are eligible for an employment driving permit, but it chose not to.

As a result, we conclude that the district court erred in concluding that there is a conflict between §§ 60-4,129 and 60-498.02(2). There is no conflict; the former confers a general benefit on drivers whose operator's licenses have been revoked, and the latter imposes a restriction to that benefit on a portion of such drivers. Under the statutory scheme in effect at the time of Bazar's offense, the intent of the Legislature as ascertained from the plain meaning of the language used, when read to give effect to all provisions, was that drivers whose operator's licenses have been revoked for a period of 1 year were eligible to apply for an employment permit. The district court erred in concluding that the statutes denied this benefit to Bazar and that Rule 027.03 was consistent with the statutes. As such, we reverse, and remand with directions to enter an order consistent with this opinion.

V. CONCLUSION

We find that the district court erred in dismissing Bazar's petition. We reverse, and remand with directions to enter an order consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF JOSIAH T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SONIA M., APPELLANT.

773 N.W.2d 161

Filed September 8, 2009. No. A-08-1214.

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 juvenile court's findings.

2. **Juvenile Courts: Parental Rights: Evidence: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2008), it must find by clear and convincing evidence that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
3. **Parental Rights: Abandonment: Intent: Words and Phrases.** Abandonment, for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 2008), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
4. **Parental Rights: Abandonment: Proof.** To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.
5. **Parental Rights.** While a parent's incarceration, standing alone, does not provide grounds for termination of parental rights, a parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect.
6. **Judicial Notice.** A trial court may take judicial notice of its own proceedings and judgment where the same matters have already been considered and determined.
7. **Parental Rights: Judicial Notice: Records.** In a proceeding to terminate parental rights, papers requested to be judicially noticed must be marked, identified, and made a part of the record; testimony must be transcribed, properly certified, marked, and made a part of the record; and the trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing.

Appeal from the County Court for Hall County: DAVID A. BUSH, Judge. Reversed and remanded for further proceedings.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Robert J. Cashoili, Deputy Hall County Attorney, for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Sonia M. appeals from the order of the Hall County Court, sitting as a juvenile court, which terminated her parental rights to her son, Josiah T. On appeal, Sonia challenges the county court's finding that her parental rights should be terminated

pursuant to Neb. Rev. Stat. § 43-292(1) and (2) (Reissue 2008) and the court's finding that termination of her parental rights is in Josiah's best interests. Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Sonia's parental rights is warranted pursuant to § 43-292(1) or (2), and accordingly, we reverse, and remand for further proceedings.

II. BACKGROUND

These proceedings involve Josiah, born in 2006. Although Josiah's father's and Sonia's parental rights were terminated during the same proceedings, Josiah's father does not appeal from the court's decision to terminate his parental rights. As such, the termination of Josiah's father's parental rights is not a subject of this appeal.

In January 2008, Josiah was removed from Sonia's home and placed in the custody of the Department of Health and Human Services (DHHS) after Sonia was arrested by federal authorities. On January 4, 2008, the State filed a petition alleging that Josiah was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006) through the fault or habits of Sonia.

On May 13, 2008, an adjudication hearing was held. The judge's notes from this hearing indicate that Sonia failed to appear. The notes also indicate that Josiah was adjudicated on the allegations in the State's petition.

On August 5, 2008, the State filed a motion for termination of Sonia's parental rights. In the motion, the State alleged that Josiah was a child within the meaning of § 43-292(1) and (2).

On October 17, 2008, a termination of parental rights hearing was held. At the hearing, the State called only one witness to testify in support of the termination of Sonia's parental rights. Judy Pfeifer, the DHHS child protection specialist assigned to the case, testified that Sonia's parental rights to Josiah should be terminated.

Pfeifer testified that Josiah has been in the continuous custody of DHHS since January 2008, when Sonia was arrested. Pfeifer testified that since January 2008, she has had some

contact with Sonia. Specifically, Pfeifer testified that Sonia has telephoned to request pictures of Josiah. Pfeifer indicated that Sonia did not request visitation with Josiah.

Pfeifer testified that Sonia recently had been convicted of distribution and possession of illegal drugs and that Sonia informed her that she had been sentenced to 12 to 15 years' imprisonment. Pfeifer opined that terminating Sonia's parental rights was in Josiah's best interests, because he "doesn't remember" Sonia and he "deserves permanency." Pfeifer "recommend[ed] that this little boy be able to get on with his life."

Sonia did not appear at the termination hearing. However, after the State rested, Sonia's counsel offered into evidence a letter authored by Sonia. In the letter, Sonia stated that she did not want her parental rights terminated. Sonia indicated that she wanted visitation with Josiah and contact with Josiah's foster parents. Sonia also stated that she was "not going to do 12 [years]." She wrote, "At the most I might do 4 [years]. But at the least is 2½ [years]."

At the close of the evidence, the county court immediately rendered its decision from the bench. The court terminated Sonia's parental rights to Josiah. The court found "by clear and convincing evidence that [Sonia] abandoned [Josiah] for six months or more immediately prior to the filing of the motion to terminate parental rights." The court also found that Sonia had "substantially and continuously or repeatedly neglected [Josiah] and refused to give him necessary parental care and protection." Finally, the court found that "it would be in the best interests of [Josiah] that the parental rights of [Sonia] be terminated."

Sonia timely appeals from the county court's decision to terminate her parental rights.

III. ASSIGNMENTS OF ERROR

On appeal, Sonia challenges the county court's finding that her parental rights should be terminated pursuant to § 43-292(1) and (2) and the court's finding that termination of her parental rights is in Josiah's best interests.

IV. ANALYSIS

1. Standard of Review

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

[2] For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. See *id*. The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven. *Id.*

2. Statutory Grounds for Termination

In Sonia's first assignment of error, she alleges that the county court erred in finding that the State presented clear and convincing evidence to prove the statutory grounds for termination of her parental rights. Specifically, she challenges the county court's determination that termination of her parental rights was warranted pursuant to § 43-292(1) and (2). Upon our de novo review of the record, we determine that the evidence does not clearly and convincingly establish that Sonia abandoned or neglected Josiah pursuant to § 43-292(1) and (2).

(a) § 43-292(1)

[3] Section 43-292(1) provides that the court may terminate parental rights when the parent has "abandoned the juvenile for six months or more immediately prior to the filing of the petition" to terminate parental rights. "Abandonment," for the purpose of § 43-292(1), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). The question of

abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances. *Id.*

[4] To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990).

It is clear from the record that Sonia has not had contact with Josiah for over 6 months. Josiah was removed from Sonia's home in January 2008 and has remained in the custody of DHHS since that time. As such, at the time of the termination hearing on October 17, 2008, Josiah had been in the custody of DHHS for approximately 9 months. There is no dispute that Sonia had not had any contact with Josiah during these 9 months.

Although Sonia has not had any contact with Josiah in approximately 9 months, this evidence does not, by itself, prove abandonment. As we discussed above, a showing of abandonment requires more than an extended absence in a child's life. A finding of abandonment requires a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. See *In re Interest of B.A.G., supra*.

Upon our de novo review of the record, we find that the State has failed to prove by clear and convincing evidence that Sonia possessed a settled purpose to be rid of all of her parental obligations or to forgo all of her parental rights.

The State's evidence at the termination hearing consisted of approximately eight pages of testimony from Pfeifer, the DHHS child protection specialist responsible for managing Josiah's case. In fact, much of Pfeifer's testimony related to terminating the parental rights of Josiah's father. Approximately two pages of testimony focused on terminating Sonia's parental rights.

The majority of the two pages of testimony concerned Sonia's criminal conviction and sentence. Pfeifer testified

that Sonia had been convicted of "[d]istribution and possession of illegal drugs" and was serving a 12- to 15-year sentence in Leavenworth, Kansas. Pfeifer indicated that Sonia informed Pfeifer of her sentence during a recent telephone conversation.

The Nebraska Supreme Court has held that parental incarceration may be considered in reference to abandonment as a basis for termination of parental rights. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). However, the court has also indicated that

> "[i]ncarceration of a parent, standing alone, does not furnish a ground for automatic termination of parental rights. . . . Incarceration, however, does not insulate an inmate from the termination of his parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent."

Id. at 418, 482 N.W.2d at 259-60 (quoting *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986)).

Here, the State's case centered on Sonia's criminal conviction and sentence and her inability to care for Josiah while she was incarcerated. Pfeifer testified that Sonia would be incarcerated for 12 to 15 years and that Josiah deserved to gain permanency during this time.

Despite the State's reliance on Sonia's incarceration as the sole basis for terminating her parental rights, the State failed to present any concrete evidence concerning Sonia's sentence or expected release date. Rather, Pfeifer testified that her knowledge of Sonia's sentence came from Sonia. Sonia indicated in her letter that Pfeifer was incorrect about the length of her sentence and wrote that she may be released in approximately 2½ years. Given the lack of evidence concerning essential details of Sonia's sentence, we cannot say that the length of Sonia's incarceration, by itself, warrants termination of her parental rights pursuant to § 43-292(1).

Furthermore, the State failed to present any other evidence to demonstrate that Sonia had abandoned Josiah pursuant to § 43-292(1). Pfeifer testified that during the 9 months that Sonia was away from Josiah, Sonia kept in contact with her

by telephone. Pfeifer testified that Sonia did request pictures of Josiah, but did not request visitation with him. It is not clear from the record whether Sonia would have been able to exercise any visitation with Josiah while she was incarcerated. This limited evidence does not clearly and convincingly demonstrate that Sonia possessed a settled purpose to be rid of all of her parental obligations or to forgo all of her parental rights.

Additionally, in Sonia's letter, she explicitly stated that she wanted to continue to be a part of Josiah's life. Specifically, Sonia indicated that she did not want her parental rights terminated. She explained that she would like to have visitation with Josiah and contact with Josiah's foster parents. Sonia indicated that she would like to be involved in any decision about a future placement for Josiah. Sonia indicated that she wanted Josiah to be placed with a family member.

Upon our de novo review of all of the evidence presented at the termination hearing, we find that the State failed to present clear and convincing evidence that Sonia abandoned Josiah pursuant to § 43-292(1). Evidence of Sonia's incarceration, without more, does not provide clear and convincing evidence of abandonment.

(b) § 43-292(2)

[5] Section 43-292(2) provides that the court may terminate parental rights when the parent has "substantially and continuously or repeatedly neglected and refused to give the juvenile . . . necessary parental care and protection." While a parent's incarceration, standing alone, does not provide grounds for termination of parental rights, a parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). The Nebraska Supreme Court has recognized that in termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated. *Id.* See, also, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

In this case, the State's evidence centered on Sonia's drug-related conviction and sentence. However, the State did not present concrete evidence to demonstrate the exact circumstances of Sonia's arrest, conviction, or sentence. There is nothing in the record to indicate exactly what crime Sonia was convicted of, and there is conflicting evidence concerning the length of Sonia's sentence. Pfeifer testified that Sonia was convicted of "[d]istribution and possession of illegal drugs." We do not have any further information about Sonia's conviction. And, although Pfeifer testified that Sonia informed her that she would be incarcerated for 12 to 15 years, Sonia indicated that she would be incarcerated for only 2½ to 4 years.

We can infer that Sonia will be unable to provide for most of Josiah's needs as long as she is incarcerated. However, we cannot say with any precision how long Sonia will be away from Josiah.

The State offered no other evidence at the termination hearing to prove Sonia has neglected Josiah pursuant to § 43-292(2). In its brief to this court, the State argues that Sonia has shown a pattern of drug abuse and incarceration and that such a pattern demonstrates neglect. In support of its argument, the State refers to an exhibit admitted into evidence at a previous disposition hearing, but not at the termination hearing. Upon our review of the record, we conclude that because this exhibit was not marked, offered, or received into evidence at the termination hearing, it was not properly made a part of the record and should not be considered in a determination of whether Sonia's parental rights should be terminated. Exhibit 5 is a case report authored by Colette Evans, the DHHS child protection specialist managing Josiah's case in July 2008. Evans did not appear at the termination hearing. In the report, Evans indicates that Sonia had been previously incarcerated for a drug-related offense immediately prior to and at the time of Josiah's birth. This report was admitted into evidence at an August 5, 2008, disposition hearing. The transcription of this hearing and the accompanying exhibit is included in our record.

At the termination hearing, the State offered into evidence two exhibits. Although these were the first exhibits offered at the termination hearing, the court continued its numbering

system from previous hearings and the exhibits were marked as exhibits 6 and 7. Exhibits 6 and 7 demonstrate that the State gave notice of the termination hearing to both Sonia and Josiah's father. The State did not reoffer the case plan admitted at the disposition hearing into evidence, nor did the State ask the court to judicially notice that document or any evidence presented at previous hearings. It is not clear from the record whether the county court considered this evidence in terminating Sonia's parental rights; however, because this exhibit was not marked, offered, or received into evidence at the termination hearing, it was not properly made a part of the record and we do not consider it in our analysis.

[6] We digress briefly to discuss the proper manner for offering into evidence an exhibit admitted at a previous hearing. A trial court may take judicial notice of its own proceedings and judgment where the same matters have already been considered and determined. See *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). However, a trial court cannot take judicial notice of disputed allegations. *Id.*

[7] The Nebraska Supreme Court has indicated that evidence from a prior hearing may be judicially noticed. The court has provided the following guidelines for offering such evidence:

> "Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review is impossible."

In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 709, 484 N.W.2d 68, 73 (1992). Accord *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997).

As such, the State must do more than include evidence from a prior hearing in the appellate record. Rather, the State must mark and identify the evidence and make the evidence a part of the record at the trial court level.

Because exhibit 5 was not properly received into evidence at the termination hearing, there was nothing presented at the termination hearing to demonstrate that Sonia was previously

incarcerated or that she had a history of drug problems. In fact, we note that Pfeifer testified that she had no knowledge that Sonia had any previous involvement with DHHS, which testimony indicates Pfeifer's lack of knowledge about Sonia's previous incarceration at the time of Josiah's birth.

We conclude that evidence of Sonia's present incarceration, without more, does not provide clear and convincing evidence of neglect.

Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Sonia's parental rights is warranted pursuant to § 43-292(1) or (2). Because the State failed to prove that one or more of the statutory grounds listed in § 43-292 have been satisfied, we conclude that the county court erred in terminating Sonia's parental rights. Accordingly, we reverse, and remand for further proceedings.

3. Best Interests

Sonia also alleges that the county court erred in determining that termination of her parental rights is in Josiah's best interests. However, because we conclude that the State failed to provide sufficient evidence to prove that termination of Sonia's parental rights was warranted pursuant to § 43-292(1) or (2) and remand for further proceedings, we do not address Sonia's second assignment of error. An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it. *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008).

V. CONCLUSION

Upon our de novo review of the record, we find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Sonia's parental rights is warranted pursuant to § 43-292(1) or (2). As such, the county court erred in terminating Sonia's parental rights and we reverse, and remand for further proceedings.

Reversed and remanded for further proceedings.

Carlson, Judge, concurs.

HEADNOTES
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