THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 20, 2005 and SEPTEMBER 4, 2006

IN THE

Nebraska Court of Appeals

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VOLUME XIV

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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THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

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No. A-04-123: **Thompson v. Thompson**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-04-146: **State v. Charles**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-04-250: **In re Interest of Devin W. et al**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-04-441: **Veath v. Neth**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-04-476: **Miller v. Miller**. Affirmed in part, and reversed in part. Carlson, Sievers, and Cassel, Judges.

No. A-04-528: **Nagavalli v. Yathish**. Affirmed as modified. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-04-582: **National Programs v. Heritage Admin. Servs**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-604: **State on behalf of Williams v. Brase**. Affirmed as modified. Sievers, Carlson, and Cassel, Judges.

No. A-04-607: **State v. Moyer**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-633: **Brooks v. Orion Insurance**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-04-684: **Hute v. County of Lancaster**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-04-730: **Engert v. Levitt**. Reversed and remanded. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-744: **Kowskie v. Hamilton**. Affirmed. Sievers, Irwin, and Moore, Judges.

Nos. A-04-752, A-04-753: **State v. Soby**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-04-774: **Hughes v. Poyko-Post**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-04-799: **Darrow v. Darrow**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-804: **Ainsworth v. Hinrichs**. Affirmed as modified. Sievers, Irwin, and Moore, Judges.

No. A-04-844: **State v. Lykens**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-04-855: **In re Estate of Whaley**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

Nos. A-04-876, A-04-877: **Campbell v. Carlson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-881: **Wright v. Wright**. Affirmed as modified. Moore, Sievers, and Carlson, Judges.

Nos. A-04-961, A-04-1376: **Gurnon v. Gurnon**. Judgment in No. A-04-961 affirmed as modified. Appeal in No. A-04-1376 dismissed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-983: **Talbott v. Talbott**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-984: **State v. Romero**. Affirmed. Cassel and Sievers, Judges. Moore, Judge, participating on briefs.

No. A-04-1027: **Otto-Briggs v. Lone Star Steakhouse**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-04-1028: **Robinson v. Robinson**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-1030: **State v. Henderson**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-1036: **Norman v. Norman**. Affirmed in part, and in part reversed and remanded with directions. Carlson, Sievers, and Moore, Judges.

No. A-04-1048: **Shrader v. Shrader Refuse & Recycling Serv. Co**. Affirmed. Sievers and Cassel, Judges. Moore, Judge, participating on briefs.

No. A-04-1053: **Garcia v. Garcia**. Affirmed as modified. Sievers, Irwin, and Moore, Judges.

No. A-04-1080: **State v. McSwine**. Affirmed. Sievers and Cassel, Judges. Moore, Judge, participating on briefs.

No. A-04-1095: **In re Estate of Mason**. Appeal dismissed. Sievers, Carlson, and Moore, Judges.

No. A-04-1102: **Timmermann v. McAvoy Living Trust**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-04-1103: **Goodwin v. Goodwin**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1133: **State v. Siegle**. Appeal dismissed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1171: **Norby v. Farnam Bank**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Moore, and Cassel, Judges.

No. A-04-1187: **State v. Coen**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-04-1190: **In re Estate of Crate**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-1203: **United Rentals v. Meier Masonry**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-04-1215: **Spence v. Bush**. Appeal dismissed. Sievers, Moore, and Cassel, Judges.

No. A-04-1219: **Lenhart v. Department of Motor Vehicles**. Reversed and remanded with directions. Sievers, Irwin, and Moore, Judges.

No. A-04-1227: **Kaufman v. Weaver**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-04-1229: **Rasmussen v. Rasmussen**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-04-1237: **Pesek v. Neth**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-04-1249: **In re Interest of Sadie W. & Noah W**. Affirmed in part, and in part reversed. Cassel, Sievers, and Carlson, Judges.

No. A-04-1254: **In re Interest of Olivia W. & Lucien W**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1260: **State v. Fountain**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-1318: **Henderson v. Henderson**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-04-1335: **In re Estate of Jelinek**. Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-04-1341: **Ross v. Board of Regents**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-04-1343: **State v. Alameen**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-04-1348: **Henk v. Ruger**. Affirmed. Cassel, Sievers, and Carlson, Judges.

Nos. A-04-1357, A-05-105, A-05-388: **Partch v. Partch**. Affirmed as modified. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1362: **State v. Jensen**. Reversed and remanded with directions. Cassel, Sievers, and Carlson, Judges.

No. A-04-1366: **State v. Abboud**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-04-1384: **Roepke v. Roepke**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-04-1421: **MacGregor v. Nebraska Dept. of Corr. Servs**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-04-1427: **Long v. Long**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-04-1435: **Stender v. State Patrol**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-04-1446: **Smith v. Smith**. Judgment vacated, and cause remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1449: **Lauer v. Lauer**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-04-1454: **Meyer v. Farrall**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-04-1455: **Nolte v. Stonestreet**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-04-1463: **Burke v. Burke**. Affirmed. Sievers and Irwin, Judges. Inbody, Chief Judge, participating on briefs.

No. A-04-1471: **State v. Thies**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-04-1472: **State v. Robertson**. Sentence affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-05-006: **Allis v. Allis**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge, and Carlson, Judge. Cassel, Judge, participating on briefs.

No. A-05-010: **In re Adoption of Cody H**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-028: **State v. Brown**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-036: **Nimmer v. Brewer**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-052: **State v. Jones**. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-055: **In re Interest of Cody S**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-095: **State v. Green**. Reversed and remanded for a new trial. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-099: **State v. Khuseinov**. Affirmed. Moore and Irwin, Judges. Carlson, Judge, participating on briefs.

No. A-05-110: **Matthews v. Drivers Mgmt., Inc**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-112: **State v. Sargent**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-113: **State v. Schram**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-131: **State v. Gade**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-167: **Kathol v. Kathol**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-168: **Harm v. Harm**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-181: **State v. Carstensen**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-214: **State v. Richards**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-05-223: **State v. Burks**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-05-224: **State v. Parnell**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-255: **Moosman v. Cherry Cty. Bd. of Adjustment**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-258: **In re Interest of Tyreek T. & Asia R**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-275: **In re Interest of Kaleb H**. Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-05-286: **State v. La**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-296: **State v. Haynes**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-312: **Fischer v. Neth**. Reversed and remanded with directions. Moore, Sievers, and Cassel, Judges.

No. A-05-322: **Stone v. Wroblewski**. Affirmed. Irwin and Moore, Judges. Cassel, Judge, participating on briefs.

No. A-05-339: **Smith v. City of Lincoln**. Affirmed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-340: **In re Interest of Devin P. et al**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-343: **In re Application of Regnier**. Reversed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-350: **State v. Charko**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-354: **In re Interest of John S**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-355: **Crosby v. Crosby**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-05-357: **State v. Parrott**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-360: **Mendez v. Mendez**. Affirmed as modified. Sievers, Moore, and Cassel, Judges.

No. A-05-361: **In re Interest of Aniyah L**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-364: **Perez v. Double Dutch Dairy**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-370: **State v. Bernhardt**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-05-382: **In re Interest of Emma B**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-390: **State v. Smith**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-397: **State v. Starks**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-401: **Palm v. Lovelace**. Affirmed as modified. Cassel, Sievers, and Moore, Judges.

No. A-05-427: **State v. Beat**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-451: **Hamre v. Everman Plumbing**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-459: **Machacek v. Long John Silvers**. Reversed and remanded with directions. Sievers, Moore, and Cassel, Judges.

No. A-05-479: **Taylor v. Bussell**. Affirmed as modified. Sievers, Irwin, and Moore, Judges.

Nos. A-05-481, A-05-482: **In re Interest of Zakary B. & Natasha B**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-483: **State v. Howard**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-485: **Lewis v. Lewis**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-493: **State v. Grosvenor**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-496: **State v. Gray**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-514: **State v. Brunson**. Affirmed. Moore, Irwin, and Sievers, Judges.

Nos. A-05-551 through A-05-553: **In re Interest of Sierra H. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-563: **In re Interest of Beau F. & Shawn F**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-570: **Byam v. Modern Equip. Co**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-590: **Ruzicka v. Dalton's Auto Center**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-595: **State v. O'Hara**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-05-596: **State v. James**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-05-599: **del Carmen Rubio v. Chavez**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-625: **State v. Ornelas-Perez**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-627: **State v. Webb**. Affirmed. Per Curiam.

No. A-05-644: **Heppler v. Omaha Cable**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-655: **Morris v. Frank**. Affirmed. Cassel, Sievers, and Irwin, Judges.

No. A-05-657: **State v. Groene**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-660: **State v. Beckman**. Reversed and remanded for further proceedings. Moore, Judge (1-judge).

No. A-05-663: **In re Estate of Kleinholz**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-668: **In re Interest of Sabrina M**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-669: **In re Estate of Anderson**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-673: **In re Guardianship of Chrystian S**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-675: **State v. Turner**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-685: **State v. Bragg**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-05-687: **Korus v. Korus**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-689: **Joshi v. VanNoordwyk**. Affirmed in part, and in part reversed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-694: **In re Interest of Vincent P**. Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-05-765: **Smith v. Smith**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-781: **Halbmaier v. Halbmaier**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-790: **State v. Adamson**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-795: **Churchill v. Churchill**. Affirmed. Cassel and Sievers, Judges. Moore, Judge, participating on briefs.

No. A-05-828: **State v. Dunovsky**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-834: **State v. Payne**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-835: **In re Interest of Bailey S. & Brady S**. Reversed and remanded for further proceedings. Sievers, Carlson, and Moore, Judges.

No. A-05-837: **In re Interest of Ashley M**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-05-859: **In re Guardianship of Matthew N**. Reversed and vacated. Inbody, Chief Judge, and Irwin and Cassel, Judges.

Nos. A-05-866, A-05-867: **In re Interest of Frederick A. & Elliott A**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-05-868: **State v. Jensen**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-893: **State v. Schriner**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-916: **McDowell v. Leprino Foods Co**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-962: **State v. Benish**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-971: **In re Interest of Mario G**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-972: **In re Interest of Peyton H**. Affirmed in part, and in part reversed. Sievers, Irwin, and Moore, Judges.

No. A-05-974: **State v. McClinton**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-05-977: **In re Interest of Jose M**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-987: **State v. Glenn**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-999: **Schrier v. Schrier**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1011: **In re Interest of Ashley K. et al**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1015: **State v. Arthur**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-1017: **In re Interest of Amanda J**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1018: **State v. Stewart**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-1026: **State v. Dunovsky**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1029: **State v. Phu**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1031: **Laska v. Laska**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1032: **In re Interest of Septembur L. & Jaden L**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-1050: **Wurdeman v. Wurdeman**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-1068: **In re Interest of Dwight R**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-1079: **In re Interest of Michael B. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1086: **State v. Beck**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1088: **State v. Hansen**. Sentence vacated and cause remanded with directions. Cassel, Sievers, and Moore, Judges.

No. A-05-1094: **State v. Shelton**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1096: **Pflepsen v. KC Concrete Placement**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1098: **State v. Scott**. Affirmed in part, and in part reversed. Sievers, Carlson, and Moore, Judges.

No. A-05-1106: **State v. Beck**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1121: **In re Interest of William S., Jr**. Appeal dismissed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1123: **In re Interest of Cameron B. et al**. Affirmed. Carlson, Sievers, and Moore, Judges

No. A-05-1140: **State v. Miner**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-1157: **State v. Miner**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-1162: **Buckendahl v. Buckendahl**. Affirmed as modified. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1177: **In re Interest of Casey S. et al**. Affirmed. Moore, Sievers, and Carlson, Judges.

Nos. A-05-1182 through A-05-1185: **In re Interest of Alica A. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1206: **State v. Aldaba-Martinez**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1220: **State v. Devitt**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1240: **State v. O'Dey**. Affirmed. Sievers, Judge (1-judge).

No. A-05-1258: **Scheurich v. Drivers Mgmt., Inc**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1281: **State v. Worley**. Affirmed in part, vacated in part, and in part reversed and remanded. Cassel, Irwin, and Moore, Judges.

No. A-05-1288: **In re Interest of Melanie S. et al**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1295: **State v. Smith**. Affirmed. Irwin, Moore, and Cassel, Judges.

No. A-05-1308: **State v. Mueller**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1315: **In re Interest of Patrick S. et al**. Affirmed. Moore, Sievers, and Cassel, Judges.

Nos. A-05-1324, A-05-1325: **In re Interest of Chynne P. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1331: **State v. Cole**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1349: **In re Interest of Grace J**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1350: **In re Interest of Maliyah W**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1366: **In re Interest of Jazmin B**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1388: **Backhaus v. Calvert**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-05-1405: **In re Interest of Andreana D**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1416: **State v. Neeman**. Affirmed. Sievers, Judge (1-judge).

No. A-05-1454: **Kuhn v. H&H Chevrolet Co**. Affirmed. Irwin, Moore, and Cassel, Judges.

No. A-05-1508: **Ahlberg v. Ahlberg**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1559: **In re Adoption of Jessica D**. Reversed and vacated. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1568: **State ex rel. Tyler v. Houston**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-05-1573: **State v. Bering**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1575: **State v. Strickland**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-06-020: **State v. Doria**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-032: **In re Interest of Christian P**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-06-055: **State v. Ford**. Affirmed as modified. Sievers, Moore, and Cassel, Judges.

No. A-06-131: **Nocita v. Nocita**. Affirmed in part, affirmed in part as modified, and in part vacated. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

Nos. A-06-135, A-06-136: **In re Interest of Wade W**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-199: **In re Interest of Teylor K**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-04-099: **In re Application of Thornton**. Appeal dismissed. See, rule 7A(2); *Thornton v. Thornton*, 13 Neb. App. 912, 704 N.W.2d 243 (2005).

No. A-04-452: **Fowler v. Palmer Brothers Granite Co**. Motion of appellant to dismiss appeal sustained; each party to pay own costs.

No. A-04-477: **Lewis v. Lewis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-689: **Salazar v. Diamond Hill Farms**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-731: **Krohn v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-800: **Murphy v. Brown**. Matter dismissed. See Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-04-1016: **Wilmot v. Snelling**. Appeal dismissed. See, rule 7A(2): *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-04-1109: **In re Estate of Putnam**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-1222: **Stamm v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-1285: **Skradski v. Cook**. Appeal dismissed. See rule 7A(2).

No. A-04-1333: **Cash v. Clarke**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004).

No. A-04-1350: **Neville v. Homeworx Custom Remodeling**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-04-1383: **Brown v. Brown**. Appeal dismissed. See, rule 7A(2); *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999).

No. A-04-1387: **State on behalf of Wieser v. Wieser**. Summarily affirmed. See rule 7A(1).

No. A-04-1391: **Tyler v. Physicians Mut. Ins. Co**. Affirmed. See rule 7A(1).

No. A-04-1403: **State v. Hyde**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Adams*, 7 Neb. App. 571, 585 N.W.2d 96 (1998).

No. A-04-1445: **Aslan Companies v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-1456: **Sehnert v. Sehnert**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-039: **State v. Hughan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-051: **Benson Park Plaza v. City of Omaha**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-102: **Wright v. Hart**. Judgment order of December 28, 2004, is summarily reversed and remanded for further proceedings. See, rule 7A(3); Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2004); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983); *Curley v. Curley*, 214 Neb. 780, 336 N.W.2d 103 (1983).

No. A-05-129: **Cave v. Clarke**. Affirmed. See, rule 7A(1); *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

No. A-05-147: **State v. McDougald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

No. A-05-186: **Deterding v. Neth**. Motion of appellant to reconsider our dismissal considered and sustained.

No. A-05-186: **Deterding v. Neth**. Reversed and remanded with directions.

No. A-05-197: **Evans on behalf of Trofholz v. Trofholz**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-211: **State v. Chavez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-252, A-05-253: **Silverman v. Collison**. Appeals dismissed. See rule 7A(2).

No. A-05-267: **State v. Griffin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-279: **Schreiner v. Schreiner**. Stipulation allowed; appeal dismissed.

No. A-05-318: **State v. Benish**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005); *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

No. A-05-331: **Gallardo v. Gallardo**. Affirmed. See, rule 7A(1); *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

No. A-05-345: **Tyler v. Auman**. Matter dismissed. See rule 7A(2).

No. A-05-351: **State v. Turley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-353: **Conn v. Conn**. Motion of appellee State for summary disposition sustained; order of district court entered February 18, 2005, vacated and cause remanded for further proceedings. See rule 7C.

No. A-05-362: **In re Interest of Patrick L**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-363: **In re Guardianship & Conservatorship of Wisniewski**. Summarily affirmed. See rule 7A(1).

No. A-05-365: **In re Estate of Schindler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-373: **Walton v. Department of Corrections**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-377: **State v. Bartunek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-381: **Timm on behalf of Tweedy v. Crook**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-05-391: **State v. Gray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-395: **Shepard v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-396: **Shepard v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-399: **Walker v. Malone**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

No. A-05-405: **State v. Anngello**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-412: **State v. Watkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-420: **Semin Construction v. Waldron**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-435: **National Loan Investors v. W.F.M., Inc**. Appeal dismissed. See rule 7A(2).

No. A-05-440: **Guerrero v. Guerrero**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-448: **State v. Mattson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-455: **State v. Villanueva**. Affirmed. See, rule 7A(1); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

No. A-05-470: **State v. Harwell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-472: **In re Estate of DeCamp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-473: **State v. Hayes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-478: **In re Estate of Malloy**. Summarily reversed and remanded. See, rule 7A(3); *In re Guardianship & Conservatorship of Bowman*, 12 Neb. App. 891, 686 N.W.2d 642 (2004).

No. A-05-484: **State v. Eissler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-487: **Hilgers v. Blue Cross and Blue Shield**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-490: **State v. Freeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-05-494, A-05-495: **State v. Roberson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-502: **State v. Kirkendall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-517: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-521: **State v. Hall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *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-05-530: **State v. Montgomery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-543: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-549: **State v. Werner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

No. A-05-550: **Samuel v. Nebraska State Penitentiary**. Motion of appellee for summary affirmance sustained. See, Neb. Rev. Stat. § 29-2801 (Reissue 1995); *Gallion v. Zinn*, 236 Neb. 98, 459 N.W.2d 214 (1990); *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977).

No. A-05-555: **State v. Burr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-568: **State v. Ajamu**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

No. A-05-569: **State v. Mendez-Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-571: **State v. Clark**. Appeal dismissed. See rule 7A(2).

Nos. A-05-573, A-05-574: **State v. McGregor**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

Nos. A-05-575, A-05-576: **State v. Blair**. Appellee's suggestion of remand sustained. Sentences vacated and cause remanded for further proceedings. See, Neb. Rev. Stat. § 29-2261(1) (Cum. Sup. 2004); *State v. Kellogg*, 10 Neb. App. 557, 633 N.W.2d 916 (2001).

No. A-05-581: **State v. Johnson**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998).

No. A-05-583: **Kaup v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-588: **Tran-Villarreal v. Villarreal**. Affirmed. See rule 7A(1).

No. A-05-594: **State v. Kelley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-598: **Kmiecik v. Erickson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-610: **Porter v. Neth**. Affirmed. See, rules 7A(1) and 9E; *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997); *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005).

No. A-05-611: **Chase v. Chase**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-05-615: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-618: **Clark v. Jansen**. Motions of appellees for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

No. A-05-620: **Von Seggern v. Von Seggern**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-624: **State v. Hunter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-632: **State v. Goynes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-633: **State v. Wilksen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-05-637: **Weiss v. Twin Cities Dermatopathology Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-641: **State v. Jeppson**. Stipulation of parties for summary reversal granted. See, rule 7C; *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001). Cause remanded for a new trial.

No. A-05-646: **State v. Schoenrock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-647, A-05-648: **State v. Chapman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-649: **Buggs v. Britten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. King*, 214 Neb. 855, 336 N.W.2d 576 (1983).

No. A-05-662: **State v. Estell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-664: **Lamprecht v. Lamprecht**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-666: **Grafton v. Columbia Ins. Group**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-667: **State v. Bretthauer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-671: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-676: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-05-677: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-678: **State v. Prior**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990).

No. A-05-682: **State v. Stekr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-684: **State v. Robinson**. Affirmed. See rule 7A(1).

No. A-05-697: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-708: **State v. Woodruff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-715: **State ex rel. Wagner v. Global Bus. Servs**. Stipulation allowed; appeal dismissed.

No. A-05-716: **State v. Hallman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-717: **State v. Fiala**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-719: **State v. Longo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-731: **Country Cars v. Price**. Appeal dismissed. See rule 7A(2).

No. A-05-733: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-734: **State v. Mohorcic**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-735: **State v. Deng**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-736: **State v. Heckenliable**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-737 through A-05-740: **State v. Greathouse**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-741: **State v. Cutshall**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2004); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-05-742: **State v. Flood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-754: **State v. Echols**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-755: **State v. Rocha**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998).

No. A-05-756: **State v. Landrum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-761: **State v. Riley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-762: **State v. Friend**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-767: **State v. Dohmen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-770: **State v. Smart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-773: **State v. Harrahill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-774: **State v. Harrahill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-775: **Tyler v. Kyler**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969).

No. A-05-776: **State v. Rickard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-783: **Tyler v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-791: **State v. Fry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-793: **Papio-Missouri River NRD v. Wright Investments**. Matter dismissed. See, rule 7A(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-05-796: **State v. Lange**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-798: **Arias v. Board of Parole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Moore v. Nebraska Bd. of Parole*, 12 Neb. App. 525, 679 N.W.2d 427 (2004).

No. A-05-799: **Friedman v. Friedman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-803: **Bush v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-805: **Randles v. Kirby**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-806: **In re Interest of Caleb H. & Savannah H**. Matter dismissed. See rule 7A(2).

No. A-05-809: **Soto v. Nau**. Stipulation allowed; appeal dismissed.

No. A-05-810: **State v. Hynes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-811: **State v. Marion**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-813: **State v. Amador-Rosario**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-814: **Tyler v. Stahlecker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-816: **State v. Shufeldt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-819: **Maloley v. Maloley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-820: **Kumar v. Thelappurath**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-821: **Dunn v. City of Bellevue**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-824: **State v. Millan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-825: **Gartin v. Brill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-826: **State v. Allen**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-2301.02(1)(b) (Cum. Supp. 2004); *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); *Moore v. Nebraska Bd. of Parole*, 12 Neb. App. 525, 679 N.W.2d 427 (2004).

No. A-05-830: **Barker v. Given**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-831: **State v. Sanchez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-833: **Tyler v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-840: **Idealhire, Inc. v. Digital Partners**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-841: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

Nos. A-05-842 through A-05-844: **State v. Young**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-845: **Nielsen v. Nielsen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-850: **State v. White**. Motion of appellee for summary affirmance sustained. Sentence orally pronounced by county court affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988); *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999); *State v. Erb*, 6 Neb. App. 672, 576 N.W.2d 839 (1998).

No. A-05-855: **Akins v. Froisland**. Motion for summary affirmance sustained. See, rule 7B(2); *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Revels v. Vincenz*, 382 F.3d 870 (8th Cir. 2004), *cert. denied, Revels v. Wimp*, 546 U.S. 860, 126 S. Ct. 371, 163 L. Ed. 2d 140 (2005); *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993); *Wishon v. Gammon*, 978 F.2d 446 (8th Cir. 1992); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004); *Newton v. Huffman*, 10 Neb. App. 390, 632 N.W.2d 344 (2001).

No. A-05-856: **Akins v. Leduc**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-858: **State v. Chavez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-862: **State v. Gonzalez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-863: **Friedman v. Friedman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1901 (Reissue 1995).

No. A-05-869: **Smith v. Brokam, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-874: **Dike v. Nichols**. Stipulation considered; appeal dismissed.

No. A-05-878: **Johnson v. Burrell**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-885: **Finnegan v. Leslie**. Appeal dismissed as moot. See, rule 7A(2); *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

No. A-05-886: **State v. Stinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-891: **Bush v. Cheuvront**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-05-899, A-05-900: **In re Interest of Alijah L. & Andre L**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-05-901: **In re Interest of Nalf A. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-902: **In re Interest of Russell K. et al**. Appeal dismissed. See, rule 7A(2); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998).

No. A-05-907: **State ex rel. Bruning v. California Alternative High Sch**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1144.01 and 25-1329 (Cum. Supp. 2004).

No. A-05-908: **State v. Vanhunnik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-4005(3)(a) and (4)(c) (Cum. Supp. 2004); *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-05-909, A-05-910: **State v. Foster**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-913: **State v. Veath**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-914: **State v. Rodriguez**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-05-917, A-05-918: **State v. Vandorien**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-919: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-923: **State v. Byers**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-924: **Smith v. City of Omaha**. Affirmed. See rule 7A(1).

No. A-05-926: **In re Guardianship & Conservatorship of Dunn**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-05-927: **State v. Haith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-931: **AFSCME Local 251 v. City of South Sioux City**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-933: **State ex rel. Tyler v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-940: **State v. Jacobs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-941: **State v. Tyndall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-942: **State v. Marrero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005); *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

No. A-05-943: **McGhee v. Security National Bank**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-05-944: **Brook View, LLC v. Brook Valley Ltd. Part**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-946: **State v. Knutson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-949, A-05-950: **State v. Huss**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-951: **State on behalf of Claypool v. Bush**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-952: **Okwumuo v. Cornhusker Bank**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). See, also, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-953: **Kerr v. Board of Regents**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-953: **Kerr v. Board of Regents**. Motion of appellant for rehearing sustained. Order dismissing appeal vacated and appeal reinstated. See, Neb. Rev. Stat. § 85-901 (Reissue 1999); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-957: **State v. Evans**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-961: **State v. Gonzales**. Affirmed. See rule 7A(1).

No. A-05-968: **State v. Brooks**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-824(2) (Cum. Supp. 2004); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-05-969: **State v. Baeza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-970: **State v. Parker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-975: **Gardner v. Tuesday**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-983: **Randles v. Nichols**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-986: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-988: **Rab v. Muhammad**. Motion for summary dismissal sustained; appeal dismissed. See *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

No. A-05-989: **Rab v. Muhammad**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998); *Ponseigo v. Mary W.*, 267 Neb. 72, 672 N.W.2d 36 (2003); *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003); *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

No. A-05-990: **Aguon v. Mathis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-994: **Concerned Citizens v. Boone Cty. Bd. of Comrs**. Motions of appellees for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005); *Hawkins Constr. Co. v. Director*, 240 Neb. 1, 480 N.W.2d 183 (1992).

No. A-05-996: **State v. Smick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-997: **State v. Smick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1001: **State v. Beckner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1002: **State v. Pavon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1009: **Billups v. Clarke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1010: **State ex rel. Tyler v. Houston**. Affirmed. See rule 7A(1).

No. A-05-1013: **Foreman v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1014: **State v. Sundermeier**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1016: **State v. Roberson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1023: **State v. Conn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001).

No. A-05-1025: **In re Interest of David Q**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 71-930 (Cum. Supp. 2004).

No. A-05-1030: **State v. Schmader**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1040: **Detamore v. Beck**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1041: **State v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1042: **State v. Velazquez**. Affirmed. See rule 7A(1).

No. A-05-1044: **State v. Montin**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1045: **State v. Kintzle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1048: **Kostos v. Kostos**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-05-1053: **Tyler v. Rife Construction**. Appeal dismissed. See rule 7A(2).

No. A-05-1054: **Kelly v. Botos**. Stipulation allowed; appeal dismissed.

No. A-05-1055: **Gartin v. Brill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1057: **State v. Hartung**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1058: **State v. Hays**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003); *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003); *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-05-1060: **Willmore v. Department of Corr. Servs. Appeals Bd**. Affirmed. See rule 7A(1).

No. A-05-1061: **Renter v. Seidenburg**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1062: **Zechmann v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1063: **State on behalf of Meyers v. Meyers**. Appeal dismissed. See rule 7A(2).

No. A-05-1065: **Reynolds v. Thomas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1068: **In re Interest of Dwight R**. Appeal dismissed. See rule 7A(2).

No. A-05-1068: **In re Interest of Dwight R**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-05-1069: **State v. O'Neal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1070: **State v. Pecka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1071: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1074: **Japp v. Papio-Missouri River NRD**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-05-1078: **In re Adoption of Khalid E**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 43-113 (Reissue 2004); *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

No. A-05-1080: **State v. Tylka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004); *State v. Martinez*, 250 Neb. 597, 550 N.W.2d 655 (1996); *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *Jeppesen v. State*, 154 Neb. 765, 49 N.W.2d 611 (1951).

No. A-05-1081: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1083: **Thelen v. State**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1085: **In re Interest of Desiree G**. Appeal dismissed. See Neb. Rev. Stat. § 43-287.01 (Reissue 2004).

Nos. A-05-1089, A-05-1090: **State v. Hansen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-1093: **Tyler v. University of Nebraska**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1095: **Brody v. Nebraska Dept. of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1097: **State v. Miller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1101: **In re Estate of Rollman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1102: **Villarreal v. Villarreal**. Order of August 31, 2005 (filed October 26, 2005), affirmed. See, rule 7B(2); *Locke v. Volkmer*, 8 Neb. App. 797, 601 N.W.2d 807 (1999).

No. A-05-1103: **Johnson v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1104: **Swetson v. Bender**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1105: **State v. Vannortwick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1107: **State v. Todd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1109: **In re Interest of Falcon H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1110: **Jacobson v. State Board of Education**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1905 (Reissue 1995) and 25-1931 (Cum. Supp. 2004); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-1111: **State v. Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1112: **State v. Manning**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1113: **County of Adams v. Arthur**. Appeal dismissed. See, rule 7A(2); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

No. A-05-1114: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,197(5) (Reissue 2004); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005); *State v. Turner*, 263 Neb. 896, 644 N.W.2d 147 (2002).

No. A-05-1117: **State v. Portillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

No. A-05-1118: **State v. Goertz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1119: **State v. Goertz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1122: **Jensen v. Jensen**. Appeal dismissed. See rule 7A(2).

No. A-05-1124: **State v. Kleve**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1127: **Citizens of Decatur v. Lyons-Decatur Sch. Dist**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-05-1128: **Holzapfel v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1129: **Classe v. Fitzgerald, Schorr**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1301 and 25-1912(3) (Cum. Supp. 2004).

No. A-05-1133: **Schmidt v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1134: **Kramer v. Charter Oak Fire Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1135: **Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

No. A-05-1136: **State v. Concannon**. Order of district court summarily reversed, and cause remanded. See, rule 7A(3); *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990); *State v. Olson*, 5 Neb. App. 951, 568 N.W.2d 273 (1997).

No. A-05-1137: **In re Interest of Larry D**. Affirmed. See rule 7A(1).

No. A-05-1139: **State v. Philby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1143: **State v. Nguyen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *State v. Cardona*, 10 Neb. App. 815, 639 N.W.2d 653 (2002).

No. A-05-1144: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1146: **Kenley v. Nebraska Liquor Control Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1150: **Bush v. County of Lancaster**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1151: **State v. Hodges**. Appeal dismissed. See rule 7A(2).

No. A-05-1152: **State v. Hodges**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1158: **State v. Fountain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1159: **State v. Zuniga**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1161: **Brodax v. Lincoln Mgmt. Assocs**. Stipulation allowed; appeal dismissed.

No. A-05-1167: **State on behalf of Fosdick v. Edwards**. Motion of appellee Bosak for summary dismissal for mootness sustained; appeal dismissed as moot.

No. A-05-1169: **Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

Nos. A-05-1170, A-05-1171: **State v. Kaiser**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-1173: **State v. Yeager**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1174: **Archibald v. Allen**. Appeal dismissed. See rule 7A(2).

No. A-05-1175: **Jones v. Jones**. Appeal dismissed. See rule 7A(2).

No. A-05-1178: **In re Interest of Jamie H. et al**. Appeal dismissed. See rule 7A(2). Juvenile court's order of September 12, 2005, vacated.

No. A-05-1179: **State v. Sommer**. Appellee's suggestion of remand, to which appellant has filed no response, is granted. Final order denying appellant's motion for absolute discharge is reversed and cause is remanded with directions. See, Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995); *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998); *State v. Droz*, 14 Neb. App. 32, 703 N.W.2d 637 (2005).

No. A-05-1180: **State v. Fox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1181: **In re Interest of Aaron K**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1186: **State v. Weiler**. Affirmed. See, rule 7A(1); *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004).

No. A-05-1187: **State v. Ladd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1188: **State v. York**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-1191, A-05-1192: **State v. Baxter**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1193: **Conley v. Hogan**. Stipulation allowed; appeal dismissed.

No. A-05-1194: **M & K Constr. & Eng. v. Franklin Pub. Sch**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989); *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

No. A-05-1195: **Hansen v. Vampola**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1196: **State v. Sandman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1199: **State on behalf of Kopystynsky v. Kopystynsky**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1202: **In re Interest of Faith M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1203: **In re Interest of Dante M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1205: **Inspro, Inc. v. WBE Company**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1209: **Capital One Bank v. Vigil**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-05-1210: **State v. Murphy**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1210: **State v. Murphy**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-05-1216: **Droud v. Droud**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1218: **State v. Basden**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-05-1219: **State v. Basden**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-05-1222: **State v. Jenkins**. Appellee's suggestion of remand for a new trial granted. See *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

No. A-05-1225: **SLF Series A v. TC Properties**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1228: **Tyler v. Clarke**. Motions of appellees for summary affirmance granted. See, *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

No. A-05-1229: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

No. A-05-1231: **In re Name Change of Henry**. Appeal dismissed. See, rule 7A(2); *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

No. A-05-1232: **Metzger v. Village of Cedar Creek**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1233: **Arias v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1235: **Becker v. PBX, Inc**. Appeal dismissed. See, rule 7A(2): *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005).

No. A-05-1236: **Ray v. Ray**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1237: **Koch v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1238: **In re Guardianship & Conservatorship of Dunn**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1239: **State v. Culp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1241: **State v. Lickliter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1243: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1244: **State v. Minard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); *State v. Brown*, 14 Neb. App. 508, 710 N.W.2d 337 (2006).

Nos. A-05-1245, A-05-1246: **State v. Griffin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1248: **Tyler v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1254: **State v. Lee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1259: **State v. Sensenbach**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1260: **State v. Smith**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1275: **State v. Ebeling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1276: **Diamond Custom Tile v. Khan**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1277: **Caston v. TMW Enters**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1278: **Grove v. Neth**. Affirmed. See, rule 7A(1); *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

No. A-05-1279: **State v. Rivero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1280: **HGR Acquisitions v. DeWall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1282: **State v. Larsen**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-1283: **Howard v. Nebraska Dept. of Corr. Servs**. Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1284: **Howard v. Nebraska Dept. of Corr. Servs**. Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1285: **Howard v. Nebraska Dept. of Corr. Servs**. Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1286: **Howard v. Nebraska Dept. of Corr. Servs**. Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1287: **Tucker v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1289: **In re Estate of Handley**. Stipulation allowed; appeal dismissed.

No. A-05-1290: **In re Estate of Handley**. Stipulation allowed; appeal dismissed.

No. A-05-1293: **Champion Window Co. of Omaha v. Andersen**. Appeal dismissed. See rule 7A(2).

No. A-05-1294: **State v. Matteo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1296: **State v. Zmievski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1298: **State v. Rhodes**. Appeal dismissed. See, rule 7A(2); *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000); *State v. Steinbach*, 11 Neb. App. 468, 652 N.W.2d 632 (2002).

No. A-05-1302: **State v. Henning**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1303: **Schirmer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1307: **State v. Schmutte**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1309: **Babbitt v. Hahn**. Appeal dismissed. See, rule 7B(1); *I.P. Homeowners v. Morrow*, 12 Neb. App. 119, 668 N.W.2d 515 (2003); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001). See, also, *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-05-1310: **Ryan v. Galbraith**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-05-1312: **State v. Cline**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1313: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1314: **State v. Mann**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1318: **State v. Simons**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-1319: **State v. Bride**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1320: **State v. Brown**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1321: **Roberts v. Steppat**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1315 (Cum. Supp. 2004) and 25-1902 (Reissue 1995).

No. A-05-1322: **Lynch v. Sparks**. Affirmed. See, rule 7A(1); *Knerr v. Swigard*, 243 Neb. 591, 500 N.W.2d 839 (1993).

No. A-05-1323: **Lockman v. Diekmann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1326: **In re Interest of Richard C**. Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 43-2,106.01 (Reissue 2004).

No. A-05-1327: **Petersen v. Petersen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1329: **Ruegge v. State**. Appeal dismissed as filed out of time.

No. A-05-1334: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1336: **State v. Belek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1338: **Tyler v. Heineman**. Appeal dismissed. See rule 7A(2).

No. A-05-1339: **Harris v. Rummel**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1340: **Discover Bank v. Bradley**. Affirmed. See, rule 7A(1); *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997).

No. A-05-1341: **Brown v. Beltramea**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-05-1342, A-05-1343: **State v. Fisher**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-1344: **State v. Haley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1345: **State v. Murphy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1346: **State v. Burton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1347: **Risney v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

No. A-05-1348: **Swift Bird v. Swift Bird**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1352: **State v. Fernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 558 N.W.2d 556 (1999).

No. A-05-1353: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *Newton v. Huffman*, 10 Neb. App. 390, 632 N.W.2d 344 (2001); *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000).

No. A-05-1354: **Manning v. Manning**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-05-1355: **Beckner v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-1356: **Beckenhauer v. Beckenhauer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1360: **Russell v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1362: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1363: **State v. McCoy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1364: **State v. Hawkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1367: **State v. McKinney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1368: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1370: **In re Interest of Cyrus P**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 43-2,106.01 (Reissue 2004) and 25-1912 (Cum. Supp. 2004).

No. A-05-1371: **Spivey v. Werner Enters**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-1373: **State on behalf of Stevens v. Stevens**. Appeal dismissed. See, rule 7A(2); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-05-1375: **State v. Pfeifer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1379: **Trout v. Neth**. Summarily affirmed. See rule 7A(1).

No. A-05-1380: **State on behalf of Strange v. Armendariz**. Appeal dismissed. See, rules 7A(2) and 1B(4); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-05-1386: **Keitges v. Keitges**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1389: **Braimah v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1390: **State v. Giesmann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,197(2) and (9) (Supp. 2003); *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992); *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989).

No. A-05-1391: **State v. Ellis**. 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. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

No. A-05-1392: **State v. Reid**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1398: **Day v. Day**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1400: **Jones v. Platteview Apartments**. Motion of appellees Platteview Apartments, Midstates Development, Terry Burns, and Jeanne Hinrich for summary dismissal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-05-1401: **Drucker v. Bejeris**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1402: **Merklin v. Curtis-Merklin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1403: **State v. Nattress**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1410: **Wilson v. Greater Omaha Packing**. Appeal dismissed. See rule 7A(2).

No. A-05-1411: **Villarreal v. Anderson**. Appeal dismissed. See rule 7A(2).

No. A-05-1413: **State v. Biloff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1414: **State v. Bussart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

No. A-05-1419: **State v. Barnes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1420: **State v. Reyes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1424: **Myers v. Myers**. Appeal dismissed. See, *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-05-1425: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1426: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1427: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1428: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1439: **State v. O'Neal**. Appeal dismissed. See, rule 7A(2); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-05-1440: **State v. Latzel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1441: **Wyatt v. Wyatt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1442: **Piernicky v. Union Pacific RR. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 466 N.W.2d 73 (1991).

No. A-05-1444: **Tyler v. Lustgarten**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1447: **State v. Cook**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1449: **First Nat. Bank of Omaha v. Moore**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1450: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1451: **State v. Liechti**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1452: **State v. Gerren**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1453: **State v. Lentz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1455: **State v. McClure**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1456: **State v. Grantham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1458: **State v. Aldaba**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1459: **State v. Schommer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1460: **State v. Schneider**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1462: **State v. Webster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1468: **Buggs v. Department of Corr. Servs**. Affirmed. See rule 7A(1).

No. A-05-1469: **State v. Roblero-Ramirez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1470: **Martin v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301(1) (Cum. Supp. 2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-05-1471: **Martin v. Board of Parole**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301(1) (Cum. Supp. 2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-05-1472: **In re Interest of Gabriela H. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1474: **State v. Rolo**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1479: **State v. Brewer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1480: **State v. Fernau**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1481: **State v. Barney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-1482 through A-05-1485: **State v. Grandel**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

Nos. A-05-1491 through A-05-1494: **State v. Clifford**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-05-1495, A-05-1496: **State v. Grant**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1497: **State v. Dunkinsel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1499: **State v. Mettin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1501: **Carpenter v. Parrella Motors**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1501: **Carpenter v. Parrella Motors**. Motion of appellant to reinstate appeal sustained. Appeal reinstated.

No. A-05-1502: **G. Auten Farms v. Adams Cty. Bd. of Adjustment**. Appeal dismissed. See, rule 7A(2); *Morello v. City of Omaha*, 5 Neb. App. 785, 565 N.W.2d 41 (1997).

No. A-05-1512: **State v. Varland**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

No. A-05-1514: **State v. Gormley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-05-1515 through A-05-1517: **State v. Walker**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-05-1519: **Tyler v. Auman**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-05-1521: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1524: **McCroy v. McCroy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1528: **Saylor v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-1530: **State v. Luea**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-05-1531: **State v. Leija**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1533: **In re Guardianship & Conservatorship of Dunn**. Appeal dismissed. See rule 7A(2).

No. A-05-1534: **State v. Spears**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1536: **State v. Hines**. Stipulation allowed; appeal dismissed.

No. A-05-1537: **State v. Downing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1539: **Vasquez v. Wright**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1541: **State v. Soash**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1542: **State v. Soash**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1545: **State v. Hansen**. Appeal dismissed. See, rule 7A(2); *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

No. A-05-1547: **Ridder v. Javed**. Stipulation allowed; appeal dismissed.

No. A-05-1551: **Discover Bank v. Runyan**. Affirmed. See rule 7A(1).

No. A-05-1552: **Morrison v. Mercer**. Appeal dismissed. See, rule 7A(2); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

No. A-05-1554: **In re Interest of Amanda M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1557: **Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

No. A-05-1558: **Berlin v. Murray**. Appeal dismissed. See, rule 7A(2); *Peterson v. Damoude*, 95 Neb. 469, 145 N.W. 847 (1914); *Vrana v. Vrana*, 85 Neb. 128, 122 N.W. 678 (1909).

No. A-05-1562: **Taylor v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

No. A-05-1563: **State v. Schooler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1564: **State v. Mesadieu**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1565: **In re Interest of Jamia F**. Motion of appellee for summary dismissal sustained; appeal dismissed as moot. See rule 7B(1).

No. A-05-1569: **State ex rel. Tyler v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1571: **Kessler v. Kessler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1572: **State v. Korth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1574: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-05-1576: **State v. Lynam**. Motion of appellee for summary dismissal sustained.

No. A-05-1578: **State v. Sauvage**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1579: **State v. Lewis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-003: **Akins v. Clarke**. Appeal dismissed. See, rule 7A(2); *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

No. A-06-004: **Akins v. Quinn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003); *State v. Smith*, 13 Neb. App. 477, 695 N.W.2d 440 (2005).

No. A-06-005: **Akins v. Leduc**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Abdullah v. Nebraska Dept. of Corr. Servs.*, 246 Neb. 109, 517 N.W.2d 108 (1994); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991).

No. A-06-007: **State v. Grant**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-009: **In re Guardianship & Conservatorship of Masek**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-013: **Sannicks v. Lanik**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-014: **State v. Ashcraft**. Matter dismissed.

No. A-06-015: **Liming v. Liming**. Appeal dismissed. See *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993).

Nos. A-06-017, A-06-018: **State v. Dixon**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-019: **State v. Stubblefield**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-021: **State v. Borseth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-022: **State v. Lyons**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-023: **Atelier Partners v. Data Duplicating**. District court's order of December 8, 2005, affirmed. See rule 7A(1).

No. A-06-024: **Hamilton v. Hamilton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-026: **State ex rel. Tyler v. Houston**. Summarily affirmed. See rule 7A(1).

No. A-06-028: **Olson v. Olson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-031: **In re Interest of Karen R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-039: **Rodwell v. State**. Appeal dismissed. See rule 7A(2).

No. A-06-040: **In re Revocable Trust of Blauhorn**. Appeal dismissed. See, rule 7A(2); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

No. A-06-043: **Trupp v. Host Marriott Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-048: **Zitek v. State ex rel. State Real Estate Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-06-051: **Arias v. Department of Corr. Servs**. Appeal dismissed as premature. See, rule 7A(2); *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002).

No. A-06-052: **Tyler v. Department of Corr. Servs**. Affirmed. See rule 7A(1).

No. A-06-053: **Tyler v. Houston**. Affirmed. See, rule 7A(1); *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998).

No. A-06-054: **State v. Jorgensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-056: **State v. Toles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-057: **State v. Werner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-058: **State v. Bradley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-059: **State v. Wehr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-061: **Shaddy v. Department of Corr. Servs. Appeals Bd**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-065: **IBEW v. City of Gering**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-071: **Cole v. Clarke**. Appeal dismissed. See, rule 7A(2); *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

No. A-06-076: **State ex rel. Tyler v. Houston**. Affirmed. See, rule 7A(1); *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998).

No. A-06-080: **State v. Mendoza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-082: **Sand Livestock Systems v. Svoboda**. Motion of appellee Area Citizens for Res. and Envtl. Support for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004).

No. A-06-083: **State v. Billington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-084: **State v. Stanko**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-087: **Bradley v. Whelan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-088: **State v. Drahota**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-089: **State v. Wicjiek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-099: **Ellis v. Ellis**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

No. A-06-101: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000); *State v. Guzman-Gomez*, 13 Neb. App. 235, 690 N.W.2d 804 (2005).

No. A-06-104: **Eastern Neb. Against Chem. Trespass v. Environ. Qual**. Appeal dismissed. See, rule 7A(2); *State v. Plymate*, 8 Neb. App. 513, 598 N.W.2d 65 (1999).

No. A-06-106: **State v. O'Doniel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-107: **State v. Dotson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-108: **State v. Hays**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-109: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-110: **State v. Lambert**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004).

No. A-06-112: **State v. Anaya**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006); *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

No. A-06-113: **Marshall v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-115: **State v. Kirkendall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-116: **Watkins v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-122: **State v. Hassan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

No. A-06-124: **State v. Lohman**. Appeal dismissed. See, rule 7A(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-06-128: **State v. Basden**. Appeal dismissed. See rule 7A(2).

No. A-06-129: **State v. Basden**. Appeal dismissed. See rule 7A(2).

No. A-06-132: **Fitzgibbon v. Carf Realty 98**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-133: **In re Guardianship of Misle**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-134: **State v. Purvis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-138: **State v. Hymond**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-139: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-141: **Hall v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-143: **MBNA America Bank v. Olmer**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-147: **State v. Vera**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-150: **Polk Cty. Rec. Assn. v. Susquehanna Patriot Commercial Leasing**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-151: **State v. Lunsford**. Appeal dismissed.

No. A-06-152: **State v. Lunsford**. Appeal dismissed.

No. A-06-155: **State v. Tyler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-156: **Martin v. Goynes**. Motion of appellant to dismiss appeal granted; appeal dismissed at cost of appellant.

No. A-06-157: **State on behalf of Goynes v. Martin**. Motion of appellant to dismiss appeal granted; appeal dismissed at cost of appellant.

No. A-06-161: **Rech v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-06-163, A-06-164: **State v. Fisher**. Motions of appellee for summary affirmance sustained; judgments affirmed.

No. A-06-165: **State v. Banks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-167: **Marriott v. SID No. 230**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960).

No. A-06-168: **State v. Beversdorf**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-174: **State v. Snyder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-175: **State v. Aldez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-183: **Tyler v. Houston**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-184: **Arias v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); *Portley-El v. Brill*, 288 F.3d 1063 (8th Cir. 2002); *Martin v. Curry*, 13 Neb. App. 171, 690 N.W.2d 186 (2004).

No. A-06-185: **Dush v. Vishay Dale Electronics**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-186: **State v. Steinman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-188: **State v. Woita**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-189: **State ex rel. Tyler v. Houston**. Summarily affirmed. See, rule 7A(1); *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

No. A-06-197: **Faxon v. Faxon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-205: **In re Interest of Nicole P. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-210: **State v. Knight**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-218: **State v. Luff**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-225: **State v. Redding**. Appeal dismissed; that part of the district court's order affirming the sentence is vacated. See, rule 7A(2); Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2004); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-231: **In re Estate of Chrisp**. Appeal dismissed. See, rule 7A(2); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 382 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-234: **State v. Lassen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-235: **In re Interest of Fedalina G**. Matter dismissed. See *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-238: **Bakewell v. Department of Motor Vehicles**. Affirmed. See rule 7A(1).

No. A-06-240: **Ryan v. Galbraith**. Matter dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-244: **Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

No. A-06-245: **Bradley v. Kahn**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-246: **In re Interest of Stevi W**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-248: **Jacobson v. Board of Education**. Affirmed. See rule 7A(1).

No. A-06-257: **Lee v. Lee**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-258: **Foster v. BryanLGH Med. Ctr. East**. Appeal dismissed. See, rule 7A(2); *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005).

No. A-06-260: **State v. Sheldon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-261: **State v. Caskey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-262: **State v. Daye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-265: **Muller v. Muller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-266: **Waste Connections of Neb. v. Sarpy Cty. Bd. of Adjustment**. Stipulation allowed; appeal dismissed.

No. A-06-267: **Golliday v. Golliday**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-270: **Looby v. Toman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004).

No. A-06-271: **Peterson v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-277: **State v. Perez**. Affirmed. See, rule 7A(1); *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992).

No. A-06-280: **State v. Wright**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-286: **Clark v. Clark**. Appeal dismissed; district court's order of affirmance vacated. See, rule 7A(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-06-288: **In re Trust of Taylor**. Appeal dismissed. See rule 7A(2).

No. A-06-290: **Dunham v. State Patrol**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

Nos. A-06-295, A-06-296: **State v. Kenney**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-297: **Moore v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-298: **Hagedorn v. Lierman**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-06-299: **Hagedorn v. Lierman**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-06-309: **State v. Valdez**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-06-311: **Clark v. Clark**. Appeal dismissed. See, rule 7A(2); *Harvey v. Harvey*, 14 Neb. App. 380, 707 N.W.2d 444 (2005).

No. A-06-312: **In re Estate of Swisher**. Motion of appellee for summary dismissal and stipulations sustained. See rule 7B(1).

No. A-06-313: **In re Trust Agreement (1997) of Swisher**. Motion of appellee for summary dismissal and stipulations sustained. See rule 7B(1).

No. A-06-314: **In re Trust Agreement (1994) of Swisher**. Motion of appellee for summary dismissal and stipulations sustained. See rule 7B(1).

No. A-06-325: **State v. Ryan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-328: **Kulhanek v. Department of Motor Vehicles**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-328: **Kulhanek v. Department of Motor Vehicles**. Motion of appellant for rehearing sustained. Dismissal vacated and appeal reinstated.

No. A-06-329: **Hofferber v. City of Hastings**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-335: **In re Interest of Lauren T**. Appeal dismissed. See, rule 7A(2); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-06-349: **In re Interest of Brittany H**. Appeal dismissed. See rule 7A(2).

No. A-06-350: **State v. Foster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

No. A-06-355: **In re Interest of Ruben M. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-357: **Kanyer v. Union Pacific RR. Co**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-362: **Shafer v. Shafer**. Appeal dismissed. See, rule 7A(2); *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

No. A-06-362: **Shafer v. Shafer**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-06-366: **Keup v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-06-368: **Garden Chateau v. Sarpy Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019 (Supp. 2005); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-06-369: **State v. Leishman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-378: **Lamar Co. v. Omaha Zoning Bd. of Appeals**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-380: **Tyler v. Heineman**. Appeal dismissed. See rule 7A(2).

No. A-06-387: **Schlichtman v. Jacob**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-396: **State v. Krejci**. Stipulation allowed; appeal dismissed.

No. A-06-397: **Herrera v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-402: **In re Interest of Emma B**. Appeal dismissed. See, rule 7A(2); *County of Sarpy v. City of Garden*, 267 Neb. 943, 678 N.W.2d 740 (2004); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004).

No. A-06-414: **In re Guardianship of Stein**. Appeal dismissed. See, rule 7A(2); *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992); *J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-415: **State v. Anderson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-419: **In re Interest of Amanda M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-422: **Dreyovich v. Dreyovich**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-429: **Baack v. Baack**. Stipulation allowed; appeal dismissed.

No. A-06-439: **In re Interest of Krista K**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 43-2,106.01(1) (Reissue 2004) and 25-1912 (Cum. Supp. 2004).

No. A-06-443: **Lovejoy v. Department of Corr. Servs**. Appeal dismissed. See rule 7A(2).

No. A-06-444: **State v. Zerley**. Appeal dismissed. See rule 7A(2).

No. A-06-448: **In re Interest of Dawnvara W**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-452: **In re Interest of Thomas Z**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-06-455: **Jay v. Lembke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-456: **Neidhardt v. Welling**. Appeal dismissed. See, rule 7A(2); *State v. Plymate*, 8 Neb. App. 513, 598 N.W.2d 65 (1999); *Morello v. City of Omaha*, 5 Neb. App. 785, 565 N.W.2d 41 (1997).

No. A-06-467: **Farrell v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-470: **Stroh v. Stroh**. Appeal dismissed. See rule 7A(2).

No. A-06-480: **State v. Jackson**. Appeal dismissed. See rule 7A(2).

No. A-06-481: **State v. Gregory**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-482: **Leverone v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-488: **In re Interest of Litzy M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-504: **State v. Craig**. Appeal dismissed. See, rule 7A(2); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-510: **State v. Fitzgerald**. Appeal dismissed. See, rule 7A(2); *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988).

No. A-06-543: **State v. Jenkins**. Affirmed. See rule 7A(1).

No. A-06-547: **State ex rel. Linder v. Strong**. Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. A-06-560: **State v. Sharp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-564: **Velehradsky v. Velehradsky**. Appeal dismissed. See, rule 7A(2); *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999).

No. A-06-565: **Preister v. Roberts Pool & Spa**. Appeal dismissed; district court's order vacated. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

No. A-06-570: **In re Interest of Angelus M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-571: **Caton v. Clarke**. Appeal dismissed. See, rule 7A(2); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

No. A-06-576: **Szawicki v. Szawicki**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-577: **Mitchell v. Williams**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-579: **State v. Thomas**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-584: **State v. Weiler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-585: **Petrie v. Petrie**. Appeal dismissed. See, rule 7A(2); *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006); *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-586: **State on behalf of Evans v. Buckhalter**. Appeal dismissed. See rule 7A(2).

No. A-06-593: **State v. Larsen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-597: **Brody v. Clarke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-598: **Eurek v. Robbins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-605: **State v. Beck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-609: **State on behalf of Luna v. Luna**. Appeal dismissed. See, rule 7A(2); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-06-627: **Villarreal v. Douglas Cty. Mediation & Conciliation Ct**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2004); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-06-633: **In re Estate of Breinig**. Appeal dismissed. See, rule 7A(2); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-634: **Realty Trust Group v. General Growth Properties**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-652: **Harris v. Rummel**. Appeal dismissed. See, rule 7A(2); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-06-670: **Travelers Indemnity Co. v. Heim**. Appeal dismissed. See rule 7A(2).

No. A-06-671: **State v. Larsen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-672: **State v. Larsen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-686: **State v. Putz**. Appeal dismissed as moot. See rule 7D.

No. A-06-696: **Tyler v. Houston**. Appeal dismissed. See rule 7A(2).

No. A-06-705: **Chapman v. Schroeder**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-06-716: **In re Interest of Melissa A. & Kenna S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-781: **State v. Nichols**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-822: **State v. Schonlau**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-860: **Coffey v. County of Otoe**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-03-560: **Keller v. State**. Petition of appellant for further review overruled on October 13, 2005.

No. A-03-630: **C & L Industries v. Kiviranta**, 13 Neb. App. 604 (2005). Petition of appellee for further review overruled on September 21, 2005.

No. A-03-721: **McDermott v. Keenan**, 13 Neb. App. 710 (2005). Petition of appellant for further review overruled on September 14, 2005.

No. S-03-924: **Didier v. Ash Grove Cement Co**. Petition of appellee for further review sustained on February 23, 2006.

No. A-03-1136: **Meredith v. Schwarck Quarries**, 13 Neb. App. 765 (2005). Petition of appellant for further review overruled on October 13, 2005.

No. A-03-1167: **Hornbarger v. TMS Design Servs**. Petition of appellant for further review overruled on September 28, 2005.

No. A-03-1209: **Westergaard v. Westergaard**. Petition of appellant for further review overruled on September 14, 2005.

No. A-03-1217: **Kramper Family Farm v. Beef Products**. Petition of appellant for further review overruled on October 26, 2005.

No. A-03-1318: **Lynn v. Jelinek**. Petition of appellant for further review overruled on October 26, 2005.

No. A-03-1331: **Salber v. Salber**. Petition of appellee for further review overruled on April 12, 2006.

No. A-03-1345: **Vande Guchte v. Hoffman**. Petition of appellant for further review overruled on December 14, 2005.

No. A-03-1361: **McCombs v. Haley**, 13 Neb. App. 729 (2005). Petition of appellant for further review overruled on September 28, 2005.

No. A-03-1425: **Edlund v. 4-S, LLC**, 13 Neb. App. 800 (2005). Petition of appellee for further review overruled on November 23, 2005.

No. A-04-034: **Thille & Son Constr. v. Thille**. Petition of appellee for further review overruled on September 28, 2005.

No. A-04-066: **Johnson v. B & K Enters**. Petition of appellant for further review overruled on November 23, 2005.

No. A-04-077: **Vital Learning Corp. v. Talent Plus**. Petition of appellant for further review overruled on October 13, 2005.

No. A-04-146: **State v. Charles**. Petition of appellant for further review overruled on May 18, 2006.

Nos. A-04-153, A-04-437: **Ord v. AmFirst Invest. Servs.**, 14 Neb. App. 97 (2005). Petitions of appellee AmFirst Bank for further review overruled on December 14, 2005.

No. A-04-184: **In re Estate of Peters**. Petition of appellee Dennis Egge for further review overruled on April 26, 2006.

No. A-04-184: **In re Estate of Peters**. Petition of appellee Kevin Peters for further review overruled on April 26, 2006.

No. S-04-237: **Bronsen v. Dawes County**, 14 Neb. App. 82 (2005). Petition of appellant for further review sustained on November 16, 2005.

No. A-04-266: **Helvering v. Union Pacific RR. Co.**, 13 Neb. App. 818 (2005). Petition of appellant for further review dismissed on October 11, 2005, for failure to timely file the fee. See, rule 2F(1); *Robertson v. Rose*, 270 Neb. 466, 704 N.W.2d 227 (2005).

No. A-04-282: **Vater v. County of Lancaster**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. Petition of appellant for further review overruled on February 15, 2006.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. Petition of appellee for further review overruled on February 15, 2006.

No. A-04-502: **C. Goodrich, Inc. v. Thies**, 14 Neb. App. 170 (2005). Petition of appellee for further review overruled on February 23, 2006.

No. A-04-521: **State v. Schmidt**. Petition of appellant for further review overruled on November 30, 2005.

Nos. A-04-565, A-04-566: **State v. Policky**. Petitions of appellant for further review overruled on September 28, 2005.

No. A-04-582: **National Programs v. Heritage Admin. Servs**. Petition of appellant for further review overruled on March 15, 2006.

No. A-04-596: **State v. Holzer**. Petition of appellant for further review overruled on April 19, 2006.

No. A-04-607: **State v. Moyer**. Petition of appellant for further review overruled on January 5, 2006.

No. A-04-617: **In re Guardianship of Brenda B. et al.**, 13 Neb. App. 618 (2005). Petition of appellee for further review overruled on September 21, 2005.

No. S-04-627: **Roseland v. Strategic Staff Mgmt.**, 14 Neb. App. 434 (2006). Petition of appellee for further review sustained on April 12, 2006.

No. A-04-683: **Howe v. Hinzman**, 14 Neb. App. 544 (2006). Petition of appellant for further review overruled on May 18, 2006.

No. A-04-684: **Hute v. County of Lancaster**. Petition of appellant for further review overruled on January 5, 2006.

No. A-04-725: **State v. Feldhacker**. Petition of appellant pro se for further review overruled on October 26, 2005.

No. A-04-735: **Marti v. Marti**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-756: **Precision Enters. v. Duffack Enters.**, 14 Neb. App. 512 (2006). Petition of appellant for further review overruled on April 12, 2006.

No. A-04-770: **Anderson v. Anderson**. Petition of appellant for further review overruled on October 26, 2005.

No. A-04-770: **Anderson v. Anderson**. Petition of appellant pro se for further review overruled on October 26, 2005.

No. A-04-774: **Hughes v. Poyko-Post**. Petition of appellant for further review overruled on March 15, 2006.

No. A-04-777: **Vande Guchte v. Kort**, 13 Neb. App. 875 (2005). Petition of appellant for further review overruled on November 16, 2005.

No. A-04-829: **Messinger v. Forsman**. Petition of appellee for further review overruled on June 20, 2006, as filed out of time.

No. S-04-844: **State v. Lykens**, 13 Neb. App. 849 (2005). Petition of appellee for further review sustained on October 19, 2005.

Nos. A-04-848, A-04-849: **State v. Hernandez-Martinez**. Petitions of appellant for further review overruled on March 29, 2006.

No. A-04-893: **Peterson v. Peterson**, 14 Neb. App. 778 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-04-894: **Nielsen v. Nielsen**. Petition of appellee for further review overruled on October 19, 2005.

No. A-04-919: **State v. Rye**, 14 Neb. App. 133 (2005). Petition of appellant for further review overruled on March 1, 2006.

No. A-04-984: **State v. Romero**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1011: **State v. Groves**. Petition of appellant for further review overruled on October 26, 2005.

No. A-04-1037: **State v. Nguth**, 13 Neb. App. 783 (2005). Petition of appellee for further review overruled on October 13, 2005.

No. A-04-1041: **State v. Nunez**. Petition of appellant for further review overruled on February 1, 2006.

No. A-04-1080: **State v. McSwine**. Petition of appellant for further review overruled on June 7, 2006.

No. A-04-1096: **Bob Bennie Properties v. Design Data**. Petition of appellee for further review overruled on June 7, 2006.

No. A-04-1123: **Michael L. v. Angelita S**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1141: **State v. Belk**, 14 Neb. App. 53 (2005). Petition of appellee for further review overruled on February 15, 2006.

No. S-04-1158: **State v. Furrey**. Petition of appellant for further review sustained on September 21, 2005.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Farnam Bank for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Rupp for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellees Franzen and Widick for further review overruled on July 6, 2006.

No. A-04-1205: **Mickelsen v. Newton**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1213: **Hibbs v. Nebraska State Patrol**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1232: **Anderson v. Anderson**. Petition of appellant for further review overruled on March 1, 2006.

No. A-04-1249: **In re Interest of Sadie W. & Noah W**. Petition of appellant for further review overruled on November 30, 2005.

No. A-04-1251: **Campagna v. Higday**, 14 Neb. App. 749 (2006). Petition of appellant for further review overruled on July 12, 2006.

No. A-04-1254: **In re Interest of Olivia W. & Lucien W**. Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1257: **State v. McCardle**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1259: **State v. Dunn**, 14 Neb. App. 144 (2005). Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1259: **State v. Dunn**, 14 Neb. App. 144 (2005). Petition of appellee for further review overruled on December 14, 2005.

No. A-04-1260: **State v. Fountain**. Petition of appellant for further review overruled on May 24, 2006.

No. A-04-1272: **State v. Wells**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1274: **State v. Ramsay**. Petition of appellant for further review overruled on December 21, 2005.

No. A-04-1298: **State v. Anderson**, 14 Neb. App. 253 (2005). Petition of appellant for further review overruled on April 12, 2006.

No. A-04-1318: **Henderson v. Henderson**. Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1333: **Cash v. Clarke**. Petition of appellant for further review overruled on January 25, 2006.

No. A-04-1337: **Dworak v. Dworak**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1343: **State v. Alameen**. Petition of appellant for further review overruled on February 15, 2006.

No. A-04-1351: **State v. Smith**. Petition of appellee for further review overruled on September 28, 2005.

No. A-04-1352: **State v. Wayt**, 13 Neb. App. 759 (2005). Petition of appellant for further review overruled on January 5, 2006.

Nos. A-04-1357, A-05-105, A-05-388: **Partch v. Partch**. Petitions of appellant for further review overruled on June 21, 2006.

No. A-04-1361: **In re Guardianship of Breeahana C.**, 14 Neb. App. 182 (2005). Petition of appellant for further review overruled on January 5, 2006.

No. A-04-1366: **State v. Abboud**. Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1384: **Roepke v. Roepke**. Petition of appellant for further review overruled on April 12, 2006.

No. A-04-1403: **State v. Hyde**. Petition of appellant for further review overruled on January 19, 2006.

No. A-04-1415: **Arias v. Board of Parole**. Petition of appellant for further review overruled on September 14, 2005.

No. A-04-1419: **In re Interest of Travis B**. Petition of appellant for further review overruled on February 15, 2006.

No. A-04-1432: **Stauffer v. Stauffer**. Petition of appellant for further review overruled on November 23, 2005.

No. A-04-1434: **State v. Rodriguez**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1487: **Spence v. Bush**, 13 Neb. App. 890 (2005). Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1488: **State on behalf of Ephraim H. v. Jon P**. Petition of appellee Phillip R. for further review overruled on November 16, 2005.

No. A-05-011: **Scott v. Drivers Mgmt., Inc.**, 14 Neb. App. 630 (2006). Petition of appellant for further review overruled on June 21, 2006.

No. A-05-011: **Scott v. Drivers Mgmt., Inc.**, 14 Neb. App. 630 (2006). Petition of appellee for further review overruled on June 21, 2006.

No. A-05-026: **State v. Gilbert**. Petition of appellant for further review overruled on October 26, 2005.

No. A-05-028: **State v. Brown**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-050: **State v. Rodriguez**. Petition of appellant for further review overruled on October 19, 2005.

No. A-05-055: **In re Interest of Cody S**. Petition of appellant for further review overruled on November 30, 2005.

No. S-05-069: **State v. Caniglia**, 14 Neb. App. 714 (2006). Petition of appellee for further review sustained on June 28, 2006.

No. A-05-110: **Matthews v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-112: **State v. Sargent**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-114: **Grandt v. Douglas County**, 14 Neb. App. 219 (2005). Petition of appellant for further review overruled on February 1, 2006.

No. A-05-131: **State v. Gade**. Petition of appellant for further review overruled on December 21, 2005.

No. A-05-134: **In re Conservatorship of Anderson**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-146: **State ex rel. Bonner v. McSwine**, 14 Neb. App. 486 (2006). Petition of appellant for further review overruled on March 29, 2006.

No. A-05-202: **Wells v. Goodyear Tire & Rubber Co.**, 14 Neb. App. 384 (2005). Petition of appellant for further review overruled on March 29, 2006.

No. S-05-212: **State v. Tompkins**, 14 Neb. App. 526 (2006). Petition of appellant for further review granted on May 18, 2006.

No. A-05-214: **State v. Richards**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-218: **State v. Davey**. Petition of appellant for further review overruled on September 21, 2005.

No. A-05-223: **State v. Burks**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-224: **State v. Parnell**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-249: **State v. Romero**. Petition of appellant for further review overruled on September 26, 2005, as untimely filed.

No. A-05-250: **State v. George**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-258: **In re Interest of Tyreek T. & Asia R.** Petition of appellant for further review overruled on November 16, 2005.

No. A-05-274: **State v. Alm**. Petition of appellant for further review overruled on October 13, 2005.

No. A-05-286: **State v. La**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-300: **Hendrix v. Sivick**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-308: **State v. Roman**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-318: **State v. Benish**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-340: **In re Interest of Devin P. et al**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-347: **Gardner v. Negley**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-357: **State v. Parrott**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-370: **State v. Bernhardt**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-377: **State v. Bartunek**. Petition of appellant for further review overruled on February 1, 2006.

No. A-05-382: **In re Interest of Emma B**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-395: **Shepard v. Hill**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-397: **State v. Starks**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-419: **State v. Shelby**. Petition of appellant for further review overruled on October 13, 2005.

No. S-05-425: **In re Interest of Veronica H.**, 14 Neb. App. 316 (2005). Petition of appellant for further review sustained on March 1, 2006.

No. A-05-428: **State v. Arevalo-Martinez**. Petition of appellant for further review overruled on June 5, 2006, as filed out of time.

No. A-05-432: **State v. Wells**. Petition of appellant for further review overruled on November 30, 2005.

No. S-05-449: **Zach v. Nebraska State Patrol**, 14 Neb. App. 579 (2006). Petition of appellant for further review sustained on June 14, 2006.

No. A-05-456: **State v. Munoz**. Petition of appellant for further review overruled on October 13, 2005.

No. A-05-470: **State v. Harwell**. Petition of appellant for further review overruled on October 19, 2005.

No. A-05-471: **State v. Lopez**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-473: **State v. Hayes**. Petition of appellant for further review overruled on December 14, 2005.

Nos. A-05-481, A-05-482: **In re Interest of Zakary B. & Natasha B**. Petitions of appellee Pamela S. for further review overruled on February 15, 2006.

No. A-05-483: **State v. Howard**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-493: **State v. Grosvenor**. Petition of appellee for further review overruled on January 17, 2006, as filed out of time. See rule 2F(1).

No. A-05-503: **State v. Carter**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-512: **State v. Renteria**. Petition of appellant for further review overruled on October 3, 2005, as filed out of time.

No. S-05-529: **State v. Bruna**, 14 Neb. App. 408 (2006). Petition of appellant for further review sustained on April 12, 2006.

No. A-05-535: **State v. Schleiger**. Petition of appellant for further review overruled on December 21, 2005.

No. A-05-543: **State v. Brown**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-569: **State v. Mendez-Lopez**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-581: **State v. Johnson**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-588: **Tran-Villarreal v. Villarreal**. Petition of appellant for further review dismissed on June 22, 2006. See rule 2F(1).

No. A-05-590: **Ruzicka v. Dalton's Auto Center**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-595: **State v. O'Hara**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-596: **State v. James**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-610: **Porter v. Neth**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-625: **State v. Ornelas-Perez**. Petition of appellant for further review overruled on June 21, 2006.

Nos. A-05-647, A-05-648: **State v. Chapman**. Petitions of appellant for further review overruled on December 21, 2005.

No. A-05-649: **Buggs v. Britten**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-653: **State v. Rouse**. Petition of appellant for further review overruled on May 19, 2006, as untimely filed.

No. A-05-671: **State v. Hansen**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-682: **State v. Stekr**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-685: **State v. Bragg**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-692: **State v. Koch**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-736: **State v. Heckenliable**. Petition of appellant for further review overruled on November 30, 2005.

Nos. A-05-737 through A-05-740: **State v. Greathouse**. Petitions of appellant for further review overruled on February 23, 2006.

No. A-05-741: **State v. Cutshall**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-745: **State v. Head**, 14 Neb. App. 684 (2006). Petition of appellee for further review overruled on June 28, 2006.

No. A-05-790: **State v. Adamson**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-791: **State v. Fry**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-795: **Churchill v. Churchill**. Petition of appellant for further review overruled on June 28, 2006.

No. A-05-798: **Arias v. Board of Parole**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-800: **State v. Sextro**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-804: **State v. Haas**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-815: **Burnham v. Pacesetter Corp**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-815: **Burnham v. Pacesetter Corp**. Petition of appellees for further review overruled on May 18, 2006.

No. A-05-824: **State v. Millan**. Petition of appellant for further review overruled on February 1, 2006.

No. A-05-826: **State v. Allen**. Petition of appellant for further review overruled on February 1, 2006.

No. S-05-838: **Rasch v. Remedy Intelligent Staffing**. Petition of appellant for further review sustained on May 24, 2006.

No. A-05-841: **State v. Young**. Petition of appellant for further review overruled on March 1, 2006.

Nos. A-05-842 through A-05-844: **State v. Young**. Petitions of appellant for further review overruled on January 19, 2006.

Nos. A-05-866, A-05-867: **In re Interest of Frederick A. & Elliott A**. Petitions of appellant for further review overruled on January 19, 2006.

No. A-05-868: **State v. Jensen**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-872: **Homemakers v. Douglas Cty. Bd. of Equal**. Petition of appellee for further review overruled on June 14, 2006.

No. A-05-881: **State v. Murphy**, 14 Neb. App. 804 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-05-907: **State ex rel. Bruning v. California Alternative High Sch**. Petition of appellant for further review overruled on November 23, 2005.

No. A-05-957: **State v. Evans**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellee for further review overruled on July 6, 2006.

No. A-05-969: **State v. Baeza**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-972: **In re Interest of Peyton H**. Petition of appellee for further review overruled on March 22, 2006.

No. A-05-988: **Rab v. Muhammad**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-995: **Griffin v. Drivers Mgmt., Inc.**, 14 Neb. App. 722 (2006). Petition of appellee for further review overruled on June 21, 2006.

No. A-05-1009: **Billups v. Clarke**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1015: **State v. Arthur**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1017: **In re Interest of Amanda J**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1018: **State v. Stewart**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1023: **State v. Conn**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1030: **State v. Schmader**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1032: **In re Interest of Septembur L. & Jaden L**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1042: **State v. Velazquez**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1058: **State v. Hays**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-1068: **In re Interest of Dwight R**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1071: **State v. Rodriguez**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1072: **In re Interest of Chloe L. & Ethan L.**, 14 Neb. App. 663 (2006). Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1072: **In re Interest of Chloe L. & Ethan L.**, 14 Neb. App. 663 (2006). Petition of appellee Daniel L. for further review overruled on June 14, 2006.

No. A-05-1079: **In re Interest of Michael B. et al**. Petition of appellant for further review overruled on May 24, 2006.

No. A-05-1081: **State v. Fletcher**. Petition of appellant for further review overruled on March 29, 2006.

No. A-05-1086: **State v. Beck**. Petition of appellant for further review overruled on May 18, 2006.

Nos. A-05-1089, A-05-1090: **State v. Hansen**. Petitions of appellant for further review overruled on June 7, 2006.

No. A-05-1135: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on November 30, 2005.

No. A-05-1140: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1157: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1177: **In re Interest of Casey S. et al**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-1186: **State v. Weiler**. Petition of appellant for further review overruled on April 26, 2006.

No. A-05-1195: **Hansen v. Vampola**. Petition of appellant for further review overruled on July 14, 2006, as untimely filed. See rule 2F(1).

No. A-05-1209: **Capital One Bank v. Vigil**. Petition of appellee for further review overruled on April 26, 2006.

No. A-05-1210: **State v. Murphy**. Petition of appellant for further review overruled on February 27, 2006, as prematurely filed.

No. A-05-1233: **Arias v. Department of Corr. Servs**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1235: **Becker v. PBX, Inc**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1241: **State v. Lickliter**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1244: **State v. Minard**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1294: **State v. Matteo**. Petition of appellant for further review overruled on June 13, 2006, as untimely filed. See rule 2F(1).

No. A-05-1296: **State v. Zmievski**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1302: **State v. Henning**. Petition of appellant for further review overruled on May 5, 2006, as untimely filed.

No. A-05-1307: **State v. Schmutte**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1312: **State v. Cline**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1323: **Lockman v. Diekmann**. Petition of appellant for further review overruled on May 18, 2006.

Nos. A-05-1324, A-05-1325: **In re Interest of Chynne P. et al**. Petitions of appellant for further review overruled on August 8, 2006.

No. A-05-1329: **Ruegge v. State**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-1335: **In re Interest of Andrew S.**, 14 Neb. App. 739 (2006). Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1392: **State v. Reid**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-1400: **Jones v. Platteview Apartments**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-1407: **In re Interest of Brandon G**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1413: **State v. Biloff**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1414: **State v. Bussart**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1440: **State v. Latzel**. Petition of appellant for further review overruled on June 28, 2006.

No. A-05-1447: **State v. Cook**. Petition of appellant for further review overruled on May 24, 2006.

No. A-05-1455: **State v. McClure**. Petition of appellant for further review overruled on July 12, 2006.

No. A-05-1470: **Martin v. Department of Corr. Servs**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1471: **Martin v. Board of Parole**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1528: **Saylor v. Department of Corr. Servs**. Petition of appellant for further review overruled on March 15, 2006. See *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-05-1568: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 19, 2006. See rule 2F(3).

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on February 13, 2006.

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on March 7, 2006, as premature.

No. S-06-015: **Liming v. Liming**. Petition of appellant for further review sustained on May 18, 2006.

No. A-06-059: **State v. Wehr**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-071: **Cole v. Clarke**. Petition of appellant for further review overruled on June 7, 2006.

No. A-06-080: **State v. Mendoza**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant for further review overruled on June 28, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant pro se for further review overruled on June 28, 2006.

No. A-06-167: **Marriott v. SID No. 230**. Petition of appellant for further review overruled on July 6, 2006.

No. S-06-235: **In re Interest of Fedalina G**. Petition of appellant for further review sustained on July 19, 2006.

No. S-06-258: **Foster v. BryanLGH Med. Ctr. East**. Petition of appellant for further review sustained on July 6, 2006.

No. A-06-290: **Dunham v. State Patrol**. Petition of appellant for further review overruled on July 6, 2006.

No. A-06-365: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on June 20, 2006, as premature.

No. A-06-366: **Keup v. Department of Corr. Servs**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-402: **In re Interest of Emma B**. Petition of appellant for further review overruled on July 12, 2006.

No. A-06-602: **State ex rel. Tyler v. Department of Corrections**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-603: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-604: **Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-698: **State v. Tyler**. Petition of appellant for further review overruled on August 14, 2006, as premature. See rule 2F(1).

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-03-924: **Didier v. Ash Grove Cement Co**. 05 NCA No. 38. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-03-1059: **Morrissey v. Knippelmeyer**. 06 NCA No. 9. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-03-1331: **Salber v. Salber**. 06 NCA No. 7. Former opinion modified. Motions for rehearing overruled. Cassel, Judge.

No. A-04-147: **Acton v. Acton**. 06 NCA No. 15. Affirmed. Moore, Judge.

No. A-04-184: **In re Estate of Peters**. 05 NCA No. 41. Affirmed in part, and in part reversed. Inbody, Chief Judge.

No. A-04-257: **Hooper v. Hooper**. 05 NCA No. 40. Affirmed. Moore, Judge.

No. A-04-282: **Vater v. County of Lancaster**. 05 NCA No. 40. Affirmed. Cassel, Judge.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. 05 NCA No. 42. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-04-306: **State v. Weiler**. 05 NCA No. 47. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Judge.

No. A-04-348: **Springer v. Springer**. 05 NCA No. 45. Affirmed. Inbody, Chief Judge.

No. A-04-513: **Burrell v. Kwik Shop**. 05 NCA No. 42. Reversed and remanded for a new trial. Sievers, Judge.

No. A-04-514: **Wiseman v. Wiseman**. 05 NCA No. 39. Affirmed in part, and in part reversed. Carlson, Judge.

No. A-04-596: **State v. Holzer**. 06 NCA No. 10. Affirmed. Inbody, Chief Judge.

No. A-04-666: **Lascsak v. Hollingsworth**. 06 NCA No. 13. Affirmed. Moore, Judge.

No. A-04-673: **Erikson v. Abels**. 06 NCA No. 10. Affirmed. Sievers, Judge.

No. A-04-675: **Darling v. Midwest Partitions**. 05 NCA No. 47. Affirmed. Irwin, Judge.

No. A-04-709: **Royer v. Royer**. 06 NCA No. 13. Affirmed. Irwin, Judge.

No. A-04-732: **State v. Norris**. 06 NCA No. 2. Affirmed. Carlson, Judge.

No. A-04-735: **Marti v. Marti**. 06 NCA No. 5. Affirmed as modified. Carlson, Judge.

No. A-04-746: **State v. Horst**. 05 NCA No. 39. Affirmed. Irwin, Judge.

No. A-04-761: **Farmers Co-op Elev. Co. v. Jelinek**. 06 NCA No. 5. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-04-801: **Thomas v. First Nat. Life Ins**. 06 NCA No. 5. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-04-829: **Messinger v. Forsman**. 06 NCA No. 18. Reversed and remanded with directions. Carlson, Judge.

Nos. A-04-848, A-04-849: **State v. Hernandez-Martinez**. 06 NCA No. 3. Affirmed. Inbody, Chief Judge.

No. A-04-858: **Controlled Rain v. Sanders**. 06 NCA No. 20. Affirmed. Cassel, Judge.

No. A-04-865: **Monroe v. Monroe**. 06 NCA No. 20. Appeal dismissed. Moore, Judge.

No. A-04-867: **Perry v. Krone Digital Comm**. 05 NCA No. 40. Affirmed. Inbody, Chief Judge.

No. A-04-873: **Anderson v. Anderson**. 06 NCA No. 6. Affirmed. Moore, Judge.

No. A-04-884: **Nichols v. Nichols**. 06 NCA No. 18. Affirmed in part, and in part appeal dismissed. Irwin, Judge.

No. A-04-921: **Blair v. Nebraska Dept. of Corr. Servs**. 06 NCA No. 6. Affirmed. Cassel, Judge.

No. A-04-1041: **State v. Nunez**. 05 NCA No. 44. Affirmed. Moore, Judge.

No. A-04-1046: **Brokaw v. Spence**. 06 NCA No. 20. Affirmed. Inbody, Chief Judge.

No. A-04-1077: **Anderson v. Christensen**. 06 NCA No. 26. Affirmed in part, and in part reversed. Sievers, Judge.

No. A-04-1088: **Forgey v. Nebraska Dept. of Motor Vehicles**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-04-1096: **Bob Bennie Properties v. Design Data**. 06 NCA No. 15. Affirmed in part as modified, and in part reversed. Carlson, Judge.

No. A-04-1114: **Mruk v. Mruk**. 06 NCA No. 10. Affirmed. Cassel, Judge.

No. A-04-1135: **Higgins v. Higgins**. 05 NCA No. 51. Affirmed. Carlson, Judge.

No. A-04-1168: **U.S. Bank Nat. Assn. v. Empire Park Joint Venture**. 06 NCA No. 21. Affirmed. Inbody, Chief Judge.

No. A-04-1193: **Eran Indus. v. City of La Vista**. 06 NCA No. 26. Affirmed in part, and in part reversed. Irwin, Judge.

No. A-04-1205: **Mickelsen v. Newton**. 06 NCA No. 13. Affirmed. Sievers, Judge.

No. A-04-1213: **Hibbs v. Nebraska State Patrol**. 06 NCA No. 11. Affirmed. Inbody, Chief Judge.

No. A-04-1214: **Lenzen v. JG Shopping Ctr. Mgmt**. 06 NCA No. 33. Affirmed. Cassel, Judge.

No. A-04-1236: **Berens v. McNeil Company**. 06 NCA No. 22. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-04-1238: **Thomas v. Hollinger**. 06 NCA No. 23. Affirmed. Carlson, Judge.

No. A-04-1314: **Caudill v. Roberts**. 06 NCA No. 26. Affirmed. Sievers, Judge.

No. A-04-1349: **Schlondorf v. Breunig**. 06 NCA No. 33. Affirmed. Cassel, Judge.

No. A-04-1381: **State v. Robinson**. 05 NCA No. 45. Affirmed. Inbody, Chief Judge.

No. A-04-1386: **Porter v. Neth**. 06 NCA No. 20. Reversed and remanded with directions. Irwin, Judge.

No. A-04-1419: **In re Interest of Travis B**. 05 NCA No. 45. Affirmed. Inbody, Chief Judge.

No. A-04-1432: **Stauffer v. Stauffer**. 05 NCA No. 41. Affirmed. Inbody, Chief Judge.

No. A-04-1459: **Richmond v. Peterson**. 06 NCA No. 30. Affirmed. Moore, Judge.

No. A-04-1488: **State on behalf of Ephraim H. v. Jon P**. 05 NCA No. 39. Reversed. Irwin, Judge.

No. A-05-014: **State v. Schoen**. 06 NCA No. 4. Affirmed. Sievers, Judge.

No. A-05-024: **Reed v. Drivers Mgmt., Inc**. 05 NCA No. 40. Affirmed. Moore, Judge.

No. A-05-034: **Lundy v. Shelter Mut. Ins. Co**. 06 NCA No. 35. Affirmed in part, and in part reversed. Irwin, Judge.

No. A-05-042: **Wineteer v. Wineteer**. 06 NCA No. 35. Affirmed as modified. Sievers, Judge.

No. A-05-043: **Sanderson v. Department of Motor Vehicles**. 06 NCA No. 26. Reversed and remanded with directions. Sievers, Judge.

No. A-05-048: **Stednitz v. Associated Press**. 06 NCA No. 26. Affirmed. Inbody, Chief Judge.

No. A-05-106: **Jepsen v. Greenfield Sales**. 06 NCA No. 26. Affirmed. Irwin, Judge.

No. A-05-134: **In re Conservatorship of Anderson**. 06 NCA No. 7. Affirmed. Sievers, Judge.

No. A-05-250: **State v. George**. 06 NCA No. 13. Affirmed. Irwin, Judge.

No. A-05-259: **In re Interest of Dayzanequie B. & Dayjeonna B**. 05 NCA No. 47. Affirmed. Carlson, Judge.

No. A-05-277: **In re Interest of Chelsea B. & Gage K**. 05 NCA No. 39. Affirmed. Carlson, Judge.

No. A-05-300: **Hendrix v. Sivick**. 06 NCA No. 11. Affirmed as modified. Cassel, Judge.

No. A-05-335: **State v. Burkhardt**. 05 NCA No. 51. Reversed and remanded for a new trial. Carlson, Judge.

No. A-05-347: **Gardner v. Negley**. 05 NCA No. 52. Affirmed. Carlson, Judge.

No. A-05-371: **Polanowski v. Neth**. 06 NCA No. 26. Affirmed. Cassel, Judge.

No. A-05-374: **Conroy v. Columbia Ins. Co**. 06 NCA No. 26. Affirmed. Cassel, Judge.

No. A-05-386: **State on behalf of Janda v. Janda**. 05 NCA No. 52. Affirmed. Carlson, Judge.

No. A-05-387: **Valasek v. Neth**. 06 NCA No. 28. Affirmed. Moore, Judge.

No. A-05-406: **Cox v. Brady Basements**. 06 NCA No. 10. Affirmed. Moore, Judge.

No. A-05-413: **State v. Rohde**. 06 NCA No. 9. Affirmed. Moore, Judge.

No. A-05-416: **State v. Wichser**. 05 NCA No. 44. Affirmed in part, and in part reversed and remanded for further proceedings. Carlson, Judge.

No. A-05-424: **In re Interest of Latifah N**. 05 NCA No. 44. Affirmed. Irwin, Judge.

No. A-05-428: **State v. Arevalo-Martinez**. 06 NCA No. 18. Affirmed. Sievers, Judge.

No. A-05-442: **In re Interest of Kayla F. et al**. 05 NCA No. 44. Affirmed. Cassel, Judge.

No. A-05-454: **Weiler v. Union Ins. Co**. 06 NCA No. 34. Affirmed. Cassel, Judge.

No. A-05-463: **B & B Sales v. Union Ins. Co**. 06 NCA No. 27. Affirmed. Moore, Judge.

No. A-05-466: **SFI Ltd. Part. II v. Sarpy Cty. Bd. of Equal**. 06 NCA No. 15. Affirmed. Irwin, Judge.

No. A-05-497: **In re Interest of Sharae H**. 05 NCA No. 42. Affirmed. Irwin, Judge.

No. A-05-519: **Zink v. Neth**. 06 NCA No. 27. Affirmed. Sievers, Judge.

No. A-05-558: **State v. McKay**. 06 NCA No. 13. Affirmed. Irwin, Judge.

No. A-05-567: **State v. Tomek**. 06 NCA No. 22. Affirmed. Sievers, Judge.

No. A-05-653: **State v. Rouse**. 06 NCA No. 15. Affirmed. Cassel, Judge.

No. A-05-692: **State v. Koch**. 06 NCA No. 23. Affirmed. Carlson, Judge.

No. A-05-722: **State v. Graves**. 06 NCA No. 33. Affirmed. Irwin, Judge.

No. A-05-723: **State v. Alford**. 06 NCA No. 22. Affirmed. Irwin, Judge.

Nos. A-05-725, A-05-726: **Sterling v. Sterling**. 06 NCA No. 14. Judgment in No. A-05-725 affirmed in part, and in part reversed and remanded with directions. Judgment in No. A-05-726 reversed and remanded with directions. Irwin, Judge.

Nos. A-05-728, A-05-729: **In re Interest of Jay M. & Johanna M**. 05 NCA No. 47. Affirmed. Irwin, Judge.

No. A-05-800: **State v. Sextro**. 06 NCA No. 15. Affirmed. Irwin, Judge.

No. A-05-804: **State v. Haas**. 06 NCA No. 16. Affirmed. Carlson, Judge.

No. A-05-807: **Bielenberg v. Brodkeys Carpet One Omaha**. 06 NCA No. 10. Affirmed. Irwin, Judge.

No. A-05-815: **Burnham v. Pacesetter Corp**. 06 NCA No. 5. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge.

No. A-05-838: **Rasch v. Remedy Intelligent Staffing**. 06 NCA No. 15. Affirmed. Moore, Judge. Carlson, Judge, dissenting.

No. A-05-848: **State v. Chancellor**. 06 NCA No. 23. Affirmed in part, sentences vacated in part, and in part reversed and remanded. Sievers, Judge.

No. A-05-865: **In re Interest of Miguel G**. 06 NCA No. 7. Affirmed. Inbody, Chief Judge.

No. A-05-872: **Homemakers v. Douglas Cty. Bd. of Equal**. 06 NCA No. 18. Reversed and remanded with directions. Sievers, Judge.

No. A-05-915: **Deitloff Transfer v. Omaha Truck Ctr**. 06 NCA No. 30. Reversed and remanded with directions. Cassel, Judge.

No. A-05-932: **In re Interest of Sierra E**. 06 NCA No. 8. Affirmed. Irwin, Judge.

No. A-05-981: **Deann E. v. Jeffery E**. 06 NCA No. 10. Affirmed. Moore, Judge.

No. A-05-985: **Thomas v. Dugan Funeral Servs**. 06 NCA No. 22. Affirmed. Carlson, Judge.

No. A-05-1003: **State v. VanDorien**. 06 NCA No. 30. Affirmed in part, and in part vacated and remanded for resentencing. Irwin, Judge.

No. A-05-1004: **State v. White**. 06 NCA No. 31. Affirmed. Moore, Judge.

No. A-05-1043: **State v. Hysell**. 06 NCA No. 30. Affirmed. Moore, Judge.

No. A-05-1049: **Margo M. v. Martin S**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-05-1108: **Jackson v. Precision Builders**. 06 NCA No. 28. Affirmed. Carlson, Judge.

No. A-05-1130: **Velehradsky v. Velehradsky**. 06 NCA No. 30. Affirmed as modified. Carlson, Judge.

No. A-05-1131: **State v. Stetz**. 06 NCA No. 26. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

Nos. A-05-1141, A-05-1142: **State v. Schmutz**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-05-1153: **State v. Agee**. 06 NCA No. 31. Affirmed in part, and in part vacated and remanded with directions. Moore, Judge.

No. A-05-1197: **Putzier v. Aurstaff**. 06 NCA No. 33. Affirmed. Irwin, Judge.

No. A-05-1217: **Poskochil v. Poskochil**. 06 NCA No. 30. Affirmed as modified. Cassel, Judge.

No. A-05-1234: **McPherson v. VFW of Geneva**. 06 NCA No. 34. Affirmed. Irwin, Judge.

No. A-05-1266: **Maag v. Maag**. 06 NCA No. 28. Reversed and remanded with directions. Irwin, Judge.

No. A-05-1300: **Bing v. Drivers Mgmt**. 06 NCA No. 30. Affirmed. Irwin, Judge.

No. A-05-1365: **In re Interest of Sarah T**. 06 NCA No. 26. Affirmed. Irwin, Judge.

Nos. A-05-1381 through A-05-1384: **In re Interest of Vanessa R. & Mario R**. 06 NCA No. 22. Judgments in Nos. A-05-1381 and A-05-1382 affirmed. Judgments in Nos. A-05-1383 and A-05-1384 reversed, and causes remanded for further proceedings. Irwin, Judge.

No. A-05-1407: **In re Interest of Brandon G**. 06 NCA No. 22. Affirmed. Carlson, Judge.

No. A-05-1409: **In re Interest of Lawrence H**. 06 NCA No. 26. Appeal dismissed. Carlson, Judge.

No. A-05-1418: **State v. Portsche**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-05-1510: **In re Interest of Navaeh C**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-05-1535: **State v. Rose**. 06 NCA No. 30. Affirmed. Cassel, Judge.

No. A-05-1544: **State v. Prater**. 06 NCA No. 28. Affirmed in part, and in part reversed and sentence modified. Sievers, Judge.

No. A-05-1555: **Olson v. Capital Electric**. 06 NCA No. 33. Affirmed. Cassel, Judge.

No. A-05-1566: **In re Interest of Raymond G. et al**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-06-047: **State v. Howard**. 06 NCA No. 30. Exception sustained, and cause remanded with directions. Inbody, Chief Judge.

No. A-06-074: **Banks v. Midwest Padding**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-06-077: **In re Interest of Malik B**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-06-127: **In re Interest of Jesse B. & Gracie B**. 06 NCA No. 34. Affirmed. Carlson, Judge.

No. A-06-194: **In re Interest of Stephanie G**. 06 NCA No. 35. Affirmed. Moore, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

RICHARD R. NYGREN, APPELLANT, V.
CHERYL A. NYGREN, APPELLEE.

704 N.W.2d 257

Filed September 20, 2005. No. A-03-1042.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of 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. **Evidence: Appeal and Error.** When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another.
4. **Property Division.** Property owned by a party at the time of marriage is not marital property.
5. **Divorce: Courts: Property Division.** The manner in which property is titled or transferred by the parties during a marriage does not restrict the trial court's determination of how the property will be divided in an action for dissolution of marriage.
6. **Divorce: Property Division.** The equitable property division in an action for the dissolution of marriage involves three steps: (1) to classify the parties' property as marital or nonmarital, (2) to value the marital assets and marital liabilities of the parties, and (3) to calculate and divide the net marital estate between the parties.
7. **Property Division.** The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
8. ____. Property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception applies when both spouses have contributed to the improvement or operation of the property that one of them received by gift or inheritance.
9. **Wills: Time.** Provisions of a will take effect and become operative at the time of the testator's death.
10. **Witnesses: Real Estate: Valuation.** It is the general rule that a witness need not be an expert to testify to the value of land.

11. **Evidence: Appeal and Error.** When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another.
12. **Property Division: Proof.** The burden of proof to show that property is a nonmarital asset remains with the person making the claim.
13. **Evidence: Proof.** Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, the party having the burden of proof may not sustain that burden by a reliance alone on the inference supporting that party's position.
14. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
15. **Appeal and Error.** Alleged errors must be specifically assigned and specifically argued in order to be considered by an appellate court.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed as modified.

Benjamin M. Belmont and Anthony W. Liakos, Senior Certified Law Student, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellant.

Frank X. Haverkamp, of Penke & Haverkamp, for appellee.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Richard R. Nygren appeals the decree of the Douglas County District Court dissolving his marriage to Cheryl A. Nygren and dividing the parties' property. On appeal, he essentially argues that the trial court erred in classifying certain items and assets as marital property and in dividing the marital estate. We hold that the trial court incorrectly applied the rule from *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), that was specifically disapproved in *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), prior to the trial court's decision. We also hold that the trial court abused its discretion in characterizing some of Richard's nonmarital property as marital property, and we affirm as modified.

BACKGROUND

On November 22, 1991, Richard and Cheryl entered into an antenuptial agreement. It provided that the farm owned by

Richard and the insurance agency owned by Cheryl, along with all other assets owned by the parties at that time, would remain their separate property. Additionally, any income derived from any businesses or assets held by the parties at that time would remain their separate property. Richard and Cheryl provided disclosures of their assets and liabilities as of the date of the antenuptial agreement and attached them to the agreement.

The parties married on November 23, 1991. No children were born to the marriage. Richard had farmed since 1960 on a farm that, as of the time of trial, had been in his family for over 100 years. In 1964, Richard had acquired 40 acres, and then had inherited an additional 40 acres in 1991 (we will refer to these parcels below as the 80-acre property). Richard denied ever gifting or transferring the farm to Cheryl. From the time of their marriage until December 1995, the parties lived on the family farm. At the time of trial, Richard had been employed full time as a truckdriver since 1997 or 1998 and farmed part time. Cheryl had been an agent with an insurance company since 1985. She also possessed a real estate license. During the marriage, Richard and Cheryl maintained separate bank accounts, although Cheryl testified that they had one joint account to which they both contributed for living expenses, such as groceries and entertainment.

On March 12, 1992, Richard obtained a loan from Wahoo State Bank, secured by a deed of trust on the 80-acre property, for approximately $120,000. Cheryl signed the deed of trust, but did not sign the note. Richard used the loan to pay his first wife the final payment pursuant to their divorce decree and to reduce his operating debts at Bank of Mead.

On July 19, 1994, Cheryl made Richard's annual loan payment at Wahoo State Bank in the amount of $14,459.29, from funds generated by her insurance agency. Cheryl presented evidence that $13,629.62 of her contribution went toward interest on the loan, while the remainder went toward debt reduction. Cheryl testified that Richard had asked her to lend him the money, having tried but failed to obtain it elsewhere. She stated that Richard was worried because the loan was in default and that he told her that he feared he would lose the family farm without her help. Cheryl testified that the loan was in danger of foreclosure and that she knew this because the payment was over 3 months overdue and

the bank had called. Based on information from the bank showing that only a slight portion of the principal had been paid, it was Cheryl's understanding that the secured debt on Richard's land still totaled all or nearly all of the value of the land, as it had when they married.

Cheryl suspected that Richard was unable to obtain money elsewhere because of his bad credit. Cheryl testified that many creditors called repeatedly and often. Richard testified that he had been involved in a co-op since 1960, but according to Cheryl, the co-op had refused to bring propane in 1994 "because there was no money." Credit card companies called, "[t]he phone was shutting off," and the local electric utility "was threatening to shut down the power." As of July 1994, Richard still had an outstanding loan at Bank of Mead. Cheryl testified that the loan was always in default. Richard denied ever receiving a notice of default regarding nonpayment at Wahoo State Bank or Bank of Mead.

In July or August 1994, the antenuptial agreement was destroyed by mutual agreement of the parties. The trial court received into evidence a letter, dated August 18, 1994, from the attorney who prepared the antenuptial agreement confirming their intent to destroy it. According to Cheryl, when Richard asked her to help him pay his debt at Wahoo State Bank, she told him that she would not loan him money because of his history with loans. Instead, she offered to "invest in our future together." Cheryl offered to give Richard the money if they destroyed the antenuptial agreement, and they agreed that it was the best thing to do. Richard testified that he considered Cheryl's payments toward his debt to be loans. Cheryl testified that when she and Richard decided to destroy the antenuptial agreement, it was her intention to commingle all of the property that each of them had brought into the marriage and make it marital property, and Cheryl stated that Richard told her that he had the same intention. Richard denied indicating to Cheryl before or after the antenuptial agreement was destroyed that she would have an interest in his farm while he was alive, and he did not recall agreeing to give Cheryl an interest in the farm in return for the payments she made.

On September 26, 1994, Richard executed a new will. According to Cheryl, Richard executed the will to protect her.

Richard's original will had stated that upon his death, Cheryl would have the opportunity to stay in their house and use the income from the farm as long as she did not remarry. Cheryl testified that when they destroyed the antenuptial agreement, however, the provisions of the original will still gave Richard's children standing to inherit the farm completely. Cheryl testified that Richard therefore executed the new will, which provided, in part:

> **DISTRIBUTION OF FARM:** My beloved wife, Cheryl . . . has contributed to reducing the debt on my farm, and has otherwise contributed to my farm. In consideration of this, as well as my love and devotion to her, if she shall survive me, I give, devise and bequeath to her a one-half interest in my farm, to include the land and all appurtenances thereon, subject to the right and obligation of my children to purchase her interest within eighteen months of the date of my death. Should Cheryl and I die simultaneously under the terms of this will, my personal representative, if sufficient assets are available, or the distributees of my farm shall pay Cheryl's children all sums which she contributed to the farm, plus interest at the rate of seven percent thereon from the date of advancement until paid.

Richard explained that the reference to "my farm" meant the 80-acre property. Cheryl stated that in June 1999, Richard reviewed the will and approved it. According to Richard, the will was no longer in existence at the time of trial.

On March 1, 1995, Cheryl paid $7,500 from her business account to Wahoo State Bank toward Richard's annual loan payment, and Richard paid the remaining sum to complete that payment. Cheryl testified that Richard had told her that his crops and the price of hogs "were not good" and that he needed more help. According to Cheryl, Richard again expressed fear that he would lose the family farm without her help.

Cheryl admitted that part of the approximately $22,000 that she put toward the loan payments at Wahoo State Bank came from funds that she had prior to the marriage, though not more than $5,200, which was an estimate of the total amount in Cheryl's checking and savings accounts when she signed the antenuptial agreement. The remainder came from funds she had earned between 1991 and 1995. Cheryl did not recall how much

money was in her savings account when she made the 1995 payment.

Cheryl testified that when she first moved to the parties' farmhouse, the "interior was in bad shape." Cheryl, her brothers, her parents, and her sons made substantial repairs and modifications, including gutting and modernizing an existing bathroom, adding a new bathroom, joining two rooms to make a large bedroom, installing closets, replacing floor coverings, replacing ceilings, and painting inside and outside. Richard admitted that Cheryl did some "decorating" and that her father and brothers "took a wall out" and helped install a new bathroom. According to Richard, it was "debatable" whether such improvements added to the value of the house. Richard denied that Cheryl ever worked on the farm or made any improvements to it during the 4 years they lived there.

On December 26, 1995, Richard sold the house and the 3 acres upon which it stood—part of the aforementioned 80-acre property—to his daughter and son-in-law for approximately $85,000. Richard testified that the 3 acres did not include farmland or buildings other than the house. Cheryl opined, as a real estate agent, that when she and Richard married, the house and the surrounding 3 acres were worth approximately $55,000. Cheryl testified that she could not accurately estimate how much the house increased in value from the time the parties married until the house was sold, but she stated, "I'm sure we had to improve the value with that complete renovation . . . ." On cross-examination, Cheryl admitted that she was not an appraiser and that any values she mentioned in the context of improvements constituted speculation. At the time of sale, the farmhouse and 3 acres were appraised at $106,000.

Richard used $23,949.54 from the sale of the farmhouse and the 3 acres for a downpayment on a house in a southwest subdivision of Omaha, in which house Richard and Cheryl took title as joint tenants. Richard testified that he made the downpayment on that house essentially to repay Cheryl for making the loan payments to Wahoo State Bank in 1994 and 1995. On August 15, 1996, the parties sold that house and purchased another house in southwest Omaha. Cheryl alone was listed on the title for the latter house. On August 31, 1999, the parties sold the latter house,

and they purchased a duplex in northeast Omaha which was likewise titled in Cheryl's name alone and where she lived at the time of trial.

On March 14, 2002, Richard informed Cheryl that he had agreed to sell 37 of the originally 80-acre property's remaining 77 acres to his four children for $80,000, or $2,162.16 per acre. Cheryl testified on direct examination that she was concerned, in part about the parties' retirement prospects, because she believed the 37 acres to be worth more than $80,000. She then testified about her opinion concerning the per-acre value of the land:

> [Cheryl's counsel:] Do you have an opinion as to the value of farmland of that type in that area?
>
> [Cheryl:] I can only state what I know the bank has told me, and —
>
> [Richard's counsel]: Judge, I'm going to object on foundation and hearsay.
>
> THE COURT: Overruled. Go ahead.
>
> [Cheryl:] Yes, sir, I do. I know what I've been told [t]hat it's worth.
>
> [Richard's counsel]: Judge, objection, hearsay and foundation.
>
> THE COURT: Overruled. Go ahead, ma'am.
>
> [Cheryl:] One banker told me $3,200 and one said [$3,400]. And then I had an appraiser that I've talked to that said it could run anywhere from [$2,900] to — some of the land in that area sold for $3,800. So I would say mid 30s, upper 30s.

Based on these values, Cheryl believed that Richard had sold the property for at least $1,000 per acre less than what he could have obtained in an arm's-length sale. Richard testified that at the time of trial, he still had 40 acres of what had been the 80-acre property. He estimated that that land was worth $2,600 per acre.

The parties testified and exhibits were received regarding the valuation of additional assets. At the time of trial, the value of Richard's interest in the co-op he had been gaining equity in was approximately $11,467.98. Richard estimated that $2,500, or approximately 25 percent, of that amount had been accumulated during the marriage. Richard admitted that he had no documentary support for this estimate. Richard admitted spending money

at the co-op during the marriage to raise approximately 500 to 600 hogs per year and to farm approximately 500 acres. In Cheryl's valuation of the marital estate, she included the entire value of Richard's interest in the co-op, or $11,467.98.

The trial court received Cheryl's valuations of the farm equipment, which she presented as "Option A = purchased during marriage" and "Option B - All." Option A stated the following values:

Skid loader	$ 1,000
Combine	12,000
Corn head	3,000
Bean head	3,000
Grain bin, 3,500-bushel	3,500
Irrigation equipment	37,500
	$60,000

Option B totaled $169,230 and included equipment acquired both before and after the parties married, except for the skid loader, which was inexplicably omitted from option B. Cheryl testified that she based her valuations of the farm equipment on the amount of insurance carried on it. Cheryl testified that the farm equipment was insured for actual cash value and that the insurance on the farm equipment lapsed on April 11, 2002. She had written the insurance policies for the farm equipment and received commissions for them based on the premiums. She did not have the equipment appraised, "[o]ther than underwriting," but she testified that she relied on Richard's word as to the equipment's value.

Richard testified that he possessed certain items of farm equipment before the marriage and purchased more items during the marriage. Of the items purchased during the marriage, a skid loader, a combine, and two six-row combine heads were still operational at the time of trial, and Richard valued them as follows:

Skid loader	$ 200
Combine	3,000
Combine heads	2,000
	$5,200

Richard paid $335 for the skid loader, $21,800 for the combine, and $2,100 for the combine heads. Richard testified that the skid loader was approximately 10 years old and was in average to below-average condition. As indicated above, Richard valued the skid loader at $200, but he admitted at trial that he probably could not replace it for that amount. The combine and one of the heads were made in 1981, and the other head was made in 1976. Richard did not dispute that he had insured the equipment for the values set forth by Cheryl.

Richard testified that he also purchased an irrigation center pivot during the marriage, which pivot, at the time of trial, had been dismantled as scrap. As noted above, Cheryl valued Richard's irrigation equipment at $37,500 based on an insurance policy, but Richard testified that the parties' $37,500 insurance policy for irrigation equipment was for such equipment that he had purchased prior to the marriage. Also, Richard did not recall purchasing a 3,500-bushel grain bin during the marriage, which bin Cheryl asserted he had bought.

Cheryl valued her 1996 Oldsmobile at $3,292, while Richard valued it at $7,315. Cheryl testified that she based her estimation of its value on the "Blue Book" and subtracted a portion of that value for the car that she brought into the marriage, which was traded eventually to obtain the 1996 Oldsmobile. According to the antenuptial agreement, Cheryl brought a 1990 Chrysler worth $20,000 into the marriage. Another exhibit recounted the subsequent vehicle trades:

Purchase	Vehicle	Value	Trade
September 1990	1990 Chrysler	(illegible)	
April 1995	1992 Oldsmobile	$20,184	$7,435
December 1998	1996 Oldsmobile	$22,194	$7,995

Cheryl requested that the court credit her with one-half of the trade value of her premarital 1990 Chrysler as against the 1996 Oldsmobile, or approximately $3,700, and deduct it from the 1996 Oldsmobile's "Blue Book" value of $6,585.

Cheryl admitted that during the marriage, she contributed to retirement accounts. Among those accounts were four "Equitrust" accounts, totaling $32,870.98. She testified that her two "Farm

Bureau variable annuities" were created during the marriage, and she assigned them a "marital value" of $20,179.16.

Cheryl testified that she contributed to a "career incentive plan" both before and during the marriage. Statements for the career incentive plan were received into evidence. A handwritten notation, signed by Cheryl, on one statement indicates that she began her career incentive plan in 1987 and had not contributed to it since 1994. Cheryl calculated that the vested value of the plan as of April 10, 2002, was $20,306.12. She testified that she considered 35.31 percent of that value, or $7,170.09, to be a "premarital asset," while the remaining portion, or $13,136.03, was a "marital asset." Cheryl offered the following figures, which reflect how she arrived at 35.31 percent as a premarital asset:

Date	Plan Total	Percent of 12/31/95 Value
11/30/91	$ 6,138.56	35.31
8/31/94	16,204.19	93.20
12/30/95	17,385.86	100.00

Thus, when Cheryl married in November 1991, she had already made 35.31 percent of the contributions she would make to the career incentive plan.

Cheryl submitted the following information regarding debts:

Miscellaneous Debt	
Overdraft protection	$1,000.00
Accountant	4,378.71
2001 taxes	3,800.00

Cheryl testified that the accountant debt of $4,378.71 represented charges for preparation of tax returns for both her insurance agency and the farm. She requested that the trial court assess $1,500 of that debt to her and the remainder to Richard. Cheryl requested that the other miscellaneous debts be divided equally between the parties.

Cheryl testified that at the time of the parties' separation, the farm debt totaled approximately $58,000 at Wahoo State Bank and $42,000 at Bank of Mead. Thus, it was Cheryl's understanding that a total of approximately $100,000 was owed

against the land. Richard denied that Bank of Mead had a lien against his land; he stated that the Bank of Mead loans were "[u]nsecured, with the exception of the farming business, grains, [and] livestock."

The trial court found:

> [A]lthough the parties brought [premarital] assets into the marriage, which they itemized in their [antenuptial] agreement, the parties gifted those [premarital] assets to the marriage, making them marital assets to be divided by the Court. This was the testimony of [Cheryl], which the Court, having observed the testimony of both parties, finds to be more credible than [Richard's] testimony, and supported by the evidence.
>
> [Cheryl's] testimony that the parties intended to co[m]mingle their separate [premarital] assets was corroborated by the fact that both agreed to rescind their [antenuptial] agreement as confirmed by [their attorney] in his letter to the parties . . . ; [Richard's] change in his will . . . ; and [Cheryl's] being listed as a seller of 37 acres of the [80-acre property] in March, 2002 . . . .

The trial court valued the 80-acre property's remaining 40 acres at $3,000 per acre and, subtracting the debt owed on the farm at the time of the parties' separation, determined the farm's equity to be $20,000 at the time of their separation. For the remaining marital assets, the trial court relied on Cheryl's valuations as set forth in her exhibit dividing the property:

	Richard	**Cheryl**
Cash	$ 500.00	$ 2,415.71
Furniture	1,865.00	2,770.00
Automobiles		
1996 Oldsmobile		3,292.00
1991 Dodge	2,185.00	
1996 Dodge	0.00	
1987 Ford	1,925.00	
Retirement account	896.00	
Equitrust accounts		32,870.98
Farm Bureau annuities		20,179.16
Career incentive plan		13,136.03

Life insurance policies		6,604.00
Duplex		16,872.00
Co-op	11,467.98	
Farm equipment, buildings	169,230.00	
Farm (40 acres at $3,000/acre)	120,000.00	
Farm debt (rounded from $99,972.27, total owed to Wahoo and Mead banks)	(100,000.00)	
TOTAL	$208,068.98	$98,139.88

The trial court found that Richard should be responsible for the marital debts, and it credited Cheryl for $1,500 that she contributed toward the accountant debt. To equalize the division of the marital assets, the trial court ordered Richard to pay Cheryl $53,420.

ASSIGNMENTS OF ERROR

Richard alleges that the trial court erred in (1) including his premarital farm and premarital farm equipment in the marital estate, (2) including in the marital estate the entire value of his interest in the co-op, (3) finding that he gifted his premarital assets to the marriage, (4) dividing the marital estate as it did, (5) overruling Richard's objections to Cheryl's valuation of Richard's farm and farm equipment, (6) not including in the marital estate the entire value of Cheryl's retirement accounts and automobile, (7) ordering Richard to pay Cheryl the sum of $53,420 to equalize the division of the marital estate, and (8) requiring Richard to pay all the parties' marital debts.

STANDARD OF REVIEW

[1-3] In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). 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.*

When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000).

ANALYSIS

Gift of Premarital Assets.

[4] Richard contends that the evidence does not support a finding that he gifted his premarital assets, including the farmland and farm equipment, to the marital estate. We begin by recalling a basic principle: Property owned by a party at the time of marriage is not marital property. *Smith v. Smith*, 9 Neb. App. 975, 623 N.W.2d 705 (2001). Thus, unless some exception applies to change the basic rule, the farmland and farm equipment owned by Richard prior to the marriage are not marital property. Cheryl contends that by an oral agreement, at the time of the destruction of the antenuptial agreement, "both parties agreed that from that time forward, they would co[m]mingle all assets and anything owned by one, would be considered the joint property of the other." Brief for appellee at 18.

[5] At the time the parties made their antenuptial agreement, public policy in Nebraska prohibited enforcement of a provision in such an agreement purporting to forfeit property rights in the event of a divorce. See *Mulford v. Mulford*, 211 Neb. 747, 320 N.W.2d 470 (1982) (generally, antenuptial agreements providing that in event of divorce or separation, each spouse should forfeit his or her rights in property of other, are contrary to public policy and void as tending to promote divorce). Thus, such agreements were enforceable only in accordance with testamentary dispositions or other transfers taking effect at death. In finding that the parties had gifted their premarital assets to the marriage, the trial court was apparently relying upon *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), in which this court held that when a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other. However, approximately 4 months before the trial court filed its decree in this case, the Nebraska Supreme Court expressly disapproved *Gerard-Ley* in *Schuman v. Schuman, supra*,

which held that the manner in which property is titled or transferred by the parties during a marriage does not restrict the trial court's determination of how the property will be divided in an action for dissolution of marriage. Therefore, we conclude that the trial court applied the wrong rule in determining that the parties had gifted their premarital assets to the marriage.

Although we agree with the trial court's determination that the parties agreed to revoke their antenuptial agreement, it does not follow that they also agreed to convert their sole property to jointly owned property. Had they intended to do so, the portion of Richard's will providing that Cheryl would receive a one-half interest in the farm upon Richard's death would have been superfluous, because Cheryl would have already owned a one-half interest in the farm. Thus, the will does not support the notion that the parties intended to gift their premarital interests to each other; instead, it lends support to the opposite conclusion.

Farmland.

[6,7] Richard argues that the trial court erred in including Richard's 40 acres, remaining from the 80-acre property, in the marital estate. The equitable property division in an action for the dissolution of marriage involves three steps: "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 . . . ." *Tyma v. Tyma*, 263 Neb. 873, 877, 644 N.W.2d 139, 144 (2002). The "marital estate" includes property accumulated and acquired during the marriage through the joint efforts of the parties. *Id.*

[8] In dividing property inherited by or gifted to one of the parties, we look to the rule in *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982):

> [P]roperty acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. . . . An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or

> the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.

Thus, the marital estate generally does not include property acquired by one of the parties through gift or inheritance. See *id.* However, an exception applies when both spouses have contributed to the improvement or operation of the property that one of them received by gift or inheritance. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). In *Tyler*, the wife brought a home from a prior marriage into the marriage at issue. The husband and the wife lived in the wife's house, sold it, and purchased another, which became the focus of the appeal. This court modified the divorce decree to require the wife to pay the husband half of the equity in the latter home owned by the parties, but the Nebraska Supreme Court reversed, stating that each time the *Van Newkirk* exception had been applied, the Nebraska Supreme Court had "required evidence of the value of the contributions and evidence that the contributions were significant." *Tyler v. Tyler*, 253 Neb. at 213, 570 N.W.2d at 320. The court in *Tyler* then recounted evidence that the husband had improved the home by performing such tasks as building a deck, carpeting and painting the family room, replacing kitchen countertops, and installing four ceiling fans. The husband had also contributed to the mortgage, paid a special assessment lien, and submitted expenses for certain improvements to the house. The *Tyler* court observed that the husband failed to produce any evidence indicating the value of these contributions and that he failed to demonstrate "the significance of the aforementioned contributions." 253 Neb. at 214, 570 N.W.2d at 320. However, the court found that the husband was entitled to be compensated for his contributions, the special assessment lien, and half the mortgage reduction.

Because it is undisputed that Richard owned the 40 acres in question prior to the marriage, the initial issue is whether the *Van Newkirk* exception applies so that the property should be included in the marital estate. Cheryl resided on the farm for 4 years of the parties' marriage. There is no evidence that she worked in the farming operation. While Cheryl presented evidence that she and her immediate family made improvements to

the farmhouse, Richard sold that portion of the farm in 1995, and there is no evidence that any improvements Cheryl made to that portion contributed to the value of the 40 acres remaining at the time of trial. Cheryl did, however, make farm payments in 1994 and 1995 totaling $21,959.29. Cheryl testified that Richard feared he would lose the family farm without her aid. Cheryl admitted that an estimated $5,200 or less of the $21,959.29 came from her premarital funds. The remainder came from funds Cheryl had earned during the marriage. The antenuptial agreement, assuming it was ever effective, had been revoked by the parties, and any funds Cheryl earned before the marriage were her separate property, while any funds she earned during the marriage were marital property. See *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). Therefore, pursuant to *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), and *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997), we conclude that Cheryl's contributions of not more than $5,200 from her separate property were not so significant as to garner Cheryl an interest in Richard's farm.

Although we conclude that Cheryl never acquired an interest in the farm, the revocation of the antenuptial agreement did operate to allow Cheryl to acquire an interest in the contributions she made to the Wahoo State Bank loan—whether from premarital or marital funds. Therefore, Cheryl is entitled to be compensated in full for her contributions from premarital funds and to receive one-half of the remainder, which came from marital funds. However, Cheryl did not present evidence of the value of her premarital contribution. She testified that she contributed not more than $5,200 in premarital funds, that amount being an estimate of her assets at the time she signed the prenuptial agreement. We consider this estimate upon an estimate to be insufficient evidence of the value of Cheryl's contribution from premarital funds, and we therefore consider her entire contribution of $21,959.29 to be from marital funds and conclude that she is entitled to compensation for half of that sum, or $10,979.65.

[9] Cheryl contends that if she is to receive credit for her contribution to the farm payments, that credit should include interest at the rate of 7 percent. Cheryl bases this rate of interest on

Richard's will, which provided: "[T]he distributees of my farm shall pay Cheryl's children all sums which she contributed to the farm, plus interest at the rate of seven percent thereon from the date of advancement until paid." We decline to allow Cheryl such interest. The will was not in effect at the time of trial, see *Tucker v. Heirs of Myers*, 151 Neb. 359, 37 N.W.2d 585 (1949) (provisions of will take effect and become operative at time of testator's death), and this provision was intended to operate upon the simultaneous death of both Richard and Cheryl. That event has not occurred, and the will cannot serve as justification for the award of interest that Cheryl seeks.

Richard also contends that the trial court erred in overruling his objections to Cheryl's valuations of his remaining 40 acres. When asked whether she had an opinion as to the value of the land, Cheryl testified that bankers had told her $3,200 per acre and $3,400 per acre. Based on this input and a discussion with an appraiser, Cheryl opined, "mid-30s, upper 30s." Richard objected based on hearsay and foundational grounds, and he restates those grounds on appeal, arguing that Cheryl had never been the owner of the land.

[10] *First Baptist Church v. State*, 178 Neb. 831, 834-35, 135 N.W.2d 756, 758-59 (1965), sets forth the general rule for lay witnesses without ownership testifying about the value of land:

> "It is the general rule that a witness need not be an expert to testify to the value of land. Market value is not a question of science or skill upon which experts alone may give an opinion. . . . It is necessary only to show that he has the means of forming an intelligent opinion derived from an adequate knowledge of the nature and kind of property in controversy, and of its value. . . . It is not essential that every witness expressing an opinion shall have all-inclusive information of every detail of the elements entering into the value. . . . It is most difficult to state an all-inclusive rule fixing the qualification of witnesses to give their opinions as to the market value of land. Their testimony is ordinarily received if they show an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their evidence being for the jury. . . ."

(Citations omitted.) (Emphasis omitted.) Quoting *Evans v. State*, 176 Neb. 156, 125 N.W.2d 541 (1963).

Although Cheryl did not possess an ownership interest in the family farm, she lived on it for 4 years, and she had worked as a licensed real estate agent. She testified that she had spoken to bankers and appraisers regarding the value of the land. Their statements were not offered for the truth of the matter asserted, but, rather, to show that Cheryl had researched the value of the land. It was upon this research that Cheryl based her opinion of the value of the land. Thus, we conclude that Cheryl demonstrated an acquaintance with the land and the state of the market and that the trial court did not err in allowing her opinion as to the value of the land, over Richard's objections.

Farm Equipment.

[11] Richard contends that the trial court erred in overruling his objections to Cheryl's valuations of the farm equipment despite insufficient foundation and in relying on those valuations. Cheryl testified that Richard's farm equipment was insured for cash value and that she relied on the figures in the insurance policies in determining the value of the equipment. She admitted that she wrote the policies, but she also testified that she relied on Richard's word in assigning values to the equipment and that the values were approved by underwriters. Richard's values for the farm equipment conflicted with Cheryl's. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000). We conclude that Cheryl established sufficient foundation for her valuations of the farm equipment and that the trial court did not abuse its discretion in using those valuations in its calculations of the marital estate.

Richard asserts that the trial court erred in relying on Cheryl's exhibit which included in the marital estate farm equipment acquired both before and during the marriage. We agree. The trial court included $169,230 for farm equipment in the marital estate, despite the fact that Cheryl clearly admitted that the figure included equipment that Richard had acquired prior to the marriage. See *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002)

(marital estate includes property accumulated and acquired during marriage through joint efforts of parties).

It is undisputed that Richard obtained the skid loader, the combine, and the combine heads during the marriage. However, Richard argues that the trial court erred in including irrigation equipment and a grain bin in the marital estate. Cheryl presented evidence that Richard acquired irrigation equipment and a 3,500-bushel grain bin during the marriage, which she valued at $37,500 and $3,500, respectively. Richard testified that the irrigation equipment to which Cheryl referred had been acquired prior to the marriage, while the irrigation equipment he had acquired during the marriage had been dismantled and had only scrap value. He also testified that he acquired the grain bin prior to the marriage. We again note that when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another, and on our de novo review, we conclude that the trial court did not abuse its discretion in including the irrigation equipment and the grain bin in the marital estate. See *Mace v. Mace, supra.*

On our de novo review, we determine that the skid loader, the combine, the combine heads, the grain bin, and the irrigation equipment were properly valued and included in the marital estate, but that the trial court abused its discretion in including any farm equipment obtained prior to the marriage. We set forth our changes to the overall division of property below.

Richard's Interest in Co-op.

Richard argues that the trial court erred in including his entire interest in the co-op in the marital estate. He points out that he had been involved in the co-op for 40 years, during only 10 of which he was married to Cheryl. Of Richard's $11,467.98 interest in the co-op at the time of trial, Richard estimated that he had accumulated $2,500, or approximately 25 percent, during the marriage. Richard did not support this testimony with co-op statements or other documentation, and considering the size of his farming operation during the marriage, it is certainly possible that he contributed more than $2,500 during that period. Moreover, Richard's calculation assumes that he acquired the

interest at a constant rate for 40 years. In Cheryl's calculations, she included the entire value of Richard's interest in the co-op in the marital estate; however, taking into account that Cheryl considered even premarital assets to be part of the marital estate after the revocation of the antenuptial agreement, she may have included Richard's premarital interest in the co-op in her division of the marital estate or she may have assumed that Richard acquired his entire interest in the co-op during the marriage.

[12,13] The burden of proof to show that property is a nonmarital asset remains with the person making the claim. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, the party having the burden of proof may not sustain that burden by a reliance alone on the inference supporting that party's position. See *Fritz v. Marten*, 193 Neb. 83, 225 N.W.2d 418 (1975). The inference that the equity in the co-op accrued at a constant rate over the 40-year period is no stronger than an inference that a greater portion accrued during the marital period. We conclude that Richard did not meet his burden and that the trial court did not abuse its discretion in including in the marital estate the entire value of Richard's interest in the co-op.

Cheryl's Retirement Accounts.

[14] Richard asserts that the trial court allowed Cheryl to arbitrarily reduce the value of one of her Farm Bureau annuities. He contests Cheryl's reduction of the value of that account, a reduction representing significant contributions she made after the parties' separation. Although Neb. Rev. Stat. § 42-366(8) (Reissue 2004) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such assets be valued at the time of dissolution; the expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. *Hosack v. Hosack*, 267 Neb. 934, 678

N.W.2d 746 (2004). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). Based on this authority, we conclude that the trial court was reasonable and did not abuse its discretion in allowing Cheryl to subtract her postseparation contributions from the value of her annuity. She and Richard were no longer supporting each other at that time, and Cheryl logically accounted for the amount of those contributions.

Richard also argues that the trial court allowed Cheryl to arbitrarily reduce the value of her career incentive plan to offset her premarital contributions to it. We disagree. Cheryl's calculations, set forth above, support her deduction of 35.31 percent to arrive at the value of the marital portion of the plan.

Cheryl's 1996 Oldsmobile.

Richard asserts that Cheryl arbitrarily reduced the value of her 1996 Oldsmobile, which was purchased during the marriage. Despite the convoluted arithmetic presented by Cheryl in her testimony, it is apparent that she requested and received approximately one-half the "Blue Book" value of her 1996 Oldsmobile because that vehicle had been obtained, in part, through trade-in value traceable to her nonmarital vehicle. On our de novo review, we conclude that the value of the 1996 Oldsmobile was not arbitrarily reduced and that the trial court did not abuse its discretion in assigning a marital value to that vehicle.

Omaha Residences.

[15] We note that Cheryl argues that the parties' first house in Omaha constitutes a marital asset because it was titled in joint tenancy. As Richard correctly points out in his reply brief, in *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), the Nebraska Supreme Court expressly disapproved an interpretation of *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), which would preclude nonmarital property titled in joint tenancy during the marriage from being considered as a nonmarital asset in an action for dissolution of marriage simply because the property was so titled. However, at no time does Richard argue or assign that the trial court erred in including the net value

of the duplex, which was eventually purchased from the proceeds of the sale of the first Omaha house, in the marital estate. Therefore, we need not consider the classification of these houses further. See *Schnell v. Schnell*, 12 Neb. App. 321, 673 N.W.2d 578 (2003) (alleged errors must be specifically assigned and specifically argued in order to be considered by appellate court).

Marital Debts.

Richard assigns that the trial court erred in requiring him to pay all the parties' marital debts. However, he did not argue that error in his brief, and we will not consider it. See *id.*

Division of Property and Credits.

Based on the foregoing analysis, we divide the parties' marital estate as follows:

	Richard	**Cheryl**
Cash	$ 500.00	$ 2,415.71
Furniture	1,865.00	2,770.00
Automobiles		
1996 Oldsmobile		3,292.00
1991 Dodge	2,185.00	
1996 Dodge	0.00	
1987 Ford	1,925.00	
Retirement account	896.00	
Equitrust accounts		32,870.98
Farm Bureau annuities		20,179.16
Career incentive plan		13,136.03
Life insurance policies		6,604.00
Duplex		16,872.00
Co-op	11,467.98	
Farm equipment		
Skid loader	1,000.00	
Combine	12,000.00	
Corn head	3,000.00	
Bean head	3,000.00	
Grain bin	3,500.00	
Irrigation equipment	37,500.00	
TOTAL	$78,838.98	$98,139.88

To equalize the marital estate, we conclude that Cheryl owes Richard $9,650.45, or one-half the difference between $78,838.98 and $98,139.88. However, as discussed above, Richard must compensate Cheryl, in the amount of $10,979.65, for her contributions to the farm loan. On appeal, Richard did not contest the $1,500 credit Cheryl received for payments she made for tax preparation; therefore, she is entitled to that credit as well. Considering together the $9,650.45 owed to Richard for equalization of the marital estate and the $12,479.65 in credits owed to Cheryl, we conclude that Richard shall pay Cheryl the difference between those two figures: $2,829.20.

CONCLUSION

On our de novo review, we hold that the trial court applied an incorrect standard in determining the marital estate, that the trial court abused its discretion in including some of Richard's farm equipment in the marital estate, and that Cheryl should receive compensation for contributions she made to the farm debt. Therefore, we affirm the trial court's decree, as modified.

AFFIRMED AS MODIFIED.

LYNN HOFF, APPELLEE, V.
VICTOR AJLOUNY, APPELLANT.

703 N.W.2d 645

Filed September 20, 2005. No. A-04-204.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is 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.
3. **Injunction: Equity.** An action for injunction sounds in equity.
4. **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 from the conclusion reached by the trial court.

5. **Affidavits.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein; sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.
6. **Rules of Evidence: Records: Proof.** The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Neb. Rev. Stat. § 27-902 (Reissue 1995) or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.
7. **Restrictive Covenants: Waiver.** The six criteria for judging whether there has been a waiver of a restrictive covenant are set out in *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976), and are as follows: (1) whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken, (2) the extent and kind of violation, (3) the proximity of the violations to those who complain of them, (4) any affirmative approval of the same, (5) whether such violations are temporary or permanent in nature, and (6) the amount of investment involved.
8. ____: ____. Evidence of a prior restrictive covenant violation is a predicate to the use of the six-criteria test for waiver under *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976).
9. ____: ____. Of necessity, without a prior violation of a covenant, which has been tolerated by those with standing to enforce the covenant, there is no basis upon which to find a waiver.
10. **Deeds: Records: Time: Notice.** All deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Scott A. Lautenbaugh, of Nolan, Olson, Hansen & Lautenbaugh, L.L.P., for appellant.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

This appeal presents the question of whether a homeowner must remove the new asphalt shingle roof on his home and

replace it with a wood shake shingle roof, which is the required roofing under the subdivision's covenants. The district court found that he must—and we agree.

I. FACTUAL BACKGROUND

After our review of the record, we find that the following recitation of pertinent facts from the Douglas County District Court's order dated January 13, 2004, is concise and accurate, and therefore we quote it at length for the sake of judicial economy:

> Plaintiff Lynn Hoff ("Hoff") is the owner of Windridge Estates Lot 134, 1412 North 158th Avenue, Omaha, Nebraska. . . . Defendant Victor Ajlouny ("Ajlouny") owns Windridge Estates Lot 42, 1553 North 158th Avenue, Omaha, Nebraska. . . . All lots in Windridge Estates are subject to certain Protective Covenants recorded in the office of the Register of Deeds of Douglas County on September 12, 1984. . . . Paragraph Seven of these Protective Covenants provides as follows: "Roofs. All houses shall have wood shake shingle roofs." . . .
>
> On or about January 2002, Ajlouny replaced the wood shake shingle roof on his residence with an asphalt roof. . . . Hoff became aware of the installation of the asphalt roof approximately two to three days after the roof was completed. . . . Hoff sent letters to Ajlouny regarding the covenant violation dated January 11, 2002, February 11, 2002, and March 18, 2002. . . . Hoff also spoke with Ajlouny between January and March regarding the roof. . . . Ajlouny refused to bring his residence into compliance with the Covenants.

II. PROCEDURAL BACKGROUND

Lynn Hoff filed her petition on October 9, 2002, and her amended petition on October 15. In her amended petition, Hoff alleges that Victor Ajlouny's residence is subject to certain protective covenants (Protective Covenants) recorded in the office of the register of deeds of Douglas County, that such covenants provide " '[a]ll houses shall have wood shake shingle roofs,' " and that the asphalt roof installed at Ajlouny's residence violates the covenants. Hoff further alleges that Ajlouny refuses to bring his

residence into compliance with the covenants, despite demand from the homeowners' association, and that such refusal to comply has caused damage to the owners of homes in the Windridge Estates subdivision. Hoff requested an order of mandatory injunction directing Ajlouny to replace the roof with a wood shake shingle roof.

Ajlouny filed his answer on February 6, 2003. Ajlouny admitted that the current roof on his residence is not a wood shake shingle roof. Ajlouny set forth three affirmative defenses: (1) The alleged covenants are void as against public policy, (2) Hoff waived the covenant by failing to enforce it in a timely manner, and (3) the burden sought to be imposed by Hoff upon Ajlouny is much greater than any alleged damages flowing from the alleged violation of the covenant in question. Ajlouny requested that the court dismiss Hoff's amended petition with prejudice. We note that Ajlouny's first and third affirmative defenses are not before us on this appeal; he assigns error only with respect to the district court's failure to adopt his defense of waiver.

On June 2, 2003, Hoff filed a motion for summary judgment alleging that there was no genuine issue of material fact with respect to her claim. In support of her motion, Hoff submitted the affidavit of Kristopher Covi, Hoff's attorney.

A hearing on Hoff's motion for summary judgment was held on October 20, 2003. The court filed its order on January 13, 2004. The order granted summary judgment in favor of Hoff. The order also enjoined Ajlouny from violating paragraph 7 of Windridge Estates' Protective Covenants recorded in the office of the register of deeds of Douglas County on September 12, 1984, and directed Ajlouny to replace his asphalt roof with a wood shake shingle roof. Ajlouny now appeals.

III. ASSIGNMENTS OF ERROR

Ajlouny alleges that the district court erred in (1) admitting the affidavit of Covi into evidence with the Protective Covenants attached, when proper foundation had not been laid and the copy did not meet the requirements of the public record hearsay exception, and (2) failing to utilize the appropriate criteria and standard for waiver of the right to seek an injunction regarding restrictive covenants.

IV. STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the 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. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003). 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. *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

[3,4] An action for injunction sounds in equity. *Whipps Land & Cattle Co. v. Level 3 Communications, supra.* 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 from the conclusion reached by the trial court. *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995). (*Poppleton* was a summary judgment case regarding an equity matter. The plaintiffs had summary judgment ruled against them when the district court refused to grant them quiet title of real estate. The Nebraska Supreme Court began its factual analysis by stating: "Viewing the evidence in a light most favorable to the [plaintiffs] and giving them the benefit of all reasonable inferences deducible from the evidence, the facts of this case are as follows[.]" *Id.* at 356, 535 N.W.2d at 402.) Therefore, we will use the same standards in the instant case, and we, too, will view the evidence in a light most favorable to Ajlouny and give him the benefit of all reasonable inferences deducible from the evidence.

V. ANALYSIS

1. Affidavit of Covi

Ajlouny argues that the district court erred in admitting Covi's affidavit into evidence with the attachment of the Protective Covenants, when proper foundation had not been laid and the copy of the covenant did not meet the requirements of the public

record hearsay exception. Ajlouny's argument relies on Neb. Rev. Stat. § 76-235 (Reissue 2003), which states:

> *Every deed acknowledged or proved, and certified by any of the officers* named in sections 76-217, 76-219, 76-220, 76-226 and 76-227, *and authorized to take acknowledgments*, including the certificate specified in section 76-242, whenever such certificate is required by law, *may be read in evidence without further proof*, and shall be entitled to be recorded. The record of a deed duly recorded, or a transcript thereof duly certified, may also be read in evidence with the like force and effect as the original deed, whenever by the party's oath or otherwise the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control. Neither the certificate of the acknowledgment or the proof of any deed, nor the record or transcript of the record of such deed, shall be conclusive, but may be rebutted, and the force and effect thereof may be contested by any party affected thereby. *If the party contesting the proof of a deed shall make it appear that such proof was taken upon the oath of an interested or incompetent witness, neither such deed nor the record thereof shall be received in evidence until established by other competent proof.*

(Emphasis supplied.)

Ajlouny argues that in Covi's affidavit, Covi "makes no mention of how or why he knows [the Protective Covenants] are correct, nor that he is employed or has capacity as an officer pursuant to . . . § 76-235 to testify to the fact that the Protective Covenants attached are the same as held by the Register of Deeds Office." Brief for appellant at 7. Ajlouny also argues that "[i]n Covi's affidavit, he attests to the fact that he is the attorney for [Hoff], making him an interested person," and "[t]hus, a third party was required to lay foundation for the admission of the Protective Covenants, and to swear and certify to their accuracy when compared with the Original Protective Covenants." *Id.* However, Ajlouny's reliance on § 76-235 is misplaced because the statute deals with real property conveyances, and the covenant at issue clearly does not convey real property.

[5,6] The correct statutes for analysis are Neb. Rev. Stat. §§ 25-1334 and 27-1005 (Reissue 1995). Section 25-1334 states in part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

And, § 27-1005, regarding the Nebraska rules of evidence, states:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with section 27-902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

In his affidavit, Covi stated that he had personal knowledge of the facts set forth in his affidavit and stated that exhibit B attached to his affidavit was "a true and correct copy of the 'Protective Covenants' recorded at Book 718 Page 382 of the Miscellaneous Records of Douglas County on September 12, 1984 as compared to the original." Thus, the requirements of §§ 25-1334 and 27-1005 have been satisfied, and the affidavit and its attachment were properly admitted.

2. Prima Facie Case and Defense of Waiver

(a) Prima Facie Case

Paragraph 7 of the Protective Covenants for Lots 1 through 154 of the Windridge Estates subdivision states: "Roofs. All houses shall have wood shake shingle roofs." In his answer, Ajlouny admitted the allegations in paragraph 6 of Hoff's amended petition, which said, "On or about January, 2002 [Ajlouny] replaced the wood shake shingle roof on the Residence with an asphalt roof." Thus, the violation of the subdivision's covenants is established as a matter of law. Therefore, Hoff has

established a prima facie case and is entitled to summary judgment, unless Ajlouny establishes a genuine issue of material fact as to the defense of waiver—the only defense at issue on appeal.

(b) Waiver

[7] Ajlouny argues that the district court erred by not using the appropriate criteria and standard for determining whether there has been a waiver of the right to obtain an injunction regarding restrictive covenants. In support of his argument, Ajlouny cites *Pool v. Denbeck*, 196 Neb. 27, 33-34, 241 N.W.2d 503, 507 (1976), which sets out six criteria for judging whether there has been a waiver of a restrictive covenant:

> Whether there has been such a waiver or acquiescence depends upon the circumstances of each case. The criteria for determining this include[:] whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations are temporary or permanent in nature; and the amount of investment involved.

[8,9] However, the foregoing from *Pool v. Denbeck, supra*, must be read in light of the facts of that case which make it readily distinguishable from the instant case. In *Pool*, there were already other covenant violations in the subdivision, and the question was whether, because of the acquiescence of the subdivision's residents to those violations, the residents had waived their right to enforce the restrictive covenants against the new violation at issue in the lawsuit. However, in the case before us, Ajlouny introduced no evidence of any other covenant violation in the Windridge Estates subdivision, which evidence in our view is a predicate to the use of the six-criteria test for waiver under *Pool*. Of necessity, without a prior violation of a covenant, which has been tolerated by those with standing to enforce the covenant, there is no basis upon which to find a waiver.

In so concluding, we are not unmindful of the consideration set forth in the criteria from *Pool v. Denbeck, supra*: "the period of time in which no action was taken." However, even without

proof of a prior violation, we believe that the "passage of time" could be a possible defense, for example, if Ajlouny alleged that Hoff waited 3 years after he installed his asphalt shingle roof to complain or seek relief. However, that situation would fall under the rubric of laches or equitable estoppel. See *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 481, 513 N.W.2d 534, 543 (1994) ("the defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary"). Equitable estoppel is said to occur "[w]hen a person, knowing her rights, takes no steps to enforce those rights until the adverse party has, in good faith, changed his position such that he could not be restored to his former state if the rights are enforced, [and] the delay becomes inequitable . . . ." *Welch v. Welch*, 246 Neb. 435, 449, 519 N.W.2d 262, 272 (1994). Neither laches nor equitable estoppel was raised as a defense, and thus no issue of delay by Hoff is before us. In conclusion, as a matter of law, the enforceability of the covenant at issue has not been waived.

(c) Ajlouny's Knowledge of Covenant

[10] While Ajlouny does not specifically assign such as error on appeal, his brief argues that he was unaware that a restrictive covenant was placed on the property, because the prior owners of his residence did not disclose the existence of a homeowners' association or covenants. While we are not required to address such argument, because it was not specifically assigned, we do so only for the sake of completeness.

Neb. Rev. Stat. § 76-238 (Reissue 2003) states in part:

> All deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering [such instruments] to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice.

Thus, Ajlouny had record notice of such covenant, and such covenant was binding. The asphalt roof clearly violates the subdivision restrictions, and an injunction is the proper remedy.

VI. CONCLUSION

Therefore, we find that the district court properly awarded summary judgment in favor of Hoff because there was no genuine issue of material fact. We further find that the district court properly enjoined Ajlouny from violating paragraph 7 of Windridge Estates' Protective Covenants recorded in the office of the register of deeds of Douglas County on September 12, 1984, and properly directed Ajlouny to replace his asphalt roof with a wood shake shingle roof.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DOROTHY A. DROZ, APPELLANT.

703 N.W.2d 637

Filed September 20, 2005. No. A-04-446.

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.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. **Speedy Trial: Proof.** The burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) is applicable when the defendant is not tried within 6 months.
5. ____: ____. 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. **Speedy Trial: Time.** 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 in any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.
7. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
8. **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.
9. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the

> courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Thomas J. Garvey, Sarpy County Public Defender, Gregory A. Pivovar, and Tom Strigenz for appellant.

Jon Bruning, Attorney General, and Michael B. Guinan for appellee.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Dorothy A. Droz appeals from an order denying her motion to discharge, wherein she alleged that her statutory and constitutional rights to a speedy trial were violated.

BACKGROUND

The record before us consists of the transcript and a copy of the trial judge's "journal entries," but no bill of exceptions, and reflects the following: On February 27, 2003, Droz was charged by information with two counts of forgery. Droz entered a plea of not guilty to both charges on March 14, and the trial was set for July 7. On July 7, Droz pled guilty to count I and count II was dismissed. Sentencing was deferred to August 29 pending completion of a presentence investigation. On August 28, sentencing was continued to September 5 " '[b]y agreement of Counsel.' "

At the September 5, 2003, hearing, the State orally moved to set aside the plea, which motion, along with sentencing, was taken under advisement until October 31. On October 31, with counsel and Droz present, the matter was continued to November 14. On November 14, the hearing on the State's motion to set aside the plea was held and the motion was sustained " 'by agreement of [Droz].' " On the same date, the matter was set for jury trial on December 10. On December 11, Droz' attorney's motion

to withdraw was sustained, a public defender was appointed, the trial scheduled for December 10 was canceled, and the matter was fixed for further proceedings on December 19. A pretrial hearing was held December 19, and a jury trial was scheduled for February 4, 2004.

On January 29, 2004, Droz filed her motion to discharge, which was heard on February 4 and taken under advisement. The district court entered its written order on March 8, overruling the motion. In this order, the district court recited that the plea agreement entered into on July 7, 2003, required Droz to make restitution prior to sentencing. The State filed the motion to set aside the plea on September 5 due to the fact that Droz had failed to comply with the plea agreement. The matter was continued to October 31 to allow the court to review the record and to give Droz the opportunity to comply with the plea agreement.

The district court noted that there were no pretrial motions filed between February 27, 2003, and the date of Droz' plea on July 7, so this period of 4 months 10 days is not excluded from the speedy trial calculation. In support of its March 8, 2004, denial of the motion for discharge, the court stated:

> The Court is of the opinion however that the period of time from July 7[, 2003,] until [March 8, 2004,] the date of this Order[,] is excludible, for the reasons of [Droz'] plea agreement and request for continuance of Sentencing to comply with the plea agreement, then consenting to set aside the plea and change of Counsel were all actions of [Droz] and are excludible (see [*State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983))].

Droz filed this timely appeal.

ASSIGNMENTS OF ERROR

Droz assigns that the trial court erred in (1) ruling that she was not denied her statutory right to speedy trial, (2) ruling that she was not denied her constitutional right to speedy trial, and (3) not allowing her to proceed on her motion to suppress.

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. Petty*, 269 Neb. 205, 691 N.W.2d 101 (2005); *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004).

[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. *Id.*

ANALYSIS

Statutory Speedy Trial.

[3-5] Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005). Section 29-1207(4) provides that the following periods shall be excluded:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent;
>
> (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 state'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

(ii) The continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case;

(d) The period of delay resulting from the absence or unavailability of the defendant;

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him; and

(f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

The burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) is applicable when the defendant is not tried within 6 months. *State v. Schmader, supra*; *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002). 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. Schmader, supra*; *State v. Dailey, supra.*

[6] The rule in Nebraska is clear that to calculate the time for speedy trial purposes, we must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add in any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. See, *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002); *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999). In this case, Droz was charged by information on February 27, 2003. Thus, the original speedy trial deadline was August 27, and all applicable exclusions are added onto that date to determine the new trial deadline. See *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

The parties agree that there was no excludable time between the filing of the information on February 27, 2003, and Droz' plea on July 7. We examine the time between that July 7 and the filing

of Droz' motion to discharge on January 29, 2004, to determine what, if any, periods were excludable.

[7] The State asserts that the time between the entry of Droz' guilty plea on July 7, 2003, and the date the plea was set aside, November 14, should be excluded. We agree. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996). The Nebraska Supreme Court has held that this waiver includes a defendant's right to a speedy trial. See *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984). See, also, Annot., 57 A.L.R.2d 302 (1958), and Annot., 56-58 A.L.R.2d Later Case Service 302-344 (2003) (defendant's plea of guilty made without raising question of denial of speedy trial constitutes valid and binding waiver of right thereto).

In this case, the record reflects that the trial judge properly advised Droz of her rights and made a finding that she understood her rights prior to accepting her plea. Specifically, the trial court's journal entry for July 7, 2003, provides in relevant part:

> "[Droz] re-arraigned on the charge contained in the Information and enters a plea of guilty to Count I. The Court finds beyond a reasonable doubt that such plea is entered with an understanding of the charges, penalties, constitutional rights, [and] consequences of pleading guilty, and is entered freely, voluntarily, intelligently and knowingly made, with advi[c]e of counsel, and with a factual basis. . . ."

Accordingly, Droz' right to a speedy trial ceased to exist on July 7, when she pled guilty to forgery.

The State's motion to set aside the plea was sustained " 'by agreement of [Droz]' " on November 14, 2003. In determining the effect of this action, we find the case *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), to be instructive. *Andersen* is distinguishable in that the defendant in that case did not plead guilty; rather, he waived his right to a speedy trial and then later revoked that waiver. The Nebraska Supreme Court held that upon termination of a defendant's waiver of speedy trial rights, "the 6-month period for the State to bring a defendant to trial

provided in § 29-1207 shall begin anew." *Id.* at 195, 440 N.W.2d at 211. We believe the holding in *Andersen* to be applicable in the present case since the setting aside of Droz' guilty plea effectively terminated the waiver of her speedy trial rights occasioned by her earlier plea. Applying *Andersen* to the case at bar, Droz' rights to speedy trial began anew on November 14. Pursuant to *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), we exclude November 14, count forward 6 months, back up 1 day, and then add in any time excluded under § 29-1207(4) to determine the last day Droz can be or could have been tried. Without counting any other excludable periods, the State had until May 14, 2004, to bring Droz to trial.

The district court concluded that the entire period between Droz' plea on July 7, 2003, and its order filed on March 8, 2004, was excludable. For the following reasons, we disagree. In reviewing the record, we find no basis for excluding the period between November 14 and December 11, 2003. On December 11, Droz' counsel was allowed to withdraw and, on Droz' motion, the district court appointed a public defender to represent her. On that same date, the trial scheduled for December 10 was canceled and the matter was fixed for a pretrial hearing on December 19. It is the State's contention that the time between December 11 and the filing of Droz' motion to discharge on January 29, 2004, is properly excluded under § 29-1207(4)(a) or (b) as either " 'time from filing until final disposition of pretrial motions of [Droz],' " or a " 'period of delay resulting from a continuance granted at the request or with the consent of [Droz] or [her] counsel.' " See brief for appellee at 23. Section 29-1207(4)(a) provides for exclusion of the period of time from the filing to the final disposition of a defendant's pretrial motions. In this case, however, the record indicates that Droz' motion for court-appointed counsel and the district court's final disposition sustaining that motion were almost simultaneous. This subsection therefore does not apply. In addition, the record does not contain any evidence of an oral or written motion for continuance made by either Droz or her counsel which would bring this delay under § 29-1207(4)(b). The State argues that Droz' consent to a continuance under these circumstances is "self-evident" because "no one would expect a newly appointed attorney to be prepared for a felony trial on such

short notice." Brief for appellee at 23. We agree with the State that some delay before trial would be expected in this situation. However, absent evidence that a continuance was sought by either Droz or her counsel, this period of time is not properly excludable under § 29-1207(4)(b).

Although it could be argued that there was "good cause" for delay following the appointment of new counsel, the district court did not make a specific finding to that effect as required by § 29-1207(4)(f). See *State v. Feldhacker*, 11 Neb. App. 872, 663 N.W.2d 143 (2003) (supplemental opinion) (when relying on § 29-1207(4)(f), general finding of good cause will not suffice and trial court must make specific findings as to good cause or causes which resulted in extension of time). Absent statutory authority to exclude the period between November 14, 2003, and January 29, 2004, we include the period in our speedy trial calculations. We find that at the time Droz filed her motion to discharge on January 29, the State had 106 days within which to bring Droz to trial.

[8] Based on the foregoing analysis, it is clear that Droz' statutory right to speedy trial had not been violated when she filed her motion to discharge on January 29, 2004. 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); *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002). Albeit for different reasons, we find no error in the district court's ruling that Droz' statutory speedy trial right was not violated.

Constitutional Speedy Trial.

Droz also argues that her state and federal constitutional rights to a speedy trial were violated. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Our case law is clear, however, that the voluntary entry of a guilty plea waives every defense to a charge, including constitutional defenses. See, *State v. Burkhardt*, 258 Neb. 1050,

607 N.W.2d 512 (2000); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996). In *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984), the Nebraska Supreme Court reasoned that whether it considered the defendant's voluntary and knowing waiver under § 29-1207, the Constitution of the United States, or the Constitution of the State of Nebraska, the conclusion it would reach would be the same: The defendant waived any rights to a speedy trial. Applying the reasoning of *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), as we did above, we find that Droz' constitutional as well as statutory rights to a speedy trial began anew on November 14, 2003, when her plea was set aside.

[9] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *State v. Loyd, supra*; *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). " 'The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.' " *State v. Robinson*, 12 Neb. App. 897, 904, 687 N.W.2d 15, 21 (2004), quoting *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). This court noted in *Robinson* that

> [o]nly in *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998), and *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), has the Nebraska Supreme Court found the length of the delay to be so short as to make it unnecessary to inquire into the other three factors of the *Barker* balancing test. In *Kula, supra*, the length of the delay at issue was only 49 days, and in *Palmer, supra*, it was 17 weeks.

12 Neb. App. at 904, 687 N.W.2d at 21.

In this case, the applicable time period we examine in determining whether Droz' constitutional rights were violated is

November 15, 2003, the day after Droz' plea was set aside, to January 29, 2004, the day Droz filed her motion to discharge. See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002) (exclude day information was filed in speedy trial calculations). This period totals 76 calendar days, or just under 11 weeks. Because the total period at issue in this case falls between the lengths of delay in *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998), and *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), we conclude without further analysis that it is unnecessary to inquire into the other three factors of the *Barker* balancing test. Droz' constitutional rights to a speedy trial were not violated. This assignment too is without merit.

Motion to Suppress.

In her brief, Droz fails to raise or argue her third assignment of error. Errors that are assigned but not argued will not be addressed by an appellate court. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005); *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

CONCLUSION

Because Droz' statutory and constitutional rights to a speedy trial were not violated, the district court's denial of Droz' motion for discharge was not clearly erroneous and is hereby affirmed. Upon entry of the mandate in the district court, there remain 106 days in which to bring Droz to trial in order to comply with § 29-1207.

AFFIRMED.

ANONYMOUS, APPELLANT AND CROSS-APPELLEE, V. ST. JOHN LUTHERAN CHURCH OF SEWARD, NEBRASKA, A NEBRASKA CORPORATION, ET AL., APPELLEES, AND THE ESTATE OF DAVID MANNIGEL, DECEASED, APPELLEE AND CROSS-APPELLANT.

703 N.W.2d 918

Filed September 27, 2005. No. A-04-275.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is 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.
3. **Limitations of Actions.** A purpose of a statute of limitations is to prevent recovery on stale claims.
4. ____. The mischief which a statute of limitations is intended to remedy is general inconvenience resulting from delay in assertion of a legal right which it is practicable to assert.
5. ____. The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim.
6. **Limitations of Actions: Negligence.** In the context of a professional relationship, a continuous relationship may toll the statute of limitations but requires that there be a continuity of the relationship and services for the same or a related subject matter after the alleged professional negligence.
7. **Mental Competency: Words and Phrases.** A person with a mental disorder is one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action.
8. **Limitations of Actions: Mental Competency: Words and Phrases.** A mental disorder within the meaning of Neb. Rev. Stat. § 25-213 (Reissue 1995) is an incapacity which disqualifies one from acting for the protection of one's rights.
9. **Expert Witnesses: Proof.** Injuries subjective in nature and effect must be established by expert medical testimony.
10. **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 Seward County: MARY C. GILBRIDE, Judge. Affirmed.

Daniel H. Friedman and Herbert J. Friedman, of Friedman Law Offices, for appellant.

David A. Domina and Claudia Stringfield, of Domina Law, P.C., for appellees St. John Lutheran Church et al.

Randy L. Goyette and Christopher J. Walker, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Estate of David Mannigel.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Anonymous filed suit against St. John Lutheran Church of Seward, Nebraska, a Nebraska corporation, and Gary Lewien and John Doe 1 through 2,300 (real names unknown), doing business as St. John Lutheran Congregation, an unincorporated religious association (collectively St. John); the Nebraska District of the Lutheran Church-Missouri Synod, a Nebraska corporation, and the Lutheran Church-Missouri Synod, a Missouri corporation (subsequently dismissed as parties); and the estate of David Mannigel, deceased (Estate of Mannigel), based upon allegations of sexual abuse perpetrated by Mannigel in the early 1970's when Anonymous was between the ages of 10 and 12. Finding that Anonymous' claims were barred by the statute of limitations, the district court granted summary judgment and dismissed the petition. We affirm.

BACKGROUND

Anonymous filed a petition for damages on November 1, 2002, alleging that she had been a member of St. John and had attended St. John Lutheran School. The petition alleged that in 1971 and 1972, Mannigel sexually abused her on numerous occasions while in the course of his position as teacher and minister, that the abuse took place on school property, that the abuse continued until 2001, that the abuse was ongoing in nature and designed to intimidate and control, and that Mannigel began inquiring about Anonymous' children in 2001. Anonymous further alleged that St. John was or should have been placed on notice "at least ten years ago" that Mannigel was "sexually abusing [Anonymous] and other children on a routine and regular basis and refused to take steps to remove him from a position of power and refused to discharge him and report him to criminal

authorities." She set forth causes of action for intentional infliction of emotional distress, negligence, breach of fiduciary duty, breach of implied warranty, and misrepresentation, and she prayed for $750,000 and general damages, interest, and costs against each party on each cause of action.

The answer of the Estate of Mannigel and that of St. John alleged the petition was barred by the statute of limitations. On May 12, 2003, St. John filed a motion for summary judgment, claiming that because Anonymous' claims were barred by the statute of limitations, the movants were entitled to judgment as a matter of law. The Estate of Mannigel filed a similar motion for summary judgment on May 16.

The court held an evidentiary hearing on the motions and received various items of evidence. According to that evidence, Anonymous was born in 1961, graduated from high school at the top of her class, attended a year of college, married in 1984, and had given birth to a number of children.

Anonymous attended St. John Lutheran School from kindergarten through the ninth grade. Mannigel was a teacher at the school and a friend of Anonymous' family. In the classroom, Mannigel would put money in Anonymous' socks and "fly" her around the room by picking her up in her chair, raising her as high as he could, and carrying her about the room. Mannigel took Anonymous on two summer vacations and on numerous trips to the movies. Anonymous' first recollection of Mannigel's molesting her was in the summer before Anonymous entered the fifth grade. Anonymous stated that Mannigel abused her by having her sit on his lap, kissing her on the mouth, rubbing her vagina through her clothes, and having her rub his penis through his clothes. Although the molesting ceased after Anonymous completed the sixth grade, Mannigel continued to have contact with Anonymous until 2001. This contact included giving Anonymous money, sending her greeting cards, and visiting the house of Anonymous' parents at times when Anonymous was present. In the mid- to late 1980's, Anonymous worked at St. John Lutheran School for approximately 3 to 4 years, where Mannigel was her "boss."

When Anonymous was approximately 14 or 15 years old, she told her mother that she had been sexually abused by Mannigel.

In approximately 1983, Anonymous told a psychiatrist about the abuse, and she also told her husband-to-be before they married. Anonymous testified that in 1990, she told Paul Vasconcellos, a mental health practitioner and also a visiting pastor at St. John, of the abuse by Mannigel. At that time, Vasconcellos provided professional mental health care to Anonymous. Anonymous stated that Vasconcellos was silent when Anonymous revealed that Mannigel had abused her. She thought Vasconcellos had an obligation to report the abuse to the police, but Anonymous did not know if he did report the abuse.

Anonymous stated that she "frequently talked about [the abuse] to people that [she] trusted, such as friends, but [she] c[ould]n't give . . . exact dates and times." She stated that during her teenage years and throughout her entire life, she told people of the abuse. Anonymous sent a letter regarding the abuse to Mannigel in approximately 1998, and around that same time, she read the letter to her mother and to a friend. Anonymous stated that she "never forgot" the abuse, that the abuse had been alive and active in her mind all her life since the time it occurred, and that she "knew what [Mannigel] had done, but it wasn't until [she] saw [a psychiatrist] that he confirmed for [Anonymous] that everything that [Anonymous] had gone through in [her] life was because of that sexual abuse."

Anonymous stated that when Mannigel telephoned or sent her letters, "[i]t always sent [her] right back to [her] childhood." Dr. Mario Scalora, who conducted forensic interviews with Anonymous and performed psychological testing, stated in his evaluation that Anonymous "described a variety of factors that would explain a significant delay in reporting the alleged abuse": Mannigel maintained a significant relationship with Anonymous and Anonymous' family and maintained substantial influence over Anonymous, Anonymous experienced a longstanding pattern of traumatic symptoms since the 2-year period the sexualized contact took place, and Anonymous suffered estrangement from her mother as a result of the lack of maternal support when reporting the abuse to her mother. Scalora stated, "To summarize, the continued contact between [Anonymous] and the alleged abuser appeared to have had the effect of continuing old emotional wounds and preventing them from healing." In personality

testing, Scalora found "no evidence of thought disorder or difficulties of reality testing," but observed indications of "significant emotional problems." Scalora opined that Anonymous' "extensive continued contact with the abuser, her struggle with post-traumatic symptoms as well as limited familial and community support appeared to have made her immediately publicly re-disclosing the abuse and publicly confronting her abuser a formidable task." Scalora's evaluation concluded with the observation that "[t]he psychological effects of sexual abuse, particularly in cases of extended exploitation at the hands of an authority figure, may impair the victim's ability to immediately confront the abuser in a public manner (such as a legal proceeding)."

Paul Flack, a provisionally licensed mental health practitioner who had counseled with Anonymous over 20 times, opined that every contact Mannigel had with Anonymous "had the effect of essentially 'tearing the scab off of a wound' and lighting up and reaggravating the incidents when he actually sexually assaulted her." Flack further opined that Mannigel's contacts with Anonymous "aggravated the original abuse and amounted to a continuation of the trauma and control issues of the original abuse."

In her answers to St. John's requests for admissions, Anonymous admitted that for more than 10 years immediately before she filed the action, she had handled her own business affairs, provided maternal custodial care to her children, "[p]rovided decision-making and control with her husband over her health and the health of her children," sought and obtained medical and other professional services for herself and her children, voted when she chose to do so, and held appointed or volunteer positions in the church or community. Anonymous admitted that she had been mentally competent for more than 10 consecutive years before she filed the lawsuit. Although she had seen various psychiatrists and psychologists, Anonymous never had any restrictions placed on her activities for any medical or mental health reason, and she had never been an inpatient at a mental health facility. In an affidavit, however, Anonymous stated that she believed she was "mentally incapacitated and ill to a degree that [she] was unable to understand [her] legal rights, retain legal counsel, and institute legal action until at least after April, 2001."

In its February 12, 2004, journal entry, the district court found that Anonymous attained the age of majority in 1981, that she had 4 years from that time to bring suit upon those causes of action which accrued prior to the time she attained majority, that Anonymous was aware of the sexual abuse from the date she achieved her majority and at all times since that date, that Anonymous was aware Mannigel's conduct was wrong prior to and after 1981, that the statute of limitations had not been tolled as the result of any disability or mental disorder, that Nebraska had not adopted the " 'continuing wrong theory' " in emotional distress cases, and that the running of the statute of limitations could not be tolled by the allegations of a " 'continuing wrong.' " The court stated that even assuming the continuing wrong theory applied, the evidence did not present any question of fact. With regard to the claim of infliction of emotional distress based upon events occurring after November 1, 1998, the court stated that the evidence did not show that the conduct of Mannigel from that time was so " 'outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and [wa]s to be regarded as atrocious and utterly intolerable in a civilized community.' " The court stated that there was no genuine issue of fact with respect to Anonymous' claims of emotional abuse occurring after 1998. Therefore, the district court sustained the motions for summary judgment and dismissed the petition. Anonymous timely appeals.

ASSIGNMENTS OF ERROR

Anonymous alleges that the trial court erred in granting the motions for summary judgment.

Upon cross-appeal, the Estate of Mannigel alleges that the district court erred in making a final determination of fact as to whether Mannigel committed the alleged acts of sexual abuse when such a determination of fact was unnecessary and improper in order to address the motions for summary judgment.

STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the 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.

Sodoro, Daly v. Kramer, 267 Neb. 970, 679 N.W.2d 213 (2004). 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. *Id.*

ANALYSIS

Statute of Limitations.

Neb. Rev. Stat. § 25-207(3) (Reissue 1995) sets forth a 4-year statute of limitations for "an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated." Neb. Rev. Stat. § 25-213 (Reissue 1995) provides that

> if a person entitled to bring any action mentioned in this chapter . . . is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed.

[3-5] The alleged abuse occurred in 1971 and 1972, when Anonymous was between the ages of 10 and 12. Because the alleged abuse occurred when Anonymous was "within the age of 20 years," see § 25-213, Anonymous had 4 years from the time she became 21 years of age to file suit. See *Brown v. Kindred*, 259 Neb. 95, 100, 608 N.W.2d 577, 580 (2000) (" 'within the age of 20 years' " means until one becomes 21 years old). Contrary to the district court's finding that Anonymous attained the age of majority in 1981, we observe that Anonymous turned 21 in 1982. However, this makes no difference in our analysis. The petition was not filed until November 1, 2002. A purpose of a statute of limitations is to prevent recovery on stale claims. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), *overruled on other grounds, Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002). The mischief which a statute of limitations is intended to remedy is general inconvenience resulting from delay in assertion of a legal right which it is practicable to assert. *Id.* The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not

prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim. *Id.* In this case, Anonymous did not file the petition until after the death of Mannigel.

Anonymous was aware of the abuse, and such awareness is evidenced by her numerous reports of the abuse to others. Anonymous told her mother of the alleged abuse when Anonymous was 14 or 15 years old. She told her husband about it prior to marriage and told a psychiatrist in approximately 1983. According to Anonymous, in 1990, she told Vasconcellos about the alleged abuse. In 1998, she wrote Mannigel concerning the alleged abuse and read the letter to her mother and a friend. Anonymous admitted that she had never been diagnosed with or treated for a mental illness that required inpatient hospitalization or for a repressed memory. She has been able to handle her own affairs and admitted to being mentally competent for more than 10 consecutive years before she filed the lawsuit. Although Anonymous argues that she suffered from a mental disorder that prevented her from instituting legal action, such assertion is unsupported by the evidence, even when viewed in the light most favorable to Anonymous.

Continuing Tort Doctrine.

Anonymous must show some reason why the action is not barred by the statute of limitations. She has not established that her discovery of the claim was delayed. Anonymous knew Mannigel's alleged molestation of her was wrong since at least the mid-1970's when she first told her mother that Mannigel had sexually abused her. Instead, Anonymous first argues that her claims are not barred by § 25-207, because Mannigel's conduct constituted a continuing tort that persisted through 2001.

[6] Anonymous acknowledges that no Nebraska case law directly supports her attempt to apply the continuing tort doctrine in the case before us. She analogizes the instant case with those applying the concept in cases of medical negligence. In the context of a professional relationship, Nebraska law does recognize that a continuous relationship may toll the statute of limitations but requires that there be a continuity of the relationship and services for the same or a related subject matter after the alleged

professional negligence. See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). No Nebraska appellate court has applied this rule in a context similar to that in the case before us, and there was no evidence of a similar professional relationship as in *Reinke Mfg. Co.* between Anonymous and Mannigel during the years after Anonymous reached the age of majority.

Anonymous cites to the Idaho case of *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749 (1993), in support of her argument. We first observe that the issue in *Curtis* involved a very different factual context, concerning alleged physical and mental abuse in the relationship between an unmarried, adult couple over a 10-year period during which they resided together.

The *Curtis* court stated that by its nature, the tort of intentional infliction of emotional distress will often involve a series of acts over a period of time, rather than one single act causing severe emotional distress. According to *Curtis*, "continuing tort" has been defined as

> "one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation."

123 Idaho at 603, 850 P.2d at 754, quoting 54 C.J.S. *Limitations of Actions* § 177 (1987).

A "continuing tort doctrine" is inapplicable in the case before us. The alleged sexual abuse ceased in 1972. Although a counselor explained that each time Mannigel corresponded with Anonymous it was like "tearing the scab off of a wound," Mannigel's contact with Anonymous after that point—such as sending Anonymous cards and money and seeing her at her parent's house—was not wrongful conduct in the legal sense and does not rise to the level needed to be actionable as an intentional infliction of emotional distress.

The *Curtis* court recognized that

> embracing th[e] concept [of continuing tort] in the area of intentional or negligent infliction of emotional distress does not throw open the doors to permit filing these actions at any time. The courts which have adopted this continuing tort theory have generally stated that the statute

> of limitations is only held in abeyance until the tortious acts cease. . . . At that point the statute begins to run. If at some point after the statute has run the tortious acts begin again, a new cause of action may arise, but only as to those damages which have accrued since the new tortious conduct began.

(Citations omitted.) 123 Idaho at 604, 850 P.2d at 755. Anonymous attempts to define the continual ill effects of the original violations as continuing unlawful acts. Construing Mannigel's subsequent contacts as unlawful—and thus equating them with the earlier acts of sexual abuse—would throw open the doors to permit filing of such actions at any time. A chance encounter on a city street would be given the same legal effect as the despicable acts of sexual abuse which were alleged to have occurred during the 1970's. We decline to apply the continuing tort doctrine in such fashion.

Mental Disorder.

Anonymous also argues that § 25-213—which tolls the time for bringing an action if the claimant "is, at the time the cause of action accrued . . . a person with a mental disorder"—applies in the case before us.

[7,8] In *Vergara v. Lopez-Vasquez*, 1 Neb. App. 1141, 510 N.W.2d 550 (1993), this court determined that the substitution of the phrase "a person with a mental disorder" for the word "insane" in § 25-213 did not change the legal standard involved. We found that a person with a mental disorder is one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action. *Vergara, supra.* A mental disorder within the meaning of § 25-213 is an incapacity which disqualifies one from acting for the protection of one's rights. *Vergara, supra.*

[9] We recognize that, because we are reviewing a summary judgment granted against Anonymous, we must view the evidence in the light most favorable to her. Obviously, Anonymous' own statements cannot serve to establish that she suffers from a mental disorder; expert testimony is required. See, e.g., *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999) (mental suffering

and sense of helplessness are injuries subjective in nature and effect and must be established by expert medical testimony). Flack's affidavit opines that Anonymous "has been plagued by a variety of medical and physical ailments including post-traumatic stress disorder," but the affidavit fails to express any opinion concerning her ability to institute a legal action. Scalora's affidavit provides lengthy discussion of Anonymous' symptoms and complaints, but also fails to opine that Anonymous suffered from a mental disorder which actually prevented her from understanding her legal rights or from instituting legal action. At most, Scalora opines that "immediately publicly re-disclosing the abuse and publicly confronting her abuser [would be] a formidable task" and that the psychological effects of sexual abuse "may" impair the victim's ability to "immediately" confront the abuser in a public manner. Viewed in the light most favorable to Anonymous, this evidence does not establish an issue of fact concerning the existence of a mental disorder within the meaning of § 25-213.

[10] Having rejected both of Anonymous' arguments, we find nothing that would toll the statute of limitations and no disputed issue of material fact regarding whether the claims are barred by the statute of limitations. Because we affirm the order of the district court, we need not consider the cross-appeal by the Estate of Mannigel. See *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

CONCLUSION

We conclude that Anonymous' causes of action are barred by the statute of limitations and that any conduct within 4 years prior to the time Anonymous filed her petition did not rise to the level of being actionable as an intentional infliction of emotional distress. We therefore affirm the order of the district court granting summary judgment and dismissing the petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSHUA BELK, APPELLANT.

703 N.W.2d 652

Filed September 27, 2005. No. A-04-1141.

1. **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.
2. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial.
3. **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.
4. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
5. **Postconviction.** Postconviction proceedings are special proceedings.
6. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** In addition to the district court's express statutory power to void the entire criminal proceedings, a district court has implicit authority to grant a new direct appeal where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.
8. **Postconviction: Appeal and Error.** In a postconviction action, the district court does not possess the power to limit the issues when it grants a new direct appeal.
9. **Judgments: Collateral Attack.** If a judgment is entered without jurisdiction of the person or the subject matter or in excess of the court's power, it is void and may be collaterally impeached.
10. **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. If the 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.
11. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

12. ____. In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.
13. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

The district court for Lancaster County, Nebraska, granted Joshua Belk's motion for postconviction relief, granting Belk the right to a new direct appeal. Belk has now appealed his convictions and sentences stemming from his pleas of no contest to two counts of sexual assault of a child. For the reasons set forth herein, we affirm Belk's convictions and sentences.

STATEMENT OF FACTS

On January 29, 2003, Belk was charged by information with one count of first degree sexual assault on a child, which is a Class II felony. The matter was to come on for trial on July 21 but was subsequently rescheduled for July 29. On July 22, the State and Belk notified the court that the parties had arrived at a plea agreement. Pursuant to the agreement, on that same date, Belk was charged by amended information with two counts of sexual assault of a child, which is a Class IIIA felony. Belk pled no contest to the two counts of sexual assault of a child, and the court accepted the pleas and found Belk guilty of two counts of sexual assault of a child. The amended information was filed with the district court clerk the next day. On September 10, the district court sentenced Belk to terms of 3 to 5 years' imprisonment on each count of sexual assault of a child. The sentences were ordered to run consecutively to each other. Belk was given credit for 244 days already served. No direct appeal was filed.

On November 18, 2003, Belk filed a motion for postconviction relief. In his motion, Belk sought to have his convictions and sentences vacated on the following grounds:

> a. That [Belk's] rights under Article I, Section 3 of the Nebraska Constitution, and the Fifth and Fourteenth Amendment[s] under the United States Constitution were violated when [Belk's] attorney refused to prosecute a direct appeal at the request of [Belk] within the allotted time limit.
>
> b. That [Belk's] rights under Article I, Section 11 of the Nebraska Constitution, and the Sixth Amendment rights under the Constitution of the United States were violated when [Belk's] attorney refused to prosecute a direct appeal at the request of [Belk] within the allotted time limit.
>
> c. [Belk's] rights under Article I, Section 23 of the Nebraska Constitution were violated when [Belk's] attorney refused to prosecute a direct appeal at the request of [Belk] within the allotted time limit.
>
> d. Had the [aforementioned] error not occurred, [Belk] would have been able to appeal his prosecution to the [N]ebraska Supreme Court.

A hearing was held on Belk's motion on May 4, 2004, and at the conclusion of the hearing, the district court took the matter under advisement. On September 10, the district court entered its order. The court found that Belk and his attorney "did not discuss [Belk's] right to appeal on September 10, 2003." The court next found that "[o]n September 16, 2003, [Belk's attorney] sent a letter to [Belk] setting forth his requirements of [Belk] before [the attorney] would file an appeal." The court further found, "[Belk's wife] took a check to [the attorney's] office on October 6, 2003, along with a letter giving [the attorney] permission to file [an] appeal, but [the attorney's] assistant would not accept either and said that [the attorney] would call. He did not call."

The court concluded that Belk's trial attorney "failed to act reasonably regarding [Belk's] right to file an appeal because he did not file the requested appeal re excessive sentence and he did not provide information to [Belk] regarding [Belk's] right to request in forma pauperis status regarding an appeal." Therefore, the court held that Belk's "motion for postconviction relief is

sustained for the reasons set forth above" and ordered that "[Belk] is hereby granted a new direct appeal re the issue of excessive sentence." The district court appointed the Lancaster County public defender's office to represent Belk in his direct appeal, and Belk has timely appealed to this court.

ASSIGNMENTS OF ERROR

Belk contends, restated, that he received ineffective assistance from his trial counsel for numerous reasons and that the district court abused its discretion when it imposed excessive sentences upon him.

STANDARD OF REVIEW

[1] 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. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

[2] An appellate court always reserves the right to note plain error which was not complained of at trial. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[3] 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. Mulinix*, 12 Neb. App. 836, 687 N.W.2d 1 (2004).

[4] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

ANALYSIS

Ineffective Assistance of Counsel.

[5] Belk's first five assignments of error, restated as a single assignment above, all claim that he received ineffective assistance from his trial counsel. However, the district court's order granting Belk's motion for postconviction relief limited the direct appeal to "the issue of excessive sentence." Belk has not appealed from the district court's order granting his motion for

postconviction relief. We note that since postconviction proceedings are special proceedings, and because the district court's decision affected a substantial right of Belk's, the district court's order was a final and therefore appealable order. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[6] Despite the fact that Belk failed to appeal from the district court's order limiting the issues of his direct appeal to the matter of excessive sentences, we note that an appellate court always reserves the right to note plain error which was not complained of at trial. *State v. Davlin, supra*. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

[7] The Nebraska Supreme Court has previously noted the following regarding the district court's power to grant postconviction relief:

> In [*State v.*] *McCracken*, [260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002),] we specifically rejected the State's contention that the power conferred by the [Nebraska Postconviction Act] is limited to either setting aside a criminal judgment because of a violation of the defendant's constitutional rights or denying postconviction relief entirely. We held that in addition to the district court's express statutory power to void the entire criminal proceedings, a district court had implicit authority to grant a new direct appeal "where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings."

State v. Meers, 267 Neb. 27, 29-30, 671 N.W.2d 234, 236-37 (2003).

[8,9] Although the district court has the implicit authority to grant a new direct appeal in a postconviction action, we are unable to find any authority that grants a district court the power to limit the issues of that direct appeal, and we determine that in a postconviction action, the district court does not possess the

power to limit the issues when it grants a new direct appeal. Therefore, we find that it was plain error for the district court to limit the direct appeal granted to Belk to the issue of excessive sentences. If a judgment is entered without jurisdiction of the person or the subject matter or in excess of the court's power, it is void and may be collaterally impeached. *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999). Because that portion of the district court's order limiting Belk's direct appeal was in excess of the court's power, it is void. As a result, Belk is entitled to a full direct appeal.

[10] After examining the record and each of Belk's allegations of ineffective assistance of counsel, it is clear to us that the record before us is not sufficient to properly address his allegations. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). The determining factor is whether the record is sufficient to adequately review the question. *Id.* If the 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. *Id.* We conclude in the instant case that the record on direct appeal is not sufficient to adequately review Belk's arguments regarding ineffective assistance of counsel, and because these matters have not been raised or ruled on at the trial level and may require an evidentiary hearing, we will not address these matters on direct appeal.

Excessive Sentences.

Belk alleges that the district court abused its discretion when it imposed excessive sentences upon him. As mentioned earlier, Belk was convicted of two counts of sexual assault of a child. He was sentenced to 3 to 5 years' imprisonment on each count, was given credit for 244 days already served, and was ordered to pay the costs of prosecution. Belk's sentences were ordered to run consecutively to each other. Sexual assault of a child is a Class IIIA felony, and the sentencing range for Class IIIA felonies is up to 5 years' imprisonment or a $10,000 fine.

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. Mulinix*, 12 Neb. App. 836,

687 N.W.2d 1 (2004). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005).

Belk alleges that his sentences were excessive because, "[d]espite the existence of numerous mitigating circumstances and the lack of any significant criminal history . . . Belk was sentenced to substantial minimum sentences and maximum, maximum sentences for the two class IIIA felonies for which he was convicted." Brief for appellant at 22. Belk points out that he was the only child of a single parent, that he never met his natural father, that his homelife was inadequate, that he suffered physical abuse at the hands of his stepfather, that he was exposed to domestic violence and drug use as a child, that his mother gave him marijuana, and that he was removed from his mother's care and placed in foster care when he was 15 years old. He also notes that his sentences created substantial hardship for his family and children. Belk suggests that "[h]ad [he] not been incarcerated, he would have been able to work, pay taxes, and provide financial support for his wife and their mutual child" and would have been able to pay child support for his other children. *Id.* at 23.

Belk's brief notes that "[i]n spite of [his] disadvantaged background, [Belk] reached the age of 30 . . . with a relatively minimal criminal record." *Id.* at 22. Belk claims that prior to the crimes in the instant case, he "had no prior history of violent or aggressive behavior, no prior felony convictions, and no arrests or convictions for sex offenses." *Id.* at 23. Belk contends that "[g]iven this fact and the fact that his prior convictions were almost exclusively related to the operation of motor vehicles, the court's combined sentences of not less than six nor more than 10 years imposed a punishment against [Belk] which was much greater than his criminal history would warrant." *Id.* Belk further notes that he pled no contest to the instant charges, saving the State money and saving the victims from having to testify.

[11-13] In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past

criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Kula*, 262 Neb. 787, 635 N.W.2d 252 (2001).

An examination of the factors to be considered in imposing a sentence reveals that the district court clearly did not abuse its discretion when it imposed its sentences upon Belk. The presentence report reveals that Belk was 29 years old at the time he committed the crimes in the instant case, while one of his victims was 6 years old and the other victim was 8 years old. The presentence report also reflects that the 6-year-old victim alleged that Belk digitally penetrated her, while the 8-year-old victim alleged that Belk touched her "private parts" with his hand and that he " 'tried to put his private in [hers].' " He was an experienced adult, while the children were susceptible and vulnerable. His crimes were undoubtedly traumatic for his victims. The record indicates that the trial court examined the presentence report prior to sentencing Belk, and the court, when it imposed its sentences, noted that "if the Court were to impose sentences less than the ones about to be imposed, it would . . . depreciate the seriousness of these crimes and promote disrespect for the law."

Belk's sentences are clearly within the statutory range for the crimes he committed. The reasons and rulings of the trial judge in sentencing Belk were not clearly untenable and did not unfairly deprive Belk of a substantial right or deny him a just result in the instant case. The district court did not abuse its discretion when it imposed its sentences upon Belk, and this assignment of error is entirely without merit.

CONCLUSION

The record in the instant case is not sufficient to properly address Belk's allegations of ineffective assistance of counsel. Further, we find that the trial court did not abuse its discretion

when it imposed its sentences upon Belk. Accordingly, Belk's convictions and sentences are affirmed.

AFFIRMED.

IN RE INTEREST OF KYLE O., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KYLE O., APPELLANT.

703 N.W.2d 909

Filed September 27, 2005. No. A-04-1477.

1. **Juvenile Courts: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings.
2. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
3. **Witnesses.** Credibility of a witness is always relevant.
4. ____. Normally, it is improper for one witness to testify as to the credibility of another witness.
5. **Trial: Evidence.** If an exhibit is admissible only in part, it is incumbent on the offeror to select and offer only the admissible part; if one offers both the admissible and inadmissible parts, the trial court may reject the entire offer.
6. **Juvenile Courts: Proof.** When an adjudication is based upon Neb. Rev. Stat. § 43-247(1) (Reissue 2004), the allegations must be proved beyond a reasonable doubt.
7. **Sexual Assault: Words and Phrases.** Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.
8. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.
9. **Sexual Assault: Proof.** In proving sexual contact, as defined in Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2004), the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such purpose.
10. **Sexual Assault: Minors: Intent: Evidence.** The issue of intent of sexual gratification in minors must be determined on a case-by-case basis. There can be no bright-line test. The fact finder must consider all of the evidence, including the offender's age and maturity, before deciding whether intent can be inferred.
11. ____: ____: ____: ____. Without some evidence of the child's maturity, intent, experience, or other factor indicating his or her purpose in acting, sexual ambitions must not be assigned to a child's actions.

12. **Criminal Law: Sexual Assault.** Nebraska does not criminalize sexual contact for the purpose of humiliating or degrading a person.

Appeal from the County Court for Burt County: C. MATTHEW SAMUELSON, Judge. Reversed and remanded with direction to dismiss.

Bryan C. Meismer for appellant.

Daniel A. Smith, Burt County Attorney, for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The county court for Burt County, sitting as a juvenile court, adjudicated Kyle O. under Neb. Rev. Stat. § 43-247(1) (Reissue 2004) for sexual contact with another child, in violation of Neb. Rev. Stat. § 28-320 (Reissue 1995). Kyle appeals. Because we conclude that (1) the trial court did not abuse its discretion in excluding an exhibit that was only partially admissible and (2) the State presented insufficient evidence to establish that "sexual contact" occurred, we reverse, and remand with direction to dismiss.

BACKGROUND

The State filed an amended petition alleging that Kyle committed two instances of third degree sexual assault in violation of § 28-320 and seeking adjudication of Kyle under § 43-247(1). Kyle denied the allegations, and the court subsequently conducted a trial.

At trial, the State presented one witness, an adult apparently related to Kyle. The State's witness testified that his children, who were ages 10, 9, and 7, were Kyle's cousins and that the witness' family lived "[r]ight across the alley" from Kyle. Kyle and the witness' children often played together and had been doing so over a period of years. The witness stated that in May 2004, he was in a detached garage near his house, working on a car, and he was observing the children playing in the yard while his wife was away from home. He testified that because of some prior incidents of an inappropriate nature, he was particularly attentive. He claimed that prior to the incident in question, he had caught Kyle

and his children underneath the bed in the basement of the witness' house, "disclothing [sic] Barbie dolls, showing the kids what to do with Barbie dolls."

The State's witness testified that on the date in question, Kyle was 14 years of age. On that occasion, the witness saw Kyle pull down the pants of another child, S.S., who was 5 years old, and observed Kyle "grab [S.S.'] penis and hold it and showed [sic] my kids how small it was." Upon observing Kyle's actions, the witness came out of the door of the garage, "hollered" at Kyle, and saw Kyle turn away and fold his arms as if to appear that he had done nothing. S.S. resided in the same neighborhood and occasionally came over to play with the witness' children. The witness then told all the children to go home, and S.S. pulled up his own pants.

On cross-examination, the witness testified that he initially told no one other than his wife about the incident. The witness' testimony conflicted as to when he reported the event to police. On one hand, he testified that it "[c]ouldn't have been too many days afterwards" and that he did not "think it was even a week"; but shortly thereafter, he also testified that a meeting on July 22, 2004, was the first time he talked to the police. He attempted to explain, "We talked to the police first, but we went to the police, because they was [sic] family, we tried to do this without going through all this."

The witness claimed that he observed the event, which took about 2 seconds, through an open window in the garage and that he heard Kyle speak, telling the witness' children how small S.S.' penis was. When the witness was asked whether "it look[ed] like [the contact] was for sexual gratification," he responded that he did not know.

After the State rested, Kyle offered no evidence other than a letter from Kyle's counselor, which stated in pertinent part:

> I have discussed with Kyle the allegations of inappropriate touching during several sessions. Kyle has always denied sexually or non-sexually touching anyone. I believe that Kyle is telling the truth. Kyle appears to be immature for his age in some ways. Kyle has expressed disgust and repulsion while discussing sexual material in my office. Which indicates to me that he is . . . still in a pre- or early

> adolescent [sic]. During this stage adolescents express little interest in sexual matters. This stage is where children express an interest in becoming more independent from their parents. Kyle chooses to express his independence with minimal rebellion in his home. Kyle expresses a great deal of maturity and independence in fixing things for his mom and working with his grandfather. In my office Kyle prefers to play and show me how he can build things, mostly things with wheels, using connecting blocks. Kyle shows a great deal of interest in anything with an engine or on wheels.

In response to the offer of the exhibit, the State's attorney expressly disclaimed any objection on the basis of foundation or hearsay, but did object on the basis of relevance. The trial court deferred ruling on the objection until after the trial. In a written judgment entered November 30, 2004, the trial court excluded the exhibit and found beyond a reasonable doubt that Kyle had subjected S.S. to sexual contact in violation of § 28-320. Accordingly, Kyle was adjudicated pursuant to § 43-247(1). Kyle timely appeals.

ASSIGNMENTS OF ERROR

Kyle asserts, consolidated and restated, that (1) the trial court erred in excluding the exhibit that Kyle offered and (2) there was insufficient evidence to support the adjudication under § 43-247(1) or to establish that Kyle subjected S.S. to sexual contact in violation of § 28-320.

STANDARDS OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings. *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002).

[2] Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).

ANALYSIS

Exclusion of Exhibit.

Kyle argues that the trial court erred in excluding the letter from Kyle's counselor. He relies upon the part of the letter which opines that Kyle is emotionally immature for his age. Kyle suggests that this opinion may indicate that adult assumptions about Kyle may be false. We assume that this portion of the exhibit was relevant and would have been admissible.

[3-5] However, the content of the exhibit was not restricted to such arguably relevant material. The letter also contained expressions concerning Kyle's statements to his counselor about the allegations and an opinion that Kyle was telling the truth. Credibility of a witness is always relevant. *State v. Eldred*, 5 Neb. App. 424, 559 N.W.2d 519 (1997). However, Kyle did not testify at the trial. Even if Kyle had testified at the trial, another principle would have precluded admission of the counselor's opinion that Kyle was telling the truth. Normally, it is improper for one witness to testify as to the credibility of another witness. See *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). We believe the rule has equal application in the situation here, where Kyle did not testify. In the instant case, the counselor's expressions describing Kyle's statements and opining that Kyle was telling the truth were irrelevant. That portion of the exhibit was not admissible. If an exhibit is admissible only in part, it is incumbent on the offeror to select and offer only the admissible part; if one offers both the admissible and inadmissible parts, the trial court may reject the entire offer. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994). We find no abuse of discretion in the exclusion of the counselor's letter.

Sufficiency of Evidence.

[6] Pursuant to Neb. Rev. Stat. § 43-279(2) (Reissue 2004), when an adjudication is based upon § 43-247(1), the allegations must be proved beyond a reasonable doubt. *In re Interest of Cory P.*, 7 Neb. App. 397, 584 N.W.2d 820 (1998).

The State sought adjudication on the basis that Kyle committed a sexual assault. Section 28-320(1) states that

> [a]ny person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or

> should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

Because the State does not assert that Kyle caused serious personal injury to S.S., the alleged sexual assault in the instant case would "be in the third degree and [be] a Class I misdemeanor." Section 28-320(3).

[7] Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2004) defines "sexual contact." Because Kyle's argument does not address or contest the physical touching portion of the definition, we confine our attention to that portion of the definition which states "[s]exual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." *Id.*

We reject Kyle's argument that the decision in *State v. Hulshizer*, 245 Neb. 244, 512 N.W.2d 372 (1994), "requires that we give all reasonable explanations equal weight and proof beyond a reasonable doubt cannot be found just because one explanation points towards guilt." Brief for appellant at 8.

Hulshizer concerned an alleged abuse of a vulnerable adult. There, a female certified nurse's aide in a nursing home facility walked into a bathroom and found the defendant, a male certified nurse's aide, seated on the toilet with a female resident of the care facility sitting on the defendant's lap. The elderly resident suffered from senile dementia and Parkinson's disease. She was wearing her briefs in place, but had her dress pulled up around her buttocks. Neither the defendant nor the resident had his or her genitalia exposed; however, the witness testified that she saw the defendant trying to zip up his pants. The Nebraska Supreme Court stated that under those circumstances, any evidence of sexual arousal or gratification was entirely circumstantial. The Supreme Court recited the principle that a reasonable inference from circumstantial evidence is to be taken most favorably to the accused when the circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. In reversing the jury's conviction

of the defendant, the Supreme Court explained that the inference that the defendant sexually abused the resident was not stronger than the inference that the defendant fell backward onto the toilet and pulled her onto his lap to prevent her from falling onto the floor.

[8] In *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995), though not discussing *Hulshizer*, the Nebraska Supreme Court rejected the "accused's rule," which is the principle from *Hulshizer* upon which Kyle relies. In *Pierce*, the Supreme Court "again overrule[d] those cases espousing the accused's rule as an appropriate standard of review." 248 Neb. at 548, 537 N.W.2d at 330. The Supreme Court adhered to the better rule that " 'one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.' " *Id.* at 546, 537 N.W.2d at 329-30, quoting *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). In our view, the decision in *Pierce* rejects the principle from *Hulshizer* that Kyle seeks to invoke.

[9] However, Kyle also contends that "[t]here was no evidence offered to show whether either party to this alleged incident was sexually gratified or aroused by what happened." Brief for appellant at 4. Citing *State v. Berkman*, 230 Neb. 163, 430 N.W.2d 310 (1988), the State correctly responds that in proving "sexual contact," as defined in § 28-318(5), the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such purpose.

Kyle also argues that "[t]he record does not indicate that [the State's witness] caught the children performing any sex acts of any sort or that the children made any attempt to conceal what was happening." Brief for appellant at 4. The evidence is undisputed that Kyle intentionally touched S.S.' penis. The only question is whether that conduct "can be reasonably construed as being for the purpose of sexual arousal or gratification of either party."

We agree that the conduct cannot be reasonably construed as being for the purpose of sexual arousal or gratification of S.S., who was only 5 years of age. Whether Kyle's action can be reasonably construed as being for the purpose of his own sexual arousal or gratification is a more difficult question. In *McGalliard*

v. State, 306 Ark. 181, 813 S.W.2d 768 (1991), the Supreme Court of Arkansas defined "sexual gratification" as, paraphrased, something that pleases the sexual organs or gratifies the libido. The court construed the words in accordance with their reasonable and commonly accepted meanings. Later, in *Farmer v. State*, 341 Ark. 220, 223, 15 S.W.3d 674, 676 (2000), the court noted its previous holdings that "it is not necessary for the State to provide direct proof that an act is done for sexual gratification if it can be assumed that the desire for sexual gratification is a plausible reason for the act." The court also observed that "it is difficult to know for certain in this day and age what is sexually gratifying to another person. Indeed, short of a confession or physical evidence, sexual gratification, like intent, is rarely capable of proof by direct evidence and must usually be inferred from the circumstances." *Id.* at 224, 15 S.W.3d at 677. Accord *State v. Berkman, supra* (intent is mental process and may be inferred from words and acts of defendant and from circumstances surrounding incident).

In several cases considering factual situations similar to the case before us, an Illinois appellate court refused to automatically make the same inference of sexual gratification where the actor was a child rather than an adult. Three cases illustrate the reasoning, which depends heavily upon the particular circumstances of each case.

The Illinois court first considered the situation in *In re A.J.H.*, 210 Ill. App. 3d 65, 568 N.E.2d 964, 154 Ill. Dec. 743 (1991). In that case, the trial court adjudicated a 13-year-old girl, A.J.H., based upon a finding that she committed an act of aggravated criminal sexual abuse against a 5-year-old boy she babysat. At the hearing, the prosecutor asked the boy to demonstrate on a doll what A.J.H. had done to him, and in response, the boy put his thumb and middle finger in the penis area of the doll and moved them back and forth. The prosecutor asked the boy to demonstrate how long A.J.H. had her hand on the boy's penis, and the court noted for the record a time of about 4 to 5 seconds. The boy testified that after the touching, A.J.H. told him not to tell anyone. A.J.H. denied touching the boy's private parts. The appellate court noted that the applicable statute defined "sexual conduct" as

> "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused." Ill.Rev.Stat.1989, ch. 38, par. 12-12(e).

In re A.J.H., 210 Ill. App. 3d at 71, 568 N.E.2d at 968, 154 Ill. Dec. at 747. In reversing the conviction, the appellate court stated:

> [I]t is not justified to impute the same intent into a child's action that one could reasonably impute into the actions of an adult. Here, [A.J.H.] was 13 years old, and the alleged victim was five. Even accepting [the alleged victim's] allegations as true, we cannot reasonably infer from [A.J.H.'s] actions that she intended sexually to gratify or arouse [the alleged victim] or herself. Without such evidence, an essential element of the crime is missing.

In re A.J.H., 210 Ill. App. 3d at 72, 568 N.E.2d at 968, 154 Ill. Dec. at 747.

The Illinois appellate court recently considered the same issue in *In re Matthew K.*, 355 Ill. App. 3d 652, 823 N.E.2d 252, 291 Ill. Dec. 242 (2005). At the time of the alleged offense in that case, Matthew K. was 12 and the alleged victim, A.L., was 8 years old. A.L. testified that she and Matthew played a game called " 'survival' " in Matthew's bedroom, for which game Matthew set the rules, *id.* at 653, 823 N.E.2d at 253, 291 Ill. Dec. at 243; that Matthew told the other children present to leave and then return in 5 minutes; and that Matthew touched A.L.'s private parts when her pants were down. When A.L. told Matthew that his sliding his finger tickled, Matthew told her to cover her mouth. Matthew then gave A.L. a " 'tongue massage,' " wherein he put his mouth to her mouth and wiggled his tongue. *Id.* at 654, 823 N.E.2d at 253, 291 Ill. Dec. at 243. According to A.L., Matthew did not remove his clothing, make any special noises, or threaten A.L., although he did tell her to keep the incident a secret. A child psychiatrist testified that Matthew was socially immature and that Matthew's actions could be better understood as those of a 10-year-old. The doctor opined that Matthew had no interest in becoming sexually aroused and that Matthew told

the doctor that Matthew "wanted to see what it felt like." 355 Ill. App. 3d at 654, 823 N.E.2d at 254, 291 Ill. Dec. at 244. After the trial court found Matthew guilty of aggravated criminal sexual abuse, Matthew appealed, alleging that the State failed to prove beyond a reasonable doubt that Matthew acted with the intent to sexually gratify or arouse.

[10] In reaching its conclusion that the State failed to prove that Matthew acted with the purpose of sexual gratification or arousal, the *In re Matthew K.* court discussed several prior cases on the issue, including *In re A.J.H.*, 210 Ill. App. 3d 65, 568 N.E.2d 964, 154 Ill. Dec. 743 (1991). In *In re E.R.E.*, 245 Ill. App. 3d 669, 614 N.E.2d 1367, 185 Ill. Dec. 682 (1993), a 12-year-old boy was adjudicated for touching the vagina of a 6-year-old over her clothes and telling the victim not to tell anyone. The boy testified and denied touching the victim. The appellate court held that the State failed to prove the sexual gratification element and reversed the adjudication. In *In re Donald R.*, 343 Ill. App. 3d 237, 796 N.E.2d 670, 277 Ill. Dec. 584 (2003), a 16-year-old boy was adjudicated for exposing his penis to a 6-year-old girl and having her touch his penis. The boy admitted exposing his penis to the girl, but he denied that the girl touched his penis, voluntarily or otherwise. On appeal, the *In re Donald R.* court concluded that a fact finder reasonably could have inferred from the circumstantial evidence that the minor boy had the required state of mind. The *In re Matthew K.* court stated that *In re A.J.H.* and *In re E.R.E.* had greater applicability because the 16-year-old minor in *In re Donald R.* was significantly closer to adulthood than the offenders in *In re A.J.H.* and *In re E.R.E.* The *In re Matthew K.* court further stated:

> [A]n inference of sexual gratification was reasonable in *Donald R.*, while the same inference, without any evidence of intent, is unreasonable here. As our analysis of these cases implies, the issue of intent of sexual gratification in minors must be determined on a case-by-case basis. There can be no bright-line test. The fact finder must consider all of the evidence, including the offender's age and maturity, before deciding whether intent can be inferred.

In re Matthew K., 355 Ill. App. 3d 652, 656-57, 823 N.E.2d 252, 256, 291 Ill. Dec. 242, 246 (2005).

[11] Similarly, the Court of Appeals of North Carolina has stated:

> [W]e hold that without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting, sexual ambitions must not be assigned to a child's actions. Adults can and should be presumed to know the nature and consequences of their acts; this is not always the case with children. . . .
>
> We are not asked to and do not hold that a nine year old is incapable of acting for the purpose of arousing or gratifying his sexual desires. We have no evidence on this question. We do not believe, however, that the State may rest on an allegation of the act alone between, for example, a four year old and a one year old, to infer sexual purpose. We hold that the element "for the purpose of arousing or gratifying sexual desire" may not be inferred solely from the act itself under [the "Indecent liberties between children" statute].

In re T.S., 133 N.C. App. 272, 277, 515 S.E.2d 230, 233 (1999).

With regard to the age factor, a California appellate court reasoned in *In re Jerry M.*, 59 Cal. App. 4th 289, 69 Cal. Rptr. 2d 148 (1997), that the closer a minor approaches the age of 14, the more likely the minor understands the wrongfulness of his or her acts. In addition to the factor of the defendant's age, that court stated:

> Circumstances which have been considered relevant to proving intent to satisfy sexual desires include: the charged act, extrajudicial statements, the relationship of the parties, other acts of lewd conduct, coercion or deceit used to obtain the victim's cooperation, attempts to avoid detection, offering of a reward for cooperation, a stealthy approach to the victim, admonishment of the victim not to disclose the occurrence, physical evidence of sexual arousal and clandestine meetings.

Id. at 299, 69 Cal. Rptr. 2d at 153.

In concluding that the prosecution failed to sustain its burden of proof, the *In re Jerry M.* court was persuaded by many factors, including: The defendant was 11 years old, there was no evidence that the defendant had reached puberty, there was no evidence that the defendant was sexually aroused, each of the minor

victims knew the defendant, the conduct occurred in public during the daytime and in the presence of others, there was no attempt to prolong the touching beyond the initial momentary contact, and there was no admonishment to the victims to not disclose the incident. The *In re Jerry M.* court stated:

> The record shows Jerry was a brazen 11-year-old whose conduct was more consistent with an intent to annoy and obtain attention than with sexual arousal. Under these circumstances Jerry was perhaps guilty of battery . . . but the record does not support a true finding beyond a reasonable doubt of conduct intended sexually to exploit a child—the "gist" of [the statute pertaining to felony lewd touching of a victim under 14 years of age].

59 Cal. App. 4th at 300, 69 Cal. Rptr. 2d at 154.

We agree with the Illinois appellate court that no bright-line rule applies regarding the age of the child actor. In the instant case, Kyle pulled down S.S.' pants, grabbed S.S.' penis, and made a remark to the other children about the small size of the penis. There may have been another charge that would not have required that the conduct be for the purpose of sexual arousal or gratification; however, as charged in this case, the State had the burden to prove beyond a reasonable doubt that Kyle's actions could be reasonably construed as being for such purpose.

The State's only witness testified that he did not know whether it appeared that Kyle was seeking sexual gratification. There is no evidence that Kyle was sexually aroused, and we are left looking to the circumstantial evidence in an attempt to glean Kyle's intent. Significantly, the act occurred outside during the daytime, in the presence of others, and lasted approximately 2 seconds. While Kyle's subsequent nonverbal response manifested an attempt to convey the impression that he had been doing nothing wrong, given that Kyle's actions were wrong on a more basic level, as an offensive touching contrary to the common law, Kyle's response does not provide sufficient proof that Kyle's conduct was for the purpose of his sexual gratification.

[12] It would be very easy to construe Kyle's conduct as being for the purpose of humiliating, bullying, or annoying S.S. Although some jurisdictions criminalize sexual contact for the purpose of humiliating or degrading a person, Nebraska does

not. See, Conn. Gen. Stat. Ann. § 53a-65(3) (West 2001); D.C. Code Ann. § 22-3001(9) (2001); Mich. Comp. Laws Ann. § 750.520a(n)(ii) (West 2004); Mont. Code Ann. § 45-2-101(67)(a) (2005); N.J. Stat. Ann. § 2C:14-1(d) (West 1995); Wis. Stat. Ann. § 940.225(5)(b)(1) (West 2005). See, also, Colo. Rev. Stat. Ann. § 18-3-401(4) (West 2004) ("for the purposes of sexual arousal, gratification, or abuse"); Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(D) (West Cum. Supp. 2004) ("or for the purpose of causing bodily injury or offensive physical contact"); Md. Code Ann., Crim. Law § 3-301(f) (2002) ("or for the abuse of either party"); R.I. Gen. Laws § 11-37-1(7) (2002) ("for the purpose of sexual arousal, gratification, or assault"); Wyo. Stat. Ann. § 6-2-301(a)(vi) (Michie 2005) ("touching, with the intention of sexual arousal, gratification or abuse"). It is a function of the Legislature and not of this court to include within the definition of "sexual contact" conduct which can reasonably be construed as being for the purpose of humiliation or abuse. Because the Nebraska definition does not include such conduct and because, upon our de novo review, we cannot find that Kyle's conduct can reasonably be construed for the purpose of sexual arousal or gratification, we find that the State failed to satisfy its burden of proving the elements of the offense beyond a reasonable doubt.

CONCLUSION

Although we find that the trial court did not abuse its discretion in excluding an exhibit which was only partially admissible, we conclude that there was insufficient evidence to support the adjudication. Accordingly, we must reverse the adjudication and remand the cause with direction to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

IN RE INTEREST OF SKYE W. AND MCKENZIE W., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JENNIFER W., APPELLANT.

704 N.W.2d 1

Filed September 27, 2005. No. A-05-285.

1. **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.
2. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven.
3. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights.** A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
5. ____. Termination of parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 2004) requires a finding that the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.
6. ____. Neb. Rev. Stat. § 43-292(7) (Reissue 2004) operates mechanically and, unlike the other subsections of the statute, does not require the State, in termination of parental rights proceedings, to adduce evidence of any specific fault on the part of a parent.
7. ____. It is in the context of analyzing the best interests of the juvenile that courts must respect a parent's commanding interest in the accuracy and justice of the decision to terminate parental rights.
8. ____. The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan.
9. **Juvenile Courts: Parental Rights.** Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, JR., Judge. Reversed.

Jason E. Troia, of Gallup & Schaefer, for appellant.

Stuart J. Dornan, Douglas County Attorney, and Karen Kassebaum Nelson for appellee.

Lynnette Z. Boyle, guardian ad litem.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jennifer W. appeals the decision of the separate juvenile court of Douglas County terminating her parental rights as to two of her children, Skye W. and McKenzie W., pursuant to Neb. Rev. Stat. § 43-292(7) (Reissue 2004), and finding that such termination is in the best interests of the children. Jennifer alleges that the juvenile court erred in finding that termination of her parental rights is in the best interests of the children. We find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Jennifer's parental rights is in the best interests of the children, and accordingly, we reverse the juvenile court's order.

II. BACKGROUND

The two minor children involved in this case are Skye, born on August 11, 1997, and McKenzie, born on May 8, 2000. On January 16, 2003, a petition was filed alleging that Skye and McKenzie were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) through the fault or habits of Jennifer. The petition alleged inappropriate discipline and emotional abuse. On February 11, an amended petition was filed. On July 2, Skye and McKenzie were adjudicated on the allegations of the amended petition.

On October 12, 2004, a motion for termination of Jennifer's parental rights was filed. The motion sought such termination solely on the basis of alleging both the statutory provision of § 43-292(7) and the best interests of the children. On January 27, 2005, a termination of parental rights hearing was held. The State called only one witness, the caseworker assigned to the case, to testify in support of the termination of Jennifer's parental rights. The substance of this witness' testimony will be discussed below in the "Analysis" section of this opinion. On January 31, the juvenile court entered an order terminating Jennifer's parental rights. This appeal followed.

III. ASSIGNMENT OF ERROR

Jennifer's sole assignment of error on appeal is that the juvenile court erred in finding that termination of Jennifer's parental rights is in the best interests of the children.

IV. ANALYSIS

Jennifer asserts that the State failed to adduce clear and convincing evidence to demonstrate termination of Jennifer's parental rights is in the best interests of the children and that the juvenile court erred in finding otherwise. We find that the record in this case bears striking similarities to the record described by the Nebraska Supreme Court in *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In that case, the court found that "the evidence in this record is, simply stated, neither clear nor convincing." *Id.* at 263, 691 N.W.2d at 175. We find the same to be true in this case. Accordingly, we reverse the judgment of the juvenile court.

[1,2] 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. *Id.*; *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003). The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. *In re Interest of Aaron D., supra*; *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). See *In re Interest of Heather G. et al.*, 12 Neb. App. 13, 664 N.W.2d 488 (2003).

[3,4] It is well established that a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of Aaron D., supra*; *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004). However, it is also well established that a parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *In re Interest of Aaron D., supra*; *In re Interest of Kassara M.*, 258

Neb. 90, 601 N.W.2d 917 (1999); *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999); *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

[5-7] As noted, the State in this case sought to terminate Jennifer's parental rights solely on the basis of § 43-292(7), which provides that the court may terminate parental rights if "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Section 43-292(7) 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. *In re Interest of Aaron D., supra.* In such cases, the Nebraska Supreme Court has indicated that appellate courts must be particularly diligent in the de novo review of whether termination of parental rights is, in fact, in the juvenile's best interests. *Id.* It is in the context of analyzing the best interests of the juvenile that courts must respect a parent's "commanding" interest in the accuracy and justice of the decision to terminate parental rights. *Id.* As the Nebraska Supreme Court stated in *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 257, 674 N.W.2d 442, 463 (2004):

> The 15-month condition set forth in § 43-292(7) serves the purpose of providing a reasonable timetable for parents to rehabilitate themselves. . . . But termination based on the ground that a child has been in out-of-home placement for 15 of the preceding 22 months is not in a child's best interests when the record demonstrates that a parent is making efforts toward reunification and has not been given a sufficient opportunity for compliance with a reunification plan.

(Citation omitted.)

Although termination of parental rights solely on the basis of § 43-292(7) can be appropriate in cases in which clear and convincing evidence is presented, it may prove difficult in cases where the record is insufficient to prove any of the other statutory grounds for termination of parental rights—i.e., where the parent did not abandon the child, did not neglect to protect or provide for the child, did not fail to participate in necessary rehabilitation, and was not abusive. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In such cases, where termination of parental rights is sought solely pursuant to

§ 43-292(7), proof that termination is nonetheless in a juvenile's best interests will, necessarily, 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.*

As noted, we find the record in the present case to bear striking similarities to the record described by the Nebraska Supreme Court in *In re Interest of Aaron D., supra.* In that case, the court found that the record lacked clear and convincing evidence of circumstances as compelling and pertinent to the child's best interests as those enumerated in the other subsections of § 43-292. The court noted "the failure of the State to produce the clear and convincing evidence required to show that termination [of parental rights] would be in [the juvenile's] best interests." *In re Interest of Aaron D.*, 269 Neb. at 261, 691 N.W.2d at 174.

In *In re Interest of Aaron D., supra*, the sole witness presented by the State was the caseworker assigned to the case. The court noted that the State used the caseworker "as a proxy for all of the other witnesses whose expertise and testimony would have been helpful, and perhaps essential, in determining what was in [the juvenile's] best interests." *Id.* at 261, 691 N.W.2d at 174. In addition, the caseworker's testimony was based in large measure on her review of records and reports generated by others who directly observed the parties. The court specifically noted, for example, that one of the primary reasons the State proffered for seeking to change the juvenile's permanency objective to adoption involved problems during visitation. However, the caseworker never actually observed any visitation, and her opinion was based only on someone else's report about such problems.

The court in *In re Interest of Aaron D., supra*, further specifically noted that the juvenile's therapists did not testify, that family support workers did not testify, and that foster parents and teachers did not testify. The court opined that "[t]he State seems to have forgotten that the focus of this proceeding is not [the parent], but [the juvenile], and the State thus did not present evidence directly adduced from many of the people most able to testify as to [the juvenile's] condition, circumstances, and best interests." *Id.* at 263, 691 N.W.2d at 175.

The record in the present case is very similar to the record described in *In re Interest of Aaron D., supra.* In the present case, the sole witness called by the State to prove the need for termination of parental rights was the assigned caseworker. The sum total of the State's evidence for terminating Jennifer's rights to parent these children consisted of approximately 43 pages of testimony and one exhibit. The caseworker, as a proxy for expert medical testimony, attempted to present testimony about Jennifer's mental health issues and opined that Jennifer needed individual therapy, proof that she was taking medications, and regular psychiatric checkups to deal with a diagnosis of suffering from bipolar disorder. The caseworker, however, acknowledged that she did not recall what medications Jennifer was supposed to be taking and did not know if Jennifer still needed to be on medication.

In addition, the caseworker's testimony was based in large measure on information reported to her, rather than on her own personal observations. For example, the caseworker opined that the children would not be safe in Jennifer's care, based on Jennifer's diagnosis of bipolar disorder and on a review of visitation reports. The caseworker acknowledged, however, that there had never been any concerns about the children's safety during any visitation but that Jennifer had not made progress toward unsupervised visitation. The caseworker never made it clear why a lack of progress toward unsupervised visitation amounted to a concern for the safety of the children such that the children's best interests would be served by terminating Jennifer's parental rights.

Finally, the caseworker attempted to support her opinion concerning the best interests of the children by testifying about Jennifer's recent marriage. The record indicates that "shortly surrounding the time" that Jennifer married her new husband, he was "in the McCook Work Camp in McCook, Nebraska." The caseworker opined that "it's not in [the children's] best interests to have visitation with an individual who's not known to the children and that may have a background record with some incarceration at the time." The record does not indicate that Jennifer ever sought to have the children attend any "visitation" with her new husband. Additionally, the caseworker acknowledged that

she had no information concerning Jennifer's new husband or for what he was incarcerated. The caseworker opined, however, that "it takes a considerable action of an individual to be incarcerated in a penal institution and those are usually pretty serious actions of some sort that would violate the law."

The State presented no evidence from a medical expert or therapist in this case—either for the children or for Jennifer—concerning Jennifer's diagnosis, medicinal needs, or ability to successfully parent the children. The State presented no evidence from any foster parent or education provider. The State essentially presented no evidence whatsoever concerning the children at issue in this case—their needs or their best interests. Tellingly, the caseworker, who presented the entirety of the State's case for termination of Jennifer's parental rights and who had been assigned to these children's case since its inception in the juvenile court system, testified that she did not know any of the surrounding circumstances about the very incident that initially led to adjudication.

Furthermore, like the record in *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005), the record in the present case does not contain any dispositional orders setting forth court-ordered rehabilitation plans, and we cannot review the reasonableness of case plans that are not contained in the record. In this case, the court purported to take "judicial notice of previous findings and orders as requested [by the State] and, as a matter of fact, on [the court's] own motion . . . take judicial notice of all previous findings and orders under this docket." However, none of these previous orders, plans, or findings were marked as an exhibit and made a part of the record or otherwise presented in the record on appeal so that we might be able to review them. See *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005) (noting papers requested to be judicially noticed must be marked, identified, and made part of record). Thus, although the caseworker testified that Jennifer has failed to rehabilitate herself, the State failed to introduce evidence in support of its contention that she failed to meet the requirements of her rehabilitative plans; nonetheless, the State is relying on Jennifer's alleged failure to comply with requirements that are not fully evidenced by the record. The only court-ordered plan apparent in the

record is part of a dispositional order entered on October 15, 2004, which was 3 days after the State filed its motion for termination of parental rights.

[8] The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan. *In re Interest of Aaron D., supra.* Because the relevant court-ordered plans are not part of our record, the reasonableness of the requirements imposed on Jennifer is uncertain. Under those circumstances, we cannot find Jennifer's alleged noncompliance with the requirements of her rehabilitative plans to be clear and convincing evidence that termination of her parental rights is in the children's best interests.

Jennifer herself testified that she had seen two different doctors and that one had diagnosed her with bipolar disorder while the other one had said she did not have bipolar disorder. She testified that her doctor had taken her off all medications and that she was participating in individual therapy until the State indicated that her therapist was "not approved." She testified that she left numerous messages on the caseworker's telephone, seeking an approved therapist, but that she received no response until the week before the termination hearing. Jennifer immediately scheduled an appointment with the approved therapist. She testified that she had maintained employment as well as safe and adequate housing.

[9] Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). See *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999). After our de novo review of the record, we do not find clear and convincing evidence that termination was in the children's best interests. " '[T]he law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.' " *In re Interest of Aaron D.*, 269 Neb. at 265, 691 N.W.2d at 176 (quoting *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004)). We conclude that the juvenile court erred in finding that the State established, by clear and convincing evidence,

that termination of Jennifer's parental rights is in the children's best interests.

V. CONCLUSION

The State did not present clear and convincing evidence that termination of Jennifer's parental rights is in the children's best interests. The evidence presented to the juvenile court indicated that the caseworker was of the opinion that Jennifer was not adequately addressing mental health issues, although the caseworker acknowledged having no personal knowledge about Jennifer's needs or medical requirements in that area. There was no expert testimony presented pertinent to how termination of parental rights would affect the children. The State almost completely failed to provide the juvenile court, and by extension this court, with testimony from many of the people whose opinions and observations would have been most pertinent to the principal issue—the children's best interests. The evidence the State did present was minimal and was simply not clear and convincing. The judgment of the juvenile court is reversed.

REVERSED.

CAROLYN BRONSEN, APPELLANT, V. DAWES COUNTY, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, AND FUR TRADE DAYS, INC., A NEBRASKA CORPORATION, APPELLEES.

704 N.W.2d 273

Filed October 4, 2005. No. A-04-237.

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. **Statutes.** Statutory interpretation presents a question of law.

4. **Judgments: Statutes: Appeal and Error.** 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.
5. **Liability: Words and Phrases.** The term "owner," as used in the Nebraska Recreational Liability Act, includes a political subdivision as well as a private person.
6. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
7. **Words and Phrases.** Under the ejusdem generis rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence.
8. ____. Under the ejusdem generis canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.
9. **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.
10. **Negligence: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result.
11. ____: ____: ____. The term "willful or wanton" imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences.
12. ____: ____: ____. To constitute willful misconduct, there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury.
13. ____: ____: ____. To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith.
14. ____: ____: ____. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

Appeal from the District Court for Dawes County: BRIAN SILVERMAN, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee Dawes County.

Neleigh N. Korth and Tim W. Thompson, of Kelley, Scritsmier & Byrne, P.C., for appellee Fur Trade Days, Inc.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Carolyn Bronsen filed a claim in the district court for Dawes County, Nebraska, against Dawes County (the County) and Fur Trade Days, Inc. (FTD), seeking damages for injuries she sustained after tripping and falling in a depression or hole in the lawn of the Dawes County courthouse while attending the Fur Trade Days celebration in Chadron, Nebraska. The district court granted motions for summary judgment filed by the County and FTD, finding that both the County and FTD were immune from liability pursuant to the Nebraska Recreational Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004). For the reasons stated herein, we affirm.

BACKGROUND

Bronsen's injuries occurred during the Fur Trade Days celebration in Chadron in July 2002. The celebration is arranged by FTD, a not-for-profit corporation organized under the laws of the State of Nebraska. The celebration takes place in Chadron each year on the second weekend of July. Fur Trade Days is a historical celebration of traders, "buckskinners," and Native Americans. The weekend is filled with a variety of different activities, including those at the "buckskinners' camp," where the public can view tepees, oldtime shelters, and furs being sold by traders. Events and activities are held on the Dawes County courthouse lawn, including a "buffalo burger" barbecue, a historical fur trade flag ceremony involving a dramatic presentation of the flags of the various entities involved in this country's fur trade, a flea market, and performances by bluegrass bands, Native American dancers, and other entertainers. Fur Trade Days also includes a parade, softball games throughout the weekend, and many other activities.

The summary judgment record shows that at the time of Fur Trade Days in 2002, Bronsen, a resident of Utah, was visiting her parents in Chadron. Bronsen had not attended Fur Trade Days or visited the courthouse lawn prior to the July 2002 celebration. On July 13, Bronsen and her family watched the parade, walked through the flea market, and purchased buffalo burgers

and beverages for lunch. Bronsen and her family sat at a picnic table on the courthouse lawn to eat their lunch, after which they planned to view the "[Native American] powwow." After lunch, Bronsen and her father went across the street to get bowls of homemade ice cream for the family to eat. Bronsen and her family visited while they ate the ice cream. As she walked across the courthouse lawn prior to her accident, Bronsen was able to feel that the lawn was uneven. Bronsen was also aware that her father had stepped in a hole in the courthouse lawn before the family first arrived at the picnic table. When Bronsen and her family were done eating, Bronsen picked up some paper plates and bowls that had blown off the picnic table, intending to throw them away in a nearby trash can. On her way to the trash can, Bronsen stepped into a hole or uneven area and fell, breaking her ankle. Since the accident, Bronsen has had several surgeries to repair the break. At the time of her deposition in November 2003, Bronsen still had pain in her ankle. Bronsen also continued to receive medical treatment in connection with the accident.

We note that although filed after the date when new rules of pleading took effect in Nebraska, Bronsen's pleadings use captions and terms from the old rules of pleading. Bronsen captioned her complaint and subsequent amended complaint with the terms "petition" and "amended petition" and used the term "cause of action" rather than the term "claim." Throughout this opinion, we will refer to Bronsen's operative "petition" (her amended petition) as the "complaint" and will refer to what Bronsen has titled her "cause of action" as her "claim."

Bronsen filed her operative complaint on May 12, 2003, setting forth a negligence claim against both the County and FTD. Specifically, Bronsen alleged that on July 13, 2002, she suffered personal injuries when she fell after stepping in a hole in the courthouse lawn while attending Fur Trade Days. Bronsen alleged that her fall was proximately caused by the negligence of the County in that it failed to (1) inspect the courthouse lawn for dangerous conditions, (2) maintain the lawn in a manner suitable for pedestrian traffic, (3) repair holes as they appeared in the lawn, (4) warn pedestrians of the existence of the hole, or (5) restrict traffic in the area of the hole so as to prevent pedestrians from falling there. Bronsen alleged that her fall was also

proximately caused by the negligence of FTD as the occupier of the courthouse lawn on July 13. Bronsen alleged that FTD was negligent in the same respects as was the County. Bronsen further alleged that her injuries required treatment from health care providers, that she incurred medical expenses exceeding $1,000, and that she would continue to incur future medical expenses. Bronsen also sought recovery for disability, pain and suffering, and lost income, both past and future. Finally, Bronsen alleged that she had filed a tort claim on October 21 with the Dawes County clerk pursuant to Nebraska's Political Subdivisions Tort Claims Act, that more than 6 months had passed without response, and that she had withdrawn her claim on April 23, 2003. Bronsen sought judgment for her special damages in an amount to be proved at trial and for such general damages as were allowable by law.

In its answer, the County denied that any defect existed in the lawn at the county courthouse other than the inherent uneven condition of the lawn itself due to the natural settling and rising of the soil. The County admitted that Bronsen fell on the lawn of the courthouse but alleged that Bronsen's fall was proximately caused by her own negligence. The County also contended that Bronsen's injuries "may not have been as she has alleged" and that Bronsen may have failed to mitigate her damages. The County alleged that it may be immune from liability because the premises were being used for recreational purposes as defined by § 37-729. The County also asserted that it did not have sufficient funds to "allocate as [Bronsen] has suggested." FTD filed an answer and subsequently an amended answer, making similar allegations and denials to those made by the County.

The County and FTD filed motions for summary judgment, which were heard by the district court on December 22, 2003. In addition to the evidence set forth above, the record at the summary judgment hearing included deposition testimony from Carol Connell, a part-time custodian and groundskeeper for the County. Connell's duties at the courthouse include minor interior maintenance, painting, daily cleaning, snow removal in the winter, and lawn maintenance in the summer. Connell mows, waters, and trims shrubs. Connell sows grass seed in areas where trees have been removed and fills holes in the courthouse lawn in the

spring and summer. Connell testified that she had filled the hole where Bronsen fell with dirt sometime prior to the 2002 Fur Trade Days celebration but that the dirt used to fill the hole had apparently settled. Connell testified that she probably did not put enough dirt in the hole and testified that the dirt "washes with the hoses." Connell testified that she thought her maintenance of the lawn and procedure for repairing uneven spots were reasonable. Connell had never heard of any other individual complaining of holes or dents in the courthouse lawn.

George Klein, one of the cochairs for the 2002 Fur Trade Days celebration, also testified by deposition. Klein was asked how FTD ensured that the land it used for Fur Trade Days activities was safe. Klein responded that FTD relied on the County's maintenance of the courthouse grounds. Klein did not direct a specific inquiry to the County about its maintenance activities prior to the 2002 celebration, and he testified that no one from FTD inspected the courthouse lawn. Klein testified that in terms of making sure the courthouse lawn was safe for Fur Trade Days activities, FTD expected the County to perform its "normal maintenance" and expected that the County would take measures to fill any holes "big enough to put a foot in" if the County were aware of such holes.

The record also includes an affidavit in which Klein provided information about FTD and his knowledge of the 2002 celebration. In his affidavit, Klein stated that he was unaware of FTD's ever paying a fee to the County for the use of the courthouse lawn and that at no time was FTD requested to perform any work or repairs on the lawn. Klein stated that at no point before or during the 2002 celebration (prior to Bronsen's accident) did he see or otherwise become aware of the hole that allegedly caused Bronsen's fall. Based on Klein's experience with and observations of the courthouse lawn, he did not believe it to be a dangerous place for hosting a public event. Klein stated that FTD does not charge the celebration attendees any sort of admission fee to enter the courthouse lawn. According to Klein, the only money paid by attendees is to purchase food or goods sold by various vendors for the event, and attendees are in no way required to purchase any of these items. Klein stated that attendees could simply sit at any of the various picnic tables on the

lawn and enjoy the free entertainment and could even bring their own food and seating. Klein was unaware of any previous injuries sustained on the courthouse lawn during the "10 years or so" that FTD had held its Fur Trade Days activities at that location. Klein stated that as cochair for the 2002 celebration, he received no reports of holes located on the lawn and was unaware of any other individual associated with FTD's being aware of any holes on the courthouse lawn.

The district court entered an order on February 4, 2004, granting both motions for summary judgment. The court found that it was clear Bronsen "was using [the courthouse lawn] for picnicking, viewing historical events or recreations (pow wow) or otherwise using the land for purposes of the user" and that those uses would qualify as recreational purposes under § 37-729(3). The court found that the facts adduced showed that FTD qualified as an owner as defined by § 37-729(2), in that it was an occupant or person in control of the premises. The court found that the evidence showed that Bronsen was allowed to use the courthouse lawn without charge. The court stated that FTD was thus immune from liability unless there was a willful or malicious failure on its part. The court found that FTD had no knowledge of the hole and did not create the hole and that thus, there was no willful or malicious action on the part of FTD.

The district court concluded that the County's actions would also place it within the protection of the RLA. The court stated that in order to establish liability on the part of the County, Bronsen was likewise required to show that its actions would amount to a willful or malicious failure. The court noted evidence showing that Connell, a county employee, had previously filled the hole but that the fill material had apparently settled. It further noted that there was no evidence that Connell knew this "condition" (the settling of the fill material) existed at the time of the 2002 Fur Trade Days. The court also noted deposition testimony from Bronsen that she knew a hole or dip existed at the location where she fell prior to her accident. The court concluded that there was no willful or malicious action on the part of the County.

The district court found no genuine issue as to any material fact and concluded that the County and FTD were entitled to

judgment as a matter of law. Accordingly, the court granted the motions for summary judgment. Bronsen subsequently perfected her appeal to this court.

ASSIGNMENT OF ERROR

Bronsen asserts that the district court erred in sustaining the County's and FTD's motions for summary judgment.

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. *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005); *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005). 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. *Range v. Abbott Sports Complex, supra.*

[3,4] Statutory interpretation presents a question of law. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). 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.*

ANALYSIS

Bronsen asserts that the district court erred in sustaining the County's and FTD's motions for summary judgment. In sustaining the motions and dismissing Bronsen's complaint, the district court determined that both the County and FTD qualified as "owners" under the RLA and that Bronsen's activities at the time of her accident constituted "recreational purposes" under the RLA. The court also found that Bronsen was not charged a fee for her use of the courthouse lawn and that there was no willful or malicious action on the part of the County or FTD. Bronsen does not dispute the court's finding that both the County and FTD qualified as owners or its finding that she was not charged

a fee for her use of the property. Bronsen does dispute the premise that the courthouse lawn is the type of property that ought to be protected under the RLA, as well as the court's finding that her activities at the time of her accident amounted to "recreational purposes" under the act. Bronsen also argues that the County's conduct was willful or malicious. We address each of these arguments separately below.

Relevant Provisions of RLA.

As a background for our discussion of Bronsen's arguments, we first set forth the relevant provisions of the RLA. Pursuant to § 37-731, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Exceptions are provided for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity and for injury suffered when the landowner charges the person or persons who enter or go on the land. § 37-734. The purpose of the act "is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-730. Pursuant to § 37-729(2), an "[o]wner" includes a "tenant, lessee, occupant, or person in control of the premises." "Recreational purposes" are defined as including, but not being limited to, "any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, waterskiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user." § 37-729(3). Finally, "[c]harge" is defined as meaning "the amount of money asked in return for an invitation to enter or go upon the land." § 37-729(4).

Application of RLA.

Bronsen argues that the RLA should not apply to public landowners whose land was not opened in reliance on the RLA.

Bronsen further argues that because in the present case there is no evidence indicating whether the courthouse lawn was opened to the public in response to the RLA, the district court's order granting the summary judgment motions should be reversed and this matter should be remanded for a finding of whether the County should enjoy the benefit of the RLA when it apparently offers no "*quid pro quo*" to the public in exchange for immunity from liability. Brief for appellant at 14. Bronsen's arguments are based in part on the purpose of the RLA as stated in § 37-730, which is set forth above.

Among comparable jurisdictions, there is a division of authority as to whether recreational use statutes are available to immunize public bodies. The following remarks are useful in understanding the controversy and the arguments presented by Bronsen:

> In a number of cases, the statutes have been applicable in cases where governmental entities or other public bodies owned the property, but other holdings are to the contrary, sometimes on the basis that a governmental entity is not a "person" within the meaning of a state recreational use statute which applies to "persons."

62 Am. Jur. 2d *Premises Liability* § 131 at 507-08 (2005).

> It has been reasoned that since the sole purpose of a recreational use statute is to induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come upon their property to pursue the activities specified in the statute, such a statute does not provide immunity to a governmental agency already operating and maintaining a supervised facility for use by the public. Furthermore, since public parks are used not only for the "recreational" purposes listed in the statute, application of such a statute to require a county to observe different standards of care with respect to various park visitors, depending upon the nature of the activity for which they entered the premises, would foster an unreasonable result. Hence, the statute did not provide immunity to a county in the maintenance of a public park that was routinely patrolled, maintained, and supervised by the county and that was held open to the public for pursuit of some

> activities other than those specified in the statute. Other courts, however, have rejected the argument that the application of the statute to public parks defeated a public policy in favor of providing the public with safe facilities, and that the statutory purpose of encouraging the opening of land to public recreational use did not apply to the state. Nor has the argument that immunizing governmental bodies is not justified because it does not result in an increase in the amount of land available for recreational activities been accepted by federal courts construing the Federal Tort Claims Act, partly on the ground that federal regulations allow certain officials to close or restrict the use of forest or park areas and roads.

Id., § 132 at 508-09.

While Bronsen cites case law from another jurisdiction in support of her argument in favor of a quid pro quo requirement, the case law relied on by Bronsen is distinguishable from the present case, and after reviewing the relevant Nebraska case law, we decline Bronsen's invitation to impose such a requirement. While the Nebraska Legislature has not explicitly stated whether an owner of land includes governmental entities as well as private parties, the Nebraska Supreme Court has expressly held on four occasions that the RLA applies to governmental and private landowners alike. See, *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981). On other occasions, the Nebraska Supreme Court, while deciding whether governmental entities were entitled to immunity on some other ground, has tacitly accepted that they could be owners under the above line of cases. See, *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998) (concluding city street could not be temporarily converted to recreational area for purpose of limiting city's liability under RLA for plaintiff's injury sustained at automobile show); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996) (concluding school district was not immune under RLA from liability for football player's injury because football clinic was not open to public without charge),

abrogated on other grounds, Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51; *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984) (concluding city was protected under RLA when plaintiffs did not pay charge to enter park and city was not guilty of willful or wanton negligence). See, also, *Teters v. Scottsbluff Public Schools*, 5 Neb. App. 867, 884, 567 N.W.2d 314, 327 (1997) (holding that school district was "owner" of land under RLA as "an occupant or a person in control of" recreational camp for weekend but was not immune from liability because it did not hold land open to public), *affirmed in part and in part reversed on other grounds* 256 Neb. 645, 592 N.W.2d 155 (1999) (reversing on separate issue but affirming Nebraska Court of Appeals' holding as to school district without discussion). Compare *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000) (concluding viewing of livestock exhibits at county fair was not recreational purpose, but neither being asked nor reaching issue whether agricultural society was governmental entity).

[5] The Nebraska Supreme Court first considered whether the RLA applied to governmental entities in *Watson v. City of Omaha, supra*. In *Watson*, the court held that the term "owner," as used in the RLA, includes a political subdivision as well as a private person. In so holding, the *Watson* court "concede[d] for the sake of argument that the original purpose of the [RLA] was to encourage private landowners to offer their lands for use by the public." 209 Neb. at 840, 312 N.W.2d at 258. The court also considered the language of the Political Subdivisions Tort Claims Act, which subjects a political subdivision to liability for the negligent acts or omissions of its employees "in the same manner and to the same extent as a private individual under like circumstances." See Neb. Rev. Stat. § 81-8,215 (Reissue 2003). The *Watson* court concluded that whatever the Legislature's intent at the time of the enactment of the RLA, the definition of "owner" in the act was sufficiently broad to cover a public entity. The court observed that the Legislature in enacting the Political Subdivisions Tort Claims Act was presumed to have knowledge of previous legislation, including the RLA. The court concluded that the intent of the Legislature, as reflected by the clear language of both the Political Subdivisions Tort Claims Act and the

RLA, was to grant the same rights and privileges to both governmental and private landowners. The court, in considering the facts of *Watson*, which involved "[s]lippery slide activities," held that while such activities were not specifically included within the definition of "recreational purposes" found in the RLA, the definition was broad enough to include the "normal activities afforded by public parks." *Watson v. City of Omaha*, 209 Neb. 835, 841-42, 312 N.W.2d 256, 259 (1981). In addition to the reasoning employed by the *Watson* court, we also note that the Nebraska Supreme Court has held that the provisions of the RLA apply to urban as well as rural areas. See, *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Garreans v. City of Omaha, supra*; *Watson v. City of Omaha, supra.*

[6] We are mindful of the reservations about the continued application of *Watson* expressed by the concurring opinion in the recent case *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005), but as noted by the dissenting opinion in *Iodence*, the ruling in *Watson* is still the law. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004). Bronsen has asked this court to answer the question "left unanswered" by *Watson*, that being whether the RLA applies if the urban park in question was open to the public before the RLA was enacted. Brief for appellant at 14. However, Bronsen is essentially asking for a judicial reconsideration of the holding in *Watson* that the term "owner," as used in the RLA, includes a political subdivision as well as a private person. Even if this court were inclined to agree with the arguments raised by Bronsen, we are bound by the Nebraska Supreme Court's ruling in *Watson*, which has not been overturned.

Given the reasoning employed by the Nebraska Supreme Court in *Watson* and the previous application of the RLA to city parks and other urban areas, we conclude that the district court

did not err in finding that the RLA was applicable in the present case. Bronsen's arguments to the contrary are without merit.

Picnicking.

[7,8] Bronsen disputes the district court's finding that her activities at the time of her accident constituted "recreational purposes" within the meaning of the RLA. Bronsen argues that buying lunch and visiting a flea market are not among the outdoor physical activities contemplated in the definition of "recreational purposes." In support of her argument, Bronsen cites case law examining activities not specifically listed within the definition and employing the rule of ejusdem generis. Under the ejusdem generis rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence. *Iodence v. City of Alliance, supra*; *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004). Under the ejusdem generis canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000).

[9] Bronsen's arguments ignore the fact that the district court found that she was using the courthouse lawn for "picnicking," an activity specifically listed in the RLA's definition of "[r]ecreational purposes." See § 37-729(3). The word "picnic" is defined as "an outing or excursion, typically one in which those taking part carry food with them and share a meal in the open air." Webster's Encyclopedic Unabridged Dictionary of the English Language 1089 (1989). The record shows that Bronsen traveled from Utah to Nebraska to visit her family and partook in various outdoor activities associated with the 2002 Fur Trade Days celebration on the day of her accident. Just prior to Bronsen's accident, she and her family obtained buffalo burgers, beverages, and ice cream from stands located on or near the courthouse lawn; took those food items to an outdoor picnic table located on the courthouse lawn; and sat and visited while consuming their food. Bronsen was in the process of disposing of trash associated with the outdoor meal when her accident occurred. Given these undisputed facts in the record, we cannot say the district court

erred in concluding that Bronsen was using the courthouse lawn for picnicking at the time of her accident and that her activities thus constituted "recreational purposes" within the meaning of the RLA. We need not consider whether other activities engaged in by Bronsen on July 13, 2002, qualified as "recreational purposes," as such analysis is not necessary to our resolution of this appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

Willful or Malicious Failure.

[10-14] Finally, Bronsen argues that the exception for willful failure to guard against a dangerous condition applies to the County's conduct in this case. In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result. *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987). The term "willful or wanton" imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences. *Id.* To constitute willful misconduct, there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. *Id.* To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. *Id.* Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury. *Id.*

The record shows that Connell had previously filled the hole which Bronsen stepped in during the accident which led to her injury. Connell testified that the fill material had apparently settled. There was no evidence that Connell knew this settling of the dirt had occurred in the hole at the time of the 2002 celebration. Viewing the evidence in a light most favorable to Bronsen and giving her the benefit of all reasonable inferences deducible

from the evidence, we cannot say that the district court erred in finding no willful or malicious action on the part of the County.

Summary Judgment.

In sum, the pleadings and evidence admitted at the hearing on the County's and FTD's motions for summary judgment 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 County and FTD were entitled to judgment as a matter of law. Viewing the evidence in a light most favorable to Bronsen and giving her the benefit of all reasonable inferences deducible from the evidence, we find no error in the district court's grant of the motions for summary judgment.

CONCLUSION

The district court did not err in granting the County's and FTD's motions for summary judgment.

AFFIRMED.

KEVIN ORD ET AL., APPELLANTS, V.
AMFIRST INVESTMENT SERVICES ET AL., APPELLEES.

704 N.W.2d 796

Filed October 11, 2005. Nos. A-04-153, A-04-437.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Summary Judgment: Proof.** Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted.
4. ____: ____. Once the party moving for summary judgment produces enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted, the burden of producing contrary evidence shifts to the party opposing the motion.

5. **Fraud.** Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive.
6. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
7. **Fraud.** Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation.
8. ____. In nondisclosure cases, the law does not attempt to define occasions when the duty to speak arises, but, instead, has adopted the proposition that whether a duty to speak exists is determined by all the circumstances of the case.
9. **Fraud: Juries.** In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact for the jury.
10. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
11. **Pleadings.** The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made.
12. ____. Although the decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made, Neb. Rev. Stat. § 25-852 (Reissue 1995) is to be liberally construed and amendments are permitted where they are proposed at an opportune time and will be in the furtherance of justice.

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

Ronald D. Mousel, of Mousel & Garner, and Mark J. Appleton, of Robinson, Waters & O'Dorisio, P.C., for appellants.

G. Peter Burger, of Burger & Bennett, P.C., and James M. Bausch, Shawn D. Renner, and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees AmFirst Bank and Van Korell.

J. Bryant Brooks, of Brooks Law Offices, P.C., and Richard M. Grant for appellees DynaCorp Financial Strategies, Inc., DFS Credit Corporation, and Robert Vener.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Kevin Ord; Ord, Inc.; D&J Trust; and Dan Liebig, as trustee of D&J Trust (collectively the plaintiffs), appeal from orders of the district court for Red Willow County dismissing certain of the plaintiffs' claims against AmFirst Bank; AmFirst Investment Services; Kent Carter; Van Korell; Aragon Financial Services, Inc. (Aragon); DynaCorp Financial Strategies, Inc. (DynaCorp); DFS Credit Corporation (DFS); DFS Secured Healthcare Receivables Trusts II and IV; Robert Vener; Bank of New York Western Trust Company; Chiao, Smith & Associates; and Buchanan, Anderson and Pratt. This case involves the plaintiffs' purchase of notes issued by DFS trusts through Carter, a registered representative of Aragon, from June 11, 1997, through January 25, 2000, and DFS' subsequent default on these obligations. For the reasons set forth below, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

Beginning in 1993, Korell, president of AmFirst Bank, began discussions with Carter and Aragon's predecessor concerning the possibility of generating income for the bank through the sale of securities. Shortly thereafter, an agreement was reached in which Carter agreed to lease space from the bank and sell investments through his company, which Carter called AmFirst Investment Services.

The record shows that upon that agreement, AmFirst Bank advertised that it had a "[n]ew [d]ivision at AmFirst Bank, AmFirst Investment Services. . . . Please make an appointment to visit with Kent Carter or any of our officers concerning this new service. AmFirst . . . second to none."

Under that agreement, AmFirst Bank received 40 to 42½ percent of each dollar of fees and compensation earned by AmFirst Investment Services, with Aragon receiving 15 to 20 percent and Carter receiving the remaining 40 to 42½ percent.

The lease agreement between Carter and AmFirst Bank specifically stated that Carter was to remain an independent contractor, but other evidence on this record suggests that Carter was an employee of AmFirst Bank. Specifically, there is evidence

that Carter's office was inside AmFirst Bank and that AmFirst Investment Services had no separate signage. Additionally, the record shows that a vice president of AmFirst Bank was supervising Carter and that AmFirst Bank had the power to approve or disapprove any investment product sold by Carter.

Furthermore, the record shows that Carter was allowed to participate in AmFirst Bank's group health insurance plan for its employees, that AmFirst Bank paid for half of Carter's health insurance costs, and that AmFirst Bank provided Carter with part-time clerical help from one of its own employees.

In 1995 or 1996, DFS notes issued by DFS trusts appeared on Aragon's approved products list. The trusts were purportedly established by and affiliated with DFS, DynaCorp, and Vener. On July 9, 1997, Ord, acting as president and on behalf of Ord, Inc., purchased two DFS notes through Carter—one for $120,000 and another for $40,000. Liebig, acting as trustee for D&J Trust, also purchased DFS notes in the following amounts on the following dates: $62,000 on June 11, 1997; $75,000 on January 16, 1998; $50,000 on May 4, 1998; $25,000 on May 15, 1998; and $38,000 on January 25, 2000, for a total of $250,000.

On November 15, 2000, after DFS had defaulted on its obligations regarding the DFS trusts, both Ord and Liebig met separately with representatives of Aragon, including Carter, in the basement of AmFirst Bank. During those meetings, Ord and Liebig each signed a copy of a document entitled "Assignment and Hold Harmless Agreement." With regard to the assignment, each agreement stated: "Investor hereby assigns and conveys to Aragon all of its rights and interests in and to any and all claims or causes of action or other rights of recovery associated with its investment in the Securities ('Claims')." In exchange, Aragon agreed that at its expense, it would "use commercially reasonable efforts to pursue the Claims of Investor . . . against DFS and/or DFS-Related Parties."

With respect to the hold harmless portion, each agreement states:

> Investor hereby agrees, on behalf of itself and all who may claim through it, to release and hold the Released Parties (as hereinafter defined) harmless from and against all claims, causes of action, debts, liabilities, obligations or expenses,

> of any nature, that arise out of or in any way relate to the offer and/or sale of the Securities, whether asserted in a court of law, arbitration or mediation and regardless of whether known by Investor or otherwise.

Each agreement further provides that for purposes of the agreement,

> "Released Parties" means and includes Aragon and each and every past and present director, officer, shareholder, employee, representative, broker, dealer, agent, affiliate, subsidiary, parent company and insurer of Aragon, including without limitation each and every bank or other financial institution with which Aragon contracted, or which participated or acted together with Aragon, in any capacity, in connection with the offer and/or sale of the Securities.

On June 8, 2001, the plaintiffs filed suit against the various defendants. In the petition, the plaintiffs asserted 15 "Claims for Relief" against AmFirst Bank, Carter, and Aragon as follows: (1) violation of the Securities Act of Nebraska, Neb. Rev. Stat. § 8-1101 et seq. (Reissue 1997, Cum. Supp. 2000 & Supp. 2001), specifically § 8-1102(b), by misrepresentation; (2) violation of the Securities Act of Nebraska, specifically § 8-1102(b), by omission; (3) common-law negligence, by misrepresentation; (4) common-law negligence, by omission; (5) common-law breach of fiduciary duty; (6) investment advisers as fiduciaries; (7) common-law fraud, by misrepresentation; (8) common-law fraud, by omission; (9) breach of contract; (10) violation of broker-dealer registration provisions under § 8-1103 and 15 U.S.C. § 78*o* (2000); (11) violation of investment adviser registration provisions under § 8-1103 and 15 U.S.C. § 80b-3 (2000); (12) violation of securities registration provisions under § 8-1104 and 15 U.S.C. § 77e (2000); (13) violation of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq. (Reissue 1999); (14) common-law agency; and (15) control person liability. The plaintiffs also asserted the allegation of control person liability against Korell.

The plaintiffs asserted claims of accounting and common-law fraud against DynaCorp, DFS, the DFS trusts, and Vener. Additionally, the plaintiffs asserted claims of accounting and common-law negligence, aiding and abetting, breach of fiduciary

duty, and common-law fraud against Bank of New York Western Trust Company; Chiao, Smith & Associates; and Buchanan, Anderson and Pratt. Although the plaintiffs originally sought punitive and exemplary damages, they later dropped that claim. The plaintiffs requested costs, expenses, "pre- and post-judgment interest," reasonable attorney fees, and "such other and further relief as to this Court seems just and proper."

On April 22, 2002, the plaintiffs filed with the district court a motion to compel production of documents and answer interrogatories. The issue presented by the motion to compel was whether Carter, AmFirst Bank, Korell, and Aragon should be required to provide the plaintiffs with the names of other persons to whom Carter had sold investments in the DFS trusts.

On May 10, 2002, AmFirst Bank, Carter, and Korell filed a written objection to the plaintiffs' request, contending that providing the plaintiffs such information would not lead to the discovery of admissible evidence and that the disclosure of such information would violate the confidentiality provisions of Neb. Rev. Stat. § 8-1401 (Cum. Supp. 2000). On July 10, the district court entered an order nunc pro tunc denying the plaintiffs' motion to compel.

On September 19, 2002, the plaintiffs filed a motion for summary judgment on their 12th claim for relief against Carter and Aragon for the sale of unregistered securities. Carter and Aragon raised the issue of the assignment and hold harmless agreement. The district court denied the plaintiffs' motion, stating that the assignment and hold harmless agreement signed by the plaintiffs generated genuine issues of material fact.

On June 5, 2003, AmFirst Bank, Carter, and Korell filed for leave to amend their answer, stating that amending their answer would allow them to assert three additional affirmative defenses: statutes of limitations, contributory negligence or assumption of risk, and estoppel. On July 1, the trial court granted this motion.

On July 24, 2003, AmFirst Bank, Carter, and Korell filed a motion for summary judgment. On September 22, the plaintiffs filed a motion for reconsideration of their previously denied motion for summary judgment. On September 23, the plaintiffs filed a motion for summary judgment on their 12th claim for relief against AmFirst Bank for the sale of unregistered securities.

In an order filed January 5, 2004, the trial court granted AmFirst Bank, Carter, and Korell's motion for summary judgment and denied the plaintiffs' motion for reconsideration of their summary judgment motion and their summary judgment motion against AmFirst Bank on the plaintiffs' 12th claim. In overruling the plaintiffs' motion for summary judgment, the trial court stated that "there are still issues of material fact with regard to the effect of the Assignment and Hold Harmless Agreement entered into by the Plaintiffs and the Defendants."

In granting AmFirst Bank, Carter, and Korell's motion for summary judgment, the court stated that the assignment and hold harmless agreement is a valid contract and that such agreement clearly shows that the plaintiffs are no longer the real parties in interest, having assigned their interests to Aragon. The trial court also found that by signing the agreement, the plaintiffs released AmFirst Bank and Korell from any liability.

The court further stated that the facts clearly show that the plaintiffs' federal claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Adviser's Act of 1940 were all filed after the 1-year statute of limitations and the 3-year statute of repose. The court further found that under the federal law, there is no tolling of the 3-year statute of repose, either legal or equitable, except for Liebig's January 25, 2000, purchase.

Subsequently, the trial court dismissed Carter from the action, given that the U.S. Bankruptcy Court for the District of Nebraska had entered a discharge against him, and the court then scheduled a new trial date for the remaining defendants. The record also shows that Bank of New York Western Trust Company was dismissed, given that it had reached a settlement with the plaintiffs. The plaintiffs then moved for a default judgment against DynaCorp, DFS, DFS Secured Healthcare Receivables Trusts II and IV, and Vener (hereinafter collectively DFS defendants), and Aragon for failure to respond to discovery. DFS defendants filed a motion for summary judgment.

On March 5, 2004, the trial court denied the plaintiffs' motion to enter default judgment except as against Aragon. The trial court entered a default judgment against Aragon and in favor of both Ord for $160,413.86 plus interest at 3.016 percent per

annum and Liebig for $280,213.04 plus interest at the same rate. The trial court granted DFS defendants' motion for summary judgment, stating that the assignment and hold harmless agreement signed by the plaintiffs dictated the dismissal of the plaintiffs' claims against these defendants.

The plaintiffs appeal.

ASSIGNMENTS OF ERROR

On appeal, the plaintiffs contend that the district court erred in (1) granting the defendants' motions for summary judgment and holding that there are no genuine issues of fact regarding the assignment and hold harmless agreement, the application of the various statutes of limitation, and the apparent authority of Carter as an agent for AmFirst Bank; (2) failing to grant the plaintiffs' motion for summary judgment against certain defendants on the plaintiffs' 12th claim for relief for the sale of unregistered securities; (3) failing to allow the plaintiffs to question other AmFirst Bank customers as to falsification of their DFS subscription documents, their nonaccredited investor status, and other misrepresentations by the defendants; and (4) allowing AmFirst Bank to amend its answer and raise, for the first time, statutes of limitation as an affirmative defense.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the 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. *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005); *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

ANALYSIS

Motions for Summary Judgment.

On appeal, the plaintiffs contend that the district court erred in granting the defendants' motions for summary judgment and

holding that there are no genuine issues of fact regarding the assignment and hold harmless agreement, the application of the various statutes of limitation, and the apparent authority of Carter as an agent for AmFirst Bank. The plaintiffs also contend that the trial court erred in failing to grant the plaintiffs' motion for summary judgment against certain defendants on the plaintiffs' 12th claim for relief for the sale of unregistered securities.

Initially, we note that in our reading of the court's order, the court did not make specific findings in regard to Carter's authority as an agent for AmFirst Bank, and therefore, we will not address this assignment in determining whether the court erred in granting certain defendants' motions for summary judgment. Rather, we focus on the trial court's two bases for the entry of summary judgment—the assignment and hold harmless agreement and the applicable statute of limitations.

[3,4] Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted. *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004). Once the party moving for summary judgment produces enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted, the burden of producing contrary evidence shifts to the party opposing the motion. *Id.*

In regard to the assignment and hold harmless agreement, the trial court made conflicting findings. In overruling the plaintiffs' motion for summary judgment, the court found that genuine issues of material fact existed regarding the agreement, while in granting certain defendants' motions for summary judgment, the trial court clearly found that no genuine issues of material fact existed. We find that genuine issues of material fact do exist regarding the assignment and hold harmless agreement. Therefore, on that basis, the trial court was correct in denying the plaintiffs' motion for summary judgment but erred in granting certain defendants' motions for summary judgment.

On appeal, the plaintiffs contend that they were fraudulently induced to sign the assignment and hold harmless agreement, given that Aragon representatives and Carter concealed the fact

that Carter himself, on behalf of Aragon and AmFirst Bank, may have been guilty of wrongdoing.

Specifically, Ord stated in his deposition that he invested in "DFS Receivables" through Carter all $160,000 of Ord's retirement funds because Carter stated that these investments were safe and secure and would preserve Ord's principal. Liebig also testified that he told Carter that his objective was a safe, secure, low-risk investment and that Carter assured him that the DFS investments met those objectives and were guaranteed by the federal government.

Both Ord and Liebig stated that Carter never gave them a prospectus for the DFS investments. Additionally, Ord testified that it was not until after the plaintiffs filed their lawsuit that he found out that the DFS investments involved a high degree of risk, according to the private placement memorandum for each DFS trust.

Additionally, both Ord and Liebig testified that at the time the assignment and hold harmless agreements were signed, neither of them was aware that the DFS investments were unregistered securities which could be sold only to "accredited investors," including individuals or entities with high income and high net worth. Both Ord and Liebig stated that they did not meet the requirements to be considered accredited investors and when shown the subscription documents stating that they met these requirements, both Ord and Liebig stated that they had never provided Carter with such information. In Carter's deposition, he denied that he had falsified any of the information regarding the plaintiffs' incomes and net worth and stated that the information he put down for the plaintiffs was information the plaintiffs gave him.

In addition to the plaintiffs' testimony regarding their own investments, they produced affidavits from two other individuals who also invested in DFS notes through Carter. In these affidavits, both individuals stated that they did not meet the specific income and net worth requirements to invest in DFS notes.

Both Ord and Liebig stated that at their individual meetings with Aragon and Carter after DFS' default on its obligations, Aragon indicated that there had been wrongdoing on the part of

entities other than Aragon but made no mention of any wrongdoing by Carter.

[5] Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[6] To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment. *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000).

Clearly, the record before us shows that genuine issues of material fact exist as to the following: whether Aragon and Carter concealed material facts with the intent that the plaintiffs acted in response to this concealment; whether the plaintiffs relied on the facts as the plaintiffs believed the facts to be as the result of the concealment; and whether the plaintiffs were damaged as the result of their reliance. AmFirst Bank argues, though, that no genuine issue of material fact exists as to whether Aragon and Carter had a duty to disclose those material facts. Specifically, AmFirst contends that "Neither Aragon nor Carter owed [the plaintiffs] a fiduciary duty to disclose information after the specific transactions [purchase of notes] were complete." Brief for appellees AmFirst Bank and Korell at 20.

[7,8] Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation. *Streeks, supra*. In nondisclosure cases, the law does not attempt to define occasions when the duty to speak arises, but, instead, has adopted the proposition that whether a duty to speak exists is determined by all the circumstances of the case. *Id.*

Under the circumstances of the instant case, we cannot adopt AmFirst Bank's conclusion that Aragon and Carter had no duty to disclose material facts to the plaintiffs. Clearly, even though

the sale of the notes was complete, Aragon and Carter had an ongoing duty to the plaintiffs, given that Aragon and Carter promised to undertake the responsibility of assisting the plaintiffs with recovering their money and impressed upon the plaintiffs that their signing of the release and the hold harmless agreement was imperative to the success of such recovery. Based on these circumstances, Aragon and Carter clearly had a continuing duty to the plaintiffs which included the duty not to conceal material facts.

[9] In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact for the jury. *Id.* Given our finding above that genuine issues of material fact exist, including whether Aragon and Carter breached their duty, we conclude that these issues of material fact precluded the entry of summary judgment in favor of the defendants. Given that genuine issues of material fact exist regarding whether the plaintiffs were fraudulently induced to sign the hold harmless agreement, the trial court did not err in denying the plaintiffs' motion for summary judgment on this ground. We note that AmFirst Bank remains a defendant in this action, given that genuine issues of material fact exist as to whether Carter was AmFirst Bank's employee.

In regard to the relevant statute of limitations, the trial court found that the plaintiffs' federal claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Adviser's Act of 1940 were all filed after the 1-year statute of limitations and the 3-year statute of repose.

The record shows that the plaintiffs' 10th claim for relief, under the Securities Exchange Act of 1934, alleges a violation of 15 U.S.C. § 78*o*; that the plaintiffs' 11th claim for relief alleges violations of 15 U.S.C § 80b-3; and that the plaintiffs' 12th claim for relief, under the Securities Act of 1933, alleges a violation of 15 U.S.C. § 77e. The defendants argued, and the court found, that § 13 of the Securities Act, 15 U.S.C. § 77m, applies to all three of the above claims. Section 77m provides as follows:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should

> have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(a)(2) of this title more than three years after the sale.

The 1-year statute of limitations in § 77m runs from the date each "violation" occurred. See *Caviness v. Derand Resources Corp.*, 983 F.2d 1295 (4th Cir. 1993). A violation of § 77e occurs when a person sells an unregistered, nonexempt security. See 15 U.S.C § 77*l*(a)(1). A violation of § 78*o* occurs when an unregistered broker sells a security. A violation of § 80b-3 occurs when an unregistered investment adviser first enters into an agreement to provide investment adviser services. See *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030 (2d Cir. 1992). The record shows that Carter sold DFS notes to the plaintiffs more than 1 year prior to the filing of the plaintiffs' complaints.

The plaintiffs contend that the district court should have tolled the statute of limitations to take into consideration that the plaintiffs did not learn of Carter's alleged misconduct and DFS' default until on or about June 15, 2000.

Under § 77m, there is no equitable tolling for failure to register claims, given that registration is a matter of public record and therefore claims alleging the sale of unregistered securities cannot be concealed. See *Perry H. Bacon Trust v. Transition Partners, Ltd.*, 298 F. Supp. 2d 1182 (D. Kan. 2004).

The trial court found that the statute of repose could not be tolled under federal law, except for Liebig's January 25, 2000, purchase, which was the only purchase by Ord or Liebig occurring within 3 years of the filing of the plaintiffs' petition on June 8, 2001. On this record, we cannot find that the trial court erred in its determination.

Opportunity to Question Other AmFirst Bank Customers.

The plaintiffs also argue that the trial court erred in failing to allow them to question other individuals who had purchased DFS

notes through Carter as to falsification of their DFS subscription documents, their nonaccredited investor status, and other misrepresentations by Carter evidencing motive, intent, plan, identity or scheme, or absence of mistake or accident, pursuant Neb. Rev. Stat. § 27-404(2) (Reissue 1995).

[10] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

Specifically, in the plaintiffs' motions to compel, they requested that the court require Carter, AmFirst Bank, Korell, and Aragon to identify all other individuals or entities who invested in DFS notes through Carter. The plaintiffs stated that at a hearing, all of the individuals could then be questioned about whether the information on their investment applications was accurate, whether they were in fact " 'accredited investors,' " whether they were provided with DFS offering or risk disclosure documents by Carter, and what Carter verbally told them as to the safety and conservative nature of such investments.

AmFirst Bank, Korell, and Carter objected to the plaintiffs' request for discovery, citing § 8-1401, which allows a bank to withhold customer information it deems confidential without

> a court order of a court of competent jurisdiction setting forth the exact nature and limits of such required disclosure and a showing that all persons or organizations to be affected by such order have had reasonable notice and an opportunity to be heard upon the merits of such order.

AmFirst Bank, Korell, and Carter also stated that the plaintiffs' requests were beyond the scope of Neb. Ct. R. of Discovery 26 (rev. 2001) and that the plaintiffs were requesting dissemination of privileged, nonpublic, confidential customer information unrelated to the plaintiffs' litigation.

Under rule 26(b)(1),

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and

> location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The trial court denied the plaintiffs' motions to compel, stating that the information requested by the plaintiffs relates only to third parties not involved in this lawsuit and that the requested information would not lead to admissible evidence. On this record, we cannot say that the trial court abused its discretion in denying the plaintiffs' motions to compel.

AmFirst Bank's Amendment to Its Answer.

The plaintiffs also argue that the trial court erred in allowing AmFirst Bank to amend its answer and raise statutes of limitation as a defense. Specifically, the plaintiffs contend that AmFirst Bank's amendment of its answer occurred many years after the original answer was filed, years after the last discovery was taken on the issue, well after the pleadings had been ordered closed, and without good cause shown.

[11,12] The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005); *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997). See, also, Neb. Rev. Stat. § 25-852 (Reissue 1995) (statute applicable to this action because action was filed prior to statute's repeal by 2002 Neb. Laws, L.B. 876, operative January 1, 2003; amended pleadings are now governed by Neb. Ct. R. of Pldg. in Civ. Actions 15 (rev. 2003)). Although the decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made, the statute is to be liberally construed and amendments are permitted where they are proposed at an opportune time and will be in the furtherance of justice. *Genthon, supra*; *New Light Co., supra.*

AmFirst Bank contends that their amendment comported with Nebraska law, given that they proposed their amended answer nearly 3 months before the trial was originally scheduled to take place and nearly 6 months before the summary judgment hearing

actually occurred. The trial court agreed with AmFirst Bank, stating that AmFirst Bank's amendment of its answer was in furtherance of justice and did not prejudice the plaintiffs, given that there were more than 90 days before the commencement of trial. On this record, we cannot say that the trial court abused its discretion.

CONCLUSION

After reviewing the record, we conclude that the trial court erred in granting the defendants' motions for summary judgment, because there are genuine issues of fact regarding the assignment and hold harmless agreement. The trial court did not err in failing to grant the plaintiffs' motion for summary judgment or in finding that the plaintiffs' 10th, 11th, and 12th claims under federal law are barred by the relevant statute of limitations, except for Liebig's January 25, 2000, purchase of DFS notes. Additionally, the trial court did not err in failing to allow the plaintiffs to question other AmFirst Bank customers or in allowing AmFirst Bank to amend its answer and raise, for the first time, statutes of limitation as an affirmative defense. For these reasons, we reverse in part, and remand with directions for the trial court to dismiss its entry of summary judgment and for further proceedings consistent with this opinion. All other orders of the trial court are affirmed.

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

STATE OF NEBRASKA, APPELLEE, V.
SERAFIN CISNEROS, APPELLANT.

704 N.W.2d 550

Filed October 11, 2005. No. A-05-597.

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. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken.

4. **Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides that three types of final order may be reviewed on appeal: (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.
5. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Judgments: Appeal and Error.** A substantial right is affected if an 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 he or she is appealing.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Appeal dismissed.

Thomas C. Riley, Douglas County Public Defender, and Peder Bartling for appellant.

Serafin Cisneros, pro se.

No appearance for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Serafin Cisneros appeals the order of the district court for Douglas County which denied his motion to withdraw his no contest pleas to criminal charges. Because we determine that the order denying the motion to withdraw the pleas was not a final, appealable order, we dismiss the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001).

BACKGROUND

On June 11, 2004, the State charged Cisneros with second degree murder and use of a deadly weapon to commit a felony. On January 24, 2005, Cisneros pled no contest to the charges and the district court adjudged him guilty as charged. The docket entries show that on April 7, the district court overruled Cisneros' motion to withdraw his pleas; that on June 2, Cisneros stated he wished to appeal; and that sentencing was postponed due to the appeal. Cisneros' notice of appeal, signed on May 1, stated that he was appealing from a May 1 judgment or order of

the district court. No such order is in the record. Even though Cisneros references a nonexistent order in his notice of appeal, we can infer that he is attempting to appeal from the order denying his motion to withdraw his pleas. We therefore address that order in this appeal.

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. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken. *Id.* Therefore, we must consider whether an order denying a motion to withdraw a plea constitutes a final, appealable order. While no Nebraska appellate court has expressly stated that such an order is not final or appealable, we conclude that existing Nebraska jurisprudence compels that result.

[4] Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides that three types of final order may be reviewed on appeal: (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. See *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

The order overruling Cisneros' motion to withdraw his pleas did not prevent a judgment, and it was not made by summary application after the judgment was rendered. Instead, we are confronted with the question of whether an order overruling a motion to withdraw a plea affects a substantial right in a special proceeding.

In *State v. Silvers*, 255 Neb. 702, 708-09, 587 N.W.2d 325, 331 (1998), the Nebraska Supreme Court identified postconviction proceedings as "special proceedings," stating that "[s]pecial

proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes" and that "[s]pecial proceedings have also been described as 'every special statutory remedy which is not in itself an action.' " Except for legislation addressing the circumstances surrounding a trial court's failure to advise of the potential consequences to a noncitizen of removal from the United States or denial of naturalization, we find no statute specifically conferring a right to withdraw a plea of guilty or no contest. See Neb. Rev. Stat. § 29-1819.02 (Cum. Supp. 2004). The right conferred by § 29-1819.02 does not apply in the instant case. Thus, under the foregoing definition of a special proceeding, we conclude that Cisneros' motion to withdraw his pleas of no contest is not a "special proceeding" within the meaning of § 25-1902.

[5,6] Additionally, we conclude that the denial of a motion to withdraw a plea, at least where § 29-1819.02 does not apply, does not involve a substantial right. Because the circumstances contemplated by § 29-1819.02 are not present in the case before us, we express no opinion concerning whether an order denying a motion to withdraw a plea of guilty or no contest, made under that section, is a final, appealable order.

> A substantial right is an essential legal right, not a mere technical right. . . . A substantial right is affected if an 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 he or she is appealing.

(Citation omitted.) *State v. Lauck*, 261 Neb. 145, 148, 621 N.W.2d 515, 517 (2001).

In *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), the Nebraska Supreme Court held that the denial of a motion to discharge based on speedy trial grounds affected a substantial right and was an appealable order. But see *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005) (order denying motion for absolute discharge was not final, appealable order where probation statute did not expressly allow for absolute discharge upon violation of right contained therein). Similarly, in *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990), the Supreme Court held that the denial of a plea in bar raising a nonfrivolous double jeopardy claim was a final, appealable order because it affected

a substantial right in a special proceeding. In both cases, the Supreme Court noted that the rights of the accused would be significantly undermined if appellate review were postponed. In *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003), the Supreme Court applied *Gibbs* and *Milenkovich* and held that although the defendant had the option to move for a new trial based on DNA evidence under Neb. Rev. Stat. § 29-4123(3) (Cum. Supp. 2004), the denial of his motion to vacate and set aside the judgment under § 29-4123(2), following a hearing on DNA test results, affected a substantial right in a special proceeding because he had lost the right to be immediately released from custody without being exposed to further delay, expense, and the risk inherent in a new trial.

Unlike the rights of the defendants in *Gibbs*, *Milenkovich*, and *Bronson*, Cisneros' rights would not be significantly undermined by postponing review. The Nebraska Supreme Court has heard appeals from denials of motions to withdraw pleas *after* the appellants were sentenced. See, *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000); *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979). Thus, in the case before us, appellate review is not foreclosed and any prejudice arising from the order denying Cisneros' motion to withdraw his pleas can be mitigated by a timely appeal after sentencing. Moreover, a withdrawal of Cisneros' pleas would not have resulted in his immediate release from custody. Our conclusion is further strengthened by the fact that in both *Carlson* and *Hill*, the defendant's motion to withdraw his prior plea was initially denied more than 30 days prior to sentencing. Nonetheless, in both cases, on appeal after sentencing, the Supreme Court addressed the issue of the trial court's denial of the defendant's request to withdraw the plea. Presumably, had the Supreme Court considered an order denying a motion to withdraw a plea to be final and appealable, it would have dismissed that portion of the appeals in *Carlson* and *Hill* as untimely. See, e.g., *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996) (dismissal of appeal after sentencing and more than 30 days after denial of defendant's plea in bar). We conclude that the order denying Cisneros' motion to withdraw his pleas did not affect a substantial right.

CONCLUSION

Because the order denying Cisneros' motion to withdraw his no contest pleas was not a final, appealable order, we dismiss Cisneros' appeal pursuant to rule 7A(2).

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
CHERYL ZIEMANN, APPELLANT

705 N.W.2d 59

Filed October 18, 2005. No. A-04-1483.

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. **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.** An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
4. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Constitutional Law: Warrantless Searches: Search and Seizure.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
6. **Constitutional Law: Search and Seizure.** Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
7. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.
8. **Constitutional Law: Search and Seizure.** The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a "legitimate expectation of privacy in the premises."
9. ____: ____. Under the open fields doctrine, open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.

10. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
11. **Sentences: Restitution.** In addition to any other sentence given for a violation of Neb. Rev. Stat. §§ 28-1009 (Cum. Supp. 2004) or 28-1010 (Reissue 1995), the sentencing court may order the defendant to reimburse a public or private agency for expenses incurred in conjunction with the care, impoundment, or disposal of an animal involved in the violation of such section.
12. **Judgments.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders.
13. **Statutes: Courts.** The provisions of chapter 25 of the Nebraska Revised Statutes apply to the Nebraska Supreme Court and county court, so far as the same may be applicable to the judgments or final orders of such courts.
14. **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.

Appeal from the District Court for Thurston County, DARVID D. QUIST, Judge, on appeal thereto from the County Court for Thurston County, DOUGLAS LUEBE, Judge. Judgment of District Court affirmed in part, and in part remanded for further proceedings.

Jeffrey H. Bush for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Cheryl Ziemann (Cheryl) appeals the decision of the district court for Thurston County affirming the decision of the county court. The county court convicted Cheryl of one count of cruelty to animals, a Class I misdemeanor, and two counts of animal neglect, each a Class II misdemeanor.

FACTUAL AND PROCEDURAL BACKGROUND

On July 8, 2003, Thurston County Sheriff Charles Obermeyer received information from an electrician who had been working at a farmstead located between Walthill and Pender regarding

two horses which appeared to be without food or water. Sheriff Obermeyer and two deputies went to the farmstead. Upon arrival, Sheriff Obermeyer found that the farmstead appeared to be abandoned and that two horses were located in a grove of trees behind the house. One of the horses was tethered, and it appeared the other horse had broken free. (The two horses were later identified by Cheryl as "Ace," a male horse, and "Moon," a female horse, and we will use their names hereinafter.) Sheriff Obermeyer observed that the horses were without water, that there was no grass within reach of the horses, and that Ace's leg had a cut that was bleeding and oozing pus. The horses appeared very thin, with their ribs visible. Sheriff Obermeyer and the deputies got water for the horses, and Sheriff Obermeyer contacted the jailer for Thurston County, Larry Lown, who had experience caring for horses. Because of the condition of the horses, they were impounded and taken to Lown's farm so that they could receive proper care. Lown provided food and water for the horses and followed veterinary instructions concerning the care of the infected cut on Ace's leg. Cheryl eventually telephoned Sheriff Obermeyer and identified herself as the owner of Ace and Moon.

On July 9, 2003, Sheriff Obermeyer went to David Hunter's residence and observed "the balance of" the horses that were said to be the property of Cheryl and Sheriff Obermeyer took possession of four more horses, as well as a fifth horse on the following day.

The State filed a complaint against Cheryl on August 1, 2003, charging her with one count of cruelty to animals and six counts of animal neglect. At Cheryl's arraignment on August 25, she pled not guilty to all seven counts.

On January 5, 2004, Cheryl filed a "Motion to Suppress Physical Evidence." In Cheryl's motion, she alleged that all "items of evidence were taken from [her] or other area in which she had an expectation of privacy without any valid or legal consent to search" and that "[t]here existed no probable cause for the search or seizure of any of said evidence." Cheryl also filed a motion to quash, alleging that the complaint was defective on its face because it designated all seven counts as Class I misdemeanors, when, by statute, they were Class II misdemeanors.

At Cheryl's January 15, 2004, arraignment on the amended complaint, which complaint cured the defects named in the motion to quash, Cheryl pled not guilty to all seven counts. Also on January 15, a hearing was held on Cheryl's motion to suppress. At that hearing, Sheriff Obermeyer testified that on July 8, 2003, an electrician advised him that two horses were on an abandoned farmstead and that they were in "bad . . . shape." When Sheriff Obermeyer arrived, he found the horses were tied up behind the house, by a grain bin in a small grove of trees. Sheriff Obermeyer observed that there was no grass within the reach of the horses, that they had eaten all the grass they could reach, and that there was no water. Sheriff Obermeyer testified that Ace was bleeding from the leg and that the leg looked infected.

Sheriff Obermeyer testified that after making several telephone calls, he found out that the horses might belong to Cheryl, but that his attempts to contact her were unsuccessful. However, Cheryl ultimately called him back and wanted to know what right he had to take her horses.

Sheriff Obermeyer related that he talked to Cindy Rarrat, the owner and operator of Sioux City Animal Control, who advised him that she was already working with a situation involving a horse belonging to Cheryl. Sheriff Obermeyer recounted that during his investigation, he discovered that Cheryl had other horses at Hunter's place, and that on July 9, 2003, Sheriff Obermeyer seized from there four horses that appeared neglected and underfed. He also seized a fifth horse on July 10. Sheriff Obermeyer testified that he did not think he needed to obtain a warrant to seize the horses because he had permission from Hunter and because it was an emergency situation.

Rarrat testified that on June 23, 2003, she received a call from Hunter, who said he could not care for a horse in dire shape he had obtained from Cheryl. Rarrat testified that Hunter brought the horse, named "Dee," to her. Rarrat testified that Dee had lice, maggots, and an infection and was given food, water, and antibiotics. Rarrat testified that the veterinarians graded Dee a "one" and that they would have graded Dee a "zero," but there was not such an option on their chart. The evidence was that the American Humane Association rates the condition of horses on a scale from one to nine, with one being the worst possible condition and nine

being a horse that is extremely overweight, and that a rating of five or six would indicate a healthy horse. Rarrat said that Hunter allowed Rarrat and Sheriff Obermeyer onto the property and that Hunter signed a release form regarding every animal that was removed from the property.

The county court's order overruling Cheryl's motion was filed on February 20, 2004. The court found that Cheryl failed to establish that she had standing to challenge the search, that Cheryl had no reasonable expectation of privacy that attached to any of the locations of any of the horses, that a search warrant was not required by statute in this case, and that the warrantless search and subsequent seizure of horses found on Hunter's premises were justified by Hunter's consent to such search. Moreover, the court found that at both Hunter's place and the abandoned homestead, the officer had the right to be in the position where he had plain view.

A jury trial was held on May 6 and 7, 2004. At the time of trial, counts IV through VII had been dropped. The only charges remaining were count I (Dee) and counts II and III (Ace and Moon).

Sheriff Obermeyer's trial testimony was not materially different than his testimony at the suppression hearing, and therefore, we do not repeat it except as to new matter. Sheriff Obermeyer testified that Cheryl called him and claimed the horses. He testified that he told Cheryl the horses were in bad shape and that he thought about shooting them but he "didn't have the heart to shoot horses." Sheriff Obermeyer testified that Cheryl responded that if she had known he would have shot the horses, she would have let him shoot the horses for her. Sheriff Obermeyer testified that at that point, he advised Cheryl that he could not talk to her any more without advising her of her *Miranda* rights.

Lown, the county jailer, testified that he was called to the farmstead on July 8, 2003, to help with Ace and Moon. Lown testified that when he arrived, the two horses did not look good, and that when given water, the horses consumed 15 to 20 gallons in 5 to 10 minutes. Lown testified that Ace had an injured leg that probably had occurred within the prior 2 days. Lown testified that he took Ace and Moon to his place and started administering veterinary care. Lown testified that on July 8, he thought

the horses, especially Ace, would die. Lown testified that Ace and Moon have remained at his place since July 8.

Hunter testified that he agreed to watch one horse, Dee, for Cheryl for a weekend for approximately $90 and that he was to provide food and medication for the horse. Hunter said that Dee had a swollen leg and a hole in its stomach and that he had to pick the horse up so that it could digest food, because the horse would not get up on its own. Hunter was worried about Dee's life and called a veterinarian, who told him the horse should be "put to sleep." Hunter testified that he did not do that because Dee was not his horse. Hunter said that he called Rarrat and took Dee to her at the Siouxland Animal Rescue League (Siouxland Rescue). Hunter testified that he was keeping seven horses for Cheryl's daughter and that the people from Siouxland Rescue took those horses as well.

Rarrat testified that in addition to owning and operating the Sioux City Animal Control Center, she is also a volunteer and board member for Siouxland Rescue. Rarrat confirmed that Hunter had contacted her and later brought the horse to her in "horrific" condition, and she stated that "[i]t was the most unbelievable case I've ever seen." Rarrat testified that Dee's hair was falling out and that Dee was skin over bones, was very weak, had sores all over her body, had a swollen leg, had maggots around infected areas, and had lice. Although Rarrat treated Dee with antibiotics, cold packs, and Epsom salts, Dee was eventually euthanized. Rarrat said that she saw Ace and Moon on July 9, 2003, and that they were also in bad shape.

Cheryl's motion to dismiss at the conclusion of the State's case was denied, and she does not assign error to such ruling; nor does she contend that the evidence was insufficient to sustain the conviction. Thus, while Cheryl introduced evidence purporting to show that the horses were not neglected or abused by her, we need not recount that evidence because under our standard of review of a jury verdict, we view the evidence in the light most favorable to the State, see *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995), and in such light, the evidence is obviously sufficient to sustain the convictions for one count of cruelty to animals and two counts of animal neglect. The court's journal entry reflecting such conviction was filed on May 12, 2004.

A sentencing hearing was held on July 8, 2004, at which Cheryl testified that she was 55 years old and had received $599 per month in disability since February 2004. Cheryl said that she also filed for chapter 13 bankruptcy in February 2004, resulting in a 5-year plan under which she pays $300 per month. Cheryl testified that she is purchasing an acreage at a cost of $1,015 per month, which payment she makes with her mother's help. Cheryl said that the Siouxland Rescue bill for $1,681 included services for horses she did not own because the other horses were owned by her daughter. The presentence investigation report also includes a bill from Lown for $1,003.47. Neither Lown nor anyone from Siouxland Rescue testified about their expenditures which resulted in those bills.

The trial judge noted that in determining Cheryl's sentence, he considered that he had sat through the trial, observed the witnesses, and reviewed the presentence investigation report. The judge also noted that in 1991, Cheryl was convicted of 11 counts of similar types of crimes involving puppies and kittens. (The presentence investigation report reflects that Cheryl was convicted of 11 counts of cruelty to animals, was placed on probation for 2 years, and was ordered not to have more than one dog and one cat on her property during the probation period.) The judge thought it appeared likely that Cheryl would commit a similar crime in the future. The judge noted that he had considered Cheryl's family situation—Cheryl has a daughter who was 12 years old and still lived at home, but the child had her father to care for her. The judge found that probation was not an appropriate sentence and that a lesser sentence than incarceration would depreciate the seriousness of the crime and would promote disrespect for the law. The county court sentenced Cheryl to 240 days in jail for the cruelty conviction and 90 days in jail for each of the two neglect convictions, with the sentences to be served consecutively. The court ordered her to pay court costs of $131.47 and to cooperate as needed to execute all documents necessary to transfer ownership of the two horses which were the subjects of the neglect convictions, since they were to be placed for adoption. The court also ordered Cheryl to pay restitution to Siouxland Rescue and to Lown in the total amount of $2,112.27, although the judge also stated in reference to the

amount, "it may be inaccurate, I'm doing it rather quickly here, to be paid within three years after the release from incarceration." The court's journal entry dated July 8, 2004, reflected the jail sentences imposed at the hearing, but showed that Cheryl was to pay a different amount—$1,202.27—for the benefit of Siouxland Rescue and Lown.

On July 8, 2004, Cheryl filed her "Notice of Intention to Prosecute Appeal" to the district court for Thurston County. On July 15, the county court entered a nunc pro tunc order which stated that "due to [a] scrivener's error while calculating the expenses incurred in th[is] matter during the sentencing hearing of July 8, 2004, the correct total amount of restitution to be paid by [Cheryl] is $1,889.27; $885.80 to Siouxland . . . Rescue . . . and $1,003.47 to . . . Lown." Why or how the court ordered Siouxland Rescue to be paid $885.80 when the bill was $1,681 is not explained, nor is it apparent from the record.

An appeal hearing was held before the district court on September 14, 2004, and in an order filed November 30, 2004, the district court affirmed the county court's denial of Cheryl's motion to suppress and affirmed Cheryl's jail sentences. The district court did, however, vacate the county court's nunc pro tunc order dated July 15, 2004, finding that at the time such order was entered, jurisdiction of the case was vested in the district court because Cheryl had already filed a notice of appeal. Cheryl now appeals to this court.

ASSIGNMENTS OF ERROR

Cheryl alleges that the county court erred in (1) overruling her motion to suppress, (2) admitting at the jury trial evidence which should have been excluded, (3) changing the amount of restitution by written order nunc pro tunc after the judge had announced it in open court, (4) imposing jail sentences which were excessive, (5) ordering restitution which was erroneous and excessive, and (6) imposing restitution on her when it was clear she lacked the means to pay restitution.

STANDARD OF REVIEW

[1] 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. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

[2,3] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[4] Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

Motion to Suppress.

Cheryl argues that the county court erred in overruling her motion to suppress. We will address the motion to suppress only as it relates to Dee, Ace, and Moon, the horses involved in counts I, II, and III, upon which Cheryl was convicted. The seizure of the other horses is moot because Cheryl was not convicted of any crimes relating to those four horses and because no evidence concerning those horses was presented at trial.

Cheryl's motion to suppress related to the seizure of horses on July 8, 9, and 10, 2003, from the farmstead and Hunter's property. Dee was surrendered to Siouxland Rescue by Hunter on June 23; thus, Dee was not seized by the State, nor was the State involved in Hunter's transfer of the horse to Siouxland Rescue. Therefore, Cheryl's argument for suppression in regard to Dee is without merit.

[5-8] We turn to the suppression motion as it relates to Ace and Moon, the two horses seized from the farmstead on July 8, 2003. The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

However, in *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), the U.S. Supreme Court stated:

> "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." [Citations omitted.] A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. [Citation omitted.] And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, [citation omitted], it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

In *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996), the Nebraska Supreme Court stated:

> A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). See, also, Neb. Rev. Stat. § 29-822 (Reissue 1995). The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a "legitimate expectation of privacy in the premises."

[9] Cheryl does not own or reside at the farmstead where her two horses were seized. Cheryl bases her claim of a "legitimate expectation of privacy in the premises" on the fact that she leased the grass area on the farmstead for a dollar—although she did not establish whether this was per day, week, month, or year. And, the only evidence that any such lease existed is Cheryl's testimony. But, assuming there was such a lease, Cheryl was leasing only open land, which is subject to the open fields exception to the warrant requirement. Under the open fields doctrine, "'[o]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance.'" *State v. Cody*, 248 Neb. 683, 695, 539 N.W.2d 18, 26 (1995), quoting *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214

(1984). The boarding of two horses at an abandoned farmstead for a dollar clearly is not the sort of intimate activity sheltered by the Fourth Amendment. To put it another way, the search is not unreasonable and does not require a warrant. Therefore, Cheryl did not have standing to challenge the search of the farmstead.

Cheryl argues that the warrantless seizure of Ace and Moon was illegal, in violation of Neb. Rev. Stat. § 28-1012(1) (Cum. Supp. 2004), which states: "Any law enforcement officer who has reason to believe that an animal has been abandoned or is being cruelly neglected or cruelly mistreated may seek a warrant authorizing entry upon private property to inspect, care for, or impound the animal." However, the statute only says "may" seek a warrant, and Cheryl cites no authority that this statute either imposes a higher standard on law enforcement officers than is otherwise established by longstanding principles of search and seizure or makes it mandatory that a warrant be secured. And, we can think of no reason why the statute would do so. Thus, we read "may seek" as purely discretionary and as not effecting other doctrines of search and seizure, such as the plain view doctrine.

[10] A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). In the instant case, the record shows that all three criteria of the plain view doctrine are undisputedly established. Cheryl did not have standing to challenge law enforcement's presence at the farmstead, for the reasons previously stated in this opinion. And, once the officers were at the farmstead, Ace and Moon were in plain view and the "incriminating nature" was immediately apparent, given the poor condition of the horses at the time; plus, the horses appeared to be abandoned. Finally, the officers had a "lawful right of access" to Ace and Moon, since the horses were essentially in an open field. Therefore, the search and seizure was not unreasonable and Cheryl's Fourth Amendment rights were not violated. Thus, the trial court properly denied her motion to suppress evidence relating to the search and seizure of Ace and Moon.

Restitution.

Cheryl argues that the trial court failed to consider her ability to pay when ordering her to make monetary payments to Siouxland Rescue and to Lown. However, Cheryl's argument rests upon Neb. Rev. Stat. §§ 29-2280 and 29-2281 (Reissue 1995), which deal with restitution. Section 29-2281 provides that restitution is "based on the actual damages sustained by the victim." Here, the horses were the victims, but they were not damaged—at least in the sense that they incurred monetary damages for which restitution can be made to them. Thus, the authority cited by Cheryl concerning a defendant's ability to pay restitution, e.g., *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999), is not on point, since such authority rests on the explicit language of § 29-2281 requiring the court to "consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and [to] balance such considerations against the obligation to the victim." From this statutory language, the rule has evolved that the sentencing court must give "meaningful consideration" to the defendant's ability to pay restitution. See *State v. Wells*, 257 Neb. at 343, 598 N.W.2d at 38.

The State's argument that the county court's order of "restitution" is really "reimbursement," citing Neb. Rev. Stat. § 28-1006 (Cum. Supp. 2004), is partially correct. Section 28-1006 does allow for "reimbursement" for care associated with seized animals involved in any violation of Neb. Rev. Stat. § 28-1005 (Cum. Supp. 2004), a statute prohibiting dogfighting, cockfighting, bearbaiting, or pitting an animal against another. However, none of that is involved here. The applicable statute dealing with "reimbursement" in this case is Neb. Rev. Stat. § 28-1011 (Cum. Supp. 2004), which deals with violations of Neb. Rev. Stat. § 28-1009 (Cum. Supp. 2004), animal cruelty and neglect—the statute under which Cheryl was convicted.

[11] Section 28-1011(1) states:

> In addition to any other sentence given for a violation of section 28-1009 or 28-1010, the sentencing court may order the defendant to reimburse a public or private agency for expenses incurred in conjunction with the care, impoundment, or disposal of an animal involved in the violation of

> such section. Whenever the court believes that such reimbursement may be a proper sentence or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the expenses incurred. The court may order that reimbursement be made immediately, in specified installments, or within a specified period of time, not to exceed five years after the date of judgment.

Furthermore, unlike the restitution statute, this statute does not provide that before making reimbursement part of a sentence, the trial court must consider the defendant's ability to pay. Therefore, we reject this argument as a basis for reversing the reimbursement order. However, we now turn to the matter of the amount Cheryl is required to reimburse Siouxland Rescue and Lown.

Order Nunc Pro Tunc.

Cheryl argues that the county court erred in changing the reimbursement order in its order nunc pro tunc after the judge had announced sentence in open court. At the sentencing hearing, the judge ordered Cheryl to pay restitution to Siouxland Rescue and to Lown in the total amount of $2,112.27, although the judge also stated in reference to the amount that it could be inaccurate and that if so, he would correct it by an order nunc pro tunc. The court's journal entry dated July 8, 2004, also required reimbursement, except that it showed Cheryl was to pay $1,202.27 for the benefit of Siouxland Rescue and Lown, without specifying any amount per payee. On July 15, the court entered a nunc pro tunc order which stated that "due to [a] scrivener's error while calculating the expenses incurred in th[is] matter during the sentencing hearing of July 8, 2004, the correct total amount of restitution to be paid by [Cheryl] is $1,889.27; $885.80 to Siouxland . . . Rescue . . . and $1,003.47 to . . . Lown."

[12,13] Before the entry of the nunc pro tunc order, on July 8, 2004, Cheryl filed her "Notice of Intention to Prosecute Appeal" to the district court for Thurston County. Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2004) states:

> Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission

> may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders. *During the pendency of an appeal, such mistakes may be so corrected before the case is submitted for decision in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.*

(Emphasis supplied.) This statute also applies to the county court. See Neb. Rev. Stat. § 25-2009 (Reissue 1995) (provisions of chapter 25 of Nebraska Revised Statutes shall apply to Supreme Court and county court, so far as same may be applicable to judgments or final orders of such courts).

While Cheryl filed her notice of appeal to the district court on July 8, 2004, the matter was not submitted to the district court for decision until after the hearing on September 14. Thus, under § 25-2001, the county court had jurisdiction to enter the order nunc pro tunc. Therefore, the district court improperly vacated the county court's order nunc pro tunc dated July 15, 2004, and although Cheryl's assignments of error do not attack the district court's action in this regard, we deal with it under the plain error doctrine. See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003) (plain error will be noted only where error is evident from record, prejudicially affects substantial right of litigant, and is of such nature that to leave it uncorrected would cause miscarriage of justice or result in damage to integrity, reputation, and fairness of judicial process).

Thus, we reject's Cheryl's core argument to this court that the county court improperly changed the sentence pronounced in open court. It is clear that a criminal sentence can be corrected by an order nunc pro tunc, see *State v. Kortum*, 176 Neb. 108, 125 N.W.2d 196 (1963), thus disposing of Cheryl's assignment of error that the county court erred in changing the sentence it had announced in open court. Cheryl cites *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995), for the proposition that when the sentencing court delays deciding the amount of restitution and an appeal is filed, the sentencing court is without jurisdiction to later order restitution. However, the *Campbell* court's finding of a lack of jurisdiction was in a case where the trial court did not pronounce one amount and then change it to

another, as here, but completely delayed the hearing on the amount of restitution until after the defendant was released from incarceration. *Campbell* does not mention § 25-2001, and in any event, *Campbell* is obviously factually distinguishable from the present situation. Because the district court committed plain error in vacating the county court's nunc pro tunc order, the nunc pro tunc order of July 15, 2004, is the operative order on the matter of reimbursement by Cheryl. However, we still have before us Cheryl's assignment of error that the amount ordered to be paid was "erroneous and excessive."

The record made at the sentencing hearing coupled with the two bills included in the presentence investigation report leave the correct amount of the reimbursement hopelessly muddled. Clearly, the purpose of § 28-1011 is to ensure the reimbursement for *all* expenses incurred by parties such as Siouxland Rescue and Lown, whether as part of the sentence or by civil liability. See § 28-1011(2) ("[e]ven if reimbursement for expenses is not ordered under subsection (1) of this section, the defendant shall be liable for all expenses incurred by a public or private agency in conjunction with the care, impoundment, or disposal of an animal. The expenses shall be a lien upon the animal"). The order nunc pro tunc does not match the bills included in the presentence investigation report, neither Lown nor anyone from Siouxland Rescue testified at sentencing, and the record shows that horses other than Dee, Ace, and Moon were cared for—but the record did not contain evidence that the bills included in the presentence investigation report were solely related to the three horses involved in the convictions, and the care of only these three animals could be involved in the reimbursement portion of the sentence under § 28-1011(1). Therefore, we remand this cause to the district court with direction that it remand the matter to the county court for a determination of the amount of reimbursement owed by Cheryl to Siouxland Rescue and to Lown.

Excessive Sentence.

[14] 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. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). The possible penalty for cruelty to animals

is imprisonment for up to 1 year, a $1,000 fine, or both; the possible penalty for each count of animal neglect is imprisonment for a period of up to 6 months, a $1,000 fine, or both. The trial judge sentenced Cheryl to 240 days in jail for the cruelty conviction and 90 days in jail for each of the two neglect convictions, with the sentences to be served consecutively.

In determining Cheryl's sentence, the trial judge considered the presentence investigation and Cheryl's family situation. The trial judge also noted that in 1991, Cheryl was convicted of 11 counts of similar types of crimes involving puppies and kittens. (The presentence investigation report reflects that Cheryl was convicted of 11 counts of cruelty to animals, was placed on probation for 2 years, and was ordered not to have more than one dog and one cat on her property during the probation period.) And, the judge thought it appeared likely that Cheryl would commit a similar crime in the future. The judge found that probation was not appropriate in this case and that a lesser sentence than incarceration would depreciate the seriousness of the crime and would promote disrespect for the law. The judge also noted that he was not in agreement with the sentencing recommendations of the county attorney, because the recommendations were far too minimal for what had occurred in the instant case, although such recommendations are not in our record. It is well known that reduction of statutorily authorized sentences by the Nebraska appellate courts is an infrequent occurrence. The sentence is within the statutory limits, and therefore, the trial court did not abuse its discretion.

CONCLUSION

For the reasons stated above, we find that the county court properly denied Cheryl's motion to suppress evidence. We find that Cheryl's jail sentences were not excessive, and we affirm such sentences. We also affirm the decision of the county court ordering Cheryl to reimburse Siouxland Rescue and Lown for expenses incurred in conjunction with the care, impoundment, or disposal of the horses at issue in the instant case—Dee, Moon, and Ace. We find that the district court committed plain error when it vacated the county court's order nunc pro tunc dated July 15, 2004, since the county court did have jurisdiction

to enter such order. However, remembering that the county court has ordered three different amounts of reimbursement and that the presentence investigation report and sentencing hearing are insufficient to establish what the reimbursement by Cheryl really should be, we remand the cause to the district court with directions for it to remand the matter to the county court to hold such proceedings as are necessary as to make an accurate determination of the amount of reimbursement owed by Cheryl to Siouxland Rescue and Lown and to enter the corresponding order.

AFFIRMED IN PART, AND IN PART REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD R. RYE, APPELLANT.

705 N.W.2d 236

Filed November 1, 2005. No. A-04-919.

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. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
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.
4. **Jury Instructions: Appeal and Error.** If the jury instructions, read together and taken as a whole, 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 a reversal.
5. **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 or in reckless disregard of the risk of causing such terror.
6. ____: ____. 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.
7. **Criminal Law.** Robbery, murder, sexual assault, and assault with intent to inflict great bodily injury are crimes of violence.

8. **Convictions: Weapons: Intent.** Under Neb. Rev. Stat. § 28-1205 (Reissue 1995), 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.
9. **Criminal Law: Weapons: Intent.** Because a reckless terroristic threat is an unintentional crime, it cannot be the underlying felony for the use of a weapon charge.
10. **Jury Instructions.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence, and because of this duty, the trial court, on its own motion, must correctly instruct on the law.
11. **Jury Instructions: New Trial.** In order to find that a trial court's error in instructing the jury warrants a new trial, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.
12. **Criminal Law: Trial: Juries: Appeal and Error.** In a criminal case tried to a jury, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
13. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
14. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
15. **Criminal Law: Juries: Verdicts.** Where a single offense may be committed in several ways and there is evidence to support each of the ways, the jury need only be unanimous that the defendant violated the law and need not be unanimous as to which of several consistent ways resulted in the violation.
16. **Jury Instructions: Evidence: New Trial.** If the trial court fails to adequately instruct the jury but the reviewing court finds sufficient evidence to convict, the cause may be remanded to the trial court for a new trial.
17. **Sentences: Appeal and Error.** 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.
18. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

Following a jury trial, Richard R. Rye was convicted in the Lancaster County District Court of terroristic threats and use of a weapon to commit a felony. Richard appeals the convictions and the sentences. Because the trial court's instructions to the jury did not require a finding that the underlying felony for the use of a weapon charge be an intentional crime, we reverse the conviction on the use of a weapon charge and remand the cause for a new trial on such charge. The conviction for terroristic threats is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2003, when Allison Rye, Richard's wife, arrived home from work, Richard and their oldest son, who is an adult, were making dinner. Soon thereafter, Richard, Allison, and their son went upstairs to the attic where the computer was located, because Richard wanted to show them a scooter advertisement on the Internet. After viewing the scooter and laughing, Richard decided to write a comment about the advertisement and post it on the Web site. In typing his comment, he made a typographical error, and Allison corrected him. Allison testified that when she corrected him, Richard got angry and told her to stop attacking him. By this time, their son had returned to the kitchen to continue making dinner.

Richard and Allison continued arguing. Allison testified that Richard grabbed her arm and said that "he was sick and tired of [her] attacking him." She testified that once he let go of her arm, she went downstairs and out of the house because she was going to leave and "get a better perspective." However, she decided to go back into the house and upstairs to talk to Richard. When she got upstairs, Richard was angry and yelled at her to "get out." The couple continued to argue; Richard then "shoved" Allison, and she fell down. He continued to yell at her, and she got up and started toward the stairs. She reached the second step from the top, when she heard him open the drawer to the computer desk. She saw Richard take out a gun and point it in her direction. Then she saw a green flash from the muzzle and heard a shot.

Richard, still carrying the gun, then walked over to Allison and began yelling at her to call the police. He testified that he thought he had shot Allison. According to Richard, he then unloaded the gun, went downstairs and put it on a table, and called the 911 emergency dispatch service. Allison was not injured, but the bullet lodged in the wall about 4 feet from where she was standing. Allison testified that during the argument, Richard never verbally threatened her, but that she felt threatened when he fired the gun.

Richard testified that he normally kept his collection of guns in a locked cabinet but that on the morning of the incident, he had intended to commit suicide, so he put two guns in the desk drawer. Richard testified that the gun he fired was a .45-caliber revolver and that it was already loaded when he removed it from the drawer. Richard testified that he did not know why he fired the gun but that he did not want to hurt Allison. In his voluntary statement to police after the incident, Richard stated that he was "very careful so [the gun] was not pointed at [Allison]" and that he pointed it "up and to [his] left."

Richard was charged by information with terroristic threats, a Class IV felony, and use of a weapon to commit a felony, a Class II felony. Following a jury trial, Richard was convicted of both charges and sentenced to 12 to 36 months' imprisonment for the terroristic threats conviction and 18 to 36 months' imprisonment for the use of a weapon conviction, with the sentences to run consecutively. Following the denial of his motion for new trial, Richard appeals.

ASSIGNMENTS OF ERROR

Richard asserts, reassigned and restated, that the trial court erred in (1) refusing his proposed jury instructions Nos. 1 and 3 through 5, (2) overruling his objections to jury instructions Nos. IV, V, and VII, (3) denying his request for a bill of particulars, (4) overruling his motion to dismiss at the close of the State's case, (5) overruling his motion for directed verdict at the close of the evidence, (6) finding the evidence was sufficient to support the convictions, (7) sentencing him to excessive sentences, and (8) overruling the motion for new trial.

STANDARD OF REVIEW

[1] 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. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). See *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

ANALYSIS

[2-4] In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Wisinski, supra*. 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. *Id.* If the jury instructions, read together and taken as a whole, 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 a reversal. *State v. Fitzgerald*, 1 Neb. App. 315, 493 N.W.2d 357 (1992).

Richard assigns several errors to the trial court's jury instructions. Richard objected to jury instruction No. IV because it did not provide the underlying elements for the "crime of violence" which Richard would have had to commit to be guilty of terroristic threats. His proposed instruction No. 1, rejected by the trial court, provided that the "material elements" the State had to prove for terroristic threats include the specific elements of the "crime of violence" which Richard was alleged to have threatened, although the proposal did not specify a particular crime.

[5] Neb. Rev. Stat. § 28-311.01 (Reissue 1995) provides, in relevant part, that a person commits terroristic threats if he or she threatens to commit any crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror. In addition to stating these elements in the jury instruction, the trial court also provided a definition for "crime of violence," to which Richard also objected and assigns as error here.

Richard's argument that the trial court should have instructed the jury as to the specific elements of the crime of violence that was allegedly committed is fundamentally flawed. If the State had to prove every element of the crime of violence, the defendant would be guilty of that crime of violence rather than having "threatened" the victim with a crime of violence, and it is of course the threat of violence which is at the heart of the crime of terroristic threats. For example, if someone threatens to commit murder but does not actually kill another, he or she may be prosecuted for terroristic threats but not for murder. On the other hand, if the threat becomes a reality and the victim is killed, then the threat is merely a step on the path to the crime which is ultimately committed—murder—and there is no terroristic threats charge. In short, if each element of murder was proved, then there would be a murder, not a terroristic threat. Thus, the trial court did not err in giving instruction No. IV, which did not include the requirement that the State prove the specific elements of the alleged crime of violence, and in rejecting Richard's proposed instruction No. 1.

Richard also objected to the trial court's instruction which defined "crime of violence" as "an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority. Murder, assault, and robbery are crimes of violence." To determine whether jury instructions create prejudicial error, they 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. *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997).

[6,7] The Nebraska Supreme Court has defined "crime of violence" as "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). The Supreme Court has also said that robbery, murder, sexual assault, and assault with intent to inflict great bodily injury are crimes of violence. See, *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990); *State v. Palmer, supra*; *State v. Foutch*, 196 Neb. 644, 244 N.W.2d 291 (1976). The trial court's instruction correctly states the law, because it used the definition of

"crime of violence" provided by the Supreme Court. Moreover, the instruction was not misleading and adequately covered the issues raised by the evidence. Thus, there is no prejudicial error necessitating reversal based on the instruction that defined "crime of violence."

Richard argues that "[b]ecause the crime of terroristic threats can be committed either intentionally or recklessly, it is critical that the jury be instructed that they can only convict the defendant of use of a deadly weapon to commit the felony offense of terroristic threats if they find that he acted intentionally." Brief for appellant at 29-30.

In *State v. Ring*, 233 Neb. 720, 723, 447 N.W.2d 908, 910 (1989), the Nebraska Supreme Court found that the word "to" as used in the use of a weapon statute, Neb. Rev. Stat. § 28-1205 (Reissue 1995), could be interpreted within the context of the statute to mean " 'for the purpose of' " or " 'with the result of.' " The *Ring* court found that the language in § 28-1205 of " 'to commit any felony' " was synonymous with " 'for the purpose of committing any felony.' " 233 Neb. at 724, 447 N.W.2d at 911. The Supreme Court found that in order to convict the defendant in *Ring* of the use of a deadly weapon charge, the State had to prove he used his vehicle "*for the purpose of* committing a felony," and the State failed to meet such burden of proof because the underlying felony—felony motor vehicle homicide—was, by definition, "a felony which is committed unintentionally." *Id.* at 725, 447 N.W.2d at 911. Therefore, because nothing in the record indicated that the defendant "sought or intended to commit the felony motor vehicle homicide," the Supreme Court vacated the defendant's conviction for the use of a weapon charge. *Id.*

[8] In *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), the Nebraska Supreme Court, relying on its decision in *Ring*, explicitly stated that under § 28-1205, 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. The *Pruett* court vacated the defendant's sentence for use of a weapon to commit a felony, because the underlying felony—manslaughter for unintentionally causing death while in the commission of reckless assault—was an unintentional crime

and the defendant could not be convicted of using a weapon to commit such felony when the felony was an unintentional crime.

Here, Richard was convicted of making terroristic threats—the underlying felony on the weapons charge—and use of a weapon to commit a felony. The terroristic threats statute, § 28-311.01, provides:

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.
>
> (2) Terroristic threats is a Class IV felony.

[9] The information alleged that Richard threatened to commit a crime of violence under § 28-311.01(1)(a), with the intent to terrorize Allison, or under § 28-311.01(1)(c), in reckless disregard of such terror, and that he used a firearm to commit the terroristic threats. The trial court instructed the jury that Richard could be guilty of terroristic threats if he threatened to commit any crime of violence either with the intent to terrorize Allison or in reckless disregard of the risk of terrorizing Allison. And, the jury was instructed that if it found him guilty of terroristic threats, but without any differentiation between intentional and reckless threats, then he could be found guilty of use of a weapon to commit a felony if he used a firearm to commit the terroristic threat. The trial court did not require the jury to make a separate finding on the terroristic threats charge as to whether Richard's threat was intentional under subsection (a) or reckless—unintentional—under subsection (c). See *State v. Pruett, supra* (state of mind to convict for reckless assault does not rise to level of intentional or knowing). As discussed earlier under *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), and *State v. Pruett, supra*, the underlying felony must be intentional before the defendant can be found guilty of use of a weapon to commit a felony. Thus, because a reckless terroristic threat is an unintentional crime, it cannot be the underlying felony for the use of a weapon charge.

[10] "Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence." *State v. Contreras*, 268 Neb. 797, 804, 688 N.W.2d 580, 585 (2004). "Because of this duty, the trial court, on its own motion, must correctly instruct on the law." *State v. Weaver*, 267 Neb. 826, 832, 677 N.W.2d 502, 508 (2004). The trial court erred in not requiring the jury to make a specific finding that the threat was intentional under § 28-311.01(1)(a) in order to then find Richard guilty of use of a weapon. In short, the trial court erred in giving an instruction that allowed the jury to convict Richard of the charge of use of a weapon to commit a felony without finding that he threatened to commit a crime of violence with the intent to terrorize Allison.

[11,12] However, in order to find that the trial court's error in the jury instruction warrants a new trial, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby. See *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991). In a criminal case tried to a jury, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

Here, during an argument between Richard and Allison, Richard yelled at her to "get out" and he took a loaded gun and fired a shot into the wall about 4 feet from where Allison was standing. A jury could find that this was an act intended to terrorize Allison. However, Richard testified that he did not know why he fired the gun but that he did not want to hurt Allison. In his voluntary statement to police after the incident, Richard stated that he was "very careful so [the gun] was not pointed at [Allison]" and that he pointed it "up and to [his] left." This evidence would permit a fact finder to conclude that Richard threatened to commit a crime of violence in reckless disregard of the risk of terrorizing Allison. Because the evidence was sufficient to convict Richard of either reckless or intentional terroristic threats, which differentiation does not impact the statutorily permissible penalty, the jury instruction did not prejudice Richard

and such was harmless error as to the terroristic threats charge. Therefore, such conviction is affirmed.

[13,14] Although the failure to find whether Richard acted intentionally or recklessly did not affect the terroristic threats charge, it was not harmless error as to the use of a weapon charge. Because the underlying crime for the use of a weapon conviction must be intentional, and no such finding was made, it was error not to instruct the jury that in order to find Richard guilty of the use of a weapon charge, the jury must first find him guilty of intentional terroristic threats. Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002).

[15,16] Here, while there is evidence to sustain a conviction on either reckless or intentional terroristic threats, the use of a weapon conviction must be reversed because only a conviction of intentional terroristic threats will serve as the predicate for such conviction. While we will not attempt to draft jury instructions in this opinion, the foregoing principles must be incorporated in the instructions upon retrial. We recognize that considered separately, the terroristic threats instruction was correct, because there is no requirement that all 12 jurors agree that such crime was intentional or reckless, except in a case such as this where there is an additional charge requiring a predicate offense which is an intentional crime. See *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986) (where single offense may be committed in several ways and there is evidence to support each of the ways, the jury need only be unanimous that the defendant violated the law and need not be unanimous as to which of several consistent ways resulted in violation). Therefore, we reverse Richard's conviction on the use of a weapon charge and remand for a new trial. See *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999) (if trial court fails to adequately instruct the jury but

reviewing court finds sufficient evidence to convict, cause may be remanded to trial court for new trial).

[17,18] We must address Richard's assignment that the sentences imposed were excessive, but only as to the terroristic threats conviction, given that we are reversing the use of a weapon conviction. Under the pertinent statute, § 28-311.01, terroristic threats is a Class IV felony, regardless of whether committed intentionally or recklessly, and the district court's sentence of 12 to 36 months' incarceration is on the low end of the statutory range. 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. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). While this is a first criminal conviction, the discharge of a weapon in the direction of another is obviously a serious matter. The trial court found that a lesser sentence would depreciate the seriousness of the offense, and we cannot say that such conclusion is an abuse of discretion. Therefore, we affirm the sentence imposed by the district court for the conviction on the terroristic threats charge. Obviously, we vacate the sentence for the use of a weapon conviction. The remaining assignments of error are unnecessary to the disposition of this case, and we need not address them here. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

CONCLUSION

The trial court failed to instruct the jury that in order to find Richard guilty of the crime of use of a weapon, the underlying felony—terroristic threats—had to be an intentional crime, meaning that he had to threaten to commit a crime of violence with the intent to terrorize Allison and not just in reckless disregard of the risk of causing such terror. We affirm the terroristic threats conviction and sentence, and we reverse the use of a

weapon conviction, vacate the sentence, and remand the cause for a new trial on the use of a weapon charge.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
TROY DUNN, APPELLANT.

705 N.W.2d 246

Filed November 1, 2005. No. A-04-1259.

1. **Trial: Evidence: Photographs.** A photograph is admissible in evidence if the subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence.
2. **Rules of Evidence: Proof.** Pursuant to Neb. Evid. R. 901(1), the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
3. **Trial: Evidence: Photographs: Appeal and Error.** Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion.
4. **Evidence: Words and Phrases.** One of the components to relevant evidence is probative value, which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.
5. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.
6. **Criminal Law: Trial: Appeal and Error.** Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the court in a judgment adverse to a substantial right of the defendant.
7. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
8. **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.

9. **Records: Ordinances: Appeal and Error.** The responsibility of the appellant to include a relevant municipal ordinance in the record can be met by a praecipe requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court when a notice of appeal is filed.
10. **Ordinances: Appeal and Error.** An appellate court assumes that the material allegations in a long-form complaint reflect the substantive content of the ordinance which the defendant was charged with violating.
11. **Criminal Law: Sentences.** Before a sentence is pronounced, the defendant must be informed by the court of the verdict and asked whether he has anything to say why judgment should not be passed against him.
12. **Sentences.** The most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence.
13. **Sentences: Due Process: Evidence.** A convicted defendant must be afforded more than a mere opportunity to express an attitude, disposition, or view toward a prospective sentence and must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information relied on by the sentencing judge.

Appeal from the District Court for Douglas County, ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed in part, and in part reversed and remanded with directions.

Jason E. Troia and Jill A. Daley, Senior Certified Law Student, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Troy Dunn was convicted and sentenced in the county court for Douglas County on charges of assault and battery and disorderly conduct. Dunn's convictions and sentences were affirmed by the district court for Douglas County. On appeal, Dunn alleges that the county court erred in admitting a photograph as evidence, that the evidence adduced at trial was insufficient to support the convictions, that he was denied his statutory right of allocution

prior to being sentenced, and that the sentences imposed were excessive. We find that the county court erred in admitting the photograph as evidence, because there was no testimony presented to authenticate the photograph or to indicate the photograph was an accurate representation of what it was intended to depict. We find the erroneous admission of the photograph to be harmless, because sufficient other evidence was adduced to support Dunn's convictions, including the victim's prior statements to law enforcement. Finally, although the sentences imposed cannot be reviewed for alleged excessiveness because the relevant municipal ordinance governing the sentences is not in the record, we find that the county court effectively denied Dunn his statutory right of allocution when the court denied Dunn the opportunity to contest any incorrect factual grounds for the sentences imposed. Accordingly, we affirm in part the district court's order of affirmance, and in part reverse and remand the matter to the district court with directions to remand to the county court for a new sentencing hearing.

II. BACKGROUND

On the night of March 26, 2004, an altercation occurred at Dunn's residence between Dunn's wife, Christine Dunn (Christine), and Dunn's ex-wife. As a result, Christine called law enforcement and left the residence. Christine returned to the residence at approximately 4:30 a.m. on March 27, at which time an altercation occurred between Dunn and Christine. Dunn called law enforcement as a result of that altercation. Law enforcement advised Dunn to leave the residence. Dunn later returned to collect some personal belongings, and another altercation occurred between Dunn and Christine, during which altercation Christine's mother called law enforcement.

When law enforcement responded to Dunn's residence for the third time, Christine was in a "hysterical state." Christine reported to law enforcement that Dunn had slammed her head against a wall, kneed her in the chest, and pulled out her hair. Law enforcement observed some bruising to Christine's arm, a "slight knot" on the back of her head, and a patch of hair on the floor. Dunn had already left the residence before law enforcement responded.

On April 19, 2004, Dunn was charged by criminal complaint with assault and battery and disorderly conduct under Omaha municipal ordinances. A bench trial was conducted on June 2. During the bench trial, Christine recanted her reports to law enforcement, alleging that any injuries she sustained on March 26 and 27 occurred as a result of her altercation with Dunn's ex-wife. Christine testified that Dunn only pushed her enough to get past her to leave the residence and that her reports to law enforcement had been false. After the bench trial, the county court found Dunn guilty of both charges. The county court sentenced Dunn to 100 days in jail for each conviction, with the sentences to be served concurrently. Dunn appealed to the district court, which affirmed the convictions and sentences on October 21. This appeal followed.

III. ASSIGNMENTS OF ERROR

Dunn has assigned four errors on appeal. First, Dunn asserts that the county court erred in receiving into evidence a photograph of Christine's arm. Second, Dunn asserts that the county court erred in finding sufficient evidence to support convictions on the charges. Third, Dunn asserts that the county court denied Dunn his statutory right of allocution prior to the pronouncement of his sentences. Fourth, Dunn asserts that the county court imposed excessive sentences.

IV. ANALYSIS

1. Receipt of Photograph

Dunn first asserts that the county court erred in receiving into evidence a photograph of Christine's arm. Dunn asserts that there was insufficient foundation for admission of the photograph, because the testimony at the bench trial indicated the photograph was not an accurate representation of what it was intended to depict. We conclude that the testimony adduced by the State concerning the photograph demonstrates both that the photograph was not authenticated and that it was not an accurate representation of what it was intended to depict. As such, we agree that the county court erred in receiving the photograph into evidence.

[1-3] The general rule in Nebraska concerning the admissibility of photographs as evidence is that a photograph is admissible in evidence if the subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992); *State v. Butler*, 10 Neb. App. 537, 634 N.W.2d 46 (2001). " 'The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' " *State v. Garza*, 241 Neb. at 261, 487 N.W.2d at 555-56, quoting Neb. Evid. R. 901(1). Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion. *Id.*

In this case, the initial requirement of authentication was not clearly satisfied. The State introduced the photograph through the testimony of one of the law enforcement officers who responded to the third call to Dunn's residence. The officer was asked if he took the picture and responded, "No, I didn't." The officer was further asked if the picture "accurately reflect[s] again how [Christine's] arm looked on the day in question." The officer responded, "No, it doesn't. It's kind of blurry." The officer acknowledged that the photograph was a picture of Christine's arm on the day in question. The State's questioning of the officer indicated that the photograph was "an attempt on [law enforcement's] part to photograph the injuries" Christine had sustained. The officer's testimony, however, indicates that he did not take the photograph and that it did not accurately reflect how Christine's arm actually looked.

[4] In addition, the photograph lacked relevance. One of the components to relevant evidence is probative value, which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. See *State v. Merrill, supra*. In this case, the photograph lacked relevance because it has no probative value. A review of the photograph reveals a blurry photograph of what appears to be a

woman's arm. However, it is not apparent from the photograph whose arm is depicted, and the photograph is so blurry that no alleged bruising is even visible on the arm. In addition, in light of the law enforcement officer's testimony concerning the photograph, it is not an accurate depiction of what Christine's arm looked like. As such, the photograph is not persuasive that Christine suffered bruising as a result of Dunn's conduct. As a result, we conclude that the county court abused its discretion in receiving the photograph into evidence.

[5,6] Although we conclude that the photograph was erroneously admitted, we find the error to be harmless. Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact. *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the court in a judgment adverse to a substantial right of the defendant. *Id.* A review of the photograph makes it apparent that the photograph could not have materially influenced the court to conclude that Dunn had assaulted or battered Christine, inasmuch as the photograph does not actually demonstrate any injury to Christine. In light of our discussion below concerning the other evidence which supports the county court's finding that Dunn was guilty of the charges, the erroneous admission of the photograph was harmless error.

2. Sufficiency of Evidence

Dunn next asserts that the evidence adduced at trial was insufficient to sustain his convictions on the charges. The State argues that Dunn failed to include in the appellate record the municipal ordinances under which he was convicted and that we are therefore precluded from reviewing the sufficiency of the evidence. Because we find that Dunn was charged in a long-form complaint containing substantive allegations, we review the sufficiency of the evidence to support the allegations of the complaint. In so doing, we conclude that there was sufficient

evidence, including Christine's statements to law enforcement, to sustain Dunn's convictions.

[7,8] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). See, also, *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). 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. *Id.*

[9] The first issue that must be addressed concerning our review of the sufficiency of the evidence to sustain Dunn's convictions is Dunn's failure to include in the appellate record the applicable municipal ordinances. In *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998), the Nebraska Supreme Court clarified the "ordinance rule" originally articulated in *Steiner v. State*, 78 Neb. 147, 150, 110 N.W. 723, 724 (1907), where the court had stated:

> [An appellate] court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record.

The ordinance rule places responsibility upon an appellant to include the ordinance in the record which is transmitted to the appellate court. *State v. Bush, supra*. In *State v. Bush*, the court clarified that this responsibility can be met by a praecipe requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court when a notice of appeal is filed.

In the present case, Dunn was convicted under Omaha municipal ordinances. Dunn has not presented the ordinances either in the bill of exceptions or in the transcript. Despite a motion for summary affirmance previously filed by the State specifically alleging Dunn's failure to satisfy the ordinance rule, Dunn took no steps to file a supplemental bill of exceptions or supplemental transcript to include the ordinances. As such, Dunn has failed to satisfy the ordinance rule.

[10] Although Dunn failed to satisfy the ordinance rule, we note that the transcript in this case includes a long-form criminal complaint containing substantive allegations against Dunn. In *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998), the Nebraska Supreme Court held that in such circumstances, an appellate court assumes that the material allegations in the complaint reflect the substantive content of the ordinance which the defendant was charged with violating and reviews the evidence to determine its sufficiency to prove the matters alleged beyond a reasonable doubt. Because the transcript includes such a long-form complaint, we review the evidence to determine its sufficiency to prove Dunn's violation of the allegations of the complaint.

The evidence adduced at trial indicated that when responding to Dunn's residence for the third time on March 26 and 27, 2004, law enforcement observed Christine with noticeable injuries. Christine told law enforcement that Dunn had slammed her head against a wall, kneed her in the chest, and pulled her hair out. Law enforcement observed a bump on Christine's head, some bruising on her arms, and a clump of hair on the floor. The evidence adduced at trial further indicates that on March 29, Christine signed an affidavit seeking a protection order in which she alleged that Dunn had assaulted her "by kicking, hitting and pulling [her] hair." Although Christine recanted these allegations at trial and testified that she had lied both to law enforcement and in the affidavit, the question of her credibility is not to be reassessed on appeal. As such, we find that the evidence adduced at trial was sufficient for the court to find Dunn guilty of assault and battery and disorderly conduct under the allegations in the complaint. This assigned error is without merit.

3. Denial of Allocution

Dunn next asserts that he was denied his statutory right of allocution. Dunn asserts that although the county court asked him if he had any reason why sentences should not be imposed, the court did not give him an opportunity to say anything concerning sentencing. The State asserts that Dunn was afforded a sufficient opportunity to offer comments. Based on our review of the record, we conclude that Dunn was effectively denied the opportunity for meaningful allocution prior to the county court's imposition of sentences.

[11-13] Neb. Rev. Stat. § 29-2201 (Reissue 1995) provides that "[b]efore the sentence is pronounced, the defendant must be informed by the court of the verdict . . . and asked whether he has anything to say why judgment should not be passed against him." The Nebraska Supreme Court discussed this provision, in dicta, in *State v. Barker*, 231 Neb. 430, 436 N.W.2d 520 (1989). The court noted that " 'the most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence . . . .' " *Id.* at 436, 436 N.W.2d at 524, quoting Arthur W. Campbell, Law of Sentencing § 72 (1978). Accord *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992). The court suggested that "[a] convicted defendant must be afforded more than a mere opportunity to express an attitude, disposition, or view toward a prospective sentence" and "must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information" relied on by the sentencing judge. *State v. Barker*, 231 Neb. at 436, 436 N.W.2d at 524.

Neb. Rev. Stat. § 29-2260 (Reissue 1995) provides a number of factors to be considered whenever a court "considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required." Section 29-2260 specifies a number of factors which, "while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment." Those factors include the offender's lack of criminal history, the offender's unlikelihood to commit another

crime, the offender's likelihood of responding affirmatively to probationary treatment, and the possible excessive hardship to the offender or his dependents entailed by imprisonment.

In the present case, the following colloquy is the entirety of the trial court's conversation with Dunn prior to imposing sentences:

> THE COURT: Mr. Dunn, I'm finding you guilty as charged on both counts. Any reason I shouldn't pass sentence today or is there anything that you or your attorney would like to say with regard to sentencing?
>
> [Defense counsel]: We'll ask that you do a presentence investigation on us.
>
> THE COURT: Well let me just tell you something, [counsel], I take this job pretty seriously and when people come in here and tell me stories, I don't really care for it. When I have people raise their hands and swear to tell the truth I expect them to tell the truth. [Christine] came in here and told me a story today. Everything was pretty consistent except for the fact of what [Dunn] did in this particular case. She tells me, as [counsel for the State] just spoken [sic] at closing remarks, that this altercation occurred on March 27th and on March 28th they are back together again and everything was h[u]nky-dory. Unfortunately, on March 29th she went into the district court, filed a petition, which is sworn to under oath. Let me just tell you what she said. She said, "I tossed a candy dish at the T.V. and knocked the stereo off the table. That's when he assaulted me by kicking, hitting and pulling my hair. I was yelling you going to kill me." "He continued to beat me. I pretended to pass out hoping that he would stop, but he continued to kick and hit me as his 9-year-old son watched." Now, when do you want me to believe that this particular witness that was called today was telling the truth?
>
> [Defense counsel]: That's —
>
> THE COURT: She told the police that statement on the 27th and she told the district court that on the 29th and today she comes in and tells me a totally different story.
>
> [Defense counsel]: Her story —
>
> THE COURT: I don't buy it.

> [Defense counsel]: — Her story she told the police was entirely different than the one you just read out loud.
>
> THE COURT: The sentence will be 100 days in the Douglas County Correctional Center on each count. Time will run concurrent.

The court was certainly entitled to decline Dunn's request for a presentence investigation report because this case involves a misdemeanor. See, Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2004); *State v. Turco*, 6 Neb. App. 725, 576 N.W.2d 847 (1998) (no presentence investigation report required in cases involving misdemeanor). However, the lack of such a report makes allocution all the more important as the defendant's only opportunity to present information to the court concerning the sentencing factors set forth above, which factors the court is obligated to consider. In the present case, the county court did not afford Dunn any opportunity either to challenge the factual basis of the sentences, which basis appeared to be the court's conclusion that Christine's statement was consistent at all times prior to trial even though the record suggests that Christine's statement contained some inconsistencies at each stage of the proceedings, or to present further information about Dunn's criminal history or lack thereof and his amenability to probation.

Our review of the record leads us to conclude that although the trial court literally complied with the requirement of § 29-2201 that the court ask Dunn if he had anything to say why judgment should not be passed against him, the court did not offer Dunn any meaningful opportunity to respond. The record reveals, in fact, that attempts to interject disagreement with the court about the consistency of Christine's prior statements were precluded by the court. As such, we conclude that Dunn was effectively denied his statutory right of allocution. Accordingly, we reverse the district court's affirmance of the sentences and remand the matter to the district court with directions to remand to the county court for a new sentencing hearing to be conducted by a different county court judge. See, *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004); *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

4. Excessive Sentences

Dunn's final assertion is that the sentences imposed by the county court are excessive. We need not discuss this assignment of error in light of our resolution above of Dunn's assertion concerning the trial court's denial of his right of allocution. We note, however, that the record presented on appeal does not contain any municipal ordinance governing the sentences for these convictions and that we would be unable to address the error on the present record. See *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

V. CONCLUSION

Although we find that the county court erred in admitting a photograph as evidence, we find such error harmless and conclude that there was sufficient evidence to support Dunn's convictions for assault and battery and disorderly conduct. We find that the county court effectively denied Dunn his statutory right of allocution, and we therefore reverse the district court's affirmance of the sentences and remand the matter with directions to remand to the county court for a new sentencing hearing before a different county court judge.

Affirmed in part, and in part reversed and remanded with directions.

Greenhall Investments, L.L.C., appellant, v. Wiese Development Corporation, appellee and cross-appellant, and Charles R. Clatterbuck, intervenor-appellee and cross-appellee.

706 N.W.2d 552

Filed November 8, 2005. No. A-04-279.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
2. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
3. **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.

4. **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.
5. **Complaints.** Allegations of a complaint not denied are admitted without any predicate ruling from the trial court.
6. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Jeffrey T. Wegner, Rebecca L. Fox, and Richard Jeffries, of Kutak Rock, L.L.P., for appellant.

James D. Sherrets, of Sherrets & Boecker, L.L.C., for appellee.

Terry J. Grennan and Michael F. Scahill, of Cassem, Tierney, Adams, Gotch & Douglas, for intervenor-appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Greenhall Investments, L.L.C. (Greenhall), and Wiese Development Corporation (Wiese) entered into a purchase agreement whereby Greenhall sought to purchase real property from Wiese. Wiese's ability to sell the property was subject to a right of first refusal requiring Wiese to give Charles R. Clatterbuck the opportunity to match any offer to purchase the property. Clatterbuck purported to exercise the right of first refusal and entered into a purchase agreement with Wiese. Litigation ensued in which Greenhall sought an order compelling Wiese to specifically perform under the purchase agreement between Greenhall and Wiese. Clatterbuck intervened and sought an order compelling Wiese to specifically perform under the purchase agreement between Wiese and Clatterbuck. The district court for Douglas County granted partial summary judgment in favor of Wiese and dismissed Greenhall's claim for specific performance. Additionally, the district court granted partial

summary judgment in favor of Clatterbuck and ordered Wiese to specifically perform under the purchase agreement between Wiese and Clatterbuck.

Greenhall appeals and alleges the district court erred in finding that the right of first refusal did not violate any rule against perpetuities and in finding that Clatterbuck had timely exercised the right of first refusal. Wiese cross-appeals and alleges the district court erred in failing to find that Clatterbuck did not provide a "mirror image acceptance" when exercising the right of first refusal and in failing to find that Clatterbuck's subsequent failure to close was unreasonable.

We find that the right of first refusal was limited in duration by the contract in which it was contained and that accordingly, it did not violate any rule against perpetuities which might apply to it. We also find that Clatterbuck timely exercised the right of first refusal. As such, we affirm the district court's summary judgment in favor of Wiese and against Greenhall. Further, we find that inasmuch as Wiese had urged the district court to find a sufficient exercise of Clatterbuck's right of first refusal, Wiese is precluded from challenging the adequacy of that exercise on appeal. As such, we affirm the district court's summary judgment in favor of Clatterbuck and against Wiese.

II. BACKGROUND

On or about December 12, 2000, Wiese purchased the property in issue from Clatterbuck, executing a promissory note and deed of trust. On or about May 5, 2003, to extend the maturity date of the promissory note, Wiese and Clatterbuck entered into a forbearance agreement. The forbearance agreement specified that the period of forbearance was "through November 15, 2003." The forbearance agreement granted Clatterbuck a right of first refusal giving Clatterbuck the right to match any offer for the purchase of the property.

On or about September 9, 2003, Greenhall and Wiese entered into a purchase agreement whereby Greenhall sought to purchase the property from Wiese. On October 20, Wiese delivered a letter to Clatterbuck together with a copy of the purchase agreement between Greenhall and Wiese. On October 24, Clatterbuck and Wiese entered into a purchase agreement whereby Clatterbuck

sought to purchase the property from Wiese. On October 27, Clatterbuck executed a notarized document indicating a desire to exercise the right of first refusal.

Also on or about October 27, 2003, Wiese informed Greenhall of Clatterbuck's exercise of a right of first refusal and canceled the purchase agreement between Greenhall and Wiese. On October 28, Greenhall filed a complaint against Wiese. Greenhall sought specific performance of the purchase agreement between Greenhall and Wiese and sought damages for breach of contract. On November 21, Clatterbuck filed a complaint in intervention. Clatterbuck sought specific performance of the purchase agreement between Wiese and Clatterbuck or, in the alternative, damages for breach of contract. On November 25, Greenhall filed an amended complaint against Wiese in which Greenhall added a claim for misrepresentation. On November 26, Wiese filed an answer to Greenhall's amended complaint. The record presented on appeal does not indicate that any answer was ever filed to Clatterbuck's complaint in intervention.

Also on November 26, 2003, Wiese filed a motion for partial summary judgment against Greenhall. Wiese sought summary judgment on Greenhall's claim for specific performance. On January 22, 2004, the district court entered an order granting Wiese partial summary judgment and dismissing Greenhall's claim for specific performance. The district court specifically found that the right of first refusal did not violate any rule against perpetuities and that Clatterbuck had exercised the right of first refusal.

On January 27, 2004, Clatterbuck filed a motion for partial summary judgment against Wiese. Clatterbuck sought summary judgment on Clatterbuck's claim for specific performance. On February 11, the district court entered an order granting Clatterbuck partial summary judgment and ordering Wiese to specifically perform.

On February 17, 2004, the district court entered an order and final judgment. The district court effectively found that the partial summary judgment orders should be considered final orders pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004) and that there was no just reason for delaying the right to appeal the

partial summary judgment orders. This appeal and cross-appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Greenhall assigns as error the district court's findings that the right of first refusal did not violate any rule against perpetuities and that the right of first refusal was timely exercised by Clatterbuck. On cross-appeal, Wiese assigns as error the district court's failure to find that Clatterbuck's exercise of the right of first refusal was not a mirror-image acceptance of Greenhall's offer and that Clatterbuck's subsequent refusal to close was unreasonable.

IV. ANALYSIS

1. Greenhall's Appeal

Greenhall asserts that the district court erred in granting Wiese summary judgment on Greenhall's claim for specific performance. Specifically, Greenhall asserts that the district court erred in finding that the right of first refusal did not violate any rule against perpetuities and in finding that the right of first refusal was timely exercised by Clatterbuck. Wiese initially challenges Greenhall's standing to assert both the alleged violation of any rule against perpetuities and the alleged untimeliness of Clatterbuck's exercise of the right of first refusal.

(a) Standing

The first issue which must be addressed is Wiese's assertion that Greenhall lacks standing to assert that the right of first refusal violated a rule against perpetuities and that the right of first refusal was not timely exercised. Wiese asserts that Greenhall's appeal should be dismissed because Greenhall lacks standing. Wiese asserts that Greenhall lacks standing primarily because Greenhall was not privy or a party to the forbearance agreement between Wiese and Clatterbuck in which the right of first refusal is contained. We disagree and conclude that because Clatterbuck's exercise of the right of first refusal and the right's validity directly impact Greenhall's legal rights, Greenhall does have standing to bring the issues on appeal.

[1,2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of the court. *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005). In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* Wiese correctly notes that the general rule is that only a party (actual or alleged) to a contract can challenge its validity. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). The fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract. *Id.*

In this case, however, while Greenhall is not a party to the forbearance agreement between Wiese and Clatterbuck, Greenhall has standing to challenge the validity of the right of first refusal under any applicable rule against perpetuities and to challenge the timeliness of Clatterbuck's exercise of the right. The facts of the present case are significantly comparable to the facts of *Spanish Oaks v. Hy-Vee, supra*, in which the Nebraska Supreme Court found that a third party had standing to challenge a provision in a contract.

In *Spanish Oaks*, the plaintiffs and one of the defendants had entered into a lease. The defendant then entered into a sublease with another party, which sublease included use restrictions. The plaintiffs tried to challenge the validity of the use restrictions in the sublease, even though the plaintiffs were not privy to the sublease. The plaintiffs alleged that the use restrictions had resulted in a breach of the lease contract between the plaintiffs and the defendant. The Nebraska Supreme Court found that the plaintiffs had standing to challenge the use restrictions because the plaintiffs were "alleging a breach of the [initial] lease, to which [they were] part[ies]." *Id.* at 138, 655 N.W.2d at 397.

Similarly, in the present case, Greenhall and Wiese entered into a purchase agreement. Wiese also entered into a forbearance agreement with Clatterbuck, which forbearance agreement included a restriction, namely a right of first refusal. Greenhall is challenging the validity of the restriction and its exercise, even though Greenhall is not a party to the forbearance agreement. Greenhall is alleging that the right of first refusal has resulted

in a breach of the purchase agreement between Greenhall and Wiese. Greenhall has standing to challenge the right of first refusal because Greenhall is alleging a breach of the purchase agreement, to which Greenhall is a party.

We also find Wiese's reliance on the Rhode Island Supreme Court's decision in *Brough v. Foley*, 525 A.2d 919 (R.I. 1987), to be misplaced because that decision is significantly distinguishable from the decision in the present case. In *Brough*, the plaintiffs and one of the defendants entered into a purchase agreement which *specifically mentioned* that the plaintiffs' rights were subject to a right of first refusal in a separate contract between the defendant and another party. When the plaintiffs tried to challenge the right of first refusal under a rule against perpetuities and under a theory that the right was not properly exercised, the Rhode Island Supreme Court found that the plaintiffs lacked standing. The significant difference in the present case is that the purchase agreement between Greenhall and Wiese made no mention of a right of first refusal. Rather, that purchase agreement provided only that Greenhall's rights were subject to liens "of record"; but there is no evidence in the record to indicate that Clatterbuck's right of first refusal was "of record." The Rhode Island Supreme Court's conclusion that the *Brough* plaintiffs' rights were subject to the right of first refusal, regardless of the right's validity, was premised on the fact that the purchase agreement specifically so provided. Such is not the case here.

We conclude that Greenhall has standing to raise the claims on appeal. Greenhall's legal rights under the purchase agreement between Greenhall and Wiese are directly affected by Clatterbuck's right of first refusal, and Greenhall has standing to challenge the district court's grant of partial summary judgment against Greenhall on the basis of the right of first refusal.

(b) Partial Summary Judgment Against Greenhall

Greenhall challenges the district court's grant of summary judgment in favor of Wiese on Greenhall's claim for specific performance. Greenhall asserts that the district court erred in finding that Clatterbuck's right of first refusal was not violative of the common-law rule against perpetuities and in finding that the right of first refusal was timely exercised by Clatterbuck.

Although it is not apparent that the common-law rule against perpetuities remains viable in Nebraska, we conclude, as we will explain below, that the limited duration of the forbearance agreement would prevent the rule against perpetuities from being violated, even assuming that it is applicable. Additionally, we conclude that there is no genuine issue of material fact concerning Clatterbuck's exercise of the right of first refusal and that the exercise was clearly within the time period required in the forbearance agreement. As such, we affirm the district court's summary judgment in favor of Wiese on Greenhall's claim for specific performance.

[3,4] 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. *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005). 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.*

(i) Rule Against Perpetuities

Greenhall asserts that the right of first refusal in the forbearance agreement between Wiese and Clatterbuck violates the common-law rule against perpetuities. Although Greenhall acknowledges that Nebraska has adopted a statutory rule against perpetuities and that the statutory rule expressly excludes from its operation nonvested property interests arising out of nondonative transfers, such as the right of first refusal at issue in this case, Greenhall argues that the common-law rule against perpetuities remains viable and that the statutory rule supersedes the common-law rule only with respect to those interests actually covered by the statutory rule. Wiese argues that the statutory rule supersedes the common-law rule in all instances and, in effect, abolishes the common-law rule. We decline to determine whether the common-law rule remains at all viable, because we conclude that the common-law rule, even if applicable, would not be violated in this case because of the limited duration of the forbearance agreement itself.

Neb. Rev. Stat. §§ 76-2001 through 76-2008 (Reissue 1996 & Cum. Supp. 2002) are the Uniform Statutory Rule Against Perpetuities Act. Section 76-2002(a) provides that a nonvested property interest is invalid unless when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive or within 90 years after its creation. Section 76-2005 specifically provides that the statutory rule does not apply to a nonvested property interest arising out of a nondonative transfer, with some exceptions not applicable to this case. Greenhall acknowledges that the right of first refusal at issue in this case is, pursuant to § 76-2005, specifically excluded from the operation of the statutory rule against perpetuities.

Section 76-2008 provides, "The Uniform Statutory Rule Against Perpetuities Act supersedes the rule of common law known as the rule against perpetuities." Greenhall argues that this provision means the statutory rule supersedes the common-law rule only with respect to those interests actually covered by the statutory rule and that because the right of first refusal at issue in this case is excluded from the coverage of the statutory rule, the common-law rule's application to the right is not superseded. Wiese argues that this provision means that the statutory rule supersedes the common-law rule entirely and that the common-law rule was, in effect, abolished.

We decline to address the question of whether the common-law rule against perpetuities is superseded only with respect to interests actually covered by the statutory rule against perpetuities or with respect to all interests. As noted above, we conclude that the right of first refusal in this case, as a matter of law, would not be violative of the common-law rule against perpetuities, even assuming that the common-law rule is applicable. The common-law rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth. See *In re Trust Estate of Darling*, 219 Neb. 705, 365 N.W.2d 821 (1985). The right of first refusal in the present case was limited in duration to a period of time well within this perpetuities period.

The right of first refusal in the present case was one provision within a larger forbearance agreement between Wiese and Clatterbuck executed on or about May 5, 2003. The purpose of the entire forbearance agreement was for Clatterbuck to "temporarily forbear from enforcing [his] legal rights and remedies" for a possible default by Wiese on a previous real estate contract. The forbearance agreement specifically provided that the period of forbearance would be "from [approximately May 5, 2003,] through November 15, 2003." The right of first refusal was only one of a number of conditions upon which the temporary forbearance by Clatterbuck would be agreed to. As such, the right of first refusal, like the larger forbearance agreement itself, was limited to a period of fewer than 7 months, well within the common-law perpetuities period.

The record reveals no genuine issues of material fact concerning the limited duration of the forbearance agreement or the right of first refusal. As a matter of law, the right of first refusal was limited in duration to a period of time that would not violate the common-law rule against perpetuities, even assuming that such rule remains viable and applicable to the right of first refusal at issue in this case. As such, the district court did not err in finding that the right did not violate any rule against perpetuities. This assigned error is without merit.

(ii) Timely Exercise of Right of First Refusal

Greenhall also asserts that there are genuine issues of material fact concerning whether Clatterbuck timely exercised the right of first refusal. Greenhall asserts that there are factual disputes concerning both when the time period for exercise of the right was triggered and when the right was actually exercised. We conclude that any factual disputes are not material, because under any calculation of time supported by the record, the right of first refusal was timely exercised.

With regard to the right of first refusal, the forbearance agreement between Wiese and Clatterbuck provides as follows:

> [Wiese] hereby grants [Clatterbuck] the right of first refusal on the land . . . . In the event [Wiese] receives a bona fide, written offer to purchase any or all of such land, [Wiese] shall present such bona fide, written offer to [Clatterbuck]

> and [Clatterbuck] shall have five (5) working days to match the bona fide written offer . . . .

The first issue that must be resolved is when the period of 5 working days began to run in this case. Greenhall presented evidence that as early as October 14, 2003, an attorney who represented Clatterbuck in executing the forbearance agreement "expressed his prior knowledge of the Purchase Agreement [between Greenhall and Wiese] by congratulating" Greenhall on the impending purchase of the property. Greenhall argues that this knowledge by Clatterbuck's attorney should be sufficient to have triggered the period of 5 working days. Wiese, however, asserts that the period was not triggered until Wiese provided written notice of Greenhall's offer, which the record indicates occurred on October 20. Alternatively, Greenhall urges this court to find that the language specifying the triggering event was "ambiguous" and that a genuine issue of material fact existed as to when the triggering event occurred. See brief for appellant at 17.

We find it immaterial whether the right of first refusal requires written notice by Wiese to Clatterbuck or merely notice by Wiese to Clatterbuck of a written offer. Any ambiguity in this regard is immaterial because, either way, the right of first refusal clearly and unambiguously requires Wiese to present the offer to Clatterbuck to trigger the running of the period of 5 working days. The record contains no evidence to suggest that Wiese presented the offer to Clatterbuck, orally or in writing, at any time prior to October 20, 2003. Although Greenhall presented evidence suggesting that Clatterbuck's counsel (and perhaps, by implication, Clatterbuck himself) had some knowledge of Greenhall's offer earlier than October 20, Greenhall presented no evidence to indicate or suggest that Wiese had ever presented the offer in any fashion to Clatterbuck prior to October 20. As such, no matter when the period of 5 working days was to be triggered, the earliest date upon which the period could have been triggered, judging from the evidence in this case, is October 20.

The next issue, then, is whether Clatterbuck timely exercised the right of first refusal "within 'five (5) working days' " of October 20, 2003. See *id.* at 20. Greenhall argues that there is a

genuine issue of material fact concerning when Clatterbuck exercised the right because the record indicates that Wiese and Clatterbuck entered into a purchase agreement on October 24 but that the document captioned as Clatterbuck's exercise of the right of first refusal was not notarized until October 27. We find any factual dispute in this regard likewise to be immaterial. As noted, the forbearance agreement specifically provided that Clatterbuck had 5 *working* days to exercise the right of first refusal. In 2003, October 20 was a Monday. As such, October 27 was the fifth *working* day after October 20. Regardless of whether Clatterbuck should be said to have exercised the right on October 24, when Wiese and he entered into a purchase agreement, or on October 27, when his notice of exercising the right was notarized, he exercised the right within 5 working days.

We find no genuine issue of material fact concerning the timeliness of Clatterbuck's exercise of the right of first refusal. Any factual dispute concerning when the appropriate time period for exercising the right was triggered and any factual dispute concerning when the right was actually exercised are immaterial. As a matter of law, Clatterbuck's exercise of the right of first refusal was within the appropriate time period set forth in the forbearance agreement, and the district court did not err in so finding. This assignment of error is without merit.

(iii) Conclusion on Greenhall's Appeal

Although we find that Greenhall has standing to raise the issues on appeal challenging the validity of the right of first refusal and the timeliness of Clatterbuck's exercise of the right, we find that the district court did not err in granting Wiese partial summary judgment and dismissing Greenhall's claim for specific performance. Even assuming that the common-law rule against perpetuities remains viable and is applicable to the right of first refusal at issue in this case, that right did not violate the common-law rule. As a matter of law, the right of first refusal in the present case was limited in duration to a period of time well within the perpetuities period. Additionally, there is no genuine issue of material fact concerning the timeliness of Clatterbuck's exercise of the right of first refusal. The record indicates that as a matter of law, the right was exercised within the appropriate

time period set forth in the forbearance agreement. As such, we affirm the district court's grant of partial summary judgment in favor of Wiese and dismissal of Greenhall's claim for specific performance.

2. Wiese's Cross-Appeal

Wiese's position on cross-appeal is that the district court erred in granting Clatterbuck summary judgment on Clatterbuck's claim for specific performance. Wiese asserts that the district court erred in failing to find that Clatterbuck's exercise of the right of first refusal did not constitute a mirror-image acceptance sufficient to match Greenhill's offer, as required by the forbearance agreement. Additionally, Wiese asserts that the district court erred in failing to find that Clatterbuck's refusal to close after the court granted Wiese partial summary judgment against Greenhall and dismissed Greenhall's claim for specific performance was unreasonable.

(a) Clatterbuck's Match of Offer

Wiese first challenges the district court's grant of summary judgment in favor of Clatterbuck by asserting that Clatterbuck's exercise of the right of first refusal did not constitute a mirror-image acceptance sufficient to match Greenhall's offer, as required by the forbearance agreement. Wiese argues that Clatterbuck's exercise of the right of first refusal contained deviations from Greenhall's offer concerning terms of the sale such as the closing date and to whom the brokerage fee should be paid.

We initially note the incongruity in Wiese's positions in response to Greenhall's appeal and in furtherance of Wiese's cross-appeal. In seeking summary judgment against Greenhall in the district court, and in urging this court on appeal to affirm the grant of summary judgment against Greenhall, Wiese asserted as the primary basis for denying Greenhall's asserted right to specific performance that Clatterbuck had properly exercised the right of first refusal, thereby usurping Greenhall's legal interest in the property. Now, in furtherance of the cross-appeal, Wiese attempts to assert that the district court was in error to find that Clatterbuck's exercise of the right of first refusal was proper. If

such were found to be the case, then the district court's error would logically also mean that Greenhall's legal right to enforcement of the purchase agreement between Greenhall and Wiese was never usurped; this, of course, is a position completely at odds with Wiese's stance both at trial and in response to Greenhall's appeal.

Wiese filed an answer to Greenhall's amended complaint. In that answer, Wiese specifically and affirmatively alleged that Clatterbuck had exercised the right of first refusal. Wiese also submitted an affidavit in support of summary judgment against Greenhall in which Wiese affirmatively alleged that Clatterbuck had exercised the right of first refusal. The record does not contain any responsive pleading filed by Wiese in reply to Clatterbuck's complaint in intervention (which alleged proper exercise of the right of first refusal) or in response to Clatterbuck's motion for summary judgment against Wiese on the issue of specific performance.

[5,6] It is fundamental in Nebraska that allegations of a complaint not denied are admitted without any predicate ruling from the trial court. See *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004). Further, an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003). One who has invited error cannot be heard to complain of it. See, *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987). See, also, *Gillespie v. Hynes*, 168 Neb. 49, 106-07, 95 N.W.2d 457, 486 (1959) (" 'party may not be heard to complain of error which he has invited. . . . Error may not be assigned upon a ruling or action of the district court made or taken with the consent of the complaining party' "), quoting *Tucker v. Paxton & Gallagher Co.*, 152 Neb. 622, 41 N.W.2d 911 (1950).

In this case, we find that Wiese is precluded from asserting on appeal that the district court should have found that Clatterbuck's exercise of the right of first refusal was somehow ineffective or improper. The very essence of Wiese's position

before the district court was that Clatterbuck had properly and effectively exercised the right of first refusal, thereby usurping any legal right that Greenhall might have had in enforcing the purchase agreement between Greenhall and Wiese. The district court having so found, Wiese cannot now assert that the district court erred in making the very finding Wiese sought. This assignment of error is without merit.

(b) Clatterbuck's Refusal to Close

Wiese next asserts that the district court erred in not finding unreasonable Clatterbuck's refusal to close after Wiese successfully received summary judgment against Greenhall and dismissal of Greenhall's claim for specific performance. Wiese asserts that Clatterbuck's refusal to close should be considered unreasonable, or a waiver of Clatterbuck's right to specific performance, or a waiver of Clatterbuck's right to any claim for monetary damages.

We disagree because the plain language of the purchase agreement between Wiese and Clatterbuck required Wiese to deliver clear title before Clatterbuck was obligated to close and specifically provided both that Wiese was required to "furnish a current title insurance commitment to [Clatterbuck]" and that Wiese was obligated to cure within a reasonable time any title defects found. Wiese has presented no evidence indicating that Wiese was able to procure such title or title insurance commitment while Greenhall's claim remained ripe for appeal. In fact, the record indicates that Clatterbuck was ready and willing to close, had placed funds equal to the purchase price into an escrow account, and was waiting only for Wiese to present a clear title before closing. On the record presented, we do not find the district court's failure to find such action by Clatterbuck unreasonable to be erroneous. This assigned error is without merit.

(c) Conclusion on Wiese's Cross-Appeal

We find Wiese's cross-appeal to be without merit. There are no genuine issues of material fact which Wiese can properly assert on appeal concerning Clatterbuck's exercise of the right of first refusal, inasmuch as Wiese urged the district court to find such exercise proper and effective at trial. We affirm the district

court's grant of summary judgment in favor of Clatterbuck on Clatterbuck's claim for specific performance.

V. CONCLUSION

We find no reversible error in the district court's grant of summary judgment in favor of Wiese and against Greenhall on Greenhall's claim for specific performance. Although Greenhall has standing to challenge the validity of the right of first refusal and the timeliness of Clatterbuck's exercise of the right, there is no genuine issue of material fact concerning the right of first refusal. The right is not violative of any rule against perpetuities and was timely exercised by Clatterbuck. As such, the district court's grant of summary judgment in favor of Wiese on Greenhall's claim for specific performance is affirmed.

We find no reversible error in the district court's grant of summary judgment in favor of Clatterbuck and against Wiese on Clatterbuck's claim for specific performance. Wiese is precluded from asserting on appeal that Clatterbuck's exercise of the right of first refusal was improper or ineffective, and Clatterbuck's refusal to close prior to Wiese's being able to deliver clear title is not unreasonable. As such, the district court's grant of summary judgment in favor of Clatterbuck on Clatterbuck's claim for specific performance is affirmed.

AFFIRMED.

C. GOODRICH, INC., APPELLEE, V. JOHN F. "JACK" THIES, APPELLEE, AND TAS TRUCK LINES, INC., APPELLANT.

705 N.W.2d 451

Filed November 8, 2005. No. A-04-502.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. ____: ____. In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

4. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
5. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
7. **Motions for New Trial: Judgments.** Unsolicited, specific findings recited by the trial court during the hearing on a motion for new trial, and written by the court in the order denying that motion, may supplant the general finding made in the initial judgment.
8. **Attorney and Client.** An attorney has power to bind his or her client by the attorney's agreement in respect to any proceeding within the scope of the attorney's proper duties and powers.
9. **Trial: Judgments: Evidence: Appeal and Error.** Where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong.
10. **Trial: Verdicts.** A general verdict cannot rectify improper or erroneous special findings.
11. **Trial: Judgments: Evidence.** It is proper to set aside a trial court's general finding if the court's articulated reasons for entering the finding are not supported by the evidence.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed in part, and in part reversed.

Robert J. Becker, of Stalnaker, Becker & Buresh, P.C., for appellant.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, L.L.P., and Craig D. Wittstruck and Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellee C. Goodrich, Inc.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

TAS Truck Lines, Inc. (TAS), appeals from a judgment, entered following a retrial to the bench, which awarded

$225,000 to C. Goodrich, Inc. (CGI), as damages resulting from a breach of contract. The primary question on appeal is whether specific findings made by the trial court in connection with TAS' motion for new trial supplant the trial court's initial general finding. Because we conclude that they do and that the monetary judgment for CGI was based solely upon a clearly erroneous factual finding, we reverse the monetary judgment for CGI but otherwise affirm the judgment rejecting the parties' other contentions.

PROCEDURAL BACKGROUND

CGI's operative petition against TAS alleged two causes of action, the first of which was subsequently dismissed. The second cause of action alleged that TAS breached the contract between the parties by failing to make payments due on CGI's trucks and trailers and by failing to pay compensation to CGI's employees. TAS denied the allegations and filed a counterclaim alleging that CGI breached the contract by failing to turn over accounts receivable payments to TAS, by refusing to sell CGI's trucks and trailers for payoffs, and by failing to remain with TAS for 5 years.

Following a jury trial, the jury returned a verdict finding in favor of CGI and awarding CGI damages of $225,000. The jury also returned a verdict in favor of TAS on its counterclaim and awarded damages of $13,600 to TAS. TAS appealed, and CGI filed a cross-appeal. After determining that a supplemental jury instruction given by the trial court was erroneous, this court set aside the jury's verdicts and remanded the cause for a new trial. See *C. Goodrich, Inc. v. Thies*, No. A-01-765, 2003 WL 105215 (Neb. App. Jan. 14, 2003) (not designated for permanent publication).

Further proceedings commenced at the trial court level on November 24, 2003. The parties stipulated that retrial would be to the bench, and the trial court received into evidence the bill of exceptions and exhibits from the first trial, along with the deposition of an agent for West Bay Leasing Services, L.L.C. (West Bay Leasing), and CGI's answers to TAS' first set of interrogatories.

FACTUAL BACKGROUND

CGI, owned by Clint Goodrich and Ruth Goodrich, is a trucking company incorporated in Minnesota that hauls goods for customers. In 1997, CGI operated eight trucks and nine trailers. TAS, owned by John F. "Jack" Thies and his wife, is a trucking company incorporated in Nebraska that also hauls goods for customers. On October 28, 1997, CGI and TAS entered into a written agreement to combine the companies and form a new corporation to conduct trucking business. The consolidation was to occur on January 1, 1998. However, problems arose before that time.

To pay for fuel, CGI's drivers used fuel credit cards issued by a third party, and the third-party issuer would debit CGI's account at CGI's bank in Winnebago, Minnesota. On November 4 and 5, 1997, CGI's bank refused to honor the debits on CGI's account due to insufficient funds in the account. After being informed of the situation, TAS paid the third-party issuer $3,500 on November 6, representing CGI's fuel charges from October 30 to November 5. From that point on, CGI's drivers used fuel credit cards issued to TAS.

On November 7, 1997, Thies and Clint negotiated a new agreement due to an "emergency need" to get the trucks moving. That handwritten agreement, signed by Thies and Clint, states:

> TAS agrees to:
> • Take over CGI trucks & trailers for payoffs
> • Work on a bonus plan & allow Clint to earn or buy stock options in TAS as TAS performance improves.
> • Pay Clint & Ruth compensation of $90,000/year total cost to TAS. (including taxes, ins[urance] etc)
> • Buy/payoff the accounts Rec[eivable] from the bank
> Goodrich agrees to:
> • Sell trucks & trailers for payoffs
> • Forward acc[ounts] Rec[eivable] checks to TAS as they come in
> • Stick with TAS for a minimum of 5 years

At the time of the November 7, 1997, agreement, all of CGI's trucks and trailers were under lease agreements, with the exception of one tractor secured by a lien and one trailer secured by a

lien at CGI's bank. TAS paid off CGI's lien for that trailer on November 7. Also on November 7, TAS paid $75,017.49 to CGI's bank in payment of CGI's accounts receivable. There is no dispute that TAS bought or paid off the accounts receivable from CGI's bank.

With regard to the bonus plan component of the agreement, Clint testified that there was no work on a bonus plan to allow him to earn or buy stock options in TAS. Thies testified that implementation of the bonus plan was not expected to happen for a few months or until TAS and CGI got everything running together. Clint admitted that he would not expect a bonus plan to be implemented 2½ months after the agreement went into effect.

According to the evidence, CGI's obligation to forward accounts receivable checks to TAS became related to TAS' obligation to pay compensation to CGI. Under the contract, CGI was to forward the accounts receivable checks to TAS. In November, CGI remitted to TAS two checks totaling $29,569.17—one in the amount of $18,003.40 with "Factoring note" written on the memo line and the other in the amount of $11,565.77 with "Acc rec." written on the memo line. Although CGI received $59,370.10 in accounts receivable collections, no other accounts receivable payments were made to TAS. Clint testified that he forwarded the accounts receivable checks to TAS until Thies told Clint not to do so. At some point, Clint approached Thies about the compensation of $7,500 per month or $90,000 per year and the parties agreed to allow CGI to retain a portion of the accounts receivable in lieu of, or as payment of, the salary. Ruth testified that she and Clint retained $22,500 of the accounts receivable collections as salary for 2 weeks in October and all of November and December 1997 and for January 1998. As to the extent that the compensation was being offset by accounts receivable, Clint was asked if TAS performed the compensation component of the contract, and he answered, "Yes. I guess, technically, in a round about way, you could look at it that way." CGI retained an additional $7,393 in accounts receivable collections and used that money to make truck payments.

Clint testified that TAS failed to take over CGI trucks and trailers for payoffs. On December 8, 1997, Thies wrote a letter to West Bay Leasing requesting a list of payments left on CGI's

equipment and the payoff figures. West Bay Leasing provided the payoff figures on December 10. West Bay Leasing provided amortization schedules for certain leases in correspondence dated December 22, 1997, and it provided more lease payoff information on some of the equipment on January 5, 1998. Thies inquired what the interest rate would be if he turned the lease into a common loan, and West Bay Leasing responded on January 15 with a possible method of refinancing the debt on the equipment. Thies also obtained temporary licensing for the trucks and trailers to be effective January through March 2, 1998. Clint testified that he was not aware that Thies and West Bay Leasing were engaged in negotiations in January 1998 regarding payoffs.

With regard to lease payments, Clint testified that he received telephone calls from West Bay Leasing, Associates Commercial Corporation, and Farm Credit Leasing that the payments were not being made for the month of November 1997. Clint spoke with Thies about it, and payments were then made. In December, payments had again not been made and insurance was lapsing. Clint spoke with Thies, and TAS made the payments, although not timely. Clint again received telephone calls regarding payments in January 1998. When Clint spoke with Thies, Thies said the November 7, 1997, contract needed to be renegotiated. Clint admitted that the November 7 contract did not require TAS to make lease payments for CGI. Further, TAS paid some bills for repairs of CGI equipment in December 1997 and January 1998. On November 17, 1997, the insurance company asked for an insurance payment, which TAS made. Confronted with evidence of this payment, Clint admitted that he was wrong when he said that TAS had not paid anything. In January 1998, TAS paid for the insurance on CGI's trucks until February 1. TAS also had licenses for CGI equipment issued in the name of "TAS Truck Lines." Thies testified that TAS would not have insured and licensed CGI equipment if TAS was not going to pay "them" off.

No lease payments for January 1998 were made by TAS. Thies testified that TAS did not make the January lease payments because (1) TAS was working on getting specific payoff amounts for CGI's trucks and trailers, (2) Clint left the company in January 1998, and (3) Clint took control of the trucks. Thies testified that while he was waiting to get a third quote related to

the payoff amounts, Clint "took" the trucks and transferred calls so that when the drivers called, the call would ring at Clint's house. Thus, TAS did not have the ability to call the drivers of those trucks.

The parties attempted to negotiate a new agreement in January 1998. Clint testified Thies told him that CGI was not worth $90,000 because "there's only half of a company," that the trucks were not worth the amount owed against them, and that they needed to renegotiate. Thies denied having any conversations with Clint wherein Thies indicated that TAS was not going to pay the $90,000 or that $90,000 was too high. Thies also denied having a discussion with Clint wherein Thies indicated that TAS would not make any further lease payments or other payments in regard to CGI trucks unless the November 7, 1997, contract was renegotiated. A document on CGI's letterhead submitted to TAS on January 19, 1998, contains suggestions and negotiations by CGI to change the November 7, 1997, agreement.

Ultimately, the remaining trucks and trailers were either sold by Clint and Ruth for more than the payoff amounts, retained by them for their own use, or leased to other companies. Between February 24 and December 10, 1998, 9 of the 13 pieces of equipment leased from West Bay Leasing were sold, and CGI received $924 more than the payoff amounts. CGI kept the other four pieces of equipment.

CGI did not remain with TAS for a minimum of 5 years. Clint "walked out" on January 25, 1998. Ruth testified that while she remained in the Minnesota office, she prepared invoices on loads carried on CGI's trucks and billed by TAS. She spoke with Thies several times a day, and Thies requested that Ruth do various tasks on behalf of TAS. The Minnesota home of Clint and Ruth was sold in December 1998, and Ruth moved to Beatrice in mid-December. She began work as the office manager in Beatrice on or about December 26. After a couple of days, for reasons in dispute, Thies asked Clint to tell Ruth not to return to work. Thies testified that Ruth was not an important part of the November 7, 1997, contract. However, Clint was to replace Thies' former manager who earned $90,000 per year. Thies testified that TAS entered into the agreement with CGI because of Clint and the ability to get Clint to manage the TAS operations.

In addition to all the evidence from the original trial, the court also received into evidence CGI's answers to TAS' interrogatories. One of the interrogatories asked CGI to identify each item of damage claimed. CGI listed dollar amounts for (1) insurance, deposit and 3 months' premiums; (2) payoff of equipment for Yellow Medicine County Bank and Minnstar Bank; (3) payoff for Associates Commercial Corporation; (4) payoff for Farm Credit Leasing; (5) loss of profits for 1998; and (6) loss of value of the business.

The court made a general finding for CGI and entered a judgment in favor of CGI in the amount of $225,000 plus the costs of the action. That judgment also dismissed TAS' counterclaim. TAS timely moved for a new trial, and during the hearing on that motion, the court stated:

> There's one thing that I regret here on my part in reviewing this. I just want to say I did not make specific findings in my order, which I normally do. So I understand it's difficult to know the basis of the decision. I did not simply adopt the jury verdict although it's fairly close to that. But I do want to state for the record I felt there was substantial compliance by both [CGI] and [TAS] with respect to the lease issues on the contract between the parties. And my judgment was based on the compensation issue as it pertained to [Ruth]. That basically, she had been — had been let go, I think, in violation of the portion of the agreement to have her provide services, and that was a breach of contract on the part of [TAS]. So I awarded damages on that basis, basically, $45,000 for five years.

The court's order on the motion for new trial stated in part:

> Part of the agreement between the parties was that [TAS] would pay [CGI] $90,000 per year for five years for the services of Clint . . . and Ruth . . . . TAS terminated the services of Ruth . . . without good cause, in violation of the agreement. Clint . . . left TAS' employment, which excused TAS from performing the portion of the agreement related to his services. TAS authorized CGI to retain certain accounts receivable, and there was substantial performance by both parties with respect to the accounts receivable and the leases. However, TAS remained obligated to compensate

> CGI for [Ruth's] services, and TAS defaulted in that obligation resulting in damages of $45,000 per year for five years. Accordingly, the motion for new trial should be overruled.

TAS timely appeals.

ASSIGNMENTS OF ERROR

TAS alleges that the trial court erred in overruling its motion for new trial by finding (1) that TAS materially breached the contract as it pertained to the compensation component of the contract; (2) that CGI should be awarded $225,000 in damages when that award was not sustained by the evidence, was contrary to law, was beyond the claims of CGI, and was excessive; and (3) that CGI did not materially breach the contract.

STANDARD OF REVIEW

[1-4] A suit for damages arising from breach of a contract presents an action at law. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). 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. *Id.* The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Id.*

[5,6] A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. See *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

ANALYSIS

[7] Because neither party requested that the district court submit written findings of fact or conclusions of law pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1995), this case presents an interesting question: Do the unsolicited, specific findings recited by the trial court during the hearing on TAS' motion for new trial, and written by the court in the order denying that motion, supplant the general finding made in the initial judgment? Under the circumstances presented here, we conclude that they do. After the retrial to the bench, the trial court initially entered a judgment for CGI based upon only a general finding. In the subsequent hearing and ruling on the motion, the court did not expressly state that it intended to modify its general verdict. The court did state, however, that it regretted not making specific findings in the initial judgment; that it understood the difficulty in knowing the basis of the court's decision; that it wanted "to state for the record" that CGI and TAS substantially complied, "with respect to the lease issues on the contract"; but that the court's judgment was "based on the compensation issue as it pertained to [Ruth]." The court stated that it "awarded damages on that basis, basically, $45,000 for five years." Under these circumstances, we conclude that the specific findings operated, in effect, to modify the initial judgment and to supplant the general finding. We make this determination only in the context of a bench trial and specific findings, made before the judgment became final, by the same trial judge who made the initial general finding.

The relevant provision of the contract states, "Pay Clint & Ruth compensation of $90,000/year." At trial, Thies explained that it had been negotiated that TAS would pay CGI rather than Clint and Ruth because CGI had a "normal operating loss . . . carried forward of $90,000 on their income taxes. So they could offset $90,000 worth of income without paying any taxes, income taxes." According to Thies, Ruth was not an important part of the agreement and Clint was replacing Thies' previous manager who earned $90,000 per year. Thies testified that the obligation to pay the $90,000 per year ran to CGI. Because we are required to view the evidence in the light most favorable to CGI, this testimony, standing alone, would be insufficient to

disturb the judgment. However, at trial, counsel for the parties agreed that the obligation was to CGI, not to Clint or Ruth individually, as evidenced in the following exchange which took place during Clint's testimony:

> [Counsel for CGI]: Okay. And let me back up to the list again. It says, "Pay Clint and Ruth compensation of $90,000 a year." When did you first receive or your wife first receive compensation from TAS?
>
> [Clint]: We didn't.
>
> [Counsel for TAS]: Objection, Your Honor. This is where we were before. I think the parties agree here that the agreement was that TAS would pay [CGI]; am I correct on that, [counsel for CGI]?
>
> [Counsel for CGI]: Yeah.
>
> [Counsel for TAS]: So it's not a matter of his wife's salary or his salary.
>
> [Counsel for CGI]: No.
>
> [Counsel for TAS]: That's where I'm getting confused.
>
> THE COURT: I see. I'll sustain it and ask counsel to restate the question.

[8] An attorney has power to bind his or her client by the attorney's agreement in respect to any proceeding within the scope of the attorney's proper duties and powers. Neb. Rev. Stat. § 7-107 (Reissue 1997). See, also, *In re Estate of Mithofer*, 243 Neb. 722, 502 N.W.2d 454 (1993) (stipulations voluntarily entered into between parties' attorneys during trial will be respected and enforced); *McCann v. McLennan*, 3 Neb. 25 (1873) (agreement by attorneys made in open court and entered on record binds parties). The stipulation made between the parties' attorneys during trial, that the parties' agreement was that TAS would pay CGI and that it was not a matter of Clint's salary or Ruth's salary, was binding upon the trial court.

The evidence also shows there had been an agreement between the parties for CGI to keep portions of the accounts receivable as payment of compensation rather than turning that money over to TAS as originally set forth under the contract. CGI had collected $59,370.10 in accounts receivable, but turned over only $29,569.17 to TAS. According to the testimony, CGI retained $22,500 as payment for compensation at $7,500 per

month, and also retained an additional $7,393 which was used to make truck payments. Because CGI had retained $22,500 of accounts receivable collections as its compensation for 3 months, there had been no breach of the compensation component of the contract at the time that Clint quit. We conclude that the trial court was clearly wrong in finding that TAS defaulted on its obligation and in awarding damages of $45,000 per year for 5 years as Ruth's compensation under the contract.

[9-11] We are mindful of the fact that the court initially made a general finding and of the proposition that where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong. See *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998). In *Wagner v. State*, 176 Neb. 589, 595, 126 N.W.2d 853, 857 (1964), *overruled on other grounds, Bentz v. Nebraska P.P. Dist.*, 211 Neb. 844, 320 N.W.2d 763 (1982), a case wherein the jury returned a general verdict and also special findings pursuant to the court's instructions, the Nebraska Supreme Court stated: "[T]o argue that the general verdict is acceptable, therefore the special findings are proper or faultless, is neither legal nor logical. A general verdict cannot rectify improper or erroneous special findings." Just as it is not error to set aside the general verdict if the special findings of a jury are not supported by the evidence, we think it is proper to set aside the general finding if the court's articulated reasons for entering the finding are not supported by the evidence. To conclude that this court must turn a blind eye to the trial court's clearly erroneous finding upon which it admittedly based its decision, because the trial court was not required to make such finding or because such finding was made upon a motion for new trial, would be prejudicial to the rights of TAS and deprive TAS of a just result.

The trial court's specific findings make it clear that the judgment in favor of CGI for $225,000 was based solely upon the finding which we have determined was clearly erroneous. At trial, the parties presented numerous other contentions to the

trial court. In its specific findings, the trial court clearly rejected those other contentions. As to those other issues, we cannot find that the trial court was clearly wrong.

CONCLUSION

The portion of the judgment granting a monetary judgment to CGI, based upon a clearly erroneous finding, is reversed. The portion of the judgment rejecting the other contentions of the parties is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

IN RE GUARDIANSHIP OF BREEAHANA C.
DAVID S., APPELLEE, AND ALICIA C., INTERVENOR-APPELLEE, V. BOBBY C., APPELLANT.

706 N.W.2d 66

Filed November 8, 2005. No. A-04-1361.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), 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. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Affidavits: Appeal and Error.** An appellate court obtains jurisdiction over an appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit, without literal payment of the fees, costs, or security mentioned in Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2004).
6. **Courts: Appeal and Error.** An appellant's designation of the wrong court in the notice of appeal is not necessarily fatal.
7. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at a trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.

8. **Trial: Records.** It is the duty of the court reporter to make a verbatim record of judicial proceedings, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.
9. **Trial: Records: Appeal and Error.** A bill of exceptions duly allowed and certified by the trial judge imports absolute verity, and its truthfulness cannot be assailed collaterally.
10. **Guardians and Conservators: Divorce: Child Custody: Jurisdiction.** During the pendency of a dissolution action, a county court's exclusive original jurisdiction in guardianship matters touching upon the custody of a minor must yield to the jurisdiction of the district court in which the dissolution petition is filed.
11. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
12. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.

Appeal from the County Court for Sherman County: GARY G. WASHBURN, Judge. Remanded with directions.

Bobby C., pro se.

Alicia C., pro se.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Bobby C. appeals the order of the county court for Sherman County appointing Kayla N. and Tony N. as permanent co-guardians of Breeahana C., the daughter of Bobby and Alicia C. The record is insufficient for us to determine whether Bobby alleged in county court that the county court's exercise of jurisdiction was an abuse of discretion because Alicia's petition for dissolution of marriage was under the jurisdiction of the district court. Therefore, we remand this matter to the county court with directions to vacate the appointment of coguardians and to conduct a new hearing on the matter.

BACKGROUND

Breeahana is the minor child of Bobby and Alicia. On June 14, 2004, the district court for Sherman County entered a decree dissolving Bobby and Alicia's marriage. The decree ordered, inter alia, that Alicia would have custody of Breeahana and that

Bobby would pay child support. On June 24, Breeahana's maternal grandfather, David S., filed a petition in the county court seeking appointment of Kayla and Tony as coguardians for Breeahana. On July 22, the county court commenced a hearing on the petition for appointment of guardian, and upon granting Bobby's motion for continuance to present witnesses, the court concluded the hearing on October 14. On October 28, the county court appointed Kayla and Tony as Breeahana's permanent coguardians. Kayla and Tony subsequently accepted the appointment.

On November 29, 2004, Bobby filed a pro se notice of appeal together with an affidavit and motion for leave to proceed in forma pauperis. In Bobby's notice of appeal, he stated that he "intend[ed] to appeal the order . . . rendered on Oct[ober] 28, 2004, to the District Court of Sherman County, Nebraska." The county court ordered the clerk magistrate to send copies of the appeal documents to this court.

ASSIGNMENTS OF ERROR

Bobby alleges that the trial court erred in (1) failing to give his "testimonial appointment of guardianship proper judicial notice," (2) disregarding the testimony of Bobby's witnesses and favoring Alicia's appointment of guardians, and (3) failing to adhere to the Uniform Child Custody Jurisdiction Act.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). 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. *Id.*

[3] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

ANALYSIS

Designating Wrong Court in Notice of Appeal.

[4] 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. *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005). Under Neb. Rev. Stat. § 30-1601 (Cum. Supp. 2004), appeals in guardianship matters lie directly to this court in the same manner as appeals from the district court. In Bobby's notice of appeal, Bobby designated the district court rather than this court as the court to which he intended to appeal. The county court forwarded the appeal documents to this court.

[5] An appellate court obtains jurisdiction over an appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit, without literal payment of the fees, costs, or security mentioned in Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2004). *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004). Under Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004), the notice of appeal must be filed "within thirty days after the entry" of the judgment or final order. The county court's order was entered on October 28, 2004. Bobby filed his notice of appeal on November 29. Ordinarily, the deadline for appeal would have been November 27, but taking into account 2 days for the Thanksgiving holiday and 2 days for the following weekend, Bobby's notice of appeal was timely. Concerning the requirements to proceed in forma pauperis, which act as a substitute for a docket fee, the county court's order to the clerk magistrate did not explicitly grant Bobby's motion to proceed in forma pauperis. However, by directing the clerk magistrate to forward the appeal documents to this court, the county court implicitly granted Bobby's motion. Thus, the only defect in Bobby's notice of appeal was his failure to designate the correct appellate court.

[6] Other jurisdictions have held that an appellant's designation of the wrong court in the notice of appeal is not necessarily fatal. See, 5 Am. Jur. 2d *Appellate Review* § 338 (1995); 4 C.J.S. *Appeal and Error* § 374 (1993). These jurisdictions seem to base their holdings in favor of the appellant upon the notion that the court officials can correct the error and the appellant is

usually not harmed. See, e.g., *United States v. Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966) (when party appealed to Court of Appeals rather than Supreme Court where jurisdiction lay, Court of Appeals certified appeal to Supreme Court, and Supreme Court noted procedural history of case and exercised jurisdiction over appeal); *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, 869 P.2d 598 (1994) (when appellee argued that notice of appeal precluded appellate court from considering certain issues because notice of appeal did not designate any trial court rulings as being challenged, appellate court exercised jurisdiction, noting that appellee did not claim that it was surprised or placed at disadvantage by issues briefed); *The People v. N. Y. C. R. R. Co.*, 391 Ill. 377, 63 N.E.2d 405 (1945) (lack of strict technical compliance with form of notice of appeal not fatal where notice gives necessary information and opposing party is not prejudiced).

In the case before us, Bobby's notice of appeal was timely forwarded to this court, and none of the opposing parties claim that they have been prejudiced. In light of the foregoing authority, we conclude that we have jurisdiction over this case, despite Bobby's failure to designate this court in his notice of appeal.

County Court Jurisdiction.

Bobby contends that the county court lacked subject matter jurisdiction over the guardianship proceedings because the district court "had original jurisdiction . . . when it entered the Divorce Decree on June 14, 2004." Reply brief for appellant at 3. Before addressing this issue, we must dispense with the preliminary issues presented by the record before us.

Bobby's jurisdictional argument requires us to consider the dissolution decree entered by the district court. The dissolution decree was included in the bill of exceptions for the guardianship proceedings as exhibit 1. The bill of exceptions contains only the following regarding the offer and reception of the decree during direct examination of David:

> [David's counsel:] We would have you look at exhibit marked number one.
>
> THE COURT: Okay. And [Bobby], do you have Exhibit 1?

> [Bobby]: Yes, I do, Your Honor.
> THE COURT: Okay.
> [David's counsel:] Can you identify —
> (At this point, the tape recorder switched sides and the remainder of the direct examination was not recorded. During this time [David] offered Exhibit No. 1. [Bobby] did not object to the offer and the Court received Exhibit No. 1 into evidence. Direct examination was completed and cross-examination began. A portion of the cross-examination was not recorded.)
> (Exhibit No. 1 is hereby made a part of this bill of exceptions and may be found at the end of this bill of exceptions.)
> (At this point, the clerk discovered that the recorder had not been working. The clerk inserted a new tape and the proceedings were as follows:)

The bill of exceptions then continues with the remainder of the cross-examination of David. None of the other witnesses testified regarding the decree or its contents, and none of the properly received exhibits referred to the decree.

The bill of exceptions includes a certification by the court stenographer that the bill of exceptions, including exhibit 1, "contains all of the proceedings had . . . or all of the evidence adduced in the foregoing cause . . . and the rulings of the Court thereon; that said bill of exceptions is a correct and complete transcription from the official tape recording made at the time of the proceedings." The bill of exceptions also contains verification by the trial court that the "following," which included exhibit 1, is "the bill of exceptions in this case" and that "the tape recording from which this bill of exceptions was prepared is the official record made at the time of the proceedings."

[7,8] Neb. Ct. R. of Prac. 5A (rev. 2005) provides in part:

> (1) The official court reporter shall in all instances make a verbatim record of the evidence offered at [a] trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
> (2) Upon the request of the court or of any party, either through counsel or pro se, the official court reporter shall

> make a verbatim record of anything and everything said or done by anyone in the course of trial or any other proceeding[.]

It is the duty of the court reporter to make a verbatim record of judicial proceedings, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty. *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995).

[9] Regardless of the court stenographer's efforts to "fill in the blanks" and the county court's approval of that approach, the record before us does not constitute a verbatim record of the evidence offered at trial. It is inevitable that technical difficulties will arise occasionally, but the better approach in this case would have been that upon discovery of the malfunction, the court reporter notify the trial judge of the difficulty with the tape recorder and the judge, with any necessary assistance of the reporter, determine the point at which the tape recorder malfunctioned and, after the proper function of the tape recorder was restored, direct the parties to continue their presentation of evidence from that point forward, repeating the omitted content. The bill of exceptions, while deficient in recording the full extent of the evidence, does memorialize that exhibit 1 was offered and received without objection, and none of the parties quarrel with that fact. Therefore, we will consider the divorce decree as an exhibit, recognizing that " '[a] bill of exceptions duly allowed and certified by the trial judge imports absolute verity and its truthfulness cannot be assailed collaterally.' " *Bors v. McGowan*, 159 Neb. 790, 795, 68 N.W.2d 596, 600 (1955), quoting *Gregory v. Kaar*, 36 Neb. 533, 54 N.W. 859 (1893).

With the dissolution decree before us, we address Bobby's argument that the county court lacked subject matter jurisdiction to entertain the guardianship proceedings because the district court had original jurisdiction over the matter of custody. Neb. Rev. Stat. § 42-351(1) (Reissue 2004) provides that the district court has jurisdiction in divorce actions to render judgments and make orders concerning, inter alia, "the custody and support of minor children." Section 42-351(2) provides that during the pendency of an appeal, the district court retains jurisdiction to "provide for such orders regarding custody, visitation, or support . . . or other appropriate orders in aid of the appeal process."

Neb. Rev. Stat. § 24-517(2) (Cum. Supp. 2004) gives the county court "[e]xclusive original jurisdiction in all matters relating to the guardianship of a person, except if a separate juvenile court already has jurisdiction over a child in need of a guardian, concurrent original jurisdiction with the separate juvenile court in such guardianship." Section 30-2602 further grants the county court "jurisdiction over . . . guardianship proceedings."

[10-12] In *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996), the Nebraska Supreme Court discussed the interplay between county court and district court jurisdiction. In that case, the mother of a minor child filed in district court for dissolution of her marriage to the minor's father. The district court awarded temporary custody of the minor to the mother " 'until further order of this court.' " *Id.* at 165, 555 N.W.2d at 771. Shortly thereafter, the minor's grandfather and his wife petitioned the county court for appointment as the minor's coguardians. The county court appointed the grandfather and his wife as coguardians, and they accepted the appointment. On appeal to the Nebraska Supreme Court, the mother alleged that because she had been granted temporary custody of the minor by the district court, the county court lacked jurisdiction to appoint coguardians for the minor. The court reviewed the applicable statutes and relevant case law and held:

> [D]uring the pendency of a dissolution action, a county court's exclusive original jurisdiction in guardianship matters touching upon the custody of a minor must yield to the jurisdiction of the district court in which the dissolution petition is filed. It was accordingly an abuse of discretion as a matter of law for the county court to have exercised its jurisdiction over the within petition for the appointment of coguardians.

Id. at 168-69, 555 N.W.2d at 772-73. Thus, the court in *In re Interest of Zyla* implicitly held that the county court's subject matter jurisdiction over guardianship proceedings was not vitiated by the district court's divorce decree; rather, the county court should have declined to exercise such jurisdiction. That difference is important in the case before us, because lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *New Tek Mfg. v. Beehner*, 270

Neb. 264, 702 N.W.2d 336 (2005). Where the county court possessed subject matter jurisdiction, an assertion that the court abused its discretion in exercising such jurisdiction would require that the objecting party raise the issue before the trial court. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Parker v. Parker*, 268 Neb. 187, 681 N.W.2d 735 (2004).

In this court, Bobby further argues that the county court erred in not "yielding jurisdiction" to the district court. Brief for appellant at 16. However, at this point, the defect in the verbatim record becomes critical. While Bobby did not raise the issue before the county court in the proceedings that were preserved, because of the "lost" portion, we are unable to determine whether Bobby raised the issue in the county court. Such a flaw in the record can only be remedied by a new hearing, at which the issue suggested by *In re Guardianship of Zyla, supra*, might be raised and considered.

CONCLUSION

For the foregoing reasons, we remand the matter to the county court with directions to vacate its appointment of coguardians and to conduct a new hearing on the petition for appointment of coguardians.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. STEVEN R. BLAIR, APPELLEE AND CROSS-APPELLANT.

707 N.W.2d 8

Filed November 15, 2005. No. A-03-942.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.

3. **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.
4. **Judgments: Time: Notice: Appeal and Error.** In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order.
5. **Pleadings: Parties: Time: Notice: Appeal and Error.** When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion.
6. **Pleadings: Judgments.** In order to qualify for treatment as a motion to alter or amend the judgment, the motion must seek substantive alteration of the judgment.
7. **Jurisdiction: Pleadings: Time: Notice: Appeal and Error.** When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Appeal dismissed.

Thomas J. Garvey and Michael F. Maloney for appellant.

Robert A. Wright, Jr., of Wright & Wright, and, on brief, Sherie E. Cotton for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The State of Nebraska appeals from an order of the district court for Douglas County granting postconviction relief, consisting of a new trial, to Steven R. Blair. The State filed a notice of appeal 2 days after the district court entered its order, and 5 days later, Blair filed a motion to alter or amend the judgment. Because under these circumstances, Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004) declares that the State's notice of appeal "shall have no effect" and requires that a new notice of appeal be filed within the prescribed time after the entry of an order ruling on the motion, we lack jurisdiction over the purported appeal.

BACKGROUND

Trial and Direct Appeal

An amended information charged Blair with kidnapping, use of a deadly weapon to commit a felony, and terroristic threats arising out of events occurring on May 12, 1997. The information also charged Blair with failure to appear, but this charge was severed from the other counts at the outset of the trial. Represented by Marc Delman, Blair waived his right to a jury trial and a bench trial was held.

At trial, Patty Dory testified that on the evening of May 11, 1997, she and Blair argued, Blair telephoned and paged her repeatedly, Blair demanded that she come to his house, and Blair said Dory knew what Blair would do if she did not comply. Dory testified that she understood Blair's comment to mean Blair would shoot her and that she eventually agreed to go to Blair's house out of fear Blair would harm her or her family. Dory testified that Blair was waiting on the front steps to her house and that she drove her car to Blair's house, with him following in his van. Dory testified that once they arrived at Blair's house, Blair positioned himself in the doorway and held a shotgun. After Dory entered the house, Blair began beating her. She testified that Blair began slashing the couch upon which she had been sitting, and pictures of a "slashed" couch were received into evidence.

At some point, Dory called her sister, Lori Anzaldo. When the telephone call got disconnected, Anzaldo called back and Blair answered. Anzaldo threatened to call the police if Dory did not arrive at Anzaldo's house within 10 to 15 minutes. Blair allowed Dory to leave, and Dory went to Anzaldo's house. Anzaldo called the police, and the police went to Anzaldo's house in response to the call.

Officer Jason Christensen of the Omaha Police Department testified that while other Omaha police officers were arresting Blair, Christensen stepped into the front door of Blair's house, because Christensen had "heard there was a couple other people sitting in the house." Christensen observed a shotgun, which he discovered was loaded, leaning against the wall at the bottom of a staircase. Christensen also testified that a rifle was found in

Blair's house. There was considerable testimony about holes in the walls of Blair's house which may have been caused by a gunshot, but there was no evidence that Blair fired a gun inside his house on the dates at issue in this case. Christensen's testimony included some confusion over the time he went to Blair's home to assist with the arrest. He testified that it was around 5 p.m., but then stated that 8 p.m. would be correct if that is what his report indicated. Other officers testified that they responded to the situation between 5 and 6 p.m. Officer Jeffrey L. Morgan searched Blair's house pursuant to a search warrant and found a knife which matched Dory's description of the knife Blair threatened her with and then used to cut up his couch.

Blair denied holding Dory against her will, threatening her life, or beating her. He testified that the van Dory alleged he drove that night was not drivable at the time. According to Blair, he had been watching television in his bedroom in the early morning hours of May 12, 1997, when Dory came to his house, let herself in, and entered his bedroom. They allegedly got into an argument over a rental car which Dory had failed to return on time. Blair maintained Dory told him that her boyfriend had beaten her and taken the money Blair had given her for the car.

Blair testified that on May 12, 1997, he spent "practically all day" working at his family's business, a self-service laundry facility (laundromat) and adjoining pizza restaurant. A friend of Blair testified that he saw Blair at the laundromat between 9 and 10 a.m. on May 12. Blair's brother, Kenneth Wayne Blair (Kenneth), testified that he saw Blair at the laundromat between 10 and 10:30 a.m. on May 12 and that he and Blair then went to Blair's house, where Kenneth had recently been staying. Kenneth testified that when he finished moving, he dropped Blair off at the laundromat at 11 or 11:30 a.m.

Blair testified that he finished working at the laundromat at about 4 p.m. on May 12, 1997. At that time, he and "Deborah," whom Blair described as his "little helper," went to his house, and Dory was still there. Blair testified that Anzaldo telephoned for Dory and that Dory stated Anzaldo would be coming over to pick up Dory. Blair objected because he did not get along with Anzaldo. Blair testified that Anzaldo then told Dory that she would call the police on Blair. Blair testified that he, Dory, and

"Deborah" all left the house together and that there did not seem to be anything wrong with Dory at that time.

At the end of the trial, the district court made several comments, some of which follow:

> From the evidence, it appears to this Court that the credibility of [Dory] and [Dory's] witnesses is corroborated to some extent by the police officers who do not have any interest in the outcome of the litigation insofar as the Court considers. And contrary to that, [Blair's] credibility, I feel, is inadequate and that it is not corroborated fully.
>
> . . . And, of course, the witness, Deborah, who did not appear here, obviously, she could have had very material evidence, but was not called by the defense.
>
> So it's going to be the judgment of the Court and the finding of the Court by evidence beyond a reasonable doubt that [Blair] is guilty of the crime of kidnapping in the first count; guilty of the second count of using a weapon to commit a felony; and third count, the terroristic threats on the part of the defendant.

Blair filed a motion for new trial on April 27, 1998, through a new attorney who also represented Blair on direct appeal. The motion alleged that "an irregularity in the proceedings occurred as a result of the prosecutor's threat to have a witness for [Blair] arrested on an outstanding warrant if she took the stand." The affidavits of Delman and Deborah Wright were attached to the motion. Delman's affidavit stated that he "was informed by [the State's attorney] that if he called . . . Wright as a witness to testify on behalf of [Blair], that [the State's attorney] would have her arrested as there was a current outstanding warrant for her arrest." The court denied the motion.

A district court judge different from the judge who heard the evidence at trial sentenced Blair to 10 to 15 years' imprisonment for the kidnapping conviction and 3 to 5 years' imprisonment for the use of a deadly weapon to commit a felony conviction, to run consecutively, and 4 to 5 years' imprisonment for the terroristic threats conviction, to run concurrently with the other two sentences.

Blair timely appealed, alleging that the trial court erred (1) in finding him guilty of kidnapping upon insufficient evidence, (2)

in not granting a new trial on the basis of newly discovered evidence, and (3) in determining that Blair knowingly, voluntarily, and intelligently waived his right to a jury trial. In a memorandum opinion, this court affirmed the decision of the district court. See *State v. Blair*, 8 Neb. App. xvi (No. A-98-732, Mar. 31, 1999).

POSTCONVICTION

Blair filed an amended motion to set aside his convictions and sentences, alleging that both trial counsel and appellate counsel provided ineffective assistance in numerous respects.

The court held an evidentiary hearing on Blair's application for postconviction relief and received into evidence numerous exhibits.

Wright testified that on the date of Blair's trial, Delman "pushed me out of the courtroom and told me I couldn't testify because the prosecuting attorney was going to arrest me because I had a warrant." She obtained a printout showing that there were no warrants for her arrest and showed such printout to Delman, but Delman did not call her to testify. Wright testified that had she been called as a witness, she would have testified that she was with Dory and Blair from noon or 1 p.m. until 4 or 5 p.m. on May 12, 1997, and Wright would have verified that Dory was not being held against her will during those hours. Wright testified that Dory and Blair "were fine" and that they "had a good time." Wright could not recall any arguments between Dory and Blair about another male acquaintance of Dory. Wright testified that Blair left the laundromat sometime after 5 p.m. and that Dory had not gone back to the laundromat with Wright and Blair. Based upon Wright's conversation with Delman, it was her understanding that Delman did not call her to testify because of the prosecutor's threat to have her arrested. Wright testified that Delman had taken her deposition prior to trial and knew what Wright's testimony would have been. Wright remained in the courtroom until the trial was over and was not arrested. Blair's mother testified that she told Delman to call Wright as a witness and that if Wright was arrested, Blair's mother would "get her out and put her on the stand anyway."

The prosecutor testified she told Delman that she ran Wright's record, that Wright had a misdemeanor warrant, and that the

prosecutor would have to alert the sheriff's department. She testified that she provided such information to Delman as a matter of professional courtesy and that the warrant could have been taken care of prior to any testimony by Wright.

Delman testified that he informed Blair and his mother of the alleged warrant for Wright's arrest and that it was Blair and his mother's decision not to call Wright to testify. Delman testified that he used a computer to check for warrants for Wright and could not find any, but the prosecutor again said that there was an active warrant. Delman did not believe that in speaking with Wright, Delman discouraged Wright from testifying. Delman thought Wright's testimony would be helpful to Blair's case.

The court received into evidence Forest Roper's affidavit, signed on September 30, 1999. The affidavit states that Roper spoke with Delman in April 1998 regarding testifying on Blair's behalf; that Roper voluntarily appeared in court on April 14, 1998, to testify on Blair's behalf; that Roper was not called as a witness; that had Roper been called as a witness, he would have testified that he was present with both Dory and Blair on May 11, 1997, between approximately 7 and 9 p.m.; that between those hours, Blair was working at the laundromat; that between those hours, Dory, Blair, and another female were drinking beer in the office; that Roper and a friend of Blair were watching television in the laundromat while Roper washed and dried his comforter; that at approximately 9 p.m., Roper "as well as the others walked out of the laundr[o]mat, got in our vehicles and left"; and that Dory and Blair were in good spirits at the time Roper left. At the evidentiary hearing, Roper testified that he never observed Blair make any threatening telephone calls. Roper believed that at the time he left the laundromat, Dory, Blair, and Wright were still there. Delman testified that he decided not to call Roper to testify because all Roper could basically testify to was having seen Blair and Dory prior to the alleged incident and that "it wasn't germane to the case, nor would it have been that beneficial."

In an order filed August 11, 2003, the court stated:

> Of all the grounds for postconviction relief raised by [Blair] in his amended application, the Court finds that [Blair] has sustained his burden of proof as to his allegation that he was rendered ineffective assistance of counsel,

> prejudicial to his defense, in failing to produce . . . Wright or . . . Roper as defense witnesses at [Blair's] trial.

The court reasoned that Wright's testimony would have "substantially contradicted" Dory's testimony, would have "brought into issue Dory's credibility," and "might have" affected Dory's credibility to the extent that the court could "find reasonable doubt as to [Blair]'s guilt." It thus found that Blair's counsel was ineffective in failing to call Wright as a witness, in failing to properly preserve the record if Wright was not called due to prosecutorial misconduct, and in failing to properly present Wright's evidence on Blair's motion for new trial by offering an affidavit rather than live testimony subject to cross-examination.

The court stated that because the State depended on Dory's credibility, Roper would have been "a critical witness," since his testimony would have been in direct conflict with Dory's testimony. Because Delman testified that he determined Roper's testimony was not relevant, the court found that Blair was further denied effective assistance of counsel by Delman's failure to call Roper as a witness. The court set aside the judgment of conviction and Blair's sentencing, and the court ordered a new trial.

Notices of Appeal and Other Motions

The court's order granting Blair postconviction relief was file stamped on August 11, 2003. On August 13, the State filed a notice of appeal regarding that order. Such appeal was docketed in our court on August 18 as case No. A-03-942 and is the appeal now before us.

On August 18, 2003, Blair moved the district court to alter or amend its order. In an order file stamped on October 10, the trial court declined to consider Blair's motion to alter or amend, due to the court's belief that it lacked jurisdiction to rule on the motion. Blair filed a notice of appeal from that order on September 26, which appeal was docketed as case No. A-03-1137. This court dismissed that appeal, citing the rule that when a lower court lacks authority to exercise jurisdiction, the appellate court also lacks power to determine the merits of the case. However, on September 14, 2005, this court recalled the mandate in case No. A-03-1137, and on October 11, this court ordered that the appeal in that case proceed.

On November 7, 2003, the State deposited $75 and filed a notice of appeal "to fully preserve and perfect its appeal should the Court of Appeals determine that [Blair's] 'Motion to Alter and Amend' did change the time for filing a Notice of Appeal." That appeal was docketed as case No. A-03-1295. Such notice was filed within 30 days after the trial court's order ruling on the motion to alter or amend. This court dismissed the appeal in that case as well.

Blair filed a motion for summary dismissal of the instant appeal and asserted in his brief on appeal that this court lacked jurisdiction to hear the appeal. Although this court overruled Blair's motion for summary dismissal, we granted additional time for the State to file a reply brief responding to Blair's argument concerning jurisdiction.

ASSIGNMENTS OF ERROR

The State alleges that the trial court erred (1) in finding that Blair's trial attorney provided ineffective assistance of counsel and (2) in applying an incorrect standard in determining whether counsel's alleged errors prejudiced Blair.

On cross-appeal, Blair alleges that the trial court erred (1) in failing to include as a basis of ineffective assistance of counsel the failure of trial defense counsel to conduct discovery and to file a motion to suppress and (2) in failing to include as finding in support of a motion for new trial that prosecutorial misconduct occurred by the prosecutor's presentation of evidence which the prosecutor knew or should have known to be false.

In a supplemental brief on cross-appeal, filed well over a year after Blair's original brief on cross-appeal, Blair alleges (1) that the court erred by failing to rule on the issue of prosecutorial misconduct for failure to disclose under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the 911 emergency dispatch service data and the medical records of Dory's emergency hospital visits and (2) that postconviction counsel failed to provide effective assistance to Blair on issues raised in the motion to set aside convictions and sentences.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court

will not be disturbed unless they are clearly erroneous. *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004).

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

ANALYSIS

[3] 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. *Id.* Blair previously moved for summary dismissal of this appeal on the bases that the trial court's order granting a new trial was an interlocutory order and that the State's notice of appeal was ineffective because Blair timely filed a motion to alter or amend the judgment. We now conclude that the second allegation of Blair's motion, which has been fully briefed by the parties, requires that the appeal be dismissed for lack of jurisdiction.

[4,5] In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order. § 25-1912(1). Section 25-1912(3) states in part:

> The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01, *(b) by a timely motion to alter or amend a judgment under section 25-1329*, or (c) by a timely motion to set aside the verdict or judgment under section 25-1315.02, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection. When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion

> *shall have no effect, whether filed before or after the timely filing of the terminating motion.*

(Emphasis supplied.)

[6] Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002) provides: "A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment." Thereafter, the 30-day appeal period begins to run from the entry of an order ruling upon the motion to alter or amend a judgment. See, § 25-1912(3); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003). In order to qualify for treatment as a motion to alter or amend the judgment, the motion must seek substantive alteration of the judgment. *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

Pursuant to § 25-1912(3), when any terminating motion such as the motion to alter or amend is timely filed, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. That section further states that a new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion.

Blair's motion to alter or amend the judgment alleged that the trial court failed to make findings of fact and conclusions of law pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1995) regarding certain allegations of Blair's amended motion for postconviction relief. In Blair's operative motion to set aside the convictions and sentences, he specifically requested that pursuant to § 25-1127, the court set forth its conclusions of fact separately from its conclusions of law. While we acknowledge that Blair's citation to § 25-1127 was inapposite, the statute governing a motion for postconviction relief, Neb. Rev. Stat. § 29-3001 (Reissue 1995), explicitly requires the trial court, after an evidentiary hearing on such motion, to make findings of fact and conclusions of law.

The State argues that Blair's August 18, 2003, motion to alter or amend the judgment did not void the State's August 13 notice of appeal because Blair's motion did not seek a substantive change in the court's August 11 order. In *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), the appellant filed a motion seeking an order granting a new trial and any other relief deemed equitable and just. The Nebraska

Supreme Court determined it had jurisdiction, stating: "In effect, [the appellant] requested that the court reconsider its grant of summary judgment. A motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment." 270 Neb. at 6, 701 N.W.2d at 326, citing *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). In *Weeder v. Central Comm. College, supra*, the appellant asked the district court to " 'reexamine its decision to dismiss . . . and reinstate the action as previously filed.' " 269 Neb. at 120, 691 N.W.2d at 513. The Nebraska Supreme Court concluded that such language sought substantive alteration of the judgment of the trial court dismissing the appellant's action.

[7] In the instant case, the relief sought by Blair was that the court "alter and amend it's [sic] Order by making findings of facts and conclusions of law on trial counsel's ineffective assistance regarding [Blair's] illegal arrest and unlawful search and seizure, and for any other relief the Court deems just and proper." The court's order granting postconviction relief is silent on these issues, and thus, Blair's request seeks a substantive change to the court's order. See *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990). When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Because Blair's motion terminated the 30-day appeal period, the State's notice of appeal was ineffective. Accordingly, we lack jurisdiction over this purported appeal.

CONCLUSION

We conclude that Blair's motion to alter or amend the judgment terminated the appeal period and that the State's notice of appeal, filed before disposition of the terminating motion, became ineffective. This court therefore lacks jurisdiction over the State's purported appeal and Blair's purported cross-appeal.

APPEAL DISMISSED.

IN RE INTEREST OF KINDRA S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TAMMIE S., APPELLANT.

705 N.W.2d 792

Filed November 15, 2005. No. A-04-1443.

1. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence.
2. **Evidence: Words and Phrases.** Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven and, further, that it is more than a preponderance of evidence, but less than proof beyond a reasonable doubt.
3. **Parental Rights: Rules of Evidence.** In proceedings to terminate parental rights, the Nebraska Evidence Rules do not apply.
4. **Parental Rights: Rules of Evidence: Due Process.** The requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. The question becomes whether the evidence is relevant based upon the broad concerns of juvenile proceedings, with the Nebraska Evidence Rules serving as a guidepost.
5. **Parental Rights: Due Process.** In termination of parental rights cases, due process requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated.
6. **Juvenile Courts: Parental Rights: Evidence.** The Nebraska Juvenile Code specifically calls for the satisfaction of two requirements before termination of parental rights is proper. First, the code requires the existence of 1 or more of the 10 statutory grounds for termination of parental rights described in Neb. Rev. Stat. § 43-292 (Reissue 2004). Second, the code allows the court to terminate parental rights when the court finds such action to be in the best interests of the juvenile.
7. **Parental Rights.** Termination of parental rights is appropriate if the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.
8. **Parental Rights: Time: Abandonment.** Neb. Rev. Stat. § 43-292(1) (Reissue 2004) provides that a court may terminate parental rights if the parents have abandoned the juvenile for 6 months or more immediately prior to the filing of the petition.
9. ____: ____: ____. Despite the fact that a parent has been incarcerated for all or part of the 6-month period used to prove abandonment, the period of time of the parent's incarceration may be considered in reference to abandonment as a basis for termination of parental rights if certain other matters are proven.
10. **Parental Rights: Abandonment: Intent: Words and Phrases.** Abandonment, for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 2004), is 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.

11. ____: ____: ____: ____. For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2004), abandonment is an intentional act as defined by law in Nebraska and the parent's act of abandonment must be voluntary, i.e., intentional.
12. **Parental Rights: Time: Abandonment.** For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2004), if the actions that gave rise to abandonment were voluntary, the time spent while being incarcerated can be used in the determination of whether the 6-month period of abandonment has been satisfied.
13. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-292 (Reissue 2004) requires that in a proceeding for termination of parental rights, the court must find such termination to be in the child's best interests.
14. ____: ____. A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
15. **Trial: Evidence: Waiver.** If, when evidence is offered, the opposing party consents to its introduction or fails to object or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, the opposing party waives whatever objection may have existed, and the evidence is in the record for consideration the same as other evidence.
16. **Parental Rights: Rules of Evidence.** The standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), are not applicable in cases where the Nebraska Evidence Rules do not apply, such as in termination of parental rights cases.
17. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) 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.
18. **Trial: Courts: Expert Witnesses.** When an expert opinion involves scientific or specialized knowledge, the trial court applies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under *Daubert*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
19. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** The improper admission of evidence by a juvenile court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made.
20. **Parental Rights: Rules of Evidence: Due Process.** The Nebraska Evidence Rules provide a guidepost in determining whether admission or exclusion of particular evidence would violate fundamental due process in termination of parental rights cases.
21. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.
22. **Rules of Evidence.** When the substance of the excluded evidence is made known to the court pursuant to Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995), the court is within its discretion to determine relevancy and admissibility of the evidence.

23. ____. Neb. Rev. Stat. § 27-403 (Reissue 1995) provides that relevant evidence may be excluded if there is needless presentation of cumulative evidence.

Appeal from the County Court for Cheyenne County: EDWARD D. STEENBURG, Judge. Affirmed.

Donald J. Tedesco for appellant.

Paul B. Schaub, Cheyenne County Attorney, for appellee.

William C. Peters, guardian ad litem for appellant.

Richard H. Jensen, guardian ad litem for Kindra S.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Tammie S. appeals from the order of the Cheyenne County Court, sitting as a juvenile court, which terminated her parental rights with regard to her daughter, Kindra S. Tammie alleges that the court erred in finding that her parental rights should be terminated, in overruling a motion in limine, and in failing to admit into evidence a statement of a former caseworker. We find that the State proved by clear and convincing evidence the grounds for termination of Tammie's parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 2004). Given the facts of this case, Tammie's incarceration or hospitalization in a mental health facility should not be excluded from the court's calculation of Kindra's time in out-of-home placement under § 43-292(7). We find that termination of Tammie's parental rights is in Kindra's best interests. Additionally, we find that the court did not err in overruling the motion in limine or in failing to admit into evidence the former caseworker's statement, since the Nebraska Evidence Rules are not applicable in cases involving the termination of parental rights and the evidentiary rulings comported with due process. Accordingly, we affirm.

II. BACKGROUND

These proceedings involve the termination of Tammie's parental rights with regard to Kindra, who was born on February 7, 2000. Kindra spent her first 13 months with Tammie. In February

2001, Tammie threw a brick or stone through a window of her father's home. Due to this incident, Tammie was arrested and subsequently extradited to Texas pursuant to an outstanding Texas warrant. She was incarcerated and hospitalized for approximately 14 months in Texas due to mental illness.

As a result of Tammie's absence, the Nebraska Department of Health and Human Services (DHHS) took legal custody of Kindra on February 27, 2001. Kindra was placed in foster care and has remained in the same foster home since that time.

Soon after the Texas authorities released Tammie, she returned to Nebraska. Here, she began working with DHHS in an effort to begin visitation with, and ultimately regain custody of, Kindra. The goals of the case plan that Tammie was required to complete were to "participate in psychotherapy[,] remain stable on her medications[, and] continue to display no physical aggression." As of June 2002, in accordance with a visitation plan, Tammie was permitted supervised visitation with Kindra.

Subsequently, Tammie spent a period of time—described by various witnesses as between 6 and 9 months—in the Hastings Regional Center. While there, she was permitted biweekly telephone visitations with Kindra.

After Tammie left the Hastings Regional Center, DHHS provided Tammie in-person visitations with Kindra every other week for a period of time. These visitations were progressively increased to three times a week. In June 2004, visitations were suspended due to the DHHS caseworker's concerns about Tammie's erratic behavior and the resulting impact on Kindra's safety. Such concerns were based on Tammie's noncompliance with taking her medication and on her cessation of psychotherapy.

On April 1, 2004, the State filed a petition to terminate Tammie's parental rights, as well as the parental rights of Kindra's father, who is not involved in this appeal. The petition alleged that Tammie's parental rights should be terminated as a result of her inability to discharge parental responsibilities due to mental illness or mental deficiency which is likely to continue for a prolonged indeterminate period. The petition also alleged that Kindra had been in out-of-home placement for 15 or more months of the most recent 22 months and that termination of Tammie's parental rights was in the best interests of Kindra.

Guardians ad litem were appointed for Tammie and for Kindra pursuant to Neb. Rev. Stat. § 43-292.01 (Reissue 2004). A hearing was held on the State's petition to terminate parental rights on August 5, 2004. Due to the presiding judge's death on August 8, Tammie filed on August 16 a motion for new trial, which motion was granted.

On September 20, 2004, and before the new hearing on the termination of parental rights, the State filed a motion to take the trial deposition of an examining psychologist, Dr. Anne Talbot. On November 9, Tammie filed a motion in limine requesting that the court determine whether Dr. Talbot's deposition could be received into evidence at the ensuing termination of parental rights hearing. The court ultimately overruled the motion.

The new hearing on the termination of parental rights was held on November 17, 2004. On December 8, the court entered an order terminating Tammie's parental rights. In that order, the court determined that termination of Tammie's parental rights was proper according to § 43-292(5) and (7) and was in the best interests of Kindra. The court relied, inter alia, on testimony from two psychologists, Drs. Daniel Scharf and Talbot, as well as the then-current DHHS caseworker assigned to the case. Their testimony revealed that Tammie's behavior had continued to be adverse to the best interests of Kindra.

Testimony established that Tammie had received several forms of assistance from DHHS staff but had been unable to meet the goals of the rehabilitation plan over a span of nearly 3 years. Tammie had terminated her psychotherapy and was noncompliant with taking her medications. Additionally, testimony from Drs. Scharf and Talbot indicated that a high risk of harm to Kindra would be likely were she to be returned to Tammie's care. Dr. Scharf testified that such placement would insert Kindra into a chaotic environment where she would be exposed to violent behavior and a lack of parental care. Dr. Scharf expressed concern that Kindra might become the target of Tammie's mood volatility. Furthermore, the DHHS caseworker testified that Kindra had been in out-of-home placement for at least 15 of the most recent 22 months before the filing of the petition to terminate.

The court noted that while Tammie might be in a position to parent Kindra after another 2 to 3 years of diligent and consistent

treatment to improve her mental condition, Dr. Scharf had indicated it would be highly unlikely that Tammie would benefit from services that would help her achieve this end because of her past noncompliance with medications and her substance abuse. The court concluded that the evidence was clear and convincing that Tammie's conditions would continue for a prolonged and indeterminate period of time. As such, the court found that it was in the best interests of Kindra to terminate Tammie's parental rights. Tammie now appeals to this court.

III. ASSIGNMENTS OF ERROR

Tammie and her guardian ad litem have filed separate briefs, and each brief contains assignments of error. Tammie and her guardian ad litem assert, combined and restated, that the county court erred (1) in finding that the State proved by clear and convincing evidence that Tammie's parental rights should be terminated, (2) in overruling the motion in limine, and (3) in failing to admit into evidence the statement of a former caseworker. Tammie also assigned error regarding termination of her parental rights based on § 43-292(5). Given our disposition below, this assigned error need not be addressed.

IV. ANALYSIS

1. Standard of Review

[1] Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[2] Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven. Further, clear and convincing evidence is more than a preponderance of evidence, but less than proof beyond a reasonable doubt. *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002).

[3,4] In proceedings to terminate parental rights, the Nebraska Evidence Rules do not apply. See *In re Interest of Brettany M. et al., supra*. The requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. The question becomes whether the evidence is relevant based upon the broad concerns of juvenile proceedings, with the Nebraska Evidence Rules serving as a guidepost. *Id.*

[5] In termination of parental rights cases, due process requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

2. Termination of Parental Rights

(a) Statutory Grounds

Tammie argues that the statutory grounds under § 43-292(7) for termination of parental rights were not proven by clear and convincing evidence. Specifically, she argues that periods of Kindra's out-of-home placement during the 22 months preceding the filing of the petition to terminate parental rights included periods of time Tammie was incarcerated or in mental health facilities and that such periods of time should be excluded when calculating whether Kindra was in out-of-home placement for 15 of those 22 months. Tammie cites to no case law in Nebraska which supports her argument that the time of incarceration or hospitalization should be excluded from calculating the time period of Kindra's out-of-home placement, and our research reveals none. We disagree with her argument given the facts of the case.

[6,7] The Nebraska Juvenile Code specifically calls for the satisfaction of two requirements before termination of parental rights is proper. First, the code requires the existence of 1 or more of the 10 statutory grounds for termination of parental rights described in § 43-292. Second, the code allows the court to terminate parental rights when the court finds such action to be in the best interests of the juvenile. § 43-292. Section 43-292(7) specifically provides that termination of parental rights is appropriate if "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months."

[8,9] That part of Tammie's argument regarding the exclusion of periods of incarceration is one previously made and addressed by Nebraska jurisprudence in the context of § 43-292(1). Section 43-292(1) provides that a court may terminate parental rights if "[t]he parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition." Nebraska jurisprudence concludes that despite the fact that a parent has been incarcerated for all or part of the 6-month period used to prove abandonment, the period of time of the parent's incarceration may be considered in reference to abandonment as a basis for termination of parental rights if certain other matters are proven. See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

[10] At this point in our analogy, § 43-292(1) and (7) diverge, because Nebraska appellate courts have concluded that " ' "[a]bandonment," 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 opportunity for the display of parental affection for the child.' " (Emphasis supplied.) *In re Interest of L.V.*, 240 Neb. at 419, 482 N.W.2d 250 at 260 (quoting *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990)).

[11,12] Nebraska appellate courts have concluded that for purposes of § 43-292(1), abandonment is an intentional act as defined by law in Nebraska and the parent's act of abandonment must be voluntary, i.e., intentional. The impact of this intent requirement means that periods of time used to calculate the 6-month period of abandonment can be included only if the actions that gave rise to the abandonment were voluntary. If such is found to be the case, the time spent while being incarcerated can be used in the determination of whether the 6-month requirement has been satisfied.

However, § 43-292(7) does not require that the child's out-of-home placement be the result of any intentional act on the part of the parent. In fact, the Nebraska Supreme Court has held that § 43-292(7) 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. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In

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. Yet, when termination of parental rights is based on the ground described in § 43-292(1), the protection of the parent's rights is analyzed not only in the best interests analysis, but is given additional scrutiny with the added requirement that the abandonment be intentional and not a mechanical operation of counting months. In both situations, however, the time that a parent spends incarcerated or hospitalized can be included in the required time calculations to determine whether the statutory ground has been proven.

Given the facts of this case, it is our conclusion that a finding of statutory grounds for termination of parental rights under § 43-292(7) is a mechanical arithmetic matter. 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.

The record shows that Kindra was placed in the custody of DHHS when she was approximately 1 year old. At the time of the hearing on the termination of parental rights, Kindra was 4 years 9 months old and had continuously been in out-of-home placement since being placed in the custody of DHHS. During the time Kindra was in out-of-home placement, Tammie had been either incarcerated or in mental health treatment in Texas for approximately 14 months and had been in the Hastings Regional Center for approximately 6 to 9 months. However, Tammie was never incarcerated or hospitalized in Texas during the most recent 22 months of the date of filing of the petition to terminate parental rights.

Tammie's hospitalization in the Hastings Regional Center did occur during the most recent 22 months of the filing of the petition to terminate her parental rights. Given our conclusion above, the time Tammie was in the Hastings Regional Center need not be excluded from the court's determination of whether Kindra

was in out-of-home placement for 15 of the 22 months immediately preceding the petition to terminate parental rights.

We find that the statutory grounds for termination of Tammie's parental rights were proven by clear and convincing evidence. Under the facts of this case, there is no exception under § 43-292(7) for Tammie's incarceration or hospitalization in mental health facilities for the purpose of determining Kindra's time in out-of-home placement. Compare *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005) (finding that father's parental rights were wrongly terminated where fundamental fairness was lacking). This assigned error is without merit.

In light of these findings, no review of the county court's ruling with regard to § 43-292(5) is required. See *In re Interest of Brittany S.*, 12 Neb. App. 208, 670 N.W.2d 465 (2003). Because we conclude that the State sufficiently proved the existence of statutory grounds for termination of Tammie's parental rights, we find this assignment of error to be without merit.

(b) Best Interests

Tammie argues that the court erred in finding that terminating Tammie's parental rights is in Kindra's best interests. We find that the State proved by clear and convincing evidence that such termination was in Kindra's best interests because of Tammie's inadequate response to the treatment of her mental illness and because of her volatile behavior that could place Kindra at risk.

[13] Section 43-292 specifically requires that in a proceeding for termination of parental rights, the court must find such termination to be in the child's best interests. This requirement ensures that there are ample safeguards in place to ensure that termination of parental rights is not based solely on the duration of out-of-home placement. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

The testimony of the two evaluating psychologists demonstrates that Tammie suffers from mental illness. Dr. Scharf diagnosed Tammie with disorganized schizophrenia. Dr. Talbot diagnosed Tammie with "a significant major psychiatric disorder that incorporates schizophrenia and a personality disorder, as well as an additional diagnosis that impacts on her ability to deal with her

other psychiatric diagnoses; and that is the diagnosis of borderline intellectual functioning." By itself, this prognosis does not preclude a person from parenting a child. However, other factors must be considered in Tammie's case.

An underlying factor that weighs heavily in the best interests analysis is Tammie's unwillingness to fully acknowledge both the seriousness of her symptoms and the need for treatment. Based on Dr. Talbot's evaluations of Tammie and review of her history, she opined that Tammie has a limited awareness of the seriousness of her illness and that Tammie downplays her condition, which could place both Tammie and Kindra at risk.

Dr. Scharf testified that Tammie has expressed ambivalence about the need for her medications and about whether she was schizophrenic or not. He testified that in June 2004, Tammie admitted that "she was not taking her medications, that she said that she had flushed them down the toilet, [and] that she believed that she did not need them." In addition to not taking her medications, Tammie had been using marijuana and drinking alcohol, which, according to Dr. Scharf, "would be very detrimental to her mental health. It probably would exacerbate her psychotic symptoms and probably exacerbate her mood difficulties also."

Tammie testified that she would take her medication if she "felt like taking it." On one occasion, Tammie left the doctor's office, after waiting 15 minutes, without having received her dosage of medication because she saw "no need to sit around." Tammie missed another appointment with the doctor to receive medication because she was otherwise occupied.

These behaviors support Dr. Talbot's statement that Tammie does not acknowledge both the seriousness of her condition and the need for treatment of the condition. Dr. Talbot indicated that Tammie had "an unrealistic perception of the impact of her psychiatric history and the impact that had, not only on her, but on her daughter."

Tammie had also been inconsistent with psychotherapy treatment, which treatment was one of the goals set forth in her case plan. On July 6, 2004, Tammie indicated to the DHHS caseworker that Tammie refused to see her psychotherapist. On July 20, Tammie called her DHHS caseworker and said that she refused to see her counselor; subsequently, Tammie did not make

an effort to go to a different counselor. Tammie had repeatedly been reminded of the conditions of her psychological evaluation that called for her to be on medication and to be stabilized before visitation with Kindra would be possible.

Dr. Scharf testified that there are mothers with schizophrenia who are capable of parenting. He also maintained that Tammie's type of disorganized schizophrenia can be controlled by medication. However, Tammie's inadequate response to her need for treatment is not in the best interests of Kindra.

[14] Similarly, Dr. Talbot testified that aspects of Tammie's condition could be mediated by medication but that Tammie "ha[d] not demonstrated a pattern of maintaining stabilization or cooperation with treatment recommendations consistently." While Tammie should not be punished for her illness, it is the juvenile's best interests that are of primary consideration in determining whether parental rights should be terminated. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005); *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

Tammie's noncompliance with taking medication and her failure to regularly attend psychotherapy have resulted in very aggressive and threatening behavior at times. Tammie has made threats against others. She threatened Kindra's foster father that she would either get a gun or train her dog to kill him. On June 2, 2004, Tammie threatened DHHS staff that she would get a gun from her father and use it if anyone touched Kindra. On June 28, Tammie threatened DHHS staff that she was going to take a gun and attempt to take Kindra. On July 21, Tammie warned several DHHS staff and a sheriff that they should watch their own daughters. One caseworker indicated that she was afraid because Tammie knew where she lived, and that caseworker expressed concern for the safety of her daughter.

Dr. Scharf administered to Tammie several psychological tests, one of which revealed Tammie was "very active and probably would have difficulty inhibiting her behavior." Dr. Scharf testified that Tammie "scored similar to other individuals that were aggressive, that tended to show aggressive behavior." While this type of behavior may be a symptom of her condition, it is nonetheless not in the best interests of Kindra.

Tammie's behavior is inconsistent with the best interests of Kindra. Her behavior and mental condition have a detrimental effect on her ability to parent Kindra. Dr. Scharf testified that Tammie's mental illness had affected her ability to parent. He reported that Tammie had suffered from functional impairment regarding real life problems, such as making appointments, taking care of hygiene, and working. Her mental deficiency also was shown to affect her ability to parent. Dr. Scharf explained that the intellectual testing which measured Tammie's IQ also measured things such as reasoning, judgment, attention, and concentration—skills necessary to parenting.

Additionally, Dr. Talbot explained that Tammie "has a diagnosis that affects her judgment and reasoning, her ability to reality test, her ability to understand the developmental needs of a child. And she is prone to delusional states and psychotic states that affect her ability to provide a safe environment for a child." Dr. Talbot clarified that in addition to the mental illness diagnosis, Tammie's mental deficiency causes difficulties for her to respond appropriately to treatment, education, and other interventions that might help her overcome or mediate her impaired reality testing or delusions.

Tammie's observed and diagnosed mental health issues have an effect on her ability to parent and, therefore, a direct effect on Kindra's best interests. Dr. Talbot stated that Tammie's responses to a "Parenting Scale" test Dr. Talbot had administered were "overly simplistic, and sometimes inappropriate, in such a way that the situation might be escalated, or place a child in danger." Dr. Talbot relayed that Tammie made inappropriate statements in Kindra's presence which "reflect a real lack of concern for Kindra's psychological state." When asked what impact there would be on Kindra if she were returned to live with Tammie, Dr. Talbot replied, "It could be devastating." Dr. Talbot also explained that it would be nearly impossible for Kindra and Tammie to have a successful reunification. Dr. Talbot stated that Tammie has a serious psychiatric disorder which puts herself, and Kindra, in jeopardy.

Likewise, when Dr. Scharf was asked what impact there would be on Kindra if she were returned to live with Tammie, he replied,

> When I saw Tammie in June of 2004, I think the impact would be that Kindra would live in a pretty chaotic environment, where — I think Tammie would have difficulty providing structure and predictability for Kindra. I think there would be a decent chance that Kindra would be exposed to violence, or threatening behavior, which would be very detrimental to her.

Dr. Scharf also expressed concern that Tammie suffered from mood volatility, of which Kindra could eventually become a target.

Therefore, we find that the State proved by clear and convincing evidence that termination of Tammie's parental rights is in Kindra's best interests. This first assigned error is without merit.

3. Motion in Limine

Tammie filed a motion in limine requesting the county court to determine whether the deposition of Dr. Talbot could be received into evidence. The court overruled the motion. We find that the court did not err, and we analyze the motion in limine in four separate subsections below.

(a) Objections in Deposition

Tammie asserts that the county court erred in overruling her motion in limine to exclude Dr. Talbot's deposition. Tammie argues that the deposition contained many objections upon which the court was never given an opportunity to rule. Citing to Neb. Rev. Stat. § 27-804 (Reissue 1995) regarding hearsay exceptions, Tammie contends that "[a]n argument could be made that because such trial deposition was not taken and offered in compliance with the law, it is not admissible." Brief for appellant at 15. This argument is without merit because Tammie did not obtain a ruling on any of the objections contained in Dr. Talbot's deposition.

[15] It is a well-known rule that if, when evidence is offered, the opposing party consents to its introduction or fails to object or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, the opposing party waives whatever objection may have existed, and the evidence is in the record for consideration the same as other evidence. *In re Interest of E.G.*, 240 Neb. 373,

482 N.W.2d 17 (1992); *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948).

Tammie's counsel made objections to the testimony during the deposition. In the hearing on the motion in limine, Tammie's counsel objected based on *Daubert* and, additionally, on inadequate foundation of the deponent, Dr. Talbot, to render an expert opinion. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The court noted at the hearing that objections were made during the deposition, but at no time was the court asked to rule on them. The court overruled the motion in limine. When the State offered into evidence at trial the exhibit containing Dr. Talbot's deposition, Tammie's counsel renewed the objection from the earlier motion in limine hearing. The court received the deposition nonetheless. As such, the objections contained in the deposition are not properly preserved for appeal.

(b) *Daubert* Challenge

[16] Tammie asserts that the county court erred in admitting the deposition of Dr. Talbot, because her expert testimony was improperly received by the court. Tammie asserts that Dr. Talbot did not "render her opinion in the appropriate form," essentially arguing that it was not made with a reasonable degree of medical certainty. Brief for appellant at 18. We find that Dr. Talbot's deposition was admissible expert testimony because the *Daubert* standards are not applicable in cases where the Nebraska Evidence Rules do not apply, such as in termination of parental rights cases. See *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

[17] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) 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. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[18] Additionally, when the expert opinion involves scientific or specialized knowledge, the trial court applies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra. Robb v. Robb, supra*. Under *Daubert*, the trial court acts as a gatekeeper

to ensure the evidentiary relevance and reliability of an expert's opinion. *Robb v. Robb, supra.*

However, application of the *Daubert* standards for admission of expert testimony is limited to those cases in which the Nebraska Evidence Rules apply. Since this is a case involving the termination of parental rights, and the Nebraska Evidence Rules are not applied in such cases, the *Daubert* standards do not apply to this case. See *In re Interest of Rebecka P., supra.* Thus, this argument is without merit.

(c) Due Process

Tammie argues that the court erred in overruling the motion in limine to exclude Dr. Talbot's deposition, and Tammie implies that the requirements of due process were not met by the admission of such deposition. We find that due process requirements were fulfilled because fundamentally fair procedures were used.

We have previously recognized that Nebraska Evidence Rules do not apply in cases involving termination of parental rights. See *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). Tammie correctly maintains that the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. See *id.* To this end, fundamentally fair procedures must be used by the State. See *In re Interest of Rebecka P., supra.*

The record shows that Tammie received notice of the deposition, she was represented by counsel, and Tammie's counsel cross-examined Dr. Talbot. Therefore, we find no basis on which to conclude that Dr. Talbot's deposition should not have been admitted into evidence. Due process requirements were met, and the admission of Dr. Talbot's expert testimony was proper. Therefore, this argument lacks merit.

(d) Existence of Reversible Error

[19] We additionally note, sua sponte, that even if Dr. Talbot's deposition was improperly received, such action would not by itself constitute reversible error; a showing of prejudice must be made. See, *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of L.H. et al.*, 241 Neb.

232, 487 N.W.2d 279 (1992). Tammie must show that the inclusion of the deposition in the evidence was prejudicial to her due process rights. See *id.*

In the instant case, Tammie does not argue that she was prejudiced; nor do we find any basis on which to conclude that Tammie was prejudiced. We find no reversible error with respect to the motion in limine.

4. Statement of Former Caseworker

Tammie asserts that the written statement of a former DHHS caseworker, Stacey Mitlehner, should have been accepted into evidence. However, on our de novo review of the record, we find that the statement was properly excluded and that no reversible error exists. The requirements of due process were comported with, and the judge was within his discretion to exclude the statement.

Tammie offered into evidence the statement of Mitlehner, who was unavailable to testify at the trial. The statement was a written memorandum containing her account of Tammie's history and progress. Both the State and Kindra's guardian ad litem objected to the admission of the statement, based on hearsay. The court sustained the objections.

Tammie correctly asserts that a due process analysis is required concerning the trial court's refusal to admit this evidence. She argues that fundamental fairness would dictate that since the State was allowed abundant hearsay in its case, she ought to be allowed hearsay evidence in her case. However, Tammie offered no explanation for Mitlehner's unavailability to appear, and the State was given no opportunity to cross-examine the witness. Tammie's attorney explained only that he "couldn't get [Mitlehner] to come in."

[20] Additionally, the Nebraska Evidence Rules provide a guidepost in determining whether admission or exclusion of particular evidence would violate fundamental due process in termination of parental rights cases. See, *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

[21] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial

right of a litigant complaining about such evidence admitted or excluded. *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005). See Neb. Rev. Stat. § 27-103(1) (Reissue 1995).

[22] In the instant case, the substance of the excluded evidence was made known to the trial court pursuant to § 27-103(1)(b), and the court was within its discretion to determine relevancy and admissibility of the evidence. As such, we find no substantial right was unfairly prejudiced by the exclusion of the statement.

[23] Additionally, Neb. Rev. Stat. § 27-403 (Reissue 1995) provides that relevant evidence may be excluded if there is "needless presentation of cumulative evidence." The statement of Mitlehner was cumulative in the sense that the court had already heard evidence on Tammie's history and progress. This assignment of error is without merit.

V. CONCLUSION

Upon a de novo review of the record, there is clear and convincing evidence that termination of Tammie's parental rights is proper pursuant to § 43-292(7) and is in the best interests of Kindra. No due process rights were violated in the overruling of Tammie's motion in limine or in the court's admission of Dr. Talbot's deposition. No due process rights were violated when the court excluded the statement of Mitlehner, the former caseworker, and no prejudicial error resulted from such exclusion. The county court's order terminating Tammie's parental rights with regard to Kindra is affirmed.

AFFIRMED.

BARBARA D. GRANDT, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

705 N.W.2d 600

Filed November 15, 2005. No. A-05-114.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. **Workers' Compensation.** Loss of earning power and employability are the bases for compensation for permanent partial disability to the body as a whole.
4. ____. The overall purpose of the Nebraska Workers' Compensation Act is to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act.
5. ____. One purpose of the Nebraska Workers' Compensation Act is to compensate an employee for the loss of his or her earning power.
6. ____. The right to and amount of recovery in workers' compensation proceedings are purely statutory.
7. **Workers' Compensation: Legislature.** The Nebraska Workers' Compensation Act creates rights which did not exist at common law, and the Legislature may place such restrictions thereon as it sees fit.
8. **Workers' Compensation.** The fact that vocational rehabilitation may reduce an employee's loss of earning power is not a valid reason for postponing a determination of such loss.
9. ____. Upon a determination that an injured worker has reached maximum medical improvement, a trial court is obligated to determine the injured worker's loss of earning power without speculating about the possible result of vocational rehabilitation.
10. ____. Where a trial court is not called upon to make a determination of loss of earning power until after completion of vocational rehabilitation, the court is not required to retroactively look to the extent of loss of earning power as of the date of maximum medical improvement and disregard the documented change in loss of earning power flowing from completion of vocational rehabilitation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James F. Fenlon, P.C., for appellant.

Stuart J. Dornan, Douglas County Attorney, and Bernard J. Monbouquette for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Barbara D. Grandt appeals from the order of the Nebraska Workers' Compensation Court review panel affirming the decision of the trial court. We are confronted with the question of whether a trial court, if it has not been called upon to determine loss of earning power until after completion of vocational rehabilitation, must disregard the reduction in loss of earning power

resulting from successful vocational rehabilitation and calculate continuing benefits upon the loss of earning power as it existed immediately upon attainment of maximum medical improvement (MMI). Because we conclude that the trial court may consider the full circumstances existing at trial, we affirm.

BACKGROUND

The relevant facts are not in dispute. On November 8, 1999, when Grandt was employed by Douglas County (Douglas) as a nurse, Grandt was attacked by a patient and suffered back injuries. Douglas recognized that Grandt had suffered a work-related injury and, without any proceedings before the Workers' Compensation Court, began making payments to Grandt in relation to her claim for workers' compensation benefits. While those payments were ongoing, Grandt's primary treating physician opined that Grandt had reached MMI as of July 24, 2000.

During periods between November 9, 1999, and November 23, 2002, Douglas paid Grandt permanent partial disability (PPD) benefits based on a 40-percent loss of earning power. On December 6, 2001, shortly after Grandt began a vocational rehabilitation program, Gail Leonhardt, the vocational rehabilitation counselor whom the parties had agreed to engage, rendered an opinion regarding loss of earning power. Leonhardt's report stated that a vocational rehabilitation plan had been submitted and that Grandt was participating in an associate degree program in substance abuse counseling, but that

> [a]s per the request, decided upon as per agreement of [counsel for both parties], an earning capacity assessment as per Gibson v. Kurt Mfg., [255 Neb. 255, 583 N.W.2d 767 (1998), was] being conducted, considering [Grandt's] loss of earning capacity as of the date she reached [MMI], prior to undergoing any vocational rehabilitation as a result of this injury.

Leonhardt found that Grandt had sustained a 35- to 45-percent loss of earning power as of the date of MMI.

On August 17, 2002, Grandt completed the vocational rehabilitation plan, through which she obtained an associate degree in substance abuse counseling. In an "update" of Grandt's loss of earning power requested by Douglas, Leonhardt noted that his

previous report had not considered "completed future vocational rehabilitation" and found that Grandt's loss of earning power was "reduced" to 25 to 35 percent upon completion of the vocational rehabilitation plan because Grandt was capable of performing work in the field of substance abuse counseling. Commencing November 24, Douglas unilaterally reduced Grandt's PPD benefits, basing subsequent payments on a 25-percent loss of earning power.

In a petition filed on March 13, 2003, after the vocational rehabilitation training had been completed and Douglas had reduced Grandt's PPD benefits, Grandt requested a hearing to address that reduction. At trial, the parties presented evidence, consisting primarily of a written stipulation and related exhibits. In its subsequent written decision, the trial court found that Grandt had sustained "a prevocational rehabilitation loss of earning capacity of 40 percent and a post vocational rehabilitation loss in earning capacity of 30 percent." The trial court then stated the respective rates of compensation to which each loss of earning power percentage "would entitle" Grandt. The trial court ordered:

> [Douglas] is entitled to "compute" [Grandt's] loss in earning capacity at the post vocational rehabilitation amount of 30 percent and that [Douglas] shall continue to pay a 30 percent loss in earning capacity . . . for the period of time set forth in [the parties' stipulation] and from and including November 24, 2002 to the date of hearing of November 20, 2003 and continuing for a period of time not to exceed 300 weeks.

While the order perhaps lacks some precision in that Douglas unilaterally reduced Grandt's PPD benefits based upon a 25-percent loss of earning power rather than 30 percent, we conclude that the order intended to approve the payments based upon a 40-percent loss prior to November 24, 2002, and upon a 30-percent loss from and after that date. Grandt appealed to the review panel, assigning the same errors she assigned in this court. The review panel summarily affirmed, with one judge dissenting and one judge in the majority responding to the dissent. Grandt now appeals to this court.

ASSIGNMENTS OF ERROR

Grandt alleges that the trial court erred in (1) finding that she had two different losses of earning power and (2) finding that her loss of earning power could be "re-determined" after she had completed vocational rehabilitation.

STANDARD OF REVIEW

[1,2] 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. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005).

ANALYSIS

Loss of Earning Power After Vocational Rehabilitation.

We choose to first address Grandt's second assignment of error, asserting that loss of earning power cannot be "re-determined" after completion of vocational rehabilitation. The simple answer to this assertion is that there has been only one determination by the trial court, made in response to a petition filed after completion of vocational rehabilitation and long after Grandt attained MMI. However, Grandt's argument makes it clear that this assignment is intended to address the date for determination of loss of earning power.

[3] Grandt contends that her loss of earning power must be determined as of July 24, 2000, the date she reached MMI, and not as of her completion of vocational rehabilitation. Loss of earning power and employability are the bases for compensation for PPD to the body as a whole. See *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989). Neb. Rev. Stat. § 48-121(2) (Reissue 2004) provides for awards of PPD benefits, and states:

> For disability partial in character, except the particular cases [of loss or loss of use of specified members], the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . . This compensation shall be paid during the period of such partial disability but not beyond three hundred weeks. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability.

Grandt argues that § 48-121(2) does not provide for a reduction of PPD benefits following completion of vocational rehabilitation and that, therefore, the workers' compensation court, as a tribunal of limited and special jurisdiction, does not have authority to change the rate of benefits at such time. However, § 48-121(2) requires only that loss of earning power be calculated after the injury, and the period following vocational rehabilitation fits within that timeframe.

The Nebraska appellate courts have not confronted this precise situation, in which no determination of loss of earning power is sought before the Workers' Compensation Court until after completion of vocational rehabilitation. While it appears that in *Clemco Fabricators v. Becker*, 62 S.W.3d 396 (Ky. 2001), another state's high court has addressed the question, we conclude that Nebraska case law precludes us from using that court's rationale. The *Clemco* court relied on a statute which allowed for the reopening of an award on the motion of a party or on the administrative law judge's motion where objective medical evidence showed a worsening of impairment due to a condition caused by the compensable injury. In effect, the *Clemco* court treated the matter as both an initial claim and a reopening. We believe that the Nebraska Supreme Court, in *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998), definitively rejected the contention that the Nebraska statute concerning modification of workers' compensation awards can support a reduction of an award based on the ground that vocational rehabilitation was successful in decreasing a claimant's loss of earning power. In the case before us, however, we are confronted by an initial determination by the

lower court, and Douglas has not sought to invoke the Nebraska statute concerning modification of an award. Thus, the real question that we must answer is, What is the proper time for determination of loss of earning power?

Before we turn to a discussion of the Nebraska case law upon which the parties rely in disputing the answer to this question, we note some general principles. In an ordinary tort action, the principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as that person would have been had there been no injury, that is, to compensate the person for the injury actually sustained. See *Keitges v. VanDermeulen*, 240 Neb. 580, 483 N.W.2d 137 (1992). In that context, the time for assessing damages concerning an impairment, loss, or diminution of future earning power is at the time of trial. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988). The injured party is not required to postpone the right to recover damages for such injuries until there is either full recovery, surgery, exhaustion of possible therapy, or treatment, although the party may choose to do so. *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972).

[4-7] The overall purpose of the Nebraska Workers' Compensation Act (Act), on the other hand, is to provide benefits for employees who are injured on the job, and the terms of the Act are to be broadly construed to accomplish the beneficent purposes of the Act. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). Within that general goal, one purpose of the Act is to compensate an employee for the loss of his or her earning power. See *Warner v. State*, 190 Neb. 643, 211 N.W.2d 408 (1973). While this purpose is similar to the purpose of recompense for future loss of earning capacity in a tort action, the right to and amount of recovery in workers' compensation proceedings are purely statutory. *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986). The Act creates rights which did not exist at common law, and the Legislature may place such restrictions thereon as it sees fit. *University of Nebraska at Omaha v. Paustian*, 190 Neb. 840, 212 N.W.2d 704 (1973).

While § 48-121(2) does not explicitly answer the precise question before us, Grandt contends that Nebraska Supreme Court precedent compels a result contrary to that reached by the

trial court and the majority of the review panel. Grandt relies on *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998), and *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000).

In *Gibson*, the trial court awarded Michael Gibson vocational rehabilitation benefits but declined to determine loss of earning power until after Gibson had completed vocational rehabilitation. The trial court stated that if, after vocational rehabilitation, the parties could not agree on Gibson's loss of earning power, either party could apply for further hearing. The employer appealed, and Gibson cross-appealed. The review panel determined that because Gibson had attained MMI by the time of trial and had received an impairment rating with restrictions, the trial court was clearly wrong in declining to assess Gibson's loss of earning power. On appeal, this court reversed the review panel's order, in part, determining that Gibson was entitled to vocational rehabilitation and that where the claimant is awarded vocational rehabilitation, the trial court should postpone a determination of loss of earning power until after completion of that rehabilitation.

[8] On further appeal, the Nebraska Supreme Court in *Gibson* reversed this court's order, affirmed the review panel's order, and stated:

> [U]pon a determination that Gibson had reached [MMI], absent a valid reason for not making such a determination, the trial judge was obligated to make a determination as to Gibson's loss of earning power. The fact that vocational rehabilitation may reduce an employee's loss of earning power is not a valid reason for postponing a determination of such loss. To hold otherwise would impose an unfair hardship on employees with [PPD] to the body as a whole who have been granted vocational rehabilitation. . . .
>
> . . . It is the intent of the Act that the employer pay [PPD] benefits as determined, if any, as soon as possible after [MMI] has been reached and that the employer, regardless of the employee's ability to increase his or her earning power through vocational rehabilitation, must continue such payment during the limited period of time provided by the Act [in § 48-121(2)] unless the requirements of

> [Neb. Rev. Stat.] § 48-141 [(Reissue 1993)] or [Neb. Rev. Stat.] § 48-185 [(Reissue 1993) (providing for appeal after review)] have been met.

255 Neb. at 265-66, 583 N.W.2d at 773.

[9] In *Collins v. General Casualty, supra*, the trial court found that Scott Collins had sustained a compensable injury and awarded benefits, including vocational rehabilitation. The trial court estimated that Collins' loss of earning power would be 5 percent after successful completion of vocational rehabilitation. The review panel affirmed, but determined that the trial court had erred in estimating Collins' loss of earning power. The Nebraska Supreme Court affirmed the review panel's order, holding that because Collins had reached MMI, the trial court was obligated to determine his loss of earning power and had erred in speculating about the possible result of vocational rehabilitation when determining his loss of earning power.

Grandt contends that no language in *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998), or *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000), allows the trial court to find that completion of vocational rehabilitation has reduced the claimant's loss of earning power. However, both cases are distinguishable from the case at hand.

First, in *Gibson* and *Collins*, trial occurred before the claimant completed vocational rehabilitation; whereas, in the case before us, trial was held after Grandt completed vocational rehabilitation. Unlike the situations in *Gibson* and *Collins*, the trial court in the instant case did not postpone a determination of loss of earning power or speculate about it. Rather, the trial court in this case made a loss of earning power determination based on all of the evidence available to it at the time of trial.

Second, Grandt received compensation for loss of earning power during the period between the dates of MMI and completion of vocational rehabilitation. This alleviates the principal concern expressed by the Nebraska Supreme Court in *Gibson*—that despite the trial judge's finding that Gibson had suffered a substantial loss of earning power, by deferring determination of the extent of loss until completion of vocational rehabilitation, the judge effectively denied Gibson any compensation for loss of earning power until completion of all the appeals. In the

instant case, the compensation Grandt received for loss of earning power during the full period of time between MMI and completion of vocational rehabilitation was calculated without any regard to the potential effect of the pending or future vocational rehabilitation. Also of note is the fact that Grandt received temporary total disability benefits while completing her vocational rehabilitation—again alleviating the *Gibson* court's concern that the injured worker would be without benefits during vocational rehabilitation.

Grandt also argues that the language of the court's opinion in *Gibson*, which we quoted at length above, dictates that loss of earning power must be determined as of the date of MMI without regard to the time at which the compensation court is called upon to make that determination. Grandt asserts that because the Legislature has not amended § 48-121(2) or Neb. Rev. Stat. § 48-141 (Reissue 2004) to address the timing of the determination of loss of earning power, this court must presume that the Legislature has acquiesced in the interpretation of those statutes contained in *Gibson*. However, as discussed above, due to factual differences, the holding in *Gibson* does not apply to the case at hand. In the case before us, the compensation court made a determination of Grandt's loss of earning power as soon after Grandt attained MMI as the court was called upon to make that determination.

We also observe that in *Collins v. General Casualty*, 258 Neb. 852, 858, 606 N.W.2d 93, 98 (2000), the Nebraska Supreme Court stated that "since Collins had reached [MMI], the trial judge was obligated to determine his loss of earning power, and . . . the trial judge erred in speculating what would be the result of the vocational rehabilitation when determining loss of earning capacity." We find it significant that the Supreme Court addressed the issue merely as a problem of speculation. This implies that if the vocational rehabilitation had been completed, then the trial court properly could have considered the results. In the instant case, where the vocational rehabilitation was completed before the trial court was called upon to determine the loss of earning power, the implication from *Collins* supports the trial court's determination of loss of earning power as of the time that Douglas reduced Grandt's benefit.

This result provides Grandt with the prompt payment of benefits and fully recognizes her greater loss of earning power between MMI and completion of vocational rehabilitation—which seems to us to be fully consistent with the purposes of the Act set forth above.

Multiple Losses of Earning Power.

Grandt's other assignment of error alleges that the trial court erred in finding that she had sustained two different losses of earning power. This assignment of error does not accurately reflect the trial court's award.

[10] As we have discussed above at some length, the trial court merely determined, as soon after Grandt reached MMI as the court was called upon to make a determination, the extent of Grandt's loss of earning power. Grandt's assignment of error on this matter relies upon her earlier argument that the trial court was required to retroactively look to the extent of loss of earning power as of the date of MMI and disregard the documented change in loss of earning power flowing from completion of vocational rehabilitation. For the same reasons that we have already rejected that argument, we conclude that this assignment of error also lacks merit.

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not err in considering the beneficial effects of vocational rehabilitation on Grandt's loss of earning power, and we affirm.

AFFIRMED.

GARY DEAN HUGHES, APPELLEE, V.
MARY BETH HUGHES, APPELLANT.

706 N.W.2d 569

Filed November 22, 2005. No. A-04-939.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.

2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judgments: Evidence: Appeal and Error.** 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. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Divorce: Property Division.** In determining and dividing the marital estate, the proper methodology is a three-step sequential 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.
6. ____: ____. The purpose of a property division is to distribute the marital assets equitably between the parties.
7. ____: ____. 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.
8. **Divorce: Property Division: Proof.** Property acquired by one spouse through gift or inheritance ordinarily is set aside to the individual receiving the inheritance or gift and is not considered a part of the marital estate, unless the other spouse has contributed to the improvement or operation of the property. Evidence is required to show the value of the contributions and that the contributions were significant.
9. ____: ____: ____. For inherited money expenditures to be set aside as nonmarital property, it is insufficient to simply show the amount of the expenditures.
10. ____: ____: ____. Where there is commingling of marital property and inherited funds, it is necessary that there be proof of the monetary effect of the inherited money expenditures on the value of the marital asset before it can be concluded that the party claiming the nonmarital property set aside has carried his or her burden of proof.
11. **Property Division.** A set-aside of inherited property requires identification of the inherited property.
12. **Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
13. **Divorce: Property: Interventions.** The right of third parties to intervene in divorce proceedings is very limited, but may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in the dissolution action.
14. **Child Support.** Earning capacity, which includes money available from all sources, may be used in lieu of a parent's actual income.
15. ____. Income averaging for the purpose of child support is to be used when there are yearly fluctuations in a parent's income, rather than when the supporting parent's income is consistently increasing or decreasing.

16. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
17. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
18. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
19. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed as modified.

Heather Swanson-Murray and Mandi J. Schweitzer, of Yeagley & Swanson-Murray, L.L.C., for appellant.

John O. Sennett and Julianna S. Jenkins, of Sennett, Duncan, Borders & Jenkins, for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

I. INTRODUCTION

Mary Beth Hughes appeals the order of the Garfield County District Court, which dissolved her marriage to Gary Dean Hughes. The case is complicated by the fact that assets from Gary's deceased mother's trust have been improperly transferred and are now part of property which must be dealt with in this dissolution action, and the evidence does not allow accurate tracing of such trust assets.

II. FACTUAL AND PROCEDURAL BACKGROUND

Gary and Mary were married on May 26, 1979. At the time of the June 15, 2004, trial, Gary was 51 years old and Mary was 46 years old. During the marriage, the parties had two children and adopted a third child. At the time of trial, the parties' son, Jason, was 24 years old, and their daughter Kaycee was 19. Allison, born April 6, 1994, was the only child at issue in the proceedings.

Gary is employed with the North Loup River Public Power and Irrigation District, earning a gross monthly salary of $1,875. Until 1993, Mary was employed outside the home. From 1993 until the parties' separation, Mary stayed home as the primary caregiver for the children and operated the parties' business on a property known as Trapper's Creek. At the time of trial, Mary worked as a seasonal employee, earning $5.50 per hour, for 40 hours per week from May to October. She testified that she would need to obtain other employment and that she had a "[s]ecretarial" associate degree. Mary said that there was employment available in the area, much of it secretarial work for $8 per hour.

On September 18, 1992, the parties purchased the real estate known as Trapper's Creek for $110,000, on which property they later operated the aforementioned business. Emma A. Hughes, Gary's mother, loaned the parties $40,000 for the purchase of Trapper's Creek, and the parties obtained a loan for the remaining $70,000 from another source. At the time of trial, there was still a debt of $24,296.86 associated with Trapper's Creek. The debt did not include the loan from Emma, which was forgiven when she died. Trapper's Creek includes a cabin and some land used for "recreation," such as hunting and fishing, as well as approximately 80 acres used for growing alfalfa. Trapper's Creek is located next to land owned by the " 'Emma A. Hughes Family Trust' " (Emma's trust). The land owned by the trust includes 80 acres, as well as two residences, one of which Gary and Mary lived in, rent free and tax free, during their entire marriage. Gary became the trustee of Emma's trust upon her death in October 1993.

Emma's trust provided, among other things, that $25,000 each in life insurance proceeds would be distributed to Gary, Mary, Jason, and Kaycee. Gary would receive the income from the trust's 80 acres and two residences until age 65. The trust provides that when Gary reaches 65, the real estate will pass to Jason and Kaycee, free of the trust. As for the residue of the trust, meaning all assets except the 80 acres and the two residences, half is to be "allocated" to Gary, from which half he is to receive the income until age 65, at which time the principal and any then accumulated income of his allocation will be distributed to him.

The other half of the residue is to be divided by allocating a quarter of the total to Jason and the remaining quarter to Kaycee. The interest or income on Jason's and Kaycee's allocations "shall be accumulated and become a part of the principal" until each attains the age of 21. From age 21 to 25, they each will receive the earnings on their allocations. Upon reaching age 25, they each are to receive half the principal remaining in their allocations of Emma's trust. At age 30, each will receive the balance of their allocations of Emma's trust, free of the trust. We note that the only separate trusts to be established via Emma's trust are two separate "educational" trusts for Jason and Kaycee to be funded by $25,000 per child from Emma's life insurance proceeds, which we have previously mentioned. Otherwise, Emma's trust is to remain intact, with a "residuary miscellaneous account" to be allocated as discussed above—Emma's trust does not provide for the establishment of separate trusts to handle the allocations. However, the record reveals that at some point, separate trusts, in addition to the educational trusts, were established by Gary for Jason and Kaycee using assets from Emma's trust; but the details about how this was done and the assets used to fund the trusts are extremely sketchy. We point out these facts at this time as a precursor to our later finding that transfers by Gary from Jason's, Kaycee's, and Emma's trusts to a trust which Mary established for herself were improper.

On March 30, 1994, Gary and Mary each executed separate living revocable trusts. On that same day, Gary and Mary conveyed a one-half interest in Trapper's Creek to each of their trusts. Mary testified that she received $25,000 in life insurance proceeds from Emma's trust, but that she could not definitely say that the entire amount went into the "Mary B. Hughes Living Revocable Trust" (Mary's trust). In October 2000, Gary signed letters authorizing the transfer to Mary's trust of 70 shares of "Microsoft" from Kaycee's trust, 145 shares of "Qwest Communications" from Emma's trust, and 256 shares of "Bank One" as well as 25 shares of "Sun Microsystems" from Jason's trust. The evidence at trial showed that the investment or brokerage account in Mary's trust was valued at $63,369.23 as of August 29, 2003.

Gary testified that Emma's trust paid for approximately $25,000 to $30,000 worth of "improvements" to Trapper's Creek which included putting in a well, a septic tank, and a deck; putting on siding; and redoing a roof and a chimney. Emma's trust sometimes paid the mortgage and real estate taxes on Trapper's Creek.

On July 13, 2004, the district court entered the decree dissolving the parties' marriage, awarding the care, custody, and control of Allison to Mary and ordering Gary to pay alimony of $100 per month for 10 years as well as child support of $387 per month to Mary. The district court also divided the parties' property, finding that Gary's "evidence was more credible than [Mary's] as to values and proposed disposition of the marital property." The court awarded Gary a credit for $38,369 "for funds inherited by him from [Emma's trust]" and found that there was evidence that funds from Emma's trust were used to improve Trapper's Creek, which improvements enhanced its value by "at least $20,000," resulting in a nonmarital credit in that amount to Gary. The district court also ordered Gary to pay Mary $68,324.67 in order to make the division of the property equal. Mary appeals.

III. ASSIGNMENTS OF ERROR

Mary asserts that the district court erred in (1) awarding Trapper's Creek to Gary, (2) giving Gary a credit for an increase in the value of Trapper's Creek due to improvements which were paid for with Gary's inherited funds, (3) giving Gary a credit for $38,369 in inherited funds, (4) failing to give Mary a credit for $25,000 in inherited funds, and (5) failing to consider Gary's income from all sources in determining his child support and alimony obligations.

IV. 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).

[2-4] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002). 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.* A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Velehradsky v. Velehradsky*, 13 Neb. App. 27, 688 N.W.2d 626 (2004).

V. ANALYSIS

1. District Court's Division of Property

We set forth the district court's calculation of how the property was valued and divided:

Item	**Gary**	**Mary**	**Total**
Household Goods	$ 6,270.00	$ 10,325.00	$ 16,595.00
Checking and Savings	3,896.64	2,123.52	6,020.16
Vehicles	5,995.00	12,350.00	18,345.00
Farm and Business	13,910.00	13,071.00	26,981.00
Real Estate	207,284.00	0.00	207,284.00
Life Insurance	95,474.46	75,527.26	171,001.72
Miscellaneous	6,419.00	1,017.00	7,436.00
	$339,249.10	$114,413.78	$453,662.88
Mortgages	($ 24,296.86)	$ 0.00	($ 24,296.86)
Secured Creditors	(3,812.04)	0.00	(3,812.04)
Unsecured Creditors	(1,726.68)	(18.60)	(1,745.28)
	$309,413.52	$114,395.18	$423,808.70
Mary's Trust (funds from Emma's Trust)	(38,369.00)		(38,369.00)
Emma's Trust (funds from Trapper's Creek)	(20,000.00)		(20,000.00)
	$2[5]1,044.52	$114,395.18	$3[6]5,439.70

The court divided what it considered as the marital estate so as to give each party an equal share ($365,439.70 ÷ 2 = $182,719.85), which division resulted in an equalization payment of $68,324.67 ($182,719.85 – $114,395.18) from Gary to Mary that the court ordered to be paid within 90 days.

[5] Mary's assignments of error concerning the property division call into question the trial court's methodology in determining and dividing the marital estate. The proper methodology, a three-step sequential process, is now firmly established. See *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). The first step is to classify the parties' property as marital or nonmarital. *Id.* The second step is to value the marital assets and marital liabilities of the parties. *Id.* The third step is to calculate and divide the net marital estate between the parties. *Id.*

(a) Trapper's Creek

[6,7] Mary asserts that the trial court erred in awarding Gary Trapper's Creek. The purpose of a property division is to distribute the marital assets equitably between the parties. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). 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.* Mary was awarded one-half of the marital estate by the trial court. Gary testified that Trapper's Creek did not generate enough income to pay for the improvements to that property or to pay the principal and interest payments, real estate taxes, and expenses associated with the property. Because Trapper's Creek did not generate enough income, Emma's trust was used to pay many of the financial obligations for Trapper's Creek. Therefore, as a practical matter, had Mary been awarded Trapper's Creek, at a value of $50,000 as she desired, she would have needed a source of income to help fund and operate the business, in addition to needing to pay Gary a judgment to equalize the property division; and we note that there is no credible evidence that Trapper's Creek is worth only $50,000. The evidence is that Trapper's Creek has never made a profit and that secretarial work, which comports with Mary's education,

skills, and experience, is readily available for her. Moreover, Trapper's Creek is directly adjacent to the real property owned by Emma's trust, including the residence in which Gary has a life estate, making an award of Trapper's Creek to Mary an awkward proposition. For all of these reasons, the trial court did not err in awarding Trapper's Creek to Gary.

(b) Improvements to Trapper's Creek

Mary asserts that the district court erred in giving Gary credit for "funds expended on Trapper's Creek from [Emma's trust] during the marriage." Brief for appellant at 18. The district court's decree states that the court found "credible evidence to warrant a credit to [Gary] for funds [that] were used from [Emma's trust] to improve the Trapper's Creek property and that such improvements enhanced the value of Trapper's Creek by at least $20,000." The appraisal of Trapper's Creek cited by the court for the latter finding is dated August 28, 2003, and states that at Trapper's Creek, the dryland is worth $15,080, the grassland and trees are worth $120,204, the cabin is worth $20,000, and the 80 acres being used for alfalfa are worth $52,000, for a total value of $207,284.

The September 1992 purchase agreement for Trapper's Creek allocates the purchase price among various aspects of the property, including $25,000 for the "house," now referred to as "the cabin"; $2,500 for a "domestic well"; and $75,000 for the land and fences. Although we recognize that such allocations can have secondary purposes somewhat affecting their reliability, in this instance, the allocations are worthy of note. The appraisal of Trapper's Creek in evidence at trial, mentioned above, shows that the land has increased in value by about $120,000, but that the cabin is now worth $5,000 less than was allocated to it in the purchase agreement. Moreover, the record does not tell us when the $25,000 to $30,000 from Emma's trust was spent on "improvements." The significance of this latter fact is that the appraisal used by the trial court is "as of" August 28, 2003, whereas the trial was over 10 months later on June 15, 2004. Thus, one predicate to any set-aside to Gary for the $25,000 to $30,000 spent on Trapper's Creek from Emma's trust, or for any portion thereof, is proof that these expenditures

are not already included in the August 28, 2003, appraisal, which values the entirety of Trapper's Creek at $207,284, including only $20,000 for the cabin. Gary's evidence does not fill this gap.

Additionally, no one testified that Trapper's Creek was "enhanced" by at least $20,000 as found by the trial court. In fact, Gary's testimony was that the cabin was in need of repairs and upkeep at the time of purchase. The increase in value of Trapper's Creek from 1992, when it was purchased, to 2003 is attributable to the land, not any enhancement of the cabin. These shortcomings in the evidence necessarily undercut the trial court's decision to set aside $20,000 to Gary for expenditures originating as inherited property from Emma's trust.

[8-10] Mary concedes in her brief that funds from Emma's trust were used to pay for expenses and upkeep of Trapper's Creek. However, she claims that there is no evidence in the record showing "the value of the contribution upon which the claim is made." (Emphasis omitted.) Brief for appellant at 20. In support of this argument, she refers us to *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). *Tyler* held that property acquired by one spouse through gift or inheritance ordinarily is set aside to the individual receiving the inheritance or gift and is not considered a part of the marital estate, unless the other spouse has contributed to the improvement or operation of the property. However, in *Tyler*, the court made it clear that if this exception applies, evidence that the contributions were significant is required, as is evidence of the value of the contributions. However, this case is somewhat different, because Trapper's Creek is clearly marital property and the improvements and maintenance were paid for by Emma's trust. (We must make it clear that we are not, in any way, suggesting or deciding that this was a proper use of funds and assets in Emma's trust.) Nonetheless, the basic notion of *Tyler* about proof of value is applicable in a case such as this, where there is intermingling of marital property and inherited property. For inherited money expenditures to be set aside as nonmarital property, it is insufficient to simply show the amount of the expenditures when property is divided in a divorce, because it is elementary that cost or expenditure does not equate with value. Generally, we

look to the fair market value of an asset. See *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). Where there is commingling of marital property and inherited funds, it is necessary that there be proof of the monetary effect of the inherited money expenditures on the value of the marital asset before it can be concluded that the party claiming the nonmarital property set aside has carried his or her burden of proof.

[11] Our holding above seems to logically flow from the well-established rule that a set-aside of inherited property requires identification of the inherited property. See *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003) (if inheritance can be identified, it is to be set aside to inheriting spouse and eliminated from marital estate). In considering the matter of identification, it necessarily involves more than simply showing that the source of the funds spent on the marital property was a gift or inheritance. What is missing in the identification process in this record is evidence that the inherited money expenditures can be traced to something which has ascertainable value. See, e.g., *Ross v. Ross*, 219 Neb. 528, 364 N.W.2d 508 (1985). In the case of purported enhancement of a marital asset, it must be proved that such expenditures increased the value of the marital asset. In this case, proof is required that the expenditures on Trapper's Creek increased the value of that property as a whole, or the cabin in particular, given that the "improvements" to the cabin form the rationale for the trial court's set-aside of $20,000 to Gary.

There are other problems with the $20,000 set-aside to Gary. Gary testified that one of the expenditures for "improvements" was for a well, but no evidence as to an amount was provided. Additionally, the purchase agreement recited that $2,500 of the purchase price was allocated to a "domestic well," which strongly suggests that the property already had a water source. Therefore, absent evidence to the contrary, there is clearly a permissible inference from the record that the expenditure for a new well was not an improvement enhancing value, but merely "maintenance" to retain value and function. Without overworking this topic, it can be said that many of the other expenditures recited in Gary's testimony would appear to be for simply maintenance rather than improvements.

In summary, proof merely that money was spent on real estate does not establish that the real estate's value has been enhanced. Gary did not prove his entitlement to a set-aside as nonmarital property for expenditures from Emma's trust on Trapper's Creek. Therefore, in our revised property division, Trapper's Creek is all marital property to be included in the marital estate at a value of $207,284.

(c) Treatment of Funds and Assets in Mary's Trust

(i) Mary's Life Insurance Proceeds From Emma

Mary also asserts that the district court erred in finding that there was "credible evidence to warrant a credit to [Gary] for funds inherited by him from [Emma's trust] in the amount of $38,369" and in not giving Mary a credit for the $25,000 she received from Emma's life insurance proceeds. An "SII Investments" (SII) account statement dated August 29, 2003, was used to prove the value of Mary's trust, which she established in March 1994. The statement shows the value of the SII account to be $63,369.23, comprising $562.56 in cash and the balance in stocks or mutual funds. Given stock market fluctuations, this account balance seems "stale" considering that the case was tried 10 months later. However, we can only use the evidence introduced by the parties. The district court awarded the full amount of the SII account to Mary, although incorrectly labeling it "Life Insurance." No nonmarital set-aside was made to Mary for any portion of the SII account. However, the trial court awarded Gary a nonmarital property credit of $38,369, which represents the balance of Mary's trust after $25,000 is subtracted from the rounded value of the SII account held by Mary's trust ($63,369 – $25,000 = $38,369).

As outlined earlier, Mary received $25,000 in life insurance proceeds upon Emma's death, pursuant to provisions of Emma's trust. This $25,000 would initially be Mary's separate property. See *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004) (property acquired through gift or inheritance ordinarily is set aside to individual receiving inheritance or gift and is not considered part of marital estate). See, also, *Ainslie v. Ainslie*, 4 Neb. App. 70, 538 N.W.2d 175 (1995). We dispense with further citation of authority, as the principles applied above to the issue of

the $20,000 set-aside to Gary are equally applicable in this discussion. The crucial issues are whether at the time of the divorce such funds still existed and, if not, whether they can be identified and traced to other existing assets. While Mary argues that the $25,000 from the life insurance is contained within her trust as the result of her investing and managing such money, her SII account contains only $562.56 in cash, and no evidence was introduced to establish that any of the stocks now found in Mary's SII account can be traced to the $25,000 she inherited from Emma.

On cross-examination, Mary first said that everything in her own trust but the $25,000 came from Emma's trust. She then said that it "was a little confusing with all of the money that came in after [Emma] died" and that she could not definitely say that "the $25,000.00 in cash" went into her own trust. Mary also admitted that she did not "know for sure" that such amount went into her trust. She ultimately admitted that transfers were made from Emma's trust, Gary's trust, or Jason's or Kaycee's trust to her trust. Mary had the burden of proof to show either that the SII account still contained the original $25,000 in cash—which it obviously did not—or that the stocks and mutual funds in such account could be traced to the $25,000, meaning that the original $25,000 has been "identified" by the evidence. A thorough examination of the record reveals that Mary failed to carry her burden of proof on this issue.

Searching the record for evidence of the source of the stocks and mutual funds in Mary's SII account is not fruitful other than revealing transfers of stock shown by four letters dated October 25, 2000, signed by Gary as trustee (for Emma's, Jason's, and Kaycee's trusts), directing a brokerage house to transfer to the SII account 70 shares of "Microsoft" from Kaycee's trust, 145 shares of "Qwest Communications" from Emma's trust, and 256 shares of "Bank One" as well as 25 shares of "Sun Microsystems" from Jason's trust. The evidence shows that as of August 29, 2003, there were 50 shares of "Sun Microsystems" and 140 shares of "Microsoft" in the SII account—twice the number of shares of these two stocks as were transferred pursuant to the letters. While a stock split might explain the increase in the number of shares, there is no evidence of such a split. In

any event, the stock in these four companies had a value of $14,658.27 in August 2003, and the evidence shows that such portion of the SII account cannot be traced to the $25,000. There is, of course, the unanswered question of how the other $48,710.96 in stock and mutual funds in the SII account was acquired—and it was Mary's burden to prove that such was acquired by use of the $25,000, as such fact cannot be assumed or presumed when the starting point in this analysis is her uncertain testimony about whether the $25,000 in life insurance proceeds from Emma was ever placed in her trust, as well as her statement in her testimony that "all the rest of the money" in her SII account "[p]robably" came from the other trusts, if she did not put the $25,000 in her trust. Therefore, on this record, the trial court did not err in failing to set aside $25,000 from the SII account to Mary as her separate inherited property.

(ii) Gary's "Inheritance" From Emma of $38,369

We now turn to the $38,369 that the trial court set aside as a "credit to [Gary] for funds inherited by him from [Emma's trust]." Mary assigns this set-aside as error, asserting that such funds are part of the marital estate. Although the trial court did not explain how it arrived at this amount, it is evident that such figure is the balance in the SII account remaining after Mary's claim of $25,000 is deducted from the account's value and the difference is rounded to the nearest dollar. The import of the trial court's calculation is acceptance of Mary's assertion that the SII account contains $25,000 of her separate money, but rejection of her claim that such amount should be set aside to her, while at the same time Gary is awarded a credit, as his inherited property, of an amount equal to the balance of the SII account after a $25,000 deduction. While this award to Gary and the method of setting the amount may not be completely logical, our study of this case makes it apparent that Gary and Mary's cavalier treatment of the restrictions in Emma's trust has created a financial and accounting morass. Therefore, the lack of comprehensive evidence documenting and tracing their handling of Emma's trust assets may account for the district court's result. To put it another way, a rough record in a complicated

divorce case sometimes means that "rough justice" is the best that can be done.

With that prelude, we return to the subject of how the stocks in the SII account were acquired, and we now consider the provisions of Emma's trust. When the document creating that trust is closely studied, it is clear that the four transfers of stock detailed in the above-mentioned letters were improper, to the extent that such stock was corpus or traceable to corpus of the trust which was to be held in the residuary miscellaneous account of the trust (there was no proof by anyone that such stock was not corpus). The transfers were clearly improper because until Gary reached age 65, he had no right to access the principal of Emma's trust. And, obviously, he could not properly transfer principal to Mary or transfer money or assets representing Jason's and Kaycee's allocations of Emma's trust to himself or to Mary before he reached age 65. Other than the trust's 80 acres and the two residences earlier discussed, all of Emma's residuary estate was to remain in the residuary miscellaneous account of Emma's trust—allocated 50 percent to Gary and 25 percent each to Jason and Kaycee, but with the corpus of such allocations remaining "off limits" to the three beneficiaries, Gary, Kaycee, and Jason, at all times during the marriage (as well as for a considerable time in the future, because Gary is not entitled to receive any of the corpus until he is age 65; he was 51 at the time of the trial).

Although the district court's decree is silent on the propriety of the transfers of stock, we review the record de novo, and the issue of the set-aside to Gary of $38,369 as property inherited from Emma necessarily requires us to examine the propriety of the transfers. In addition to our finding above, we note that during oral argument of this appeal, Gary's counsel candidly conceded that the transfers were improper. And Gary admitted much the same at trial, as well as the fact that there were no provisions in Emma's trust authorizing him to use Emma's trust funds to pay mortgage payments and real estate taxes on Trapper's Creek, as was apparently routinely done. Therefore, because the evidence fails to show that the noncash assets of Mary's trust, 99 percent of the SII account, were the result of proper transfers

from Emma's trust, the assets in the SII account cannot be considered marital property and Mary's claim to that effect is clearly without merit.

That said, we hasten to point out that our conclusion about the impropriety of the transfers is reached only in the context of determining whether the trial court erred by not including the $38,369 under discussion in the marital estate, as Mary wants. Rejecting her assignment of error is a far different conclusion from saying that Gary was lawfully entitled to access the corpus of Emma's trust assets, including any that may now be residing in the SII account. The record strongly suggests that Gary and Mary routinely ignored the restrictive terms of Emma's trust.

The inheritance tax worksheet for Emma's estate shows that her net estate was approximately $651,000, of which $207,000 was attributed to the trust's 80 acres and, though they are not explicitly mentioned, the two residences. Thus, the "residuary miscellaneous account" of Emma's trust would contain approximately $444,000 of corpus. When the statements for the accounts which would make up the residuary miscellaneous account as of May 30, 2003, are examined, there is approximately $172,142 left—in a situation where no corpus of the residuary miscellaneous account could have yet been properly used or spent.

Clearly, there are entities and individuals, not parties to this action, who likely have potential claims against Gary, Mary, or both concerning the SII account, the transfers, and the handling of Emma's trust. Obviously, we cannot resolve such claims in this action, as neither the claims nor the parties are before us.

While Gary is ultimately the 50-percent beneficiary of the corpus of the trust, he may have a financial day of reckoning with the other beneficiaries—his children. Therefore, while the district court's set-aside to Gary of $38,369 as an inheritance is really not supported by the evidence and he certainly did not carry his burden to prove that such sum was his inherited property, the trial court's division will not be set aside. Our reasoning is simply that the result strikes us as a fair and equitable result—considering all of the unique circumstances we have detailed in this opinion, as well as other considerations which are revealed to some degree by the evidence. In other words,

this seems the best result that can be accomplished, and such result has the advantage of putting more assets in Gary's hands should the other beneficiaries seek to hold him accountable for his handling of Emma's trust. And, in the final analysis, in approximately 13 years, Gary is entitled to 50 percent of the residuary corpus.

[12] This seems an appropriate point to recall that the division of property in a dissolution action is based on equitable principles and that the ultimate test for determining the appropriateness of a division of property is reasonableness as determined by the facts of each case. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). There is no mathematical formula by which such awards can be precisely determined, because each depends upon the facts of the particular case. *McCollister v. McCollister*, 219 Neb. 711, 365 N.W.2d 825 (1985). Finally, we note that the record is clear that Gary and Mary were both involved in the decisions about Emma's trust and that both participated in the transfers and usage of the trust's assets. Thus, while the result here may not be perfect and precise, we think it is as fair and equitable as we can make it, under these unusual circumstances, recalling what we said in *Griess v. Griess*, 9 Neb. App. 105, 116-17, 608 N.W.2d 217, 225 (2000):

> "[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973). In *Janke v. Chace*, 1 Neb. App. 114, 487 N.W.2d 301 (1992), we also said that where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.

[13] To conclude this issue, we note that attached to the court's decree are a property statement and the court's property award and division worksheet, the latter document containing an award of "Life Insurance" in the amount of $75,527.26 to Mary. But, it really is not life insurance. Rather, it is $4,354.46 of "School retirement," $7,803.57 from "AmerUS Life," and the $63,369.23 from the SII account which total $75,527.26. Thus, Mary was actually awarded possession of the SII account containing the $63,369.23, and Gary's set-aside was accounted for

as a credit against this equalizing judgment to Mary. So that there is no misunderstanding, we point out here that we affirm that result. However, we hasten to add that our decision resolves the matter of possession and use of Mary's trust's SII account only as between Mary and Gary in his capacity as an individual, not as to Gary in his capacity as trustee of Emma's trust. In other words, our affirmance of the district court's award is not a finding, binding on those who might later assert claims against such account or against Gary (individually or as trustee) or Mary, that Mary or Gary is the lawful owner of any portion of the assets in the SII account. We simply leave the account in Mary's possession as an equalizing judgment and give Gary a credit against that equalizing judgment for a portion of the SII account. While it was possible for other persons or entities to have sought intervention in this action to assert claims against assets in the hands of Gary and Mary, no such relief was sought. See *Yelkin v. Yelkin*, 193 Neb. 789, 229 N.W.2d 59 (1975) (right of third parties to intervene in divorce proceedings is very limited, but may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in dissolution action). No potential claims of the various trusts and no claims of Jason and Kaycee are before us, and in any event, the record is inadequate to resolve any such claim. Compare *Parker v. Parker*, 1 Neb. App. 187, 492 N.W.2d 50 (1992) (district court erred in divorce action in attempting to mandate disposition of account under Nebraska Uniform Gifts to Minors Act, where parties' son was no longer minor).

2. Calculating and Dividing Marital Estate

The second step in an equitable property division is to value the marital assets and marital liabilities of the parties. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in Neb. Rev. Stat. § 42-365 (Reissue 2004). *Medlock v. Medlock, supra.* No error is assigned to the district court's valuation of the property in the instant case; nor does either party claim that an equal division is not appropriate. Thus, we accept the district court's valuations as stated in the decree and accept its finding that the

marital estate should be equally divided. Our calculations using the three-step sequential methodology are as follows, after the modification previously outlined in this opinion:

Assets	**Gary**	**Mary**
Household Goods	$ 6,270	$10,325
Checking and Savings	3,897	2,124
Vehicles	5,995	12,350
Farm and Business	13,910	13,071
Trapper's Creek	207,284	0
Life Insurance/Retirement	95,474	12,158
Miscellaneous	6,419	1,017
SII Account		25,000
TOTAL	$339,249	$76,045
Liabilities		
Mortgages	$ 24,297	
Secured Creditors	3,812	
Unsecured Creditors	1,727	$ 19
TOTAL	$ 29,836	$ 19
Net Value of Property Received	$309,413	$76,026

Net Marital Estate:
$309,413 + $76,026 = $385,439 ÷ 2 = $192,719.50
Equalization Payment to Mary:
$192,719.50 – $76,026 = $116,693.50
Gary's Credit Against Judgment: $38,369
Mary's Equalizing Judgment From Gary: $78,324.50

Therefore, initially, Gary's equalization payment to Mary, rounded to the nearest dollar, was $116,693. However, because Mary retains all of the SII account in her possession and because Gary receives a credit for $38,369 of the SII account, requiring Gary to pay Mary a judgment which includes 50 percent of the $38,369 would constitute a substantial and undeserved "windfall," given our previous discussion about the propriety of the handling of Emma's trust. Therefore, the equalization payment is reduced by $38,369 as the most straightforward method of "balancing the ledger" between Gary and

Mary. The judgment to be paid by Gary to Mary is $78,324, and the district court's order is so modified. The district court's previous judgment of $68,324.67 was to be paid within 90 days of the entry of the decree. Therefore, Gary shall pay Mary the sum of $68,324 within 90 days after our mandate is issued, and the remaining balance of $10,000 shall be paid within 180 days of the issuance of the mandate. Interest shall not accrue on such amounts unless they are not timely paid, in which event the statutory interest rate on judgments in effect at the time when the delinquency occurs shall apply until such amounts are paid in full.

3. Gary's Income and Child Support

Mary argues that the trial court erred in failing to consider all of Gary's income in calculating child support and alimony. We agree as concerns child support. The trial court stated in its order that the child support calculation was based solely on Gary's "regular employment" because the "income from [Emma's trust] property appears sporadic and speculative." Paragraph D of the Nebraska Child Support Guidelines provides that in calculating child support, the total monthly income of both parties "from all sources" is to be used.

The record contains a "2003 Rental Agreement" for the "Hughes Family Trust Farm," which agreement provides that the tenants agreed to pay Emma's trust $135 per acre for 67.6 acres in 2003. Mary testified that this rent was paid; therefore, the trust received $9,126 in 2003 for farm rental, and Emma's trust directs that this income is to be paid to Gary, at least annually. Gary and Mary's 2002 joint income tax return shows that Emma's trust generated interest income of $1,468 and other income of $401. Gary and Mary's 2001 joint income tax return shows that Emma's trust produced interest income of $656, "ordinary dividends" of $6,723, and other income of $2,488. Their 2001 return also shows rent received of $3,600 for the "farm house," which we assume to be the rental house located on Emma's trust property because Gary testified that he intended to rent out that house and that he previously received about $300 per month in rent from it. The parties' 2000 joint income tax return provides that the trust generated interest and ordinary

dividends of $5,256 and other income of $3,076 and that the farmhouse generated rent received of $300. Thus, the evidence in the record provides that the income Gary received from the trust is hardly speculative or uncertain, particularly with respect to the land and residences, although the amounts Gary is entitled to receive might vary somewhat from year to year. But, variance from year to year in the amounts received does not justify the total exclusion of the substantial income that Gary receives from the nonresiduary portion of Emma's trust.

[14,15] From 2000 to 2003, Gary's average income from Emma's trust, calculated using the figures above, was $8,273.50. Using this 4-year average fairly and reasonably accounts for the variances in amounts from year to year. Including the trust income more accurately reflects Gary's earning capacity; earning capacity may be used in lieu of a parent's actual income, and it includes money available from all sources. See *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001). Moreover, The Nebraska Child Support Guidelines specifically allow for income averaging in certain circumstances. The fifth comment to worksheet 1 of the guidelines states, "In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent . . . ." Case law suggests that income averaging is to be used when there are yearly fluctuations, rather than when the supporting parent's income is consistently increasing or decreasing. See *Willcock v. Willcock*, 12 Neb. App. 422, 675 N.W.2d 721 (2004).

Thus, in addition to Gary's gross monthly employment income of $1,875, we find that his income from all sources includes at least an additional $8,273 per year. The trial court erred in not including Gary's income generated by Emma's trust when calculating child support. In our reworking of the child support worksheet, attached as appendix A, Gary's income, rounded to the nearest dollar, is $2,564 per month, resulting in a child support payment of $493 per month which shall be effective retroactively to July 1, 2004, the date provided in the trial court's decree. The trial court is directed to adopt our appendix A as its worksheet and to order child support as set forth above.

4. ALIMONY

[16,17] Mary asserts that the district court erred in "establishing the alimony award to Mary without taking into consideration Gary's considerable nonmarital assets as well as in not considering Gary's income from those nonmarital assets." Brief for appellant at 26. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). 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.* One of the predicates of Mary's argument concerning Gary's nonmarital assets has been undercut by our modification of the property division, as well as by the fact that the residuary miscellaneous account of Emma's trust has been improperly used by Gary—with Mary's admitted involvement.

[18,19] The district court ordered Gary to pay $100 per month beginning July 1, 2004, for a period of 10 years. 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.*

Gary and Mary were married for 25 years. Gary's gross income from all sources is about $30,773 per year. Mary's gross income at the time of trial was about $11,400 per year, but she testified that she was looking for different employment and that she could obtain a secretarial position making $8 per hour, which calculates into a gross income of about $15,400. At the time of trial, Gary was 51 years old and Mary was 46 years old, and no health problems were discussed in the record which would interfere with either party's ability to work. During the marriage, the parties lived in a home owned by Emma's trust

without payment of rent or taxes; thus, there is no marital home for Mary and the parties' daughter Allison. However, Mary will receive a substantial cash payment within 90 days of our mandate which should mitigate any difficulties regarding her housing situation. While Mary's earnings are modest in today's economy, Gary's earnings are likewise modest, particularly without the beneficence of Emma. Additionally, he will have a significant child support obligation. While additional alimony could have been awarded on this record, we are unable to say that the trial court's award of alimony is untenable, and we will not disturb its award.

VI. CONCLUSION

We affirm the court's order granting dissolution of the marriage and granting Mary custody of Allison. We modify the decree to order Gary to pay $68,324 of the property division judgment within 90 days of the entry of the district court's order and an additional $10,000 within 180 days of such time, with interest as provided above. We also modify the amount of child support so that it is $493 per month, effective July 1, 2004. In all other respects, the decree of dissolution is affirmed.

AFFIRMED AS MODIFIED.

(*See page 252 for appendix A.*)

APPENDIX A

WORKSHEET 1

BASIC NET INCOME AND SUPPORT CALCULATION

		MOTHER	COMBINED	FATHER
1	Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)*	953.00		2,564.00
2.	Deductions**			
	a. Taxes***	0.00		333.62
	b. FICA	72.90		196.15
	c. Health insurance****	0.00		0.00
	d. Retirement	0.00		0.00
	e. Child support previously ordered for other children	0.00		0.00
	f. Regular support for other children	0.00		0.00
	g. Total deductions	72.90		529.77
3.	Monthly net income (line 1 minus line 2g)	880.10		2,034.23
4.	Combined monthly net income		2,194.33	
5.	Combined annual net income		34,971.93	
6.	Percent contribution of each parent (line 3, each parent, divided by line 4)*****	30.2%		69.8%
7.	Monthly support from table 1		706.15	
8.	Each parent's monthly share (line 7, times line 6, for each parent)	213.25		492.90

* Court will require copies of last 2 years' tax returns to verify "total income" figures and copies of present wage stubs to verify the pattern of present wage earnings, except where a party is claiming depreciation as a deduction from income, in which case a minimum of 5 years' tax returns shall be required. Income should be annualized and divided by 12 to arrive at monthly amounts.

** All claimed deductions should be annualized and divided by 12 to arrive at monthly amounts.

*** Deductions for taxes will be based on the annualized income and the number of exemptions provided by law.

**** The increased cost to the parent for health insurance for the child(ren) of the parent shall be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium.

***** In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet.

STATE OF NEBRASKA, APPELLEE, V. LARRY ANDERSON, APPELLANT.

706 N.W.2d 564

Filed November 22, 2005. No. A-04-1298.

1. **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.
2. **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.
3. **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.
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. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

Appeal from the District Court for Antelope County, PATRICK G. ROGERS, Judge, on appeal thereto from the County Court for Antelope County, PHILIP R. RILEY, Judge. Judgment of District Court affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Larry Anderson appeals from an order of the district court which affirmed his county court conviction on the charge of trespassing in what was formerly his marital home. Regardless of

whether Anderson had an ownership interest in the home, we conclude that the State adduced sufficient evidence to show that Anderson knowingly entered the home without license or privilege. We therefore affirm.

BACKGROUND

At all times relevant to this proceeding, Carol Anderson and Anderson were in the process of dissolving their marriage. Carol and Anderson separated in 2000, and she has occupied the marital home since that time. After Carol filed for divorce in 2000, Anderson lived with his aunt for a period of time and also lived in a rental house. Carol and Anderson had stipulated that with regard to temporary orders, Carol should be awarded the temporary use and possession of the marital home. A district court order dated January 9, 2001, awarded to Carol the temporary use and possession of the home. Carol testified that she was thus to have possession and use of the house during the pendency of the divorce.

In the decree of dissolution rendered May 21, 2002, the district court awarded to Carol the house and real estate upon which it was situated as her sole and separate property. This court subsequently reversed the order of the district court and remanded the cause for a new trial. See *Anderson v. Anderson*, No. A-02-809, 2003 WL 21398219 (Neb. App. June 17, 2003) (not designated for permanent publication).

Carol testified that she experienced some difficulties with Anderson after he moved out of the home. At some point, Anderson was arrested for a criminal act that allegedly occurred at the home in January 2001, and in the course of the court proceeding in regard to that allegation, a bond prohibited Anderson from being at the home. Carol testified that because of this earlier incident, she would not have given Anderson a license or privilege to enter the home for any reason.

On July 7, 2003, Carol was vacationing in Alaska with two children of the marriage, one of whom was Matt. Carol had arranged for her mother to take care of the house and water plants in Carol's absence. Carol had locked the doors and windows of the house and had given her mother a key. Carol testified that from 2001 up until this vacation, she had changed the locks on

the house two or three times. At the time of this vacation, only Carol and her mother had a key to the house and her mother was the only person who was supposed to be in the house while Carol was away. While on vacation, Carol was informed by her mother about a problem with the house, and Carol called the Antelope County sheriff's office.

Anderson testified that he went to the former marital home on two or three occasions while Carol was gone, and there is no dispute that Anderson was inside the former marital home on July 7, 2003. Anderson testified that he and one of Anderson and Carol's children, Aaron, went to the home on July 7 to pick up Matt. According to Aaron, the home was unlocked, so they decided to wait inside for Matt to return from vacation with Carol.

Aaron did not reside at the home. When asked if he had a key to the home, he answered, "Yeah, we might somewhere I suppose." Aaron did not know whether the key was an old key or a new one. Aaron testified that there was a protection order which prohibited Anderson from entering the house and that Aaron "suppose[d]" that Anderson knew of the protection order. Anderson admitted that Carol did not give him permission to be in the house after protection orders were filed in 2001.

Brad Higgins, a trooper with the Nebraska State Patrol, testified that in the late evening hours of July 7, 2003, he observed Anderson's pickup truck parked at the former marital home and Anderson answered the door when Higgins knocked. Higgins and Anderson discussed who actually lived at the residence, and Anderson handed Higgins a document. The document appeared to be an opinion of a court and stated that Anderson "owned the house because his divorce decree was overturned." Higgins testified that Anderson said he "owned some of the property" but did not have any clothes in the house. Higgins testified that he explained to Anderson that "it was just like a rental property. [Anderson] may own it but he didn't have a right to actually be in there. At that point in time, [Anderson] said — that was way different. And he asked [me] to leave." Higgins left, and after speaking with the county attorney, Higgins returned to the former marital home. At that time, Anderson's pickup was parked inside the garage and the garage door was down. Higgins told

Anderson that Anderson needed to leave or he would be arrested. Anderson left the house at approximately 11:45 p.m.

On October 3, 2003, the State filed a complaint in the county court charging Anderson with first degree trespassing. Following a bench trial, the county court found Anderson guilty of trespassing and imposed a sentence of 18 months' probation, a 90-day suspended jail sentence waivable upon successful completion of probation, and a $1,000 fine. Anderson appealed the conviction and sentence to the district court, and the district court affirmed. Anderson now appeals to this court.

ASSIGNMENTS OF ERROR

Anderson alleges (1) that the evidence was insufficient to support the conviction and (2) that the county court erred in determining the essential elements of the offense by using a negligence standard.

STANDARD OF REVIEW

[1] 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. *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005).

[2] Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Sparr*, 13 Neb. App. 144, 688 N.W.2d 913 (2004).

[3] 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. *State v. Dittoe, supra.*

ANALYSIS

Sufficiency of Evidence.

[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. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005). Neb. Rev. Stat. § 28-520(1) (Reissue 1995) provides that "[a] person commits first degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or secretly remains in any building or occupied structure, or any separately secured or occupied portion thereof." Anderson argues that his ownership interest in the property was an affirmative defense to the charge of criminal trespass, even if his interest is disputed, and that "[t]he evidence was insufficient as a matter of law, to establish beyond a reasonable doubt that [Anderson] knew he was not permitted to be in the property." Brief for appellant at 6. Affirmative defenses to prosecution under § 28-520, set forth in Neb. Rev. Stat. § 28-522 (Reissue 1995), are as follows:

> (1) A building or occupied structure involved in an offense under section 28-520 was abandoned; or
>
> (2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
>
> (3) The actor reasonably believed that the owner of the premises or other person empowered to license access thereto would have licensed him to enter or remain; or
>
> (4) The actor was in the process of navigating or attempting to navigate with a nonpowered vessel any stream or river in this state and found it necessary to portage or otherwise transport the vessel around any fence or obstructions in such stream or river.

Notably, an ownership interest is not included as an affirmative defense, and under the facts of this case, subsection (3) is the only affirmative defense that could arguably apply.

Anderson has not resided in the home since 2000. Carol and Anderson stipulated, and the district court ordered, that Carol should be given temporary use and possession of the marital home during the pendency of the divorce proceedings. In dissolving the marriage, the court awarded the home to Carol as her sole and separate property, and this court's mandate reversing and remanding for a new trial was not issued until September 5, 2003—after the date of the incident at issue.

According to the evidence, at one point, a bond prohibited Anderson from being at the former marital home. Carol had the

locks changed several times, and Anderson did not have a key. Carol testified that she would not have given Anderson a license or privilege to enter the home for any reason, and Anderson admitted that Carol had not given him permission to be in the house. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Anderson entered the home knowing that he was not licensed or privileged to do so. This assignment of error lacks merit.

Use of Negligence Standard.

[5] Although the county court's order shows that it found Anderson guilty beyond a reasonable doubt, Anderson argues that the county court erred in using a negligence standard, based upon that court's oral statement, "But I think the bottom line is that on July 7th, 2003 you knew or should have known based on all of the circumstances that you weren't authorized to be in that property." In his untimely filed "Statement of Issues on Appeal" in the district court, Anderson stated that he intended to assign error to "[w]hether the evidence was sufficient to support the conviction" and "[w]hether the sentence imposed was excessive"—and the district court proceeded to consider those two issues. Clearly, the argument that the county court erroneously applied a negligence standard was not assigned to or considered by the district court.

> "Where a cause has been appealed to [a higher appellate court] from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to [the higher] court. In the absence of plain error, where an issue is raised for the first time in [the higher appellate court], it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition."

In re Estate of Trew, 244 Neb. 490, 498, 507 N.W.2d 478, 483 (1993) (quoting *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985)). We find no plain error in the matter before us and therefore disregard the assignment not presented to or passed upon by the district court.

CONCLUSION

We find that the evidence is sufficient to support the conviction. We disregard Anderson's second assignment of error—that the county court erroneously applied a negligence standard—because that issue was not presented to or passed upon by the district court. We therefore affirm the order of the district court affirming the judgment of the county court.

AFFIRMED.

IN RE GUARDIANSHIP OF ANGELA LILLIAN GAUBE, AN INCAPACITATED AND PROTECTED PERSON. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE, V. WILLIAM H. GAUBE AND SANDRA L. GAUBE, APPELLANTS.

707 N.W.2d 16

Filed November 22, 2005. No. A-04-1374.

1. **Guardians and Conservators: Claims: Notice.** A guardian who has individual claims of his or her own against the estate of the ward or protected person is barred from paying the claims which aggregate in excess of $250 without first specifically informing the court of his or her adverse interest and obtaining the approval of the court.
2. **Guardians and Conservators: Claims: Notice: Words and Phrases.** Language expressly limiting powers shall be included on all letters of guardianship or conservatorship in the following language: "You shall not pay yourself or your attorney compensation from the assets or income of your ward without first obtaining an order therefor, after an application, notice to the interested persons, and a hearing thereon."
3. **Guardians and Conservators: Claims: Words and Phrases.** There is no distinction between a guardianship and a conservatorship for the purpose of determining whether payments are "compensation" per the letters of guardianship or letters of conservatorship.
4. ____: ____: ____. Compensation is any form of payment or remuneration made to a conservator or guardian from assets of a protected person.
5. **Guardians and Conservators: Claims: Notice.** When no conservator for the estate of a ward has been appointed, the guardian may not use funds from his or her ward's estate for room and board which he or she, or his or her spouse, parent, or child, has furnished the ward unless a charge for the service is approved by order of the court.
6. **Judgments: Appeal and Error.** Remand is necessary where the trial court may have based its order on an incorrect rule of law.
7. **Public Assistance: Costs: Liability: Proof.** A Nebraska Department of Health and Human Services developmental disability service recipient's liability to service

providers is based on the costs for the services, and there is no further requirement that the department offer proof as to the costs' fairness and reasonableness.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas K. Harmon, of Respeliers & Harmon, P.C., for appellants.

Jon Bruning, Attorney General, and Ronald L. Sanchez, Special Assistant Attorney General, for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

William H. Gaube and Sandra L. Gaube, coguardians for their daughter, Angela Lillian Gaube, appeal from an order of the county court for Douglas County, Nebraska. They appeal the court's order that they repay $25,500 to Angela's account for amounts they paid to themselves for Angela's monthly living expenses and $3,484.74 they paid to third-party retailers, all without court approval. They also contest the court's order that they pay, from Angela's funds, the Nebraska Department of Health and Human Services (DHHS) the sum of $3,948.93 for the cost of services received by Angela.

William and Sandra assert that the county court erred in failing to "ratify" certain payments and in failing to establish that DHHS' claimed costs were fair and reasonable. They also collaterally attack the determination made by DHHS in an order from an administrative appeal that Angela is liable for the cost of services received through DHHS.

We find that the court did not err in ordering William and Sandra to repay Angela's account, because they did not receive prior approval for claims in the amount of $25,500. We find that the court erred in ordering William and Sandra to repay an additional $3,484.74 for other items. Additionally, we find that the court did not err in ordering William and Sandra to pay DHHS costs of services received by Angela, because William and Sandra's assertion that DHHS must prove that costs are fair

and reasonable is incorrect. There is no requirement that costs of services provided be proven to be fair and reasonable in this situation, because the governing statutes provide that Angela's liability for services, to the extent of her ability to pay, is DHHS' cost of providing the services. Accordingly, we affirm in part, and in part reverse and remand for further proceedings.

II. BACKGROUND

Angela was born on February 1, 1982. She "suffers from Down's Syndrome and has limited mental capacity making it difficult for her to protect herself." Brief for appellants at 7. As such, the court appointed William and Sandra as her coguardians.

The "Order Appointing Guardian" lists William and Sandra's powers and duties as coguardians. It expressly provides that William and Sandra "may not use funds from the ward's estate for room and board which the ward, the ward's spouse, parent or child has furnished the ward unless a charge for the service is approved by order of the Court." In addition, the county court issued "Letters of Co-Guardianship," which include a limitation that directs William and Sandra not to pay themselves or their attorney compensation from Angela's assets, "except as approved by an order of this Court."

Until September 2003, Angela's income consisted of wages from her part-time job, supplemental security income, and assistance from the State of Nebraska. In September 2003, Angela inherited $42,000 from her aunt, which inheritance resulted in her supplemental security income's being discontinued.

Angela had been receiving services from DHHS, such as day services and case management services, for which she was not liable for any costs. The day services for Angela consisted of "employment support services with a class component for various skills including life skills." Brief for appellee at 6. The case management services provided by DHHS "consist[ed] of planning, coordination, support and monitoring activities." *Id.* Beginning in July 2003, Angela was required to pay for these services.

Sandra appealed the determination of DHHS that "full payment would have to be made for the developmental disabilities supports and services received by Angela." DHHS held an

administrative hearing on August 13, 2004, to resolve whether full payment was due for the support and services received by Angela. The director of DHHS entered an order on August 23 requiring William and Sandra to pay the full amount for the services provided. The record indicates that DHHS gave Sandra notice of the right to appeal the administrative order, but that she did not appeal it.

William and Sandra had made payments from Angela's account to third parties, and to themselves, without prior court approval. William and Sandra assert that the payments they made to themselves were "reimbursement . . . of bills including the cost of room, board, transportation, clothing, telephone, [and] entertainment." Brief for appellants at 8.

On August 23, 2004, William and Sandra filed an "Application for Approval of Accounting and for Review of the Guardian's Expenditures." The application requests, in pertinent part, an order "[p]rescribing the nature and amounts of expenses that may be incurred by [William and Sandra as] Co-Guardians of Angela . . . without prior approval of the court of each such expense" and "approving and ratifying the payment of the expenses previously made by [William and Sandra as] Co-Guardians of Angela."

On September 17, 2004, DHHS filed a "Motion for Payment of Claim and Objection to Approval of Accounting" in the above proceeding. The motion asserts, inter alia, that DHHS has a claim against Angela and her estate for services and that Angela's "liability was affirmed by [the D]HHS Director [in] her Finding and Order dated August 23, 2004, in the administrative appeal proceeding under the Administrative Procedure Act." Additionally, regarding its objection to the approval of accounting, DHHS asserted that payments were made by William and Sandra to themselves without advance court approval, contrary to Neb. Rev. Stat. § 30-2628(a)(4)(ii) (Cum. Supp. 2002), Neb. Ct. R. of Cty. Cts. 37(II) (rev. 2000), and the letters of coguardianship.

On October 12, 2004, the hearing was held on William and Sandra's application and DHHS' motion. The court heard testimony from Sandra; Lori Ann Sperry, a service coordinator for DHHS; and Christine Ann Ford, an accountant for DHHS.

Sandra's testimony consisted of information pertaining to Angela's financial history and expenses. She explained her failure to seek prior approval from the court for payments made to William and herself and to third parties from Angela's account and requested the court's ratification of those payments. Sperry testified regarding the process used by DHHS in providing services, and specifically regarding the services Angela received. In addition, Sperry provided case management for Angela and was Angela's service coordinator. Ford, as an accountant in the financial responsibility office of DHHS, testified regarding costs and billing of services.

The court entered an order on November 24, 2004, finding that William and Sandra "received $25,500.00 without court approval and paid an additional $3,484.74 for other items without court approval" and that DHHS' claimed costs were shown to be "usual and customary." Therefore, the court ordered William and Sandra to repay $28,984.74 to Angela's account and to pay DHHS $3,948.93 from Angela's funds. This appeal followed.

III. ASSIGNMENTS OF ERROR

William and Sandra have assigned five errors on appeal, which we restate and combine generally into three. They assert that the county court erred (1) by failing to ratify payments made to William and Sandra for Angela's monthly living expenses, (2) by failing to ratify certain payments made from Angela's account to two retailers, and (3) by finding that DHHS' claim must be paid.

IV. ANALYSIS

1. Standard of Review

In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005); *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). 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. *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004); *In re Guardianship &*

Conservatorship of Trobough, 267 Neb. 661, 676 N.W.2d 364 (2004).

An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings. See, *McCray v. Nebraska State Patrol*, 270 Neb. 225, 701 N.W.2d 349 (2005); *Eledge v. Farmers Mut. Home Ins.*, 6 Neb. App. 140, 571 N.W.2d 105 (1997). 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. *In re Estate of Bauer*, 270 Neb. 91, 700 N.W.2d 572 (2005); *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). 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. *McCray v. Nebraska State Patrol, supra.*

2. Application for Approval of Accounting and for Review of Guardian's Expenditures

William and Sandra argue that it is their duty to furnish Angela with the necessaries of life suitable to her condition and that payments made for that purpose from Angela's estate may be ratified and approved by the court. "Ratification," as it is used here by William and Sandra, means that although prior approval of certain expenses is required but was not obtained, the court may nevertheless "adopt" William and Sandra's payments of such expenses at the time of the annual accounting. William and Sandra allege that the court erred in not ratifying payments made on Angela's behalf, including payments they made to themselves and to third parties. Put another way, William and Sandra recognize that they were required to seek prior approval for certain payments made from Angela's estate, but assert that such failure can be remedied by the court's ratification of payments at the time of annual accounting.

We find that the court did not err in ordering William and Sandra to reimburse Angela's estate for payments they made to themselves. Absent prior court approval, William and Sandra

were barred from making individual claims in excess of $250 against Angela's estate, from paying themselves " ' "compensation from the assets or income" ' " of Angela, and from using Angela's funds for room and board which they, as her parents, had furnished. See brief for appellants at 20. However, we find that the court erred in ordering remuneration for certain other unapproved payments made to third parties. The court's decision regarding these payments was not supported by the record, because while these payments were made to third-party retailers without prior approval, such approval was not necessary regarding these payments.

(a) Payments to Coguardians

William and Sandra assert that payments they made to themselves without the court's prior approval may nonetheless be ratified by the court. They allege three grounds upon which ratification should be granted, which we analyze below.

(i) Rule 37: Individual Claims of Coguardians

William and Sandra argue that their request for ratification of payments they made from Angela's account to themselves should be granted because the payments were for reimbursement of Angela's expenses. They assert that they were acting within their duty to supply Angela " 'with the necessaries of life suitable to [her] condition out of [funds from her] estate.' " (Emphasis omitted.) Brief for appellants at 22. However, we find that the court did not err in failing to ratify these payments, because William and Sandra neglected to obtain prior court approval.

[1] County court rule 37, promulgated by the Nebraska Supreme Court and binding upon the county court for Douglas County, forbids a guardian who "has individual claims of his or her own . . . against the estate of the ward or protected person [from paying] the claims which aggregate in excess of $250 without first specifically informing the court of his or her adverse interest and obtaining the approval of the court."

William and Sandra made payments to themselves from Angela's estate, and they assert that these payments "were for the reimbursement of monthly expenses." Brief for appellants at 20. The annual accounting of Angela's estate for the period of

August 31, 2003, to August 4, 2004, reveals 12 disbursements of money to Sandra, each described as "living expenses," in the collective amount of $25,500.

Sandra testified that these disbursements were associated with out-of-pocket expenses" related to Angela, and she further detailed Angela's continuing expenses. She offered estimates for such expenses, including rent, food, clothing, utilities, telephone, security system, transportation, entertainment, and medical. Sandra estimated that Angela's living expenses averaged $2,024 per month during this time period, and Sandra asked the court to approve the payments. However, William and Sandra did not seek the court's prior approval for these payments. They argue that they were unaware of the requirement that they seek court approval, and they acknowledge their mistake. Specifically, Sandra recounted at trial, "I did not think about that simply because under federal law I was required to take those [supplemental security] funds and report to Social Security then how those funds were expended, so I . . . didn't think to carry it over into county court once [Angela] received her inheritance."

Nevertheless, county court rule 37 is clear: No individual claims in excess of $250 were to be made by William and Sandra against Angela's estate without prior approval of the court. Under the facts of this case, we find no exception to this rule. Therefore, William and Sandra's argument that the court should ignore the requirement of prior approval by ratifying these payments because they were for Angela's support is without merit.

(ii) Rule 43 and Letters of Coguardianship

William and Sandra contend that the court should ratify the payments they made to themselves from Angela's assets because the payments were reimbursement for Angela's expenses and not compensation to themselves. We find this argument to be without merit, and under the facts of this case, we hold that such remuneration made to coguardians from the estate of a ward must receive court approval prior to disbursement.

[2] Neb. Ct. R. of Cty. Cts. 43 (rev. 2000), promulgated by the Nebraska Supreme Court and binding upon the county court for Douglas County, provides in pertinent part the following:

> Language expressly limiting powers shall be included on all letters of guardian/conservator in the following language: "You shall not pay yourself or your attorney *compensation* from the assets or income of your ward . . . without first obtaining an order therefor, after an application, notice to the interested persons, and hearing thereon."

(Emphasis supplied.)

[3,4] In addition, the Nebraska Supreme Court has addressed the issue of "compensation" in the context of letters of conservatorship in *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004). We find no distinction between a guardianship and a conservatorship for the purpose of determining whether we shall consider payments as "compensation" per the letters of guardianship or letters of conservatorship in a given case. In *In re Conservatorship of Hanson*, the court adopted a broad definition of "compensation" which includes "any form of payment or remuneration made to the conservator from assets of the protected person." 268 Neb. at 205, 682 N.W.2d at 211. The court noted that

> the appointment of a conservator is based upon a judicial determination that it is necessary to protect the property of one who is unable to manage his or her property and affairs effectively for various reasons, including "physical illness or disability," and that such person "has property which will be wasted or dissipated unless proper management is provided . . . ."

Id. at 204, 682 N.W.2d at 210. By adopting a broad definition of "compensation," the court underscored the concept embodied in rule 43 that "self-dealing by a conservator may be permissible, but only after a judicial finding that there is an adequate reason for the transaction." *In re Conservatorship of Hanson*, 268 Neb. at 206, 682 N.W.2d at 211.

In *In re Conservatorship of Hanson*, the conservator of the estate of an incapacitated ward had made payments to herself out of conservatorship funds without court approval. In addition, she argued that such payments should be ratified by the court. She asserted that the payments were made pursuant to an oral agreement with the ward "which antedated her appointment as conservator." *Id.* at 201, 682 N.W.2d at 208.

In the instant case, William and Sandra made payments to themselves from Angela's assets without court approval. They argue that the court should consider such payments as not compensation, but reimbursement for expenses they paid on Angela's behalf. In addition, the letters of coguardianship, filed in December 2000, expressly provide the limitation that William and Sandra are not to pay compensation to themselves or their attorney from Angela's assets unless they receive approval by order of the court.

We follow the Nebraska Supreme Court's determination in *In re Conservatorship of Hanson* that the concept embodied in rule 43 and the express limitation provided in the letters of conservatorship, or in this case coguardianship, are controlling. Payments made from Angela's assets may be legitimate and consistent with William and Sandra's obligations to Angela as her coguardians; "however, subjecting all such transactions to the filter of prior judicial approval affords a measure of protection against those which are not." *In re Conservatorship of Hanson*, 268 Neb. at 205-06, 682 N.W.2d at 211. We find William and Sandra's argument to be without merit.

(iii) Room and Board

William and Sandra assert that the court erred in not ratifying the payments they made to themselves from Angela's assets, including those made as reimbursement for room and board. They argue that it is their duty as coguardians to furnish Angela with the necessaries of life suitable to her condition out of her estate. They assert that "necessaries of life" include " 'food, drink . . . shelter . . . and a suitable place of residence.' " Brief for appellants at 22. However, we find their assertion to be without merit because they did not obtain an order of the court for the payments.

[5] Section 30-2628(a)(4)(ii), regarding the general powers, rights, and duties of guardians, instructs that when no conservator for the estate of a ward has been appointed, the guardian "may not *use* funds from his or her ward's estate for room and board which he or she, his or her spouse, parent, or child has furnished the ward unless a charge for the service is approved by order of the court." (Emphasis supplied.) In addition, the order

of appointment in this case, filed in December 2000, imposes the same restriction.

Evidence adduced at trial shows that payments William and Sandra made to themselves from Angela's account were, in part, for Angela's room and board. Sandra testified that in calculating the out-of-pocket expenses incurred by William and herself, she considered a mortgage, taxes, and insurance associated with the residence to determine an estimate of Angela's rent. In addition, Sandra testified that she included estimates of food expenses in the payments she and William made to themselves. She based these estimates on "the types of food that [Angela] eats per month plus her drinks and just her special needs [which include] softer foods [because] she has trouble with choking if she eats foods that are too thick or too crunchy."

William and Sandra, in having made unapproved payments to themselves from Angela's assets for her room and board expenses, violated § 30-2628(a)(4)(ii). As we did in our analysis of William and Sandra's expenditures vis-a-vis "compensation," we conclude regarding room and board costs that expenditures made from a ward's estate must be given the same filter of prior judicial approval that was emphasized by the Nebraska Supreme Court in *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004). Therefore, under the facts of this case, we determine that there is no exception to the rule requiring prior approval and that the use of Angela's funds for room and board furnished by William and Sandra was improper. William and Sandra's claim that the disbursements they made to themselves, and specifically those disbursements being used for Angela's room and board, should be ratified by the court is without merit.

(iv) Conclusion

Upon our examination of the record, we determine that the judgment of the county court regarding the order to pay $25,500 to Angela's estate conforms with the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See, *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005); *In re Conservatorship of Hanson, supra.* The record clearly establishes that William and Sandra made

payments to themselves from Angela's funds for Angela's expenses, including room and board, without prior approval of the court. By making these payments to themselves, William and Sandra violated the order of appointment and the letters of coguardianship. Additionally, they made such payments in violation of § 30-2628(a)(4)(ii) and county court rules 37 and 43. As such, this assignment of error is without merit.

(b) Unapproved Expenditures to Third Parties

The annual accounting of Angela's estate includes all receipts and disbursements made from Angela's account during the period of August 31, 2003, to August 4, 2004. Based on this accounting, the court ordered that William and Sandra repay a total of $3,484.74 that was paid from Angela's account to two retailers. This total is separate and distinct from the payments William and Sandra made to themselves. William and Sandra assert that the court erred in failing to ratify these payments made on Angela's behalf without court approval. In our review for errors appearing on the record, we determine that the court did err in failing to ratify these two payments, because it based its decision on William and Sandra's failure to obtain prior judicial approval.

The duty owed by guardians of an incapacitated ward is set forth in § 30-2628. Section 30-2628(a) provides in part that "a guardian of an incapacitated person has the same powers, rights, and duties respecting his or her ward that a parent has respecting his or her unemancipated minor child." Additionally, § 30-2628(a)(4)(ii) provides that guardians may "[r]eceive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward." These provisions do not mandate the prerequisite of judicial approval.

William and Sandra made a payment from Angela's account to a furniture retailer from which they purchased a couch selected by Angela. At trial, Sandra testified, "Angela uses it and that's what we purchased for her . . . we bought a good couch because it will last her 30-some years . . . it's not in her room, it's in the living room." This expenditure amounted to $2,307.99. Additionally, William and Sandra made a payment from Angela's account to a storage building and garage retailer

from which they purchased a shed to store some of Angela's belongings, such as "her bicycle, all of her equipment, bocci [sic] equipment, snow shoe equipment, and so forth." This expenditure amounted to $1,176.75.

The county court's order stated that William and Sandra "paid . . . $3,484.74 for [these] items without court approval." It is clear that the court relied upon county court rule 37 or 43, or upon *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004)—all of which require prior judicial approval for certain expenditures—and thereby held that William and Sandra had a duty to obtain prior judicial approval for expenditures made to the two retailers. This part of the county court's order is in error.

[6] When reviewing a judgment for errors appearing on the record, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*; *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004). Because the court based its decision on an incorrect rule of law, namely that prior court approval was necessary for such expenditures to third parties, we conclude that the decision must be reversed in part and the cause remanded. Remand is necessary where the trial court may have based its order on an incorrect rule of law. See *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992) (recognizing that remand for new trial was necessary where trial court may have based its decision, inter alia, on incorrect rule of law). On remand, the court shall make a determination, based on the record that presently exists, whether the payments made to the two retailers were for Angela's "support, care, and education." See § 30-2628(a)(4)(ii).

3. DHHS Claim Against Estate

(a) Determination of Costs

William and Sandra claim that the amount the court ordered them to pay for services provided through DHHS "cannot be supported on appeal because no sufficient or proper evidence was adduced to support the State's claim." Brief for appellants at 27. They assert that the State solely adduced evidence that the

costs of the services were "usual and customary" and thus failed to offer evidence that the costs were "fair, necessary and reasonable." *Id.* at 28. We find that the court did not err in ordering William and Sandra to pay the full amount for these services, because DHHS adduced evidence as to the cost of such services, which adduction satisfies Neb. Rev. Stat. §§ 83-364 through 83-366 and 83-1211 (Reissue 1999 & Cum. Supp. 2004).

Neb. Rev. Stat. § 83-1208 (Reissue 1999), of the Developmental Disabilities Services Act, governs developmental disability services provided by DHHS. This act is applicable to the specialized services received by Angela, which were, under § 83-1208, "service[s] provided specifically for persons with developmental disabilities." The evidence adduced is that Angela has a developmental disability as defined by Neb. Rev. Stat. § 83-1205 (Reissue 1999), which articulates that "[d]evelopmental disability shall mean: (1) Mental retardation." Further, § 83-1211 directs:

> A person receiving specialized services from a local specialized program which receives financial assistance through [DHHS] shall be responsible for the *cost of such services* in the same manner as are persons receiving care at the Beatrice State Developmental Center. Provisions of law in effect on September 6, 1991, or enacted after such date relating to the responsibility of such persons and their relatives for the cost of and determination of ability to pay for services at the center shall also apply to persons receiving services from specialized programs.

(Emphasis supplied.) Sections 83-364 and 83-366 provide instruction as to a person's liability for his or her "care, support, maintenance, and treatment," § 83-364, and afford a reduction of such liability based on that person's limited ability to pay.

The method used to determine such costs is also dictated by the Legislature in § 83-365, which pronounces:

> [DHHS] shall periodically determine the individual cost, exclusive of the cost of education, for the care, support, maintenance, and treatment of the patients in each state institution and for persons receiving treatment prescribed by an institution following release or without being admitted as a resident patient. In making such determinations,

> [DHHS] may use averaging methods for each institution if, in the judgment of the director, it is not practicable to compute the cost for each patient. The cost of capital expenditures and capital construction shall not be included in making such determinations.

DHHS asserts that the cost of services such as those provided to Angela is "[D]HHS' expense in providing care, support, maintenance and treatment which may be apportioned and assessed to each individual based on averaging methods authorized by section 83-365." Brief for appellee at 13. William and Sandra's contention that the costs to Angela should be proven fair and reasonable amounts to a collateral attack on this statutory procedure that governs how DHHS is to determine costs. DHHS argues that if it were required to prove that costs are fair and reasonable, then the consequences would be incongruent with § 83-365. Specifically, DHHS contends that it would

> require adoption of the propositions that (i) the cost for which a [developmental disability] service recipient is liable is not [D]HHS' cost, but rather an amount which may be a different amount based on other factors, such as rates in the open market for like services, and (ii) such different liability amount is to be determined by an individualized review of the individual's [developmental disability] services and their respective values.

Brief for appellee at 13-14.

Ford, whose job is to determine the financial responsibility of those receiving developmental disability services through DHHS, testified that DHHS' financial responsibility office assessed Angela's obligation to pay for services based on her income and assets. At trial, William and Sandra's counsel made objections to exhibits that demonstrated the charges for services rendered through DHHS. He argued that there had been "no proper and sufficient foundation that [Ford] can testify as to the fairness or the reasonableness of the value of these particular services." The court overruled the objections. Ford testified that Angela was charged for services from April through September 2004, in the total amount of $7,703.07, and that William and Sandra had made payments to DHHS reducing the amount due to $3,948.93.

Further, testimony by Ford revealed that the costs of services were based on expenses calculated by DHHS for services rendered. Specifically, the cost of case management services is a "flat monthly rate . . . that [is] reviewed annually by the director of [DHHS]." The costs of day services such as those provided to Angela are based on "the cost to the [S]tate." Ford testified that DHHS "only request[s] reimbursement from the client to the extent that [DHHS] pay[s] out to the [service] provider."

Additionally, Angela's ability to pay was determined based on her assets, in particular the fact that her estate had assets in excess of $4,000. Specifically, "if an individual has resources over $4,000, then [he or she] must pay the full amount for the services" he or she receives. The annual accounting illustrates that on August 4, 2004, Angela's assets totaled $6,401.94.

[7] We determine that the decision of the county court ordering William and Sandra to pay DHHS $3,948.93 conforms with the law and is supported by competent evidence, as detailed above. Angela received specialized services through DHHS and, under § 83-1211, is liable for the "cost of such services," with consideration taken as to her ability to pay. That cost is based on DHHS' determination of "individual cost[s]" made using averaging methods, see § 83-365, and on DHHS' liability to the various providers. Thus, the statutory language is clear that Angela's liability is based on the costs of the services, and there is no further requirement that DHHS offer proof as to the costs' fairness and reasonableness. Instituting such a requirement would be contrary to § 83-365, which, as noted, allows averaging methods to determine costs, rather than requiring an individualized determination. As such, we find William and Sandra's assignment of error to be without merit.

(b) Administrative Order and Claim Against Guardianship Estate

William and Sandra argue that the State must prove that "the claim filed was valid," and they contend that the State failed to do so. See brief for appellants at 28. As such, they maintain that the court erred in ordering payment of the costs claimed by DHHS. We disagree because the claim against Angela's estate by DHHS

was made based on an administrative order, which cannot be collaterally attacked in this proceeding.

The Administrative Procedure Act provides the procedure that William and Sandra must follow to contest an administrative order. Specifically, Neb. Rev. Stat. § 84-917 (Reissue 1999) provides:

> (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act. . . .
>
> (2)(a) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency.

As such, judgments rendered by administrative agencies acting in a quasi-judicial capacity, as was DHHS, are not subject to collateral attack if the agency had jurisdiction over the parties and the subject matter. *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

Sandra appealed, on behalf of Angela, DHHS' determination that Angela was liable for full payment of the developmental disability support and services she had received. This appeal was in the form of an administrative proceeding held on August 13, 2004. Ford testified at the hearing and indicated that Angela's ability to pay was determined on the basis of her assets of $28,680 and that as such, Angela was required to pay for the services in full. DHHS' director entered an order and final judgment on the appeal, finding that Angela was liable for full payment for the services she received from DHHS during the period at issue. No judicial appeal was taken from this proceeding.

At the hearing in the instant case, before the county court, William and Sandra's counsel attempted to obtain testimony as to whether the charges claimed by DHHS were fair and reasonable. In questioning Ford, William and Sandra's counsel asked whether she had "any ability to testify as to whether [the charges were] fair or reasonable [and whether she made] certain assumptions as to their validity." She answered that she did not personally "set the rates" and that her role was limited to "accounting." Specifically,

she stressed, "I would reinforce or apply the rules and regulations under [DHHS] based on the amount of [the] statement that goes out. And then that's the amount that's billed and that's hopefully the intent of what's collected."

In addition, Sandra testified that she sought explanations "as to what the bills were." Sandra said that some of the bills she received were incongruent with "what [she was] hearing from" the corresponding service provider. She requested that DHHS provide her with explanations as to the costs associated with the bills.

We find that William and Sandra were precluded from challenging the validity of DHHS' claim in the county court. Pursuant to the Administrative Procedure Act, the proper forum for such an attack was in the district court, within 30 days after the final order was entered on their administrative appeal. See § 84-917. As such, we find that this assignment of error is without merit.

V. CONCLUSION

The county court's order mandating that William and Sandra repay Angela's account $25,500 for payments they made to themselves is affirmed. The county court's order directing William and Sandra to pay DHHS, on Angela's behalf, costs of services received by Angela is also affirmed.

However, the court's order mandating that William and Sandra repay Angela's account $3,484.74 for payments made to the two retailers is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE GUARDIANSHIP OF CAMERON D., A MINOR. HOLLY S., APPELLANT, V. ROGER S. AND NANCY S., APPELLEES.

706 N.W.2d 586

Filed December 6, 2005. No. A-05-189.

1. **Child Custody: Parental Rights.** The principle of parental preference provides that a court may not properly deprive a biological or adoptive parent of the custody of a

minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the parent-child relationship or has forfeited that right.

2. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
3. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child.
4. **Parental Rights: Guardians and Conservators: 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.
5. **Child Custody: 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.

Appeal from the County Court for Holt County: PHILIP R. RILEY, Judge. Reversed and remanded with directions.

John C. Jorgensen, of Legal Aid of Nebraska, for appellant.

John P. Heitz for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Holly S. appeals an order of the county court for Holt County, Nebraska, denying her petition for removal of coguardians of her child, Cameron D. She asserts that the court erred in finding that the coguardians had met their burden of proving by clear and convincing evidence that she is unfit to discharge her parental duties and in finding that it is in Cameron's best interests to continue the guardianship. The court based its determination on, inter alia, evidence of Holly's marital, educational, employment, and medical histories. Such evidence was insufficient to support the court's findings. We reverse, and remand with directions.

II. BACKGROUND

Holly is the natural mother of Cameron, who was born December 30, 2000. Holly was a senior in high school at the

time of Cameron's birth. Holly and Cameron lived in the home of Holly's parents, Roger S. and Nancy S. Holly graduated from high school as salutatorian in May 2001. She attended college in Sioux City, Iowa, for one academic year while Cameron resided with Roger and Nancy.

Subsequently, Roger and Nancy filed a "Petition for Appointment of Guardian for a Minor" on June 19, 2002, requesting that the court name them as coguardians for Cameron. A corresponding affidavit was filed by Nancy. The petition asserted that an "emergency exist[ed]," that it was "not in the best interest of [Cameron] to be in the care and custody of [Holly]," and that "even temporary custody with [Holly] would be detrimental and not in the best interest of [Cameron]." According to the petition, the apparent "emergency" which necessitated the appointment of guardians for Cameron was that Holly "ha[d] indicated her intention to remove [him] from the state of Nebraska." Nancy testified that the "initial reason" for the guardianship was that Holly "wanted to take [Cameron] to Sioux City" while she attended college. The record indicates that the court appointed Roger and Nancy as coguardians on August 26. Holly did not appeal this order, and we assume for the purpose of deciding this appeal that the guardianship was properly ordered.

During this guardianship, Holly maintained a relationship with Cameron. She attended college in Iowa and later in Lincoln, Nebraska. Holly came to Roger and Nancy's home "virtually every weekend" while she was attending college. In May 2004, Holly began living with her boyfriend, who is not Cameron's father, in a "[s]ubstantially furnished" three-bedroom apartment. She frequently visited Cameron at Roger and Nancy's home and had "taken him to her place for supper [and] had him overnight a few times." If Holly left work early, she would pick Cameron up from daycare, and she spent more time with him during times when she was unemployed. In addition, Holly and her boyfriend completed a parenting class.

Nearly 2 years after the guardianship was ordered, on July 6, 2004, Holly filed a petition with the county court, pursuant to Neb. Rev. Stat. § 30-2616 (Reissue 1995), to remove Roger and Nancy as coguardians of Cameron and to terminate the

guardianship. In the petition, Holly alleged that she "is a fit and proper person to resume her role as natural guardian of Cameron." A hearing on the petition was held on November 17, at which time Holly was 21 years old. Testimony was received from Jackie Fahrenholz, Cameron's daycare provider; Nancy; Cameron's father; and Holly.

Fahrenholz testified that she is a licensed home daycare provider and has provided daycare for Cameron since he was 6 weeks old. She testified as to the arrangements regarding who deposited Cameron at her house in the mornings and who retrieved him in the afternoons. Her testimony indicated that despite the guardianship of Cameron, Holly frequently picked Cameron up from daycare. Fahrenholz testified that on one occasion, Holly dropped Cameron off at Fahrenholz' home for daycare and allowed him to walk into the house on his own while Holly watched him from the car, as Nancy frequently did. Cameron entered the house through the unlocked front door, but unknown to Holly, no one was at home. Cameron was alone in the house for no more than 20 minutes and was unharmed.

In correspondence to the attorneys of record which was filed on December 30, 2004, the court noted that it was obligated to determine whether Holly was "not fit to take over [Cameron's] physical custody." In making that determination, the court considered that Holly "had numerous issues in her life" and examined Holly's educational, employment, relationship, and medical histories. Additionally, the court opined that "Cameron is comfortable and feels at home in [Roger and Nancy's] house." In its order, filed on January 13, 2005, the court denied Holly's petition and found that Roger and Nancy proved "by clear and convincing evidence that Holly . . . is, at this time, unfit to discharge her parental duties" and that "[i]t is in the best interests of Cameron . . . that the guardianship continue." This appeal followed.

III. ASSIGNMENTS OF ERROR

Holly asserts that the county court erred in finding that (1) Roger and Nancy had proven by clear and convincing evidence that Holly is unfit to discharge her parental duties and (2) it is in Cameron's best interests that the guardianship continue.

IV. STANDARD OF REVIEW

Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). 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. *Id.* 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. See *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

V. ANALYSIS

Holly asserts that the court wrongly denied her petition based on her educational, employment, relationship, and medical histories. She argues that Roger and Nancy did not meet the burden of proving by clear and convincing evidence either that she is unfit or that she forfeited her right to custody. Additionally, she asserts that Roger and Nancy did not prove that it is in Cameron's best interests that the guardianship continue. We find merit in Holly's assignments of error and find that the court erred in denying Holly's petition. The record is insufficient to show that Holly is unfit to take physical custody of Cameron and that Cameron's best interests would be served by continuing the guardianship.

[1] Our analyses of Holly's parental fitness and the best interests of Cameron are inseparable. It is well established that there are two competing principles in the area of child custody jurisprudence: the parental preference principle and the best interests of the child principle. See *In re Guardianship of D.J., supra.* Courts have long considered the best interests of the child to be of paramount concern in child custody disputes. See *id.* Yet, "the principle of parental preference provides that a court 'may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the [parent-child] relationship or has forfeited that right.' " *Id.* at 244, 682 N.W.2d

at 243, quoting *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). See, also, § 30-2608(a) (expressing that parents are natural guardians of minor child when they are "competent to transact their own business and not otherwise unsuitable").

[2-4] In weighing these two principles, the Nebraska Supreme Court has held that in guardianship termination proceedings involving a biological or adoptive parent, "the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent." *In re Guardianship of D.J.*, 268 Neb. at 244, 682 N.W.2d at 243. Under this principle, 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.* at 244, 682 N.W.2d at 243-44. Therefore, for a court to deny a parent the custody of his or her minor child, it must be affirmatively shown that such parent is unfit to perform parental duties or that he or she has forfeited that right. See *id.* Thus,

> 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.

(Emphasis supplied.) *In re Guardianship of D.J.*, 268 Neb. 239, 249, 682 N.W.2d 238, 246 (2004).

In termination of guardianship proceedings, courts must be mindful of the temporary nature of guardianships that are created to relieve parents of the burdens of raising a child. One purpose of creating guardianships is to enable parents to "take those steps necessary to better their situation so they can resume custody of their child in the future." *Id.* at 248, 682 N.W.2d at 246. The policy behind this rule would be frustrated if guardianships were permanent or created a de facto termination of parental rights. See *id.* Parents in need of guardians for their minor children would be less likely to petition the court for the appointment of a guardian if such an appointment resulted in a

guardianship of unlimited duration. We address Holly's arguments below and, as mentioned above, find that her assignments of error have merit. In this case, our review for error on the record reveals that the decision of the county court is not supported by competent evidence.

1. Educational History

Holly argues that her educational history is not relevant to the determination of whether she is fit to resume custody of Cameron. She asserts that if she "had been to twenty different colleges and had been through twenty different programs of study, these facts are not relevant to whether she . . . is capable of carrying out any of the various parental duties and/or responsibilities." Brief for appellant at 21. Roger and Nancy assert that Holly's explanation of her educational history "reveal[s] her character. She is willing to make any argument necessary to try to get her way." Brief for appellees at 8. However, we find that Holly's argument has merit and supports her assertion that Roger and Nancy failed to meet their burden of proving that Holly is unfit to resume custody of Cameron.

[5] As previously stated, Roger and Nancy must prove by clear and convincing evidence that Holly either is unfit or has forfeited her right to custody. See *In re Guardianship of D.J., supra*. Without such a showing, termination of the guardianship is proper and Cameron should be reunified with Holly. " '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.' " *Uhing v. Uhing*, 241 Neb. 368, 375, 488 N.W.2d 366, 372 (1992), quoting *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

Testimony adduced at trial shows that Holly has attended three institutions of higher education, where she has achieved an excellent academic record. Holly attended college in Iowa from August 2001 to May 2002 and from August 2002 to February 2003. She received a scholarship and was a "pre med" major. Holly attended college in Lincoln, Nebraska, from August 2003 to May 2004. She had accumulated student loan debt from

attending the Iowa college and sought to take advantage of in-state tuition rates in Nebraska. Holly changed her focus from "pre med" to "pre nursing" because she "didn't want to leave Cameron behind" for the period of time it would require for her to complete medical school. She attended a community college at the time of the hearing in fall 2004, taking online courses in "Health Information Management," so that she "could come home [and] be close to Cameron." Holly testified that her cumulative grade point average for her completed coursework was approximately 3.8.

The court noted Nancy's testimony that Holly "seems unable to settle on any particular course of study." However, this evidence does not support a finding that Holly is unfit. Holly's educational history does not represent any " 'personal deficiency or incapacity' " that would be detrimental to Cameron's well-being. See *Uhing v. Uhing*, 241 Neb. at 375, 488 N.W.2d at 372. The evidence adduced at trial regarding Holly's educational history does not clearly and convincingly establish that Holly is unfit to resume parental responsibility of Cameron; nor does it rebut the presumption that it is in Cameron's best interests to be reunited with Holly. As such, Holly's assertion has merit.

2. Employment History

Holly argues that the evidence received at trial was insufficient to support the finding that she is an unfit parent by reason of her employment history or status. We find that the evidence of Holly's employment history is inadequate either to support the court's finding that Holly is unfit to take custody of Cameron or to rebut the presumption that it is in Cameron's best interests to be reunited with Holly.

On our review for error on the record, we must determine whether there was clear and convincing evidence that Holly is unfit or has forfeited her right to custody. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). See, also, *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000) (comparing parental fitness standard applied in guardianship appointment under § 30-2608 with juvenile court's finding that it would be contrary to juvenile's health, safety, and welfare to return juvenile home).

Nancy testified as to Holly's employment history from the time of her high school graduation to the time of the hearing in the instant case. Holly's employment history consists of several part-time jobs at fast-food restaurants and clothing and grocery stores. In addition, she became a certified nurse's aide and has worked at several nursing homes. Holly testified that her part-time jobs were "temporary transitional positions" and not a part of her "life's work." She explained that she had a history of frequently changing jobs because she had often been in the position of having to choose between working at a "minimum wage job" and studying. At the time of the hearing, Holly was scheduled to begin working at a nursing home in Atkinson, Nebraska, as a certified nurse's aide at the rate of $8.52 an hour.

The evidence in the record regarding Holly's employment history does not support a finding that Holly is unfit to perform the duties imposed by her parental relationship. On the contrary, Holly is a licensed certified nurse's aide and has completed courses in the fields of sociology and psychology. Given these facts, the record does not justify the conclusion that Cameron's health, safety, or welfare would be compromised by returning him to Holly's home. Therefore, Holly's contention that her employment history does not support the court's finding that she is unfit has merit.

3. Marital Status

Holly asserts that "the evidence adduced at trial below lacks sufficient competency to support the finding of unfitness and is otherwise arbitrary, capricious and/or unreasonable." Brief for appellant at 13. She argues that a determination of parental fitness founded in part or whole upon her marital status is erroneous. Roger and Nancy argue that Holly's marital status creates uncertainty for Cameron and that they do not approve of Cameron's living with Holly while she cohabitates without the benefit of marriage. The court opined that "[t]here are indications that Holly's relationship with [her boyfriend] is not permanent. Holly contends that they are 'engaged' but I don't find that assertion compelling." We find that the evidence of Holly's relationship or marital status does not support a finding that Holly is unfit to perform the duties imposed by her parental relationship.

Of primary consideration in the instant case is whether there was clear and convincing evidence at trial that Holly is unfit. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). In looking at the issue of parental fitness, the court must consider whether Holly has a personal deficiency or incapacity that will be detrimental to Cameron, by preventing her from performing her parental obligations. See *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

While attending college in Iowa, Holly was in a relationship with a man which had terminated prior to the time of the hearing in the instant case. Nancy testified that during the course of the relationship, an abusive incident occurred against Holly that resulted in Holly's overdose on antidepressant pills. Holly remained hospitalized for 1½ days for psychiatric evaluation due to this incident. The evidence adduced at trial indicates that this was an isolated event and, furthermore as noted above, that the relationship has ceased. Given these facts, the abuse suffered by Holly and her subsequent overdose do not justify the conclusion that Cameron's well-being would be compromised by his returning to Holly's home.

After attending college for a year in Lincoln, Holly moved to O'Neill, Nebraska, in May 2004 and resided with her current boyfriend. There is no evidence on the record to show that he poses a threat to Cameron's safety. We understand that Roger and Nancy may have concerns about Holly's boyfriend, because Holly once had a volatile relationship with another man, but there is no evidence showing that Holly should be considered unfit to parent Cameron, given this relationship. Additionally, there is no evidence that the living arrangement would be detrimental to Cameron's best interests. In fact, Holly's boyfriend voluntarily took parenting classes with Holly. Therefore, we find merit to Holly's assertion that the court erred in determining that Holly is unfit by reason of her relationship or living arrangement.

4. Medical History

Holly asserts that the court erred in finding her unfit based, in part, on her medical history. She argues that "[t]he medical issues raised at trial are insufficient to demonstrate unfitness

and were merely utilized as a guise for bypassing the parental preference principle and instead applying a best interests of the child rationale." Brief for appellant at 19. Roger and Nancy maintain that Holly's medical condition essentially creates an unsafe and unstable environment for Cameron and that her condition will affect Cameron's well-being, as he depends on her for his care and safety. The court noted that "Holly takes medication for anxiety and depression" and that Holly "has seen several doctors . . . and has an appointment with a neurologist." We find that Holly's argument has merit. The evidence of Holly's medical history does not clearly and convincingly establish that she is unfit or that her condition will prevent her from performing her parental obligations, resulting in detriment to Cameron's well-being.

As previously stated, clear and convincing evidence is mandatory to establish that Holly is unfit to resume the obligations imposed by the parent-child relationship. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). Whether Holly is unfit is a determination made based on an examination of personal deficiency or incapacity that would result in detriment to Cameron's well-being. See *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

Nancy testified at trial that Holly received counseling services from the time she was 14 years old, both before and after being sexually assaulted by a 14-year-old boy. According to Nancy, the original cause for seeking these services was that Holly "was getting to be out of control [with t]emper tantrums." Nancy indicated that Holly had been in counseling and had been receiving psychiatric evaluations since that time, and that Holly had been referred to different counselors. Nancy testified that Holly "was having trouble with . . . depression type things" and had been prescribed antidepressants. Also, Nancy testified that Holly received counseling while attending college in Nebraska, because "she was having trouble with school and her finances and things like that." Based on the results of one psychological evaluation, Nancy testified that to her knowledge, Holly was diagnosed as "bipolar."

Testimony by Nancy and Holly describes one incident where it appears that Holly may have had some type of seizure while

driving with Cameron. Holly pulled over, stopped the car, and telephoned Roger and Nancy. She was able to describe her surroundings to them, and they located Holly and Cameron and returned them home. Additionally, Holly has had two other episodes where she had "what appeared to be like heat stroke," but may have been "some type of seizures." Based on these incidents, a neurologist performed an electroencephalogram test on Holly and further recommended that Holly not operate a motor vehicle pending the results of that test. Holly complied with this recommendation and made alternate arrangements for transportation.

We note that the record is lacking testimony from any expert witness able to provide a medical opinion regarding Holly's condition. However, based on the testimony adduced at trial, there is a lack of sufficient evidence to buttress the court's finding that Holly's condition makes her unfit, and the evidence adduced certainly does not rebut the presumption that reunification with Holly is in Cameron's best interests. Holly's condition does not rise to the level of parental unfitness where her incapacity would prevent " 'performance of a reasonable parental obligation in child rearing and . . . has caused, or probably will result in, detriment to [Cameron's] well-being.' " See *Uhing v. Uhing*, 241 Neb. at 375, 488 N.W.2d at 372. As such, we find merit to Holly's argument.

5. Resolution

From our review for error on the record, we conclude that the evidence, examined separately and cumulatively, is insufficient to establish Holly's unfitness to perform the duties imposed by the parent-child relationship and that therefore, the evidence fails to show that Holly is unfit to have custody of Cameron. Holly argued that her educational, employment, relationship, and medical histories were insufficient to support the court's finding that she is unfit. We find merit with each of her arguments and, as such, find merit with her assignments of error.

Although, as the court noted, "Cameron is comfortable and feels at home in [Roger and Nancy's] house," and although at the time of the trial proceedings, Cameron might have enjoyed some economic advantages from continued presence in Roger and

Nancy's residence, neither of those circumstances justifies a denial of Holly's application. The parental preference principle dictates that in order to deny Holly's petition, the court must find either that Holly is unfit or that she forfeited her right to perform the duties imposed by the parent-child relationship. The principle establishes a rebuttable presumption that Cameron's best interests are served by reuniting him with Holly. We find that there was insufficient evidence to support the court's finding that Holly is unfit or to rebut the presumption that Cameron's best interests would be served by his reunification with Holly.

VI. CONCLUSION

We reverse the order denying Holly's petition to terminate the guardianship and remand the case with directions to terminate the guardianship and to reinstate in Holly the care, custody, and control of Cameron.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD E. TOMLIN, APPELLEE, V. DENSBERGER DRYWALL INC. AND UNITED FIRE GROUP, APPELLANTS.

706 N.W.2d 595

Filed December 6, 2005. No. A-05-284.

1. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
2. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. An appellate court 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.
4. **Workers' Compensation: Evidence: Appeal and Error.** An appellate court is precluded from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court.

5. ____: ____: ____. In analyzing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, who also receives the benefit of all inferences that may be drawn from the evidence.
6. **Workers' Compensation: Appeal and Error.** The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous.
7. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2004), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job.
8. **Workers' Compensation.** The "arising out of" employment requirement is primarily concerned with causation of an injury.
9. **Workers' Compensation: Expert Witnesses.** It is the role of the Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.
10. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
11. **Workers' Compensation: Expert Witnesses.** An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."
12. **Workers' Compensation.** Generally, compensation for repetitive trauma injuries is to be tested under the statutory definition of an accident.
13. **Workers' Compensation: Proof.** Three elements must be demonstrated in order to prove that a workers' compensation injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.
14. **Workers' Compensation: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.
15. **Workers' Compensation: Proof.** In workers' compensation cases, stopping work to seek medical attention, after which attention the employee returns to work, is sufficient to establish the identifiable point in time component of the suddenly and violently test.
16. **Workers' Compensation.** Finding an identifiable point in time satisfies the disjunctive test for whether an employee's accidental injury occurs suddenly and violently, making it unnecessary to determine whether the cause of injury is reasonably limited in time.
17. ____. Given the nature of the human body, not all injuries are caused instantaneously and with force, but may nevertheless be sudden and violent, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment.

18. **Workers' Compensation: Pleadings.** When an injured worker pleads a specific date of injury and fails to plead that the injury resulted from repetitive trauma, such failure is not dispositive on the issue of repetitive trauma.
19. ____: ____. When an employer will not be misled by a worker's pleading of a specific date of injury and the evidence is sufficient to support a claim of repetitive trauma, the compensation court must consider whether the injury is a result of repetitive trauma.
20. **Workers' Compensation: Judgments.** Under the provisions of Workers' Comp. Ct. R. of Proc. 11(A) (2002), all parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached.
21. **Workers' Compensation: Time.** The date of injury for repetitive trauma cases is generally the date in which the evidence shows that the employee discontinued employment and sought medical treatment.
22. **Workers' Compensation: Liability.** Under Neb. Rev. Stat. § 48-120 (Reissue 2004), the employer is liable for all reasonable medical, surgical, and hospital services, 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.
23. ____: ____. The only limitation on medical benefits set forth in Neb. Rev. Stat. § 48-120 (Reissue 2004) is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished.
24. **Workers' Compensation.** The Nebraska Workers' Compensation Act is to be broadly construed to accomplish the beneficent purpose of the act.
25. ____. Medical expenses incurred before the date of an employee's accident in a repetitive trauma case may be compensable if they are reasonably necessary and related to the compensable injury as required by Neb. Rev. Stat. § 48-120 (Reissue 2004).
26. **Workers' Compensation: Rules of Evidence.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.
27. **Testimony: Evidence: Appeal and Error.** Admitting testimony objected to which is substantially similar to evidence admitted without objection is not prejudicial error.
28. **Workers' Compensation.** In workers' compensation cases, travel expenses are compensable if they are shown to be reasonably necessary and related to the compensable injury.
29. **Workers' Compensation: Evidence: Proof.** In workers' compensation cases, when an employee presents evidence of medical expenses from a work-related injury, a prima facie case of fairness and reasonableness has been made, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John W. Iliff and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Jamie Gaylene Scholz, of Shasteen, Brock & Scholz, P.C., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

Densberger Drywall Inc. (Densberger) and United Fire Group (United) appeal the decision of the Nebraska Workers' Compensation Court review panel affirming the decision of the trial court, which found that Richard E. Tomlin suffered a compensable shoulder injury arising out of and in the course of his employment with Densberger.

FACTUAL BACKGROUND

Tomlin had been working in the drywall industry since 1972, with the exception of about 2 years. Tomlin began his employment as a "[r]ocker framer" with Densberger on July 23, 2001, and ended his employment in August 2003. Tomlin testified that his job duties as a "rocker framer" were metal framing and drywall hanging and that while performing such duties, he did "lots" of heavy lifting and "overhead work." Prior to working at Densberger, Tomlin was part owner in a company called Drywallers, Inc. At Drywallers, he had those same job duties but he also had supervisory duties, and therefore, he did not do as much physical labor as in his employment at Densberger.

On June 3, 2002, Tomlin went to see John Grandgenett, a nurse practitioner at the office of his family physician, for a "recheck [of] blood pressure medication." While seeing Grandgenett, Tomlin complained that he had been experiencing right shoulder pain for approximately 1 year but that he had no known trauma or injury. Grandgenett referred Tomlin to Dr. David J. Clare, an orthopedist.

On June 12, 2002, Tomlin saw Dr. Clare. Dr. Clare's notes state that Tomlin has had problems with his right shoulder for a couple of years but that Tomlin was unable to recall an injury. Dr. Clare diagnosed Tomlin with degenerative arthritis in his right shoulder. In a letter dated September 18, 2002, Dr. Clare opined:

> There has been some question as to whether this [severe degenerative arthritis of the right shoulder] defines a

> Workman Comp case. Although [Tomlin] did not sustain a single, isolated work-related injury, I feel he has experienced accumulative trauma that has resulted in the degenerative condition. I cannot say with 100% certainty that his work is the direct cause of his shoulder condition, but 30 years of laying dry wall undoubtedly contributed in some form or fashion to his degenerative right shoulder condition.

On that same day, Dr. Clare stated in his progress notes that "the long term heavy, repetitive work [Tomlin] performed for over 30 years has at least contributed to [his] level of degenerative arthritis."

In a letter dated December 16, 2002, Dr. Clare opined: "The etiology of [Tomlin's] arthritis is difficulty [sic] to definitively determine. He has been employed laying drywall for 30 years. I do believe that this occupation has contributed to the development of his arthritis."

On September 12, 2002, Tomlin presented to Dr. David A. Clough for a second opinion. Dr. Clough diagnosed Tomlin with degenerative arthritis and stated, "In the absence of a specific injury, I can not attribute this to Workers' Compensation." Dr. Clough clarified his opinion in a February 13, 2003, letter as follows:

> My statement, 'In the absence of a specific injury, I can not attribute this to Workers' Compensation', was intended to include both causation directly as well as aggravation of a pre-existing condition. It is my opinion, to a reasonable degree of medical certainty, that . . . Tomlin's degenerative arthritis of the right shoulder was not caused and not aggravated by his employment at Densberger . . . . It is my opinion that the degenerative arthritis is following it's [sic] natural progression with increasing symptoms and with decreasing levels of work activity and that his employment for the last year has not been a factor in any way.

On November 8, 2002, Dr. Clare performed a right shoulder hemiarthroplasty. Tomlin testified that he missed work for the surgery but that he did not remember missing work for any other doctors' appointments. On January 15, 2003, Tomlin returned to work at Densberger, doing "light duty."

On August 13, 2003, Dr. D.M. Gammel provided a medical evaluation of Tomlin based on a July 29 physical examination of Tomlin, a personal interview and history given by Tomlin, and a review of medical records and tests from June 3, 2002, to June 5, 2003. Dr. Gammel opined: "Tomlin's repetitive, heavy, overhead work duties as a drywall installer for thirty years resulted in and substantially contributed to the development of his right shoulder degenerative joint disease and need for subsequent medical intervention including right shoulder hemiarthroplasty." Dr. Gammel issued an impairment rating of 15 percent to the right upper extremity.

PROCEDURAL BACKGROUND

Tomlin filed a petition in the Nebraska Workers' Compensation Court on October 17, 2002, alleging that on June 12, he had sustained an injury in an accident arising out of and in the course of his employment with Densberger. Following a trial before a single judge on September 18, 2003, the trial court issued an award on March 23, 2004. The trial court found that Tomlin's shoulder injury was a result of the cumulative effects of a work-related trauma. The court stated that the parties' greatest contention regarding Tomlin's injury being an "accident" was whether the injury occurred "suddenly and violently." The trial court found that Tomlin's discontinuance of employment occurred within a reasonably limited period of time after the appearance of his symptoms and that when Tomlin "submitted himself to surgery" and missed work for such, he established an identifiable point in time when the injury occurred. Thus, the trial court found that the date he suffered his accident was November 8, 2002.

As to causation, the trial court stated that it had "carefully weighed and evaluated each of [the expert witnesses'] opinions" and that "a sufficient ca[us]al nexus has been proven so as to link [Tomlin's] shoulder injury to the subject accident." The trial court specifically stated that it "relied" on the opinion of Dr. Gammel and was "persuaded" by the opinions of Dr. Clare.

The trial court awarded Tomlin temporary total disability benefits for 9⅝ weeks, permanent disability benefits for 33¾ weeks based on an impairment rating of 15 percent to the right upper

extremity, and both medical and mileage expenses. The court denied an award for future medical benefits, finding the evidence insufficient to support such an award. The trial court found that there was a reasonable controversy which insulated Densberger and United from liability for the requested penalties, attorney fees, and interest.

Densberger and United appealed to the Workers' Compensation Court review panel the trial court's award. The review panel affirmed the trial court's award in all respects, stating that the trial court was not clearly wrong and that there was sufficient evidence in the record to support the award. Densberger and United timely appeal to this court.

ASSIGNMENTS OF ERROR

[1] Although Densberger and United assert 10 assignments of error in their brief, we restate and renumber the errors in accordance with those assignments that are actually argued in their brief. See *Shipferling v. Cook*, 266 Neb. 430, 665 N.W.2d 648 (2003) (errors assigned but not argued will not be addressed on appeal). Densberger and United assert that the trial court erred in (1) finding that Tomlin was injured in an accident arising out of and in the course of his employment with Densberger, because the injury was not caused by Tomlin's employment with Densberger; (2) finding that Tomlin sustained a repetitive trauma injury, because the injury does not meet the statutory definition of an accident; (3) finding that Tomlin suffered a repetitive trauma injury on November 8, 2002, because such finding violated Densberger's and United's due process rights and Workers' Comp. Ct. R. of Proc. 11 (2002); (4) awarding medical expenses and mileage; and (5) failing to sustain the objections to exhibits 1, 2, and 5 through 8.

STANDARD OF REVIEW

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Schwan's Sales Enters. v. Hitz*, 263 Neb. 327, 640 N.W.2d 15 (2002). 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. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

[4] An appellate court is precluded from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996). See Neb. Rev. Stat. § 48-185 (Reissue 2004).

[5,6] In analyzing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, who also receives the benefit of all inferences that may be drawn from the evidence. *Armstrong v. Watkins Concrete Block*, 12 Neb. App. 729, 685 N.W.2d 495 (2004). The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous. *Id.*

ANALYSIS

Causation.

[7,8] Densberger and United contend that the trial court erred in finding that Tomlin's injury was caused by his employment with Densberger. Densberger and United state in their brief that Tomlin's injury was not an accident arising out of his employment because "his shoulder condition was the result of his 30 year occupation as a drywaller and not a result of his employment by Densberger." Brief for appellant at 14. The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2004), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job. *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005). "The 'arising out of' employment requirement is primarily concerned with causation

of an injury." *Misek v. CNG Financial*, 265 Neb. 837, 842, 660 N.W.2d 495, 500 (2003).

[9,10] In finding that Tomlin's injury was caused by or "arose out of" his employment with Densberger, the trial court relied on the medical opinion of Dr. Gammel and was "persuaded" by the opinions of Dr. Clare. According to the trial court, both physicians' opinions "blamed the cumulative repetitive task associated with the dry-walling trade as the cause of [Tomlin's] problem." Dr. Gammel opined, "Tomlin's repetitive, heavy, overhead work duties as a drywall installer for thirty years resulted in and substantially contributed to the development of his right shoulder degenerative joint disease." Dr. Clare stated that "the long term heavy, repetitive work [Tomlin] performed for over 30 years has at least contributed to [his] level of degenerative arthritis" and that "30 years of laying dry wall undoubtedly contributed in some form or fashion to [Tomlin's] degenerative right shoulder condition." Although Dr. Clough's opinion was that Tomlin's employment at Densberger did not cause his injury, it is the role of the compensation court as the trier of fact to determine which, if any, expert witnesses to believe. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004). Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

In addition to the medical opinions relating Tomlin's work as a drywaller to his degenerative arthritis, Tomlin testified that as a "rocker framer" for Densberger, he did "lots" of heavy lifting and overhead work. He testified that when he was hanging drywall, he lifted between 50 and 100 pounds "all day." Tomlin stated that the overhead work caused him to have "specific kinds of pain in [his] shoulder" and that it got to the point where the pain was "unbearable" and he could not lift things. He testified that before he began working at Densberger, he had aches and pains in his shoulder, but that when he began working at Densberger, his pain "got worse real quick." Tomlin testified that he had not received medical attention for his shoulder before he worked at Densberger, and Densberger and United produced no evidence to the contrary.

[11] Because both Drs. Clare and Gammel opined that overhead work and heavy lifting contributed (substantially so, in Dr. Gammel's words) to Tomlin's shoulder injury, and because Tomlin testified that he performed lots of overhead work and heavy lifting at Densberger, the trial court did not err in determining that Tomlin's injury resulted from the risks arising within the scope or sphere of his employment with Densberger, i.e., overhead work and heavy lifting. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996) (expert opinion is to be judged in view of entirety of expert's opinion and is not validated or invalidated solely on basis of presence or lack of magic words "reasonable medical certainty").

Accident.

[12,13] Densberger and United assert that the trial court erred in finding that Tomlin was injured in an "accident" that arose out of and in the scope of his employment with Densberger. The trial court found that Tomlin suffered a repetitive trauma injury. Generally, compensation for repetitive trauma injuries is to be tested under the statutory definition of an accident. See *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Three elements must be satisfied under the statutory definition of an accident: (1) The injury must be " 'unexpected or unforeseen,' " (2) the accident must happen " 'suddenly and violently,' " and (3) the accident must produce " 'at the time objective symptoms of an injury.' " See *Jordan v. Morrill County*, 258 Neb. 380, 388, 603 N.W.2d 411, 418 (1999).

[14] For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004). The trial court found that Tomlin had established the "suddenly and violently" element of an accident, because the cause was reasonably limited in time and because the result materialized at an identifiable point.

Tomlin testified in his deposition that he did not know when he was injured but that he believed his injury was caused by

continuous lifting and working overhead. He also admitted at trial that there "[wa]s no accident" and that nothing happened suddenly or violently to cause symptoms of an injury, he just had pain. He testified that he began to "notice" pain 1 to 3 years before he went to the doctor, which was in June 2002. Tomlin admitted that while he was employed at Densberger, the pain in his shoulder was "unbearable." He admitted that he did not remember if he missed work for his doctors' appointments but that he did miss work for his November 8, 2002, surgery. He did not return to work at Densberger until January 15, 2003, at which time he performed "light duty" work.

[15-17] The trial court found that when Tomlin stopped working due to his surgery on November 8, 2002, such stoppage was sufficient to satisfy the suddenly and violently test. We agree. "[S]topping work to seek medical attention, after which attention the employee returns to work, is sufficient to establish the 'identifiable point in time' component of the 'suddenly and violently' test." *Armstrong v. Watkins Concrete Block*, 12 Neb. App. 729, 738, 685 N.W.2d 495, 504 (2004). The fact that Tomlin stopped working at Densberger in order to undergo surgery on his right shoulder and returned to light-duty work more than 2 months later, which work was different from the type of work he did prior to his surgery, is sufficient to constitute an identifiable point in time after which he sought medical treatment and discontinued his employment. Because we find an identifiable point in time, we need not consider whether the cause of Tomlin's injuries is reasonably limited in time. See *Swoboda, supra* (finding identifiable point in time satisfies disjunctive test for whether employee's accidental injury occurs suddenly and violently, making it unnecessary to determine whether cause of injury is reasonably limited in time). The Nebraska Supreme Court has recognized that given the nature of the human body, not all injuries are caused instantaneously and with force, but may nevertheless be sudden and violent, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment. *Swoboda, supra*; *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). Therefore, Densberger

and United's argument that there was no "accident" causing Tomlin's injury is without merit.

Date of Injury.

Densberger and United assert that the trial court erred in finding that Tomlin's date of injury was November 8, 2002, because the finding was inconsistent with the theory upon which the case was pled and tried. We have already determined that November 8, 2002, was a proper date of injury for the trial court's finding of a compensable accident.

[18,19] In *Armstrong, supra*, we found that when an injured worker pleads a specific date of injury and fails to plead that the injury resulted from repetitive trauma, such failure is not dispositive on the issue of repetitive trauma. In following *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds, Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), we further found in *Armstrong, supra*, that when an employer will not be misled by a worker's pleading of a specific date of injury and the evidence is sufficient to support a claim of repetitive trauma, the compensation court must consider whether the injury is a result of repetitive trauma.

Here, although Tomlin pled a specific injury date of June 12, 2002, and did not plead a repetitive trauma, there were pretrial proceedings as early as 8 months before trial which clearly put the question of whether Tomlin's injury was a result of repetitive trauma in issue. For example, Tomlin testified at his deposition on January 27, 2003, that he believed the continuous lifting and overhead work at Densberger caused his injury. He admitted that he missed work only for his surgery and not for his doctors' appointments. He admitted that he worked from June 12, 2002—the date of the accident he alleged in his petition—until his surgery, that he missed work for his surgery, and that he then returned to work on January 15, 2003. Tomlin also stated at his deposition, "I don't know when I got injured" and "I don't know when [the injury] happened." He stated that nothing specific happened at work and that "over a period of time," the continuous lifting and overhead work caused his injury.

Moreover, there was abundant medical evidence obtained prior to trial showing that whether Tomlin sustained a repetitive trauma

injury was at issue. Dr. Clare stated in a letter on September 18, 2002, "Although [Tomlin] did not sustain a single, isolated work-related injury, I feel he has experienced accumulative trauma that has resulted in the degenerative condition." Dr. Gammel opined in his August 13, 2003, report, "Tomlin's repetitive, heavy, overhead work duties as a drywall installer for thirty years resulted in and substantially contributed to the development of his right shoulder degenerative joint disease."

Thus, there was sufficient evidence prior to trial that Tomlin's injury may have been a result of repetitive trauma and Densberger and United were not misled by Tomlin's pleading a June 12, 2002, date of injury. Any variance between the pleading and the evidence here was immaterial, and Densberger and United's argument that the court erred in finding an injury date of November 8, 2002, because of such variance is without merit.

Rule 11.

[20] Densberger and United contend that the trial court's decision was not a reasoned decision in compliance with rule 11 of the Workers' Compensation Court, because the trial court did not explain (1) why it used the parties' stipulated average weekly wage as of June 12, 2002, if the date Tomlin suffered his accident was November 8 and (2) why medical expenses and mileage were awarded for expenses allegedly incurred prior to November 8. Rule 11(A) provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

The trial court stated in its award, "Given the stipulation of the parties relative to [Tomlin's] average weekly wage, i.e. $742.17, [he] would be entitled to $494.78 for each of the aforementioned weeks of temporary total disability." As to the medical bills and mileage, the trial court said, "The Court, having

reviewed the evidence (both expert and lay), is satisfied that the medical bills submitted by [Tomlin] as set forth in Exhibits 2 through 7 (the latter exhibit representing a summary of said bills) ought to be paid by [Densberger and United]." The court further stated that Tomlin "should also be paid for his mileage expense incurred in the medical treatment of his injury." We find that when the trial court's entire decision is considered, there has been compliance with rule 11.

Medical Expenses and Mileage.

Densberger and United argue that the award of medical expenses and mileage was error. The trial court ordered Densberger and United to pay the medical expenses set forth in exhibits 2 through 7 and the mileage expenses set forth in exhibit 8. The exhibits calculated both medical and mileage expenses incurred by Tomlin beginning on June 3, 2002. Densberger and United contend that they should not be liable for medical and mileage expenses incurred prior to November 8, 2002—the date of injury.

[21-25] The date of injury for repetitive trauma cases is generally the date in which the evidence shows that the employee discontinued employment and sought medical treatment. See *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004). Thus, the concept of "date of injury" in repetitive trauma cases must be conceded to be a bit of a necessary legal artifice, articulated by the appellate courts in order for repetitive trauma cases to be manageable within the statutory framework of an accident. Nonetheless, Neb. Rev. Stat. § 48-120(1) (Reissue 2004) provides: "The employer is liable for all reasonable medical, surgical, and hospital services . . . 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 . . . ." "The only limitation on medical benefits set forth in § 48-120 is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished." *Foote v. O'Neill Packing*, 262 Neb. 467, 474, 632 N.W.2d 313, 320 (2001). Because the Nebraska Workers' Compensation Act is to be broadly construed to accomplish the

beneficent purpose of the act, see *Foote, supra*, and given the language of § 48-120 quoted above, we find no rational reason for a rule precluding the award of medical expenses incurred before the date of accident in a repetitive trauma case—remembering that such date is often fortuitously established by when the employee seeks treatment and misses work for such. See *United Wisconsin Ins. Co. v. LIRC*, 229 Wis. 2d 416, 600 N.W.2d 186 (Wis. App. 1999) (employer's argument that it could not be liable for expenses incurred prior to date of injury was rejected, because date of injury is fixed by statutory definition and can be after onset of symptoms and treatment and because there is no support for proposition that worker must stop working before being eligible for benefits). Similarly, under Nebraska precedent, the date of injury for a repetitive trauma injury is fixed by case law, meaning that the employee can incur expenses before the "technical" date of injury. The evidence regarding Tomlin's medical and mileage expenses showed that such were reasonably necessary and related to his compensable injury. Therefore, the trial court did not err in allowing both medical and mileage expenses as stated in exhibits 7 and 8.

Objections to Exhibits.

[26] Densberger and United argue that the trial court erred in failing to sustain its relevancy objections to exhibits 1, 2, and 5 through 8. Remembering that the Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence, we look to the substance of each of the exhibits. See *Baucom v. Drivers Mgmt., Inc.*, 12 Neb. App. 790, 686 N.W.2d 98 (2004). Exhibit 1 is Dr. Gammel's report, and exhibit 2 is Dr. Clare's opinion and progress notes. Exhibit 5 is Tomlin's medical records. Exhibit 6 is a letter from Tomlin's physical therapist to Dr. Clare regarding Tomlin's condition and the physical therapy objectives. Exhibit 7 is a "Medical Bills Summary," and exhibit 8 is Tomlin's mileage expenses.

[27-29] As for exhibits 1, 2, 5, and 6, they are clearly relevant to Tomlin's injury and the trial court did not err in admitting them. Exhibit 7, the summary of Tomlin's medical bills, is also relevant, because he is asking for medical expenses to be paid as part of his compensation benefits. Moreover, exhibit 19 was

also a compilation exhibit of medical expenses. Exhibit 19 was admitted without objection and is substantially similar to exhibit 7. Thus, any error in admitting exhibit 7 could not prejudice Densberger and United. See *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997) (admitting testimony objected to which is substantially similar to evidence admitted without objection is not prejudicial error). Exhibit 8 is Tomlin's mileage expenses and is relevant here because in workers' compensation cases, travel expenses are compensable if they are shown to be reasonably necessary and related to the compensable injury. See *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959). We also remind Densberger and United of the longstanding rule that when an employee presents evidence of medical expenses from a work-related injury, a prima facie case of fairness and reasonableness has been made, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable. See *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). Therefore, Densberger and United's argument that the court erred in overruling the relevancy objections is without merit.

CONCLUSION

We affirm in all respects the decision of the trial court, which decision was affirmed by the review panel.

AFFIRMED.

RICKY L. SHURTS AND EAGLE HILLS EXCAVATING, INC., APPELLANTS, V. JESSICA E. FLYNN AND DEBORAH M. HEINSSEN, APPELLEES.

707 N.W.2d 37

Filed December 13, 2005. No. A-04-240.

1. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
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. ____: ____: ____. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous.
4. **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.
5. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

E. Terry Sibbernsen, Mandy L. Strigenz, and Andrew D. Sibbernsen, of Sibbernsen & Strigenz, P.C., and Richard B. Maher for appellants.

Betty L. Egan and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellee Jessica E. Flynn.

Donald D. Schneider, P.C., for appellee Deborah M. Heinssen.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

In this motor vehicle accident case, Ricky L. Shurts and Eagle Hills Excavating, Inc. (collectively the appellants), appeal from a judgment of the district court for Washington County granting Deborah M. Heinssen a directed verdict and entering the jury's verdict in favor of Jessica E. Flynn. For the reasons set forth below, we reverse, and remand for a new trial on the issue of damages in regard to Flynn, and affirm the directed verdict in favor of Heinssen.

BACKGROUND

On October 23, 2002, the appellants filed a second amended petition against Flynn and Heinssen, alleging that on April 27,

2000, Flynn's vehicle rear-ended Heinssen's vehicle, causing Heinssen's vehicle to travel into Shurts' lane of traffic and collide into the side of his vehicle. Specifically, the second amended petition alleged that on April 27 at approximately 8:55 p.m., Shurts was operating a semi-trailer truck, owned by Eagle Hills Excavating, in a northerly direction on U.S. Highway 30 in Blair, Nebraska, when a vehicle operated by Flynn, which was traveling south on Highway 30, struck the rear of a vehicle operated by Heinssen, which was also traveling south on Highway 30. At that time, Heinssen's vehicle crossed the centerline and struck Shurts' vehicle on the driver's side, causing bodily injury and property damage to Shurts.

Flynn admitted that her negligence was the proximate cause of the accident, but denied the nature and extent of Shurts' injuries. Heinssen denied that she was at fault in the accident.

A jury trial took place on December 17 through 19, 2003. Shurts testified that he owns Eagle Hills Excavating and that he works as an excavating demolition contractor. He testified that at the time of the accident, he was driving a "semi-truck" attached to a flatbed trailer that was carrying a piece of heavy equipment. Shurts testified that as he was traveling north on Highway 30, a two-lane highway, he saw Heinssen's vehicle, which was traveling south, and he initially thought Heinssen was going to make a left turn in front of him. He testified that he did not think there was enough time for Heinssen to safely turn in front of him, so he slowed down and moved his truck to the right toward the shoulder of the road. He testified that he then observed Heinssen's vehicle come to an abrupt stop, as if Heinssen had changed her mind about turning in front of him and had decided to wait. He testified that when she stopped, her vehicle was approximately 6 inches across the centerline that separates the two lanes of traffic. Shurts testified that he did not know whether Heinssen had her headlights on or whether she had her left turn signal on.

Shurts testified that when Heinssen's vehicle collided with his truck, he felt a sudden jolt. He testified that when he woke up the morning after the accident, the back of his neck was stiff and sore and he had a headache. He testified that before the accident, he had never experienced any neck pain. He testified

that the pain in his neck and the headache continued for several days. On the fourth day after the accident, he could not turn his head and his headache was severe, so he made an appointment with his family physician. Shurts testified he saw his physician on May 3, 2000, and complained that he could not turn his head, that he had pain in the back of his neck and into his shoulders, and that he had a persistent headache. He returned to his physician's office on May 12 with the same symptoms. Shurts testified that on May 18, he started seeing Dr. David W. Hoffman, a chiropractor, and continued treating with him until August 1. Shurts testified that during that time, he continued to have neck pain and severe headaches.

Shurts testified that in March 2001, he went to see Dr. Huy D. Trinh, an orthopedic surgeon who specialized in spinal disorders, including neck problems. Shurts testified that at that time, he was still suffering from pain in his neck and headaches. Shurts testified that Trinh recommended physical therapy for him, but that he did not attend physical therapy because he could not afford it. Shurts testified that he saw Trinh a second time in March 2002, a year after the first visit, and that the same symptoms were still persisting. Shurts further testified that in the year before trial, there had not been a day that he had not had some pain in his neck. He testified that he had days when the pain in his neck was milder and other days when the pain was more severe. He also testified that there were days when his headache was not severe. Shurts presented an exhibit claiming that he had incurred medical expenses in the amount of $2,502.87, as a result of the accident.

Flynn's deposition was read into the record, because she was not present at trial. She testified that at the time of the accident, she was traveling south on Highway 30, it was dark outside, and she had her vehicle's headlights on. Flynn testified that she saw Heinssen's vehicle for the first time just a few seconds before the accident, when Flynn "looked up." Flynn testified that she saw the brakelights illuminated on Heinssen's vehicle, but that she did not know whether Heinssen's vehicle was completely stopped or not. Flynn testified that when she saw Heinssen's vehicle, Flynn stepped on her brakes and turned her wheel to the right. She testified that the front driver's side of her vehicle rear-ended

Heinssen's vehicle. Flynn testified that she did not know why she did not see Heinssen's vehicle sooner than she did. She testified that her "mind must have been elsewhere."

Flynn testified that she did not know whether Heinssen did anything that caused or contributed to the accident. Flynn also testified that she did not know whether Heinssen stopped abruptly, whether Heinssen's vehicle had its left turn signal on, or whether Heinssen's vehicle had its headlights on. Flynn further testified that she did not know whether Heinssen's vehicle was over the centerline before the accident.

Heinssen testified that just before the accident, she was traveling south on Highway 30 and came to a complete stop, intending to make a left turn. She testified that she had her vehicle's headlights on and left turn signal on. Heinssen testified that she saw oncoming headlights from traffic traveling northbound, so she stopped and was waiting for northbound traffic to clear before making her left turn. She testified that she came to a gradual stop and not an abrupt stop. She testified that while she was stopped, she looked in her rearview mirror and saw Flynn's vehicle coming up behind her and it appeared that Flynn was not going to stop. Heinssen testified that Flynn's vehicle then struck the right rear end of her vehicle. Heinssen testified that she had been stopped for 5 to 10 seconds before the impact occurred and that she saw Flynn's vehicle in her rearview mirror just a few seconds before impact. Heinssen testified that before Flynn rear-ended her, the front wheels of Heinssen's vehicle were positioned straight ahead and her vehicle was "straight with the lane" and was not over the centerline. Heinssen testified that after the impact with Flynn's vehicle, Heinssen's vehicle went into the northbound lane of traffic and the left front end of her vehicle struck the driver's side of Shurts' vehicle.

Lori Wheaton, a witness to the accident, also testified. Wheaton testified that just before the accident, she was driving northbound on Highway 30 and was two to three car lengths behind Shurts' vehicle. She testified that she saw Heinssen's vehicle stopped in the southbound lane, as if Heinssen was waiting to turn left. Wheaton testified that she observed Heinssen's vehicle stopped for a few seconds before the accident and that Heinssen's vehicle was positioned in its own lane and was not

over the centerline. Wheaton testified that Heinssen's vehicle had its headlights on and that Wheaton was "95 percent sure" that Heinssen's vehicle had its left turn signal on. Wheaton further testified that she observed Flynn's vehicle coming up behind Heinssen's vehicle and saw that it was not slowing down. Wheaton testified that there was not anything Heinssen could have done to prevent the accident. Wheaton further testified that following the accident, Flynn repeatedly said, " 'I didn't see [Heinssen]. I did not see her stop.' "

Hoffman testified that he provided Shurts with chiropractic care from May 18 to August 1, 2000, and treated him 11 times during this period. He testified that at Shurts' first visit, Shurts complained of low-neck pain, with the pain radiating into his shoulders, and also complained of headaches. Hoffman testified that Shurts told him that following the automobile accident on April 27, 2000, Shurts initially had some discomfort in his neck and shoulders which gradually got worse and led him to seek medical attention. Hoffman testified that based on his examination of Shurts and the history that Shurts provided, he diagnosed Shurts with "cervical sprain/strain — acute/severe which is complicated by cervical somatic dysfunction." Hoffman explained that "cervical somatic dysfunction" basically means that a bone in the neck is out of place, causing swelling and putting tension on the tissues in the area, thereby causing pain. Hoffman further testified that he secondarily diagnosed Shurts with having a thoracic sprain/strain, which is a sprain/strain in the area just below the neck. Hoffman testified that it was his opinion within a reasonable degree of chiropractic certainty that the cervical sprain/strain, complicated by cervical somatic dysfunction, and the thoracic sprain/strain were caused by the automobile accident on April 27, 2000.

Hoffman testified that during the time he treated Shurts, Hoffman's diagnosis of Shurts remained the same throughout the treatment and Shurts continued to be in pain. Hoffman testified that Shurts stopped treating with him after August 1, 2000, despite Hoffman's recommendation that Shurts continue treating with him.

Trinh's video deposition was played for the jury. Trinh testified that Shurts was referred to him by Shurts' family physician.

Trinh testified that he saw Shurts on three occasions, the first being in March 2001. Trinh testified that on that date, Shurts indicated that he had been in an automobile accident on April 27, 2000, and that about 4 days after the accident, he began having pain and stiffness in his neck, as well as headaches. Trinh testified that Shurts indicated he was still having these problems at the March 2001 visit. Trinh testified that Shurts did not indicate that he had any neck problems before the accident.

Trinh testified that Shurts' MRI showed degenerative disk disease, or "discarthrosis," involving three disks in Shurts' neck. Trinh explained that discarthrosis is an aging condition of the spine. He further explained that the disk or disks become degenerated, meaning they lose water content and become "more crumbly [and] a lot of time[s] bulge out." He testified that this condition is often due to age or the amount of physical work a person does. Trinh testified that Shurts' condition developed over a period of years.

Trinh diagnosed Shurts as suffering from chronic neck pain with related headaches and gave him a secondary diagnosis of discarthrosis in three disks in his neck. Trinh testified that Shurts' discarthrosis was a preexisting condition that was aggravated by the accident. Trinh explained that a person can have this degenerative condition without any symptoms, i.e., not experience any pain, until some type of traumatic event irritates the area and triggers symptoms. Trinh testified that in Shurts' case, Trinh assumed there was some violent movement of the neck or head during the accident that irritated the degenerated area and triggered Shurts' symptoms.

Trinh testified that he saw Shurts for the second time in March 2002 and that Shurts still complained of neck pain and headaches. Trinh testified that his diagnosis of Shurts remained the same and that Shurts' preexisting discarthrosis, which was aggravated by the accident, was still causing his pain.

Trinh testified that he saw Shurts for the third time on September 8, 2003. Trinh testified that Shurts continued to complain of neck pain and that upon examination, Trinh determined that Shurts' condition remained about the same. Trinh testified that his diagnosis of Shurts also remained the same—

chronic neck pain and discarthrosis in three disks in the neck, aggravated by the April 27, 2000, accident.

Trinh testified that it was his opinion, within a reasonable degree of medical certainty, that the accident on April 27, 2000, aggravated Shurts' preexisting discarthrosis, which in turn caused Shurts' neck pain; that Shurts' chronic neck pain and related headaches were caused by the accident; and that Shurts experienced a permanent disability as a result of the aggravation of his preexisting discarthrosis.

At the close of the appellants' evidence, Heinssen moved for a directed verdict, which the trial court granted, and Heinssen was dismissed from the case. Subsequently, the jury returned a verdict in favor of Flynn. Pursuant to the jury verdict, the trial court entered a judgment in favor of Flynn. Thereafter, the appellants filed a motion for new trial and motion for judgment notwithstanding the verdict. The trial court overruled the motions, and the appellants now appeal.

ASSIGNMENTS OF ERROR

The appellants assign that the trial court erred in failing to give their proposed jury instruction regarding preexisting conditions and in directing a verdict in favor of Heinssen.

STANDARD OF REVIEW

[1] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002); *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

[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. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005); *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

[3] A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *Pribil v. Koinzan*,

266 Neb. 222, 665 N.W.2d 567 (2003); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

[4] 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. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005); *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003).

[5] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Livingston v. Metropolitan Util. Dist., supra*; *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003).

ANALYSIS

Jury Instruction.

The appellants assign that the trial court erred in failing to give their proposed jury instruction regarding preexisting conditions. Regarding Shurts' preexisting condition, the trial court specifically instructed the jury in jury instruction No. 14: "There is evidence that [Shurts] had a neck condition prior to the accident on April 27, 2000. [Flynn] is liable only for any damages that you find to be proximately caused by the accident." The trial court refused to give the appellants' proposed jury instruction, which stated:

> There is evidence that [Shurts] had a neck condition prior to the accident on April 27, 2000. [Flynn] is liable for any damages you find to be proximately caused by the accident.
>
> If you cannot separate damages caused by the preexisting condition from those caused by the accident, then [Flynn] is liable for all of those damages.

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. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005); *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

In *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996), the Nebraska Supreme Court addressed a case similar to the one at hand. In *Ketteler*, the trial court gave the following instruction: " 'There is evidence that the plaintiff had a neck, back and hip condition prior to the accident of April 26, 1991. The defendant is liable only for any damage that you find to be proximately caused by the accident of April 26, 1991.' " 251 Neb. at 295, 556 N.W.2d at 629.

The trial court in *Ketteler* did not give the following instruction, which the plaintiff had requested:

> "There is evidence that [the plaintiff] had a pre-existing neck and back condition prior to the date of this collision. The Defendant is liable only for any damages that you find to be proximately caused by the collision of April 26, 1991.
>
> "If you cannot separate damages caused by the pre-existing condition from those caused by the accident, then the Defendant is liable for all of those damages.
>
> "The Defendant may be liable for bodily harm to [the plaintiff] even though the injury is greater than usual due to the physical condition which predisposed [the plaintiff] to the injury. In short, the Defendant takes the Plaintiff as he finds her."

251 Neb. at 295-96, 556 N.W.2d at 629.

Relying on *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996), the Nebraska Supreme Court in *Ketteler* concluded that the trial court's failure to give the plaintiff's proposed instruction was reversible error. Therefore, the Supreme Court reversed, and remanded for a new trial.

David v. DeLeon, supra, involved an automobile accident case in which the jury returned a verdict for the plaintiff. Prior to the accident, the plaintiff suffered from arthritis in his back and knees. The defendant proposed a jury instruction which stated:

> "There is evidence that the plaintiff had degenerative disc disease of the cervical spine (also called spondylosis),

> spinal stenosis of the lumbar spine, and degenerative arthritic changes in the knees prior to the date of the accident. The defendant is liable only for any damages that you find to be proximately caused by the accident."

Id. at 113, 547 N.W.2d at 729.

The trial court in *David* rejected the defendant's instruction and instead submitted the plaintiff's proposed instruction:

> "There is evidence that the plaintiff had pre-existing back and joint conditions prior to the date of the accident. The defendant is liable only for any damages found to be proximately caused by the accident.
>
> "If you cannot separate damages caused by the pre-existing conditions from those caused by the accident, then the defendant is liable for all of those damages."

Id.

On appeal, the defendant in *David* argued that the portion of the instruction stating that if the jury could not separate damages, then the defendant was liable for all damages should not have been given. The Nebraska Supreme Court affirmed.

In rejecting the defendant's argument, the Nebraska Supreme Court in *David* relied on *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969), which "adopted the theory of the 'eggshell-skull' plaintiff, whom the negligent defendant must take as he finds." 250 Neb. at 114, 547 N.W.2d at 729. The Supreme Court in *McCall* held that a person injured as a result of another person's negligent acts is entitled to recover all damages which proximately resulted from those acts, including damages resulting from aggravation of a preexisting condition. In *David*, the Supreme Court found that the ruling in *McCall* justified the trial court's decision to issue its instruction.

The Nebraska Supreme Court in *David* further stated:

> [A] plaintiff is not . . . required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition the defendant can exhume as a precondition for recovering any damages at all. . . . Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant.

> . . . .
>
> In the instant case, without the admonition that the defendant is liable for all damages if the jury cannot apportion, the instruction would have failed to address the event in which a jury finds that damages were proximately caused by a collision, but is unable to determine precisely what quantum of those damages was not preexisting. This instruction prevents the result of a jury finding that damages were proximately caused by the tortious act, but failing to award damages because it cannot demarcate preexisting illnesses from new losses.

250 Neb. at 115-16, 547 N.W.2d at 730.

Based on the above case law, we conclude that the appellants' proffered instruction should have been submitted to the jury. The appellants' adduced evidence that the accident proximately caused an aggravation of a preexisting condition. Specifically, Trinh testified that Shurts had a preexisting condition, known as discarthrosis, in three disks in his neck. Trinh testified that Shurts' preexisting discarthrosis was aggravated by the April 27, 2000, accident and that such aggravation caused Shurts' neck pain and related headaches. The burden of apportioning damages then rested squarely with Flynn. The trial court's instruction to the jury did not reflect this fact. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). As the Nebraska Supreme Court stated in *David*, without the admonition that Flynn is liable for all damages if the jury cannot apportion, the instruction fails to address the event in which the jury finds that damages were proximately caused by the collision, but is unable to determine precisely what quantum of those damages was not preexisting.

Accordingly, the trial court's refusal to give the appellants' requested instruction is reversible error. First, the proffered instruction correctly stated the law. Second, the instruction was warranted by the evidence, based on the testimony of Trinh. Finally, refusal by the trial court to submit the proposed instruction was prejudicial to the appellants. Thus, we reverse, and remand for a new trial on the issue of damages.

Directed Verdict.

The appellants next assign that the trial court erred in granting Heinssen's motion for directed verdict. The appellants argue that the directed verdict should not have been granted, because there was evidence of negligence on Heinssen's part which was a proximate cause of the accident. We disagree.

A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005); *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003).

The appellants specifically point to Shurts' testimony that Heinssen came to an abrupt stop and that her vehicle was resting approximately 6 inches over the centerline that separates the two lanes of traffic. While there is evidence that contradicts Shurts' testimony, in reviewing a directed verdict, we must resolve every controverted fact in the appellants' favor. See, *Livingston v. Metropolitan Util. Dist., supra*; *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003).

Assuming Heinssen did come to an abrupt stop, there is no evidence that Flynn rear-ended Heinssen as a result of Heinssen's quick stop. Flynn testified that she did not know why she did not see Heinssen's vehicle sooner than she did and that her "mind must have been elsewhere." The evidence is undisputed that Heinssen's vehicle was stopped at the time she was rear-ended by Flynn. The evidence indicates that Flynn would have rear-ended Heinssen whether Heinssen came to a gradual stop or an abrupt stop, because Flynn was simply not paying attention and did not see Heinssen until it was too late. Thus, whether Heinssen came to an abrupt stop or a gradual stop is of no consequence. Given that Heinssen was stopped in front of Flynn, Flynn was responsible for operating her vehicle in a manner that allowed her to stop her vehicle or turn it aside without colliding with Heinssen's vehicle. See *Kissinger v. United Parcel Serv.*, 8 Neb. App. 260, 263, 592 N.W.2d 169, 171 (1999) ("[n]egligence generally arises as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop her or

his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision"). Thus, assuming Heinssen came to an abrupt stop, such action was not a proximate cause of the accident.

Likewise, assuming Heinssen's vehicle was positioned over the centerline, there is no evidence that this was a proximate cause of the accident. Had Heinssen's vehicle not been over the centerline, Flynn would still have rear-ended Heinssen and the accident would have occurred in the same manner. Thus, we conclude that the trial court did not err in granting Heinssen's motion for directed verdict and the appellants' second assignment of error is without merit.

CONCLUSION

We conclude that the trial court erred in failing to give the appellants' proposed jury instruction regarding preexisting conditions. We further conclude that the trial court did not err in granting Heinssen's motion for directed verdict at trial. Accordingly, we reverse, and remand for a new trial on the issue of damages, and affirm the portion of the trial court's judgment granting a directed verdict in favor of Heinssen.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

IN RE INTEREST OF VERONICA H., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ARNOLDO T. AND MELINDA O., APPELLEES, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

707 N.W.2d 29

Filed December 13, 2005. No. A-05-425.

1. **Juvenile Courts: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.

3. **Juvenile Courts: Jurisdiction.** Juvenile courts are courts of limited jurisdiction.
4. **Juvenile Courts: Counties.** Each county, depending on its population, has either a separate juvenile court or a county court with authority to sit as a juvenile court.
5. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred upon it by statute.
6. **Juvenile Courts: Legislature: Words and Phrases.** The phrase "by and with the assent of the court," which the Legislature elected to add to the language in Neb. Rev. Stat. § 43-285(1) (Reissue 2004), clearly gives the court the power to assent and, by implication, to dissent from the placement and other decisions of the Department of Health and Human Services, as well as of other entities to whom the court might commit the care of a minor.
7. **Juvenile Courts.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. It is the law in this jurisdiction that juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Jon Bruning, Attorney General, Royce N. Harper, and John M. Baker, Special Assistant Attorney General, for appellant.

No appearance for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) appeals from the judgment of the separate juvenile court of Douglas County, Nebraska, ordering DHHS to reassign the case of Veronica H. to a more experienced case manager. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On July 26, 2002, a petition was filed in the separate juvenile court alleging that Veronica, a minor child, was a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The petition asserted that Veronica had been subjected to inappropriate sexual contact by her stepfather, Arnoldo T., and that Veronica's natural mother, Melinda O., had taken insufficient steps to protect Veronica; therefore, the petition alleged that Veronica was at risk for harm. On that same date, the separate

juvenile court entered an "Order for Immediate Custody," placing temporary custody of Veronica with DHHS. On April 8, 2003, Veronica was adjudicated as a child within the meaning of § 43-247(3)(a), with Arnoldo and Melinda admitting to the allegations in the petition. It was also ordered that Veronica remain in the temporary custody of DHHS "for appropriate care and placement." The matter was then set for disposition.

On June 6, 2003, a disposition and permanency planning hearing was held. At that time, the separate juvenile court ordered that Veronica remain in the temporary custody of DHHS for appropriate care, which was to exclude the parental home. The juvenile court found that the permanency objective was reunification and that reasonable efforts were being made to return Veronica to the parental home and to finalize permanency. The hearing was continued to August 21, and at that hearing, the juvenile court again ordered that Veronica remain in the temporary custody of DHHS and that placement of Veronica was to exclude the parental home. A review and permanency planning hearing was held on December 11, at which point the juvenile court again found that the permanency objective was reunification and that reasonable efforts were being made to return Veronica to the parental home and to finalize permanency. The court ordered Arnoldo and Melinda to complete psychological evaluations and complete any recommended treatment; to participate in individual and family therapy; to participate with a family support worker; to maintain safe, adequate, and consistent housing for themselves and their family; and to participate in a parenting program. Arnoldo was also ordered to complete a sex offender specific psychological evaluation.

Another review and permanency planning hearing was held on March 10, 2004. The court received numerous exhibits into evidence. Custody of Veronica remained with DHHS, which placed her at an enhanced treatment group home in Columbus, Nebraska. One of the exhibits accepted into evidence was a case plan and court report authored by LaKeisha Bonam, a case manager for DHHS. In her report, Bonam noted that Arnoldo had completed his sex offender evaluation and that Dr. Theodore DeLaet had done a psychological evaluation of Arnoldo.

The juvenile court asked Bonam for "a real concrete and coordinated recommendation for what kind of treatment, who's to go, what issues are to be addressed and by whom." The court further noted that it had numerous concerns regarding the instant case, including the lack of evaluations to answer questions regarding treatment and therapy for Veronica, Arnoldo, and Melinda; the lack of confirmation that therapy was occurring despite the lack of evaluations and progress reports; and the need for a concrete plan. Bonam informed the juvenile court that Dr. DeLaet was willing to work with Veronica, Arnoldo, and Melinda, and that the family would rather work with Dr. DeLaet than with other care providers. The juvenile court asked Bonam to provide a plan to the court within 2 weeks and asked that the plan provide for individual and family therapy with a goal of reunification. The court's order from the March 10, 2004, hearing noted that Dr. DeLaet was willing to work with the family, and Dr. DeLaet was asked to provide a plan and/or an outline of treatment, to be presented to the court within 2 weeks.

Between the March 10, 2004, hearing and the next hearing on July 30, Veronica's placement had changed from the enhanced treatment group home in Columbus to an enhanced treatment group home in Omaha, Nebraska. In addition, the case was assigned to DHHS' "Integrated Care Coordination Unit" and Michelle Mutum was assigned as the new case manager. At the July 30 hearing, numerous exhibits were again accepted into evidence. The juvenile court noted at the hearing that "things [we]re in order," that reunification remained as the permanency objective, that reasonable efforts were being made to return Veronica to the parental home and to finalize permanency, and that Veronica was to remain in the custody of DHHS for continued appropriate care and placement.

Another review and permanency planning hearing was held on November 16, 2004. More exhibits were entered into evidence, including a case plan and court report authored by Mutum; a mental health and substance abuse treatment plan by Dr. DeLaet and Veronica's therapist at the enhanced treatment group home in Omaha, Jean McKechnie; and a report from Veronica's guardian ad litem, as well as other reports. In her

case plan and court report, Mutum noted that Dr. DeLaet and McKechnie had developed a new visitation plan, and a joint letter from Dr. DeLaet and McKechnie set forth a precise plan as to treatment issues and interventions. However, the juvenile court expressed dissatisfaction with the reports that were offered. The court indicated that it expected both Dr. DeLaet and McKechnie—as well as any other therapists working with Veronica, Arnoldo, and Melinda—to testify. The court further referred the case to the "LB 1184 Treatment Team," indicating that "they are to look at everything from the inception, as I'm looking back, the many difficulties in this case, including the wrong kinds of evaluations [and] the conflict of interest with regard to some of the service provisions, like the family support worker and other issues." The court noted that "somebody has to get a grip on this case from a case management standpoint, and no one has it, and the Court lacks sufficient information to be that individual."

At a January 11, 2005, evidentiary hearing, Dr. DeLaet testified. He described his involvement in the case and described the types of therapies that he had provided. He further indicated that he would no longer be providing therapy in the instant case due to a disagreement with McKechnie regarding the course of therapy to be pursued. The hearing was then continued until January 14.

At the January 14, 2005, hearing, McKechnie testified. At the conclusion of McKechnie's testimony, the juvenile court expressed frustration with the professionals involved in the instant case, citing concerns with Veronica's lack of progress. The court stated as follows:

> [I]t's quite distressful to me to have to keep saying this, and I mean no offense. . . . Mutum is a fine individual and generally a fine caseworker, so this is not any personal reflection on her, but from the first day of disposition, this matter has been about [DHHS] and [its] total lack of accountability in terms of case management, in terms of any substantive understanding of the dynamics of incest cases and the treatment protocol in those cases and it continues.

Subsequently, the juvenile court ordered DHHS "to reassign this case to an experienced case manager with demonstrated

knowledge of incest cases and the needed treatment protocol to address these cases," stating as follows:

> I am ordering [DHHS] to assign [a different case manager.] And I want to know the name and approve it. . . . I want a seasoned, competent, experienced [DHHS] case manager with savvy and understanding of the dynamics of a case involving intrafamily sexual abuse, strong personalities . . . and that has to be demonstrated to me.

DHHS has timely appealed to this court.

ASSIGNMENT OF ERROR

DHHS asserts that the separate juvenile court erred when it ordered DHHS to remove the case manager dealing with Veronica's case and replace her with a more experienced case manager.

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[2] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Marie E.*, 260 Neb. 984, 621 N.W.2d 65 (2000).

ANALYSIS

Validity of Order.

DHHS alleges that the separate juvenile court erred when it ordered DHHS to remove the case manager dealing with Veronica's case and to reassign the case to "an experienced case manager with demonstrated knowledge of incest cases and the needed treatment protocol to address these cases." DHHS asserts that the separate juvenile court lacks the authority to make such an order and that therefore, the order was made in error.

[3-5] Article V, § 27, of the Nebraska Constitution provides the following language regarding the creation and powers of juvenile courts in Nebraska: "[T]he Legislature may establish

courts to be known as juvenile courts, with such jurisdiction and powers as the Legislature may provide." Therefore, juvenile courts are courts of limited jurisdiction. See *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980). Each county, depending on its population, has either a separate juvenile court or a county court with authority to sit as a juvenile court. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002). As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred upon it by statute. *Id.*

Neb. Rev. Stat. § 43-285(1) (Reissue 2004), a statute dealing with the care of juveniles who have been removed from the parental home, provides:

> When the court awards a juvenile to the care of [DHHS], an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed. Any such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it. Such guardianship shall not include the guardianship of any estate of the juvenile.

[6] This court has previously held that the phrase "by and with the assent of the court," which the Legislature elected to add to the language in § 43-285(1), "clearly [gives] the court the power to assent and, by implication, to dissent from the placement and other decisions of [DHHS], as well as of other entities to whom the court might commit the care of a minor." *In re Interest of Crystal T. et al.*, 7 Neb. App. 921, 927, 586 N.W.2d 479, 483 (1998). We further found that "this change certainly indicates the Legislature's intent to remove [DHHS'] complete control of a minor whose care is given to [DHHS] under the Nebraska Juvenile Code." *Id.*

[7] In *In re Interest of Crystal T. et al., supra*, this court dealt with a similar issue as presented by DHHS. In *In re Interest of Crystal T. et al.*, the juvenile court entered an order directing

DHHS to conduct 10 to 12 unannounced home visits at the home of a mother whose child was under the supervision of DHHS. DHHS appealed, arguing that "the court's order constitutes an improper attempt to 'micromanag[e] the case that only [DHHS] is authorized by law to handle.' " *Id.* at 927, 586 N.W.2d at 483. We disagreed with DHHS, noting the following:

> The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. . . . It is the law in this jurisdiction that juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.

(Citation omitted.) 7 Neb. App. at 927-28, 568 N.W.2d at 483.

We find that because juvenile courts have been given the power by the Legislature to assent and, by implication, to dissent from the placement and other decisions of DHHS, the juvenile court properly exercised that power when it ordered DHHS to replace the case manager dealing with Veronica's case with "an experienced case manager with demonstrated knowledge of incest cases and the needed treatment protocol to address these cases." The juvenile court had broad discretion in its attempt to best serve the interests of Veronica, and we find that the court's order did not abuse that discretion. This assignment of error is without merit.

Separation of Powers.

DHHS concedes that this court is not the proper forum in which to challenge the constitutionality of a statute. Nevertheless, DHHS does contend that "an order that dictates case management infringes on an essential legal right belonging to [DHHS] because it crosses the separation of powers boundary." Brief for appellant at 11. DHHS further contends that "state agencies [such as DHHS] have been given the power by the Legislature to manage their own work force, including job assignments. Neb. Rev. Stat. §81-1311(9) [(Reissue 1999)]. The Legislature did not grant this authority to the court." Brief for appellant at 12.

However, we noted earlier that through § 43-285(1), the Legislature gave juvenile courts the power to assent and dissent

from the placement and other decisions of DHHS, as well as of other entities to whom the court might commit the care of a minor, and that the Legislature intended to remove DHHS' complete control of a minor whose care is given to DHHS under the Nebraska Juvenile Code. Thus, we conclude that the Legislature, when it elected to add the phrase "by and with the assent of the court" to § 43-285(1), did in fact give juvenile courts the authority to issue orders such as that issued in the instant case.

This is a case of first impression in Nebraska. Looking to other jurisdictions for guidance, we find the reasoning in *In re K.C.*, 325 Ill. App. 3d 771, 759 N.E.2d 15, 259 Ill. Dec. 535 (2001), persuasive. In *In re K.C.*, the Illinois appellate court first found that the trial court had the statutory authority to remove or reassign a caseworker, as we have found in the instant case. When addressing whether the trial court's order requiring the Department of Children and Family Services (DCFS) to remove the current caseworkers and reassign the case to a new team of caseworkers violated the doctrine of separation of powers, the Illinois appellate court found the following:

> [T]he doctrine of separation of powers was not designed to achieve a complete divorce among the three branches of government, nor does it require governmental powers to be divided into rigid, mutually exclusive compartments. . . . When the legislature creates a statute that contemplates an interplay between the courts and the executive branch, court orders directing the actions of the executive agencies do not violate the doctrine of the separation of powers. . . . Under the Juvenile Court Act, where the legislature intends an interplay between DCFS and the courts in determining the appropriate services for neglected and abused children, the evil of the court's usurping the executive discretion is absent. . . .
>
> We do not find the court's action, in ordering the removal and reassignment of alternative caseworkers, impermissibly infringed upon the administrative discretion of DCFS, as an agency of the executive branch. As previously pointed out, the court here did not order that specific caseworkers be assigned to the matter. Rather, the court, having determined the current team of caseworkers had not

> fulfilled its statutory obligation to report, simply ordered the removal and reassignment of an alternative team. The ultimate determination of which caseworkers to assign to the matter, therefore, remained within the discretion of DCFS. In our judgment, this interplay between DCFS and the court, in a situation where assigned caseworkers fail to satisfy a duty to report, is one that the legislature specifically contemplated and sanctioned under the [Juvenile Court] Act.

(Citations omitted.) *Id.* at 779-80, 759 N.E.2d at 23, 259 Ill. Dec. at 543.

We agree with the reasoning used by the Illinois appellate court. We believe that the Legislature must have contemplated the interplay between DHHS and the juvenile court when it added the phrase "by and with the assent of the court" to § 43-285(1). We therefore determine that the doctrine of separation of powers was not violated by the juvenile court's order. Whether the addition of the phrase "by and with the assent of the court" to § 43-285(1) renders the statute unconstitutional is neither before us nor possible for us to decide. This court cannot determine the constitutionality of a statute. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003). Accordingly, we decline to address this issue.

CONCLUSION

Finding that the separate juvenile court did not err when it ordered DHHS to remove the case manager dealing with Veronica's case and replace her with a more experienced case manager, we affirm the decision of the juvenile court in its entirety.

AFFIRMED.

IN RE ESTATE OF THOMAS W. TIZZARD III, ALSO KNOWN AS THOMAS W. TIZZARD, DECEASED. SANDRA J. TIZZARD, APPELLEE, V. RENA A. TIZZARD, PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS W. TIZZARD III, DECEASED, APPELLANT.

708 N.W.2d 277

Filed December 20, 2005. No. A-04-618.

1. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** The appellate court has 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, and to vacate an order of the lower court entered without jurisdiction.
2. **Taxation: Federal Acts: Courts.** The determination of whether a person owes federal income tax on money received does not occur in the Nebraska state courts.
3. ____: ____: ____. State law is not binding on federal courts in determining income tax questions pursuant to I.R.C. § 71 (2000).
4. **Decedents' Estates: Taxation: Federal Acts: Courts.** Where federal estate tax liability turns upon the character of a property interest held and transferred by a decedent under state law, federal authorities are not bound by the determination made of such property interest by a state court.
5. **Federal Acts: Courts.** In answering a question of federal law, the U.S. Supreme Court is in no way bound by state courts' answers to similar questions involving state law.
6. **Taxation: Federal Acts.** State law creates legal interests, but the federal statute determines when and how they shall be taxed.
7. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
8. **Contracts: Declaratory Judgments.** Any person interested under a written contract may have any question of construction determined and obtain a declaration of rights, status, or other legal relations thereunder.
9. **Declaratory Judgments: Justiciable Issues.** In order to grant declaratory relief, there must be a justiciable issue, meaning a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
10. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska.
11. **Parties: Proof.** In order to maintain an action to enforce private rights, the plaintiff must show that he will be benefited by the relief to be granted.
12. **Courts: Declaratory Judgments: Justiciable Issues.** A court can declare the law and its application to a given set of facts only when a justiciable controversy is presented for determination, and a court is not empowered to render advisory opinions.
13. **Justiciable Issues.** To determine whether there is a justiciable issue presented, the crucial questions are as follows: (1) Is there a present substantial controversy between parties with adverse interests, (2) is such controversy susceptible of immediate

resolution and judicial enforcement, (3) will the plaintiff be benefited by the relief to be granted, and (4) is the court's decision merely an advisory opinion?

14. **Judgments: Jurisdiction: Appeal and Error.** An appellate court has the power to vacate an order entered by the lower court without jurisdiction.

Appeal from the County Court for Douglas County: JOSEPH P. CANIGLIA, Judge. Vacated and dismissed.

Jay A. Ferguson for appellant.

Dennis E. Martin and Kevin J. McCoy, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

This appeal involves a claim that an Internal Revenue Service (IRS) "Miscellaneous Income" form 1099 (hereinafter Form 1099) issued by the personal representative of an estate was inaccurate. The recipient of the disputed Form 1099, Sandra J. Tizzard, contends that the personal representative, Rena A. Tizzard, should not have issued a Form 1099 showing that Sandra received $144,000 in miscellaneous income from the estate of Thomas W. Tizzard III, also known as Thomas W. Tizzard, who is the deceased former husband of both Sandra and Rena. The county court for Douglas County reopened Thomas' estate and ultimately granted Sandra's motion for summary judgment, finding that "at no time did the Estate pay $144,000.00 to [Sandra] as alleged in the [Form 1099] sent to [Sandra]." The court further ordered Rena, as the personal representative, to file an amended Form 1099 "showing $0 paid to [Sandra] by the Estate."

We find that Sandra did not present a justiciable issue to the county court, because her claim that she received an inaccurate Form 1099, to the extent that it presents any issue, presents only a matter of federal income tax law. Therefore, we find that the county court erred in granting summary judgment, and we vacate the judgment of the county court and order that Sandra's application be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

The record shows that Thomas, the decedent, was first married to Rena. After their divorce, Thomas married Sandra on January 1, 1989. On October 18, 1999, Sandra and Thomas' marriage was dissolved, and the decree incorporated their April 16, 1999, property settlement agreement. Part of that agreement provided as follows: "Alimony shall terminate: 1. upon the death of either party, the remarriage of [Sandra], 2. or upon [Sandra's] cohabitation with an unrelated adult with whom she shares living expenses, 3. or, the passage of 72 months."

The agreement further provided:

> [Thomas] shall maintain existing life insurance through his employer . . . on his life naming [Sandra] as primary beneficiary for an amount sufficient to cover the outstanding alimony obligation as ordered under the terms of this Decree. [Thomas] shall periodically provide proof, at [Sandra's] request, that sufficient insurance is in force and that the coverage remains adequate.

Despite the above provision, the record shows that on December 14, 1999, Thomas submitted a change of beneficiary to his life insurance company designating Rena as the primary beneficiary instead of Sandra. On January 3, 2000, Thomas died, and Rena was appointed as personal representative of Thomas' estate.

Subsequently, both Sandra and Rena made claims against Thomas' life insurance policy. In February 2000, Sandra filed a claim against the estate, alleging "[a]limony" due in the amount of $144,000. Sandra amended her claim in March to "64 monthly alimony payments" of $2,250 each, as well as life insurance proceeds of $144,000, noting in such amendment with respect to the insurance claim that the "[v]alue" of the second claim "is a repeat of Claim No. 1"—which notation is clearly Sandra's admission that she is only entitled to satisfaction of one or the other of her two claims for $144,000. Rena, as personal representative, disallowed both of Sandra's claims on April 10.

Thomas' life insurance company then filed an interpleader action in federal district court, noting Sandra's and Rena's competing claims to Thomas' life insurance proceeds and making

both Sandra and Rena parties. As part of that action, the company paid $178,500 in life insurance proceeds into federal court. The interpleader action was settled by a stipulation filed in the federal court on February 1, 2002, which provided for the execution of a mutual release by Sandra, by Rena, and notably by Rena as personal representative of the estate—although the estate was not a party in the interpleader action. Under the stipulation, Sandra and Rena agreed that Sandra would receive $144,000, which amount was described therein as "representing 63 unpaid alimony payments by Thomas . . . in the amount of $141,750.00, plus $2,250.00 in interest," and that Rena was entitled to the remainder of the proceeds of the life insurance policy. Pursuant to the stipulation, the clerk of the federal district court paid such funds to the trust accounts of Sandra's and Rena's attorneys, and the interpleader action was dismissed. The mutual release was signed by Sandra and Rena individually and again by Rena as the personal representative of Thomas' estate.

On July 24, 2002, the estate was closed by entry of an order of complete settlement. A receipt signed by Sandra was filed with the county court on July 26. That receipt states:

> [Sandra] hereby acknowledges receipt of the following described property . . . [:]
>
> Claim No. 1. 64 monthly alimony payments due to Sandra . . . in the amount of $2,250.00 per month.
>
> Claim No. 2: Life insurance proceeds due to [Sandra] for [Thomas'] policy issued through his place of employment by [Thomas' life insurance company].

In January 2003, Sandra received a Form 1099 showing payment by Thomas' estate of $144,000 to Sandra, and such amount was listed on the form in the box entitled "Other Income."

On August 26, 2003, Sandra filed an application to reopen the estate stating that Rena had sent the Form 1099 after her discharge as personal representative, that Rena was attempting to subject Sandra to income tax "by sending her a Form 1099 showing $144,000.00 in taxable income paid to her, [and that such Form 1099 was] false as to [Sandra]." In her prayer for relief, Sandra asked for a "declaration that at no time did the Estate pay $144,000.00 to [Sandra]" and asked that Rena, as the

personal representative, be ordered "to file an amended [Form] 1099 showing $0 paid to [Sandra]."

Sandra's application also stated that she discovered that Rena had submitted a petition for determination of inheritance tax, showing a deduction under "Debts Paid for Which [Thomas] Was Liable At Death" of $144,000, the amount paid to Sandra in settlement of the interpleader action. Sandra noted that Rena had taken this amount as a deduction against her own inheritance tax, reducing to $0 what otherwise would have been a taxable amount of $133,713.77. The record before us bears out that in Rena's final accounting of Thomas' estate, she deducted $144,000, describing the deduction as "Ex-wife's divorce decree alimony." Sandra alleged that at no time did she receive $144,000 in alimony from the estate, nor did the estate ever have any interest in or possession of the $144,000 in life insurance proceeds paid to Sandra via the interpleader action. Perhaps inconsistent with such pleading is Sandra's signed receipt from which we quoted above.

On December 11, 2003, the county court granted Sandra's application to reopen the estate. On April 28, 2004, Sandra filed a motion for summary judgment. In her motion, Sandra sought the same relief we have previously detailed from her application. On May 13, the court held a hearing on Sandra's motion for summary judgment at which Sandra offered into evidence a letter from Rena to the IRS dated October 6, 2003, which stated:

> Dear IRS:
>
> I am not sure exactly what to do about this. I previously sent a [Form] 1099, as [personal representative of Thomas' estate], because I thought I was supposed to report this as alimony. A copy is enclosed. Sandra . . . has raised objection to this [Form] 1099['s] being from the Estate. Enclosed please find true copies of the Federal Court documents that settled this issue, or so I thought. If this alimony was supposed to be reported by me individually then please instruct me and I will send in a new [Form] 1099. If it was supposed to be reported by the Estate, then I am sorry to have bothered you.

Attached to that letter was a copy of the Form 1099 Rena sent to Sandra. The payor is listed as Thomas' estate, with Rena as

personal representative. In the box entitled "Other Income" is the amount of $144,000, and the recipient is listed as Sandra. Sandra also offered into evidence the settlement stipulation between Sandra and Rena in the interpleader action.

Rena likewise offered two exhibits into evidence. The first was an affidavit by one of Rena's attorneys which we deem not to be pertinent except to the extent that it attached a copy of a letter, the original of which was received as Rena's second exhibit. This letter, dated May 10, 2004, was from the IRS and was signed by Mark Munsterman, "Tax Specialist." The caption on Munsterman's letter reads, "Re: Issuance of Form 1099-MISC re Alimony Payments re [Thomas' estate]," and the letter is addressed to Rena's attorneys. Munsterman's letter recites the core facts, much as we have detailed them above, including a summary of the federal court interpleader action and its resolution by payment of the $144,000 to Sandra, which payment, Munsterman said, "was to fulfill [Thomas'] alimony obligation." Munsterman's letter also states, "The fact that life insurance was the source of the funds for the payment of the alimony claim does not affect the includability of the payment as ordinary income in Sandra's income tax return for the year of receipt," citing "Income Tax Reg. §1.101-5 of the Internal Revenue Code." Munsterman concluded his letter by saying that because the payment "was made to satisfy a claim made against [Thomas' estate] and [because] Rena agreed to the payment in her capacity as the Personal Representative . . . Rena as the Personal Representative is the proper party to issue the [Form 1099] to Sandra."

ASSIGNMENTS OF ERROR

Generally, Rena contends that the county court erred in its grant of summary judgment; however, we do not set forth her exact assignments of error because ultimately, we resolve this case on a very fundamental jurisdictional premise of Nebraska law.

STANDARD OF REVIEW

[1] The appellate court has 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,

and to vacate an order of the lower court entered without jurisdiction. See *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

ANALYSIS

After thoroughly considering the record, the briefing, and the oral argument, we believe that this litigation can be distilled down to its essence in the following brief paragraph, remembering that what transpired in Sandra's divorce, in the resolution of Thomas' estate, in the interpleader action, and with the IRS up to the time of the summary judgment hearing constitute essentially undisputed facts:

Clearly, the federal income tax consequences which Sandra perceives to be deriving from the issued Form 1099 are the core of and the motivation for this litigation. Put another way, absent adverse tax consequences for Sandra, the disputed Form 1099 is a matter of no consequence for Sandra. Sandra does not want the $144,000 classified as alimony because she would likely be obligated to pay federal income tax on the money. Therefore, as a sort of preemptive strike (against the IRS, we surmise), Sandra sought the county court's help to get a federal tax form amended to show that she got nothing from Thomas' estate rather than $144,000 as now shown by the Form 1099 issued to her by the estate. But, there is no doubt from the record that irrespective of what the Form 1099 originally said, or might be modified to say, the IRS is fully aware that Sandra received $144,000 as a result of the resolution of the federal court interpleader action. Thus, the IRS' awareness of Sandra's receipt of this money certainly does not hinge on the Form 1099 or what it says—Munsterman's letter proves this proposition. Therefore, bearing in mind the essence of the matter, the crucial question for us becomes whether Sandra presented a justiciable issue.

We answer the question by noting that the premise upon which Sandra brings this litigation is flawed. The notion that gaining the relief Sandra desires—an amended Form 1099 to show $0 received from the estate—will make a difference to the IRS is flawed because what the Nebraska state courts say about the Form 1099 does not determine a federal tax issue generally or determine the taxability of the $144,000 in particular.

[2] The determination of whether a person owes federal income tax on money received does not occur in the Nebraska state courts. Instead, if the taxpayer receives a proposed adjustment to a return from the IRS (for example, because Sandra did not report the $144,000 as taxable income), the taxpayer can in certain circumstances request that the matter be considered by the IRS Appeals Office or, in other situations, after a notice of deficiency, file a petition for redetermination of the deficiency with the U.S. Tax Court; or, the taxpayer can pay the tax and then file a request for a refund which, if denied, can then be litigated in a U.S. District Court. See 26 C.F.R. § 601.103 (2005) (summary of general tax procedure). While we have used a "bare bones" treatment of how disputes over federal income tax are resolved, it is sufficient to demonstrate the general proposition that Nebraska's courts do not determine federal taxability, and Sandra cites no authority to the contrary.

[3-6] We next turn to a longstanding principle having its roots in basic precepts of federalism, as illustrated by *Bardwell v. C. I. R.*, 318 F.2d 786 (10th Cir. 1963). In *Bardwell*, a former wife was to receive monthly payments of $425 after her divorce and her former husband was to place certain insurance policies in trust from which the former wife would be paid $600 per month if he died. Although the former husband was apparently still alive, the former wife and the IRS disagreed about how the monthly payments were to be treated, the former wife arguing that under Colorado law, the payments were not taxable alimony, but, rather, were made in discharge of a property settlement. The *Bardwell* court said that "state law is not binding on federal courts in determining income tax questions arising out of situations such as this." 318 F.2d at 789. The statutory reference in the *Bardwell* opinion regarding "situations such as this" was to the annotated counterpart to I.R.C. § 71 (1952), which was the federal statute making "[a]limony and separate maintenance payments" includable in gross income for federal tax purposes as well as defining what shall be considered alimony or separate maintenance payments. The *Bardwell* court also said that it was no more bound by the labels which parties to the payments put on them than it was by state law. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d

886 (1967) (where federal estate tax liability turns upon character of property interest held and transferred by decedent under state law, federal authorities are not bound by determination made of such property interest by state court), *nonacq. on other grounds* 1968-2 C.B. 3. See, also, *United States v. Craft*, 535 U.S. 274, 122 S. Ct. 1414, 152 L. Ed. 2d 437 (2002) (holding that state law determines only which sticks are in person's bundle; whether those sticks qualify as "property" for purpose of federal tax lien statute is question of federal law, and in answering question of federal law, the U.S. Supreme Court is in no way bound by state courts' answers to similar questions involving state law); *United States v. Mitchell*, 403 U.S. 190, 91 S. Ct. 1763, 29 L. Ed. 2d 406 (1971) (state law creates legal interests, but federal statute determines when and how they shall be taxed); *Burnet v. Harmel*, 287 U.S. 103, 53 S. Ct. 74, 77 L. Ed. 199 (1932); *Pahl v. C.I.R.*, 150 F.3d 1124 (9th Cir. 1998) (holding that courts look to federal law to determine what interest creates tax liability, but look to state law to determine whether taxpayer has requisite interest).

[7,8] Therefore, from the foregoing authority, it is abundantly clear that whatever the county court might order about the content of the Form 1099 does not make any difference on the only issue with which Sandra is truly concerned—the federal income taxability of the $144,000. The evidence which is central to our analysis of this appeal is (1) the stipulation and the mutual release earlier detailed which settled the interpleader action and (2) the property settlement agreement between Thomas and Sandra executed as part of their divorce. These key documents are subject to the law of contracts. See *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988) (settlement agreement is subject to general principles of contract law). Sandra's application which began this litigation is for "Declaratory Relief," and her prayer asks the court to declare that at no time did the estate pay her $144,000 and to order that Rena file an amended Form 1099 showing "$0 paid." Thus, this matter is in the nature of a declaratory judgment action under Neb. Rev. Stat. § 25-21,150 (Reissue 1995), which provides, "Any person interested under a . . . written contract . . . may have determined any question of

construction . . . and obtain a declaration of rights, status or other legal relations thereunder."

[9-12] In order to grant declaratory relief, there must be a justiciable issue, meaning a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. See *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). See, also, *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982). "While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska (cf. U.S. Const. art. III, § 2), existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska." *Mullendore v. Nuernberger*, 230 Neb. 921, 925, 434 N.W.2d 511, 515 (1989). In the context of a standing inquiry in a declaratory judgment action involving classification of school districts, the Nebraska Supreme Court held that in order to maintain an action to enforce private rights, the plaintiff must show that he will be benefited by the relief to be granted. *Stahmer v. March*, 202 Neb. 281, 275 N.W.2d 64 (1979) (residents and taxpayers of Class V school district failed to demonstrate how they would benefit from declaration that one or more laws applicable to Class I school districts were invalid, and thus, sustainment of demurrers for lack of standing in declaratory judgment action was affirmed). The Nebraska Supreme Court has said numerous times that it can declare the law and its application to a given set of facts only when a justiciable controversy is presented for determination and that it is not empowered to render advisory opinions. See, *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980); *American Fed. of S., C. & M. Emp. v. State*, 200 Neb. 171, 263 N.W.2d 643 (1978). Similarly, neither we nor the Douglas County Court can render advisory opinions.

RESOLUTION

The bill of exceptions, aside from the documentary exhibits admitted in evidence, contains 102 pages of discussion between the trial judge, the lawyers for Sandra and Rena, and someone often referred to as "UNIDENTIFIED VOICE," who apparently was a representative of the Douglas County Attorney's office who

was concerned about the county inheritance tax implications of Sandra's request for declaratory relief. And while, in the course of those 102 pages, the question of the propriety of the inheritance tax determination was discussed at some length, the county court made no order concerning such propriety; Douglas County is not a party to this appeal, and thus, no inheritance tax issue is before us. Additionally, we note that Rena did not ask for any affirmative relief, nor seek summary judgment, merely maintaining the position that the Form 1099 was correct. However, Rena alleged in her responsive pleading: "The Douglas County Court does not have jurisdiction to determine whether, according to Federal Tax Laws, [the $144,000] distribution is taxable alimony to [Sandra] or not."

[13] To determine whether there was a justiciable issue and whether the county court had jurisdiction, the crucial questions are as follows: (1) Is there a present substantial controversy between parties with adverse interests, (2) is such controversy susceptible of immediate resolution and judicial enforcement, (3) will Sandra be benefited by the relief to be granted, and (4) is the court's decision merely an advisory opinion?

The answer to all of these questions becomes apparent when the true nature of the "dispute" is recognized: whether the $144,000 distribution is taxable income in the eyes of the IRS. The Form 1099 is merely a piece of paper, and its contents do not determine whether the $144,000 amount is includable in Sandra's gross income for federal income tax purposes. Thus, whether the Form 1099 says that Sandra received $0 or $144,000 from the estate is not a substantial controversy. Moreover, since Rena as the personal representative has nothing at stake as to whether Sandra pays income tax on the money, Rena as the personal representative has no interest adverse to Sandra's. The real issue presented is not subject to judicial enforcement by the Douglas County Court, because the law is quite clear that state courts' pronouncements on the nature of a payment are not binding on the IRS' treatment of money under I.R.C. § 71 (2000). Thus, it naturally follows that an order from a Nebraska state court as to what should be written in the boxes on a Form 1099 is of no benefit to Sandra. It also follows that such an order is merely advisory and does not resolve the issue which concerns

Sandra. The long and short of it is that Sandra's "fight" about the taxability of the $144,000 is not with the personal representative of her former husband's estate, but with the IRS. And, while some of the evidence involved here—such as Sandra's property settlement agreement with Thomas and the terms of the resolution of the federal court interpleader action—will clearly be important in the ultimate determination of this issue, the forum for such determination is not the Douglas County Court; it will be resolved in another forum. As an aside, we recall that the IRS tax specialist, Munsterman, said that the Form 1099 was properly issued by Rena as the personal representative.

[14] Because there was no justiciable issue presented by Sandra, the county court should not have attempted to exercise its judicial power, and it lacked subject matter jurisdiction. Therefore, the county court's order of May 18, 2004, is vacated and this appeal is dismissed. See *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999) (appellate court has power to vacate order entered by lower court without jurisdiction).

VACATED AND DISMISSED.

DEBBI JEAN LAMB, APPELLEE, V.
KEITH WILLIAM LAMB, APPELLANT.

707 N.W.2d 423

Filed December 20, 2005. No. A-05-044.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Child Custody: Appeal and Error.** Child custody 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.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court.
4. **Child Custody.** Pursuant to Neb. Rev. Stat. § 43-1266 (Reissue 2004), a motion or other request for relief made in a child custody proceeding or to enforce a child

custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made.

5. **Child Custody: Words and Phrases.** A child custody proceeding for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act is a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue.
6. ____: ____. For purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, "commenced" means the filing of the first pleading in a proceeding.
7. **Child Custody: Jurisdiction.** In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction.
8. **Child Custody: Modification of Decree: Jurisdiction: States.** A Nebraska court may modify a custody decree from another state if (1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1998) or has declined to assume jurisdiction to modify the decree and (2) the court of this state has jurisdiction.
9. ____: ____: ____: ____. A Nebraska court must first determine whether the issuing state appears to have continuing exclusive jurisdiction under the jurisdictional prerequisites enumerated in the Uniform Child Custody Jurisdiction Act; if the issuing state no longer has continuing exclusive jurisdiction, a custody decree may be modified by a Nebraska court if Nebraska itself has jurisdiction under the Nebraska Child Custody Jurisdiction Act.
10. ____: ____: ____: ____. The state which initially enters a custody decree may lose continuing exclusive jurisdiction to modify the decree if it loses all or almost all connection with the child.
11. **Child Custody: Jurisdiction: States.** When a child and all parties have moved away from the state in which an initial custody decree was granted, deference to that state's continuing jurisdiction is no longer required because the issuing state no longer meets the jurisdictional prerequisites of Neb. Rev. Stat. § 43-1203(b) (Reissue 1998).
12. **Child Custody: Jurisdiction: States: Proof.** When the issuing state no longer has continuing exclusive jurisdiction, it is unnecessary to also show that the issuing state declined jurisdiction.
13. **Child Custody: Modification of Decree: Jurisdiction: States.** A Nebraska court has jurisdiction to decide custody matters by modification if Nebraska (1) is the home state of the child at the time of commencement of the proceeding or (2) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state.
14. **Child Custody: Jurisdiction: Time: Words and Phrases.** The home state of a child for purposes of the Nebraska Child Custody Jurisdiction Act is the state in which the child, for at least 6 consecutive months immediately preceding the time involved, lived with his or her parents, a parent, or a person acting as a parent.
15. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
16. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.

17. **Child Custody: Child Support: Modification of Decree: Jurisdiction: States.** The Nebraska Child Custody Jurisdiction Act does not confer subject matter jurisdiction upon a Nebraska court to modify a child support order issued by another state.
18. **Child Support: Modification of Decree: Jurisdiction: States.** The modification of another state's child support order must be addressed under the Uniform Interstate Family Support Act, Neb. Rev. Stat. §§ 42-701 to 42-751 (Reissue 2004).
19. **Child Support: States.** The Uniform Interstate Family Support Act provides a system where only one child support order may be in effect at any one time.
20. **Child Support: Modification of Decree: Jurisdiction: States.** Upon petition, a tribunal of this state may modify a child support order issued in another state which is registered in this state if, after notice and hearing, the tribunal finds that (1) neither the child nor the individual obligee nor the obligor resides in the issuing state, a petitioner who is a nonresident of Nebraska seeks modification, and the respondent is subject to the personal jurisdiction of the Nebraska district court or (2) Nebraska is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the Nebraska district court, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for the Nebraska district court to modify the support order and assume continuing exclusive jurisdiction.
21. ____: ____: ____: ____. A party seeking to modify a child support order issued in another state shall register that order in Nebraska in accordance with Neb. Rev. Stat. §§ 42-736 to 42-739 (Reissue 2004) if the order has not been previously registered.
22. **Statutes: Foreign Judgments: Child Support.** Substantial compliance with the registration requirements of the Uniform Interstate Family Support Act is expected.
23. **Child Support: Modification of Decree: Jurisdiction: States.** Failure to register an order as required under the Uniform Interstate Family Support Act precludes a Nebraska court from modifying the issuing state's child support order.
24. ____: ____: ____: ____. Registering a child support order issued by another state under the Nebraska Uniform Enforcement of Foreign Judgments Act does not confer subject matter jurisdiction on a Nebraska court to modify the foreign order with respect to payments to be made in the future.
25. ____: ____: ____: ____. A district court may modify a registered child support order issued in another state when, among other requirements, the petitioner seeking modification is a nonresident of Nebraska.
26. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. The party must also show that a change in custody is in the child's best interests.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part reversed and vacated.

Michael S. Borders and Julianna S. Jenkins, of Sennett, Duncan, Borders & Jenkins, P.C., L.L.O., for appellant.

Cheryl C. Guggenmos, of Guggenmos, England & Peterson, for appellee.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

Keith William Lamb appeals the order of the Custer County District Court granting the application of Debbi Jean Lamb, now known as Debbi Jean Rhoad, to modify a Wyoming decree of dissolution. That application requested changing the custody of the parties' minor child, Daniel, to Debbi. We reject Keith's claim that the Arizona courts had jurisdiction, and we find that the Nebraska district court had jurisdiction to award Daniel's custody to Debbi but that the court lacked subject matter jurisdiction to modify the Wyoming divorce decree with respect to child support. Thus, we affirm the district court's order concerning child custody, but we reverse and vacate the district court's order concerning child support.

FACTUAL AND PROCEDURAL BACKGROUND

Debbi and Keith were married on June 12, 1976. Three children were born of the marriage: Jeremy, born March 21, 1980; Justin, born December 22, 1981; and Daniel, born December 27, 1989. Daniel is the only child at issue in these proceedings. Debbi and Keith were divorced pursuant to a decree of dissolution entered in Laramie County, Wyoming, on January 11, 1991. The decree granted custody of the three children to Debbi.

On November 8, 1995, an order modifying the divorce decree was entered by the Wyoming court, which found that there was a substantial change in circumstances warranting a modification of the custody of the minor children. Keith was given "sole, complete and exclusive care, custody and control" of the minor children, subject to Debbi's "frequent and liberal visitation." Debbi was ordered to pay child support of $176.66 per month.

After the divorce, Keith moved from Wyoming to Colorado, and then in late 1994, he moved to Arizona. On July 16, 1999, he married Michelle. One child was born of that marriage, and Keith adopted Michelle's two children from a previous marriage. Keith and Michelle were divorced in Arizona on May 30, 2003.

Michelle obtained custody of the three children, and Keith was ordered to pay child support of $2,369 per month for the three children.

Keith is employed as an airline pilot, and his 2003 income tax forms show he earned wages of $136,561 that year. Keith testified that he flies three to four international trips per month and is home about 15 to 25 days during the month. At the time of trial, Keith lived in Arizona with his girl friend, whom he had been dating for 2 years. Keith testified that although he had filed for bankruptcy prior to trial, an order of discharge had not been entered.

Debbi moved from Wyoming to Nebraska in 1998. At the time of trial, she was employed as a "personal care giver," working 17 hours per week at $8 per hour. In May 2000, Daniel came to Nebraska to visit Debbi for the summer. After that summer visit, Daniel never went back to live with Keith. Debbi testified that in the summer of 2000, Daniel came to live with her pursuant to an agreement with Keith, and that in August, Keith provided Debbi a power of attorney for Daniel. Keith claims that the parties agreed that Daniel would live with Debbi for one school year, while Debbi said that they did not agree to a specific time limitation.

On October 23, 2001, Debbie filed a "Petition for Exercise of Jurisdiction" in the Custer County District Court. While there is not a specific order ruling on such petition, the court obviously exercised jurisdiction as shown by the subsequent proceedings we detail herein. On April 4, 2002, Debbi filed an "Application for Ex Parte Order of Custody" in the district court for Custer County, and on that same day, the court granted Debbi temporary custody of Daniel pursuant to an ex parte order. Keith testified at trial that in April 2002, he came to Nebraska to retrieve Daniel but discovered Debbi had obtained temporary custody of him.

On April 4, 2002, Keith filed with the Custer County District Court a "Special Appearance," followed by an application for modification or dismissal of the ex parte order of custody filed on April 15. On April 18, the district court granted Keith's application for modification to the extent that the ex parte order was to expire on May 10, 2002, but denied the remainder of the application. The court noted that Keith's filing of the application

for modification constituted the "entry of a voluntary appearance and is the equivalent of personal service of process," thereby implicitly overruling the special appearance. On July 22, the district court entered an order continuing "the temporary custody order granted on April 18, 2002," subject to reasonable rights of visitation and weekly telephone contact.

On May 3, 2004, Debbi filed an application to modify the decree, requesting the Custer County District Court to grant her custody of Daniel and to require Keith to pay child support. The court, following a hearing on the matter, entered an order on November 4, 2004, finding that the court had had jurisdiction since October 2001 and that custody of Daniel should be awarded to Debbi. Keith was granted visitation, in accord with *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987), and was ordered to pay child support of $991 per month beginning September 1, 2004. Keith's motion for new trial was overruled, and he now appeals to this court.

ASSIGNMENTS OF ERROR

Keith asserts, reassigned and restated, that the Custer County District Court lacked jurisdiction under the Nebraska Child Custody Jurisdiction Act, lacked jurisdiction to modify the child support order from Wyoming given the provisions of Nebraska's Uniform Interstate Family Support Act, and erred in granting Debbi custody of Daniel.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

[2] Child custody 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. *Id.*

[3] Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999).

ANALYSIS

Jurisdiction to Determine Custody of Daniel.

Keith asserts that the Custer County District Court did not have jurisdiction to modify the Wyoming decree and to grant Debbi custody and that the case is governed by the Nebraska Child Custody Jurisdiction Act (hereinafter NCCJA) and not by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The provisions of the NCCJA, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1998), were repealed by 2003 Neb. Laws, L.B. 148, § 105, and replaced by the UCCJEA, Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2004), operative January 1, 2004. We must first determine which of the two acts—the NCCJA or the UCCJEA—is controlling here.

[4-6] Section 43-1266 provides: "A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made." A "[c]hild custody proceeding means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." § 43-1227(4). "Commenced" means "the filing of the first pleading in a proceeding." § 43-1227(5). In determining whether the NCCJA or the UCCJEA applies, we must first determine when a motion or other request for relief was filed in a "child custody proceeding."

On April 4, 2002, Debbi filed in the Custer County District Court an "Application for Ex Parte Order of Custody." On that same day, the court entered an ex parte order granting Debbi custody of Daniel for an indefinite amount of time. Keith then filed a motion to modify or dismiss the ex parte order. Because the trial judge, District Judge Ronald Olberding, was not available to hear the motion, Keith requested that another judge hear the motion. The motion was heard by then District Judge William Cassel, who entered an order on April 18 stating that Judge Olberding's ex parte order was to expire on May 10, 2002, and

that "[t]he burden of initiating such hearing for further temporary custody rests upon [Debbi]; however, nothing in this order shall preclude [Keith] from seeking an earlier hearing consistent with the notice requirements of the [NCCJA] and Rule 8-3 of this court." Judge Cassel "otherwise denied" Keith's motion to modify or dismiss the ex parte order. Therefore, Judge Cassel's order essentially terminated Judge Olberding's ex parte order by finding that such would "expire" on May 10. However, on May 2, a hearing was held on the temporary custody order, at which hearing both parties were represented by counsel. On July 22, Judge Olberding entered an order stating that "the temporary custody order granted on April 18, 2002, is continued, subject to rights of reasonable visitation in [Keith] and at least once per week telephone privileges." No appeal was taken from the orders of April 4, April 18, or July 22. On May 3, 2004, Debbi filed her "Application to Modify Order of Decree of Dissolution," and it was this pleading which resulted in the order of the Custer County District Court that Keith now appeals to this court.

We first look to Debbi's "Application for Ex Parte Order of Custody" filed on April 4, 2002, which resulted in the requested ex parte order granting Debbi temporary custody of Daniel. The question is whether such application and ruling thereupon constituted a "child custody proceeding" under § 43-1227(4), remembering that while Daniel's custody was at issue, there was no notice to Keith and no hearing in which Keith had an opportunity to participate. A "proceeding" is defined by Black's Law Dictionary 1221 (7th ed. 1999) as follows:

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing.

Even if Debbi's "Application for Ex Parte Order of Custody" filed on April 4, 2002, is not a motion or request for relief in a "child custody proceeding" because of the lack of notice and hearing—a question we need not decide—Keith's "Application for Modification or Dismissal of Ex Parte Order of Custody" is clearly a motion made in a child custody proceeding, given the

expansive definition of that term in § 43-1227(4). Keith's motion, filed April 15, requested that the Custer County District Court modify its ex parte order to allow Keith to maintain custody of Daniel as "decided in the District Court of Laramie County, Wyoming." A hearing was held on Keith's motion. Section 43-1266 provides: "A motion or other request for relief made in a child custody proceeding . . . which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made." Because Keith's April 15, 2002, motion was made in a "child custody proceeding" well before January 1, 2004, the NCCJA is the applicable act because it was in effect on April 15, 2002.

In using Keith's April 15, 2002, "Application for Modification or Dismissal of Ex Parte Order of Custody" as the determinative pleading for purposes of commencement, we rely largely on the fact that such pleading resulted in a continuation of temporary custody for several years, until Debbi filed her "Application to Modify Order of Decree of Dissolution" asking that the "permanent care, custody and control" of Daniel "remain" with her, based on a material change of circumstances. In short, the Nebraska district court had placed temporary custody with Debbi in 2002, as a result of Keith's April 15 application, which beyond question began a "proceeding in which legal custody, physical custody, or visitation with respect to a child [wa]s an issue." See § 43-1227(4).

[7-9] We now turn to whether the district court had jurisdiction under the NCCJA. In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction. *Paulsen v. Paulsen*, 11 Neb. App. 582, 658 N.W.2d 49 (2003). Section 43-1214 provides that a Nebraska court may modify a custody decree from another state if (1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with §§ 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (2) the court of this state has jurisdiction. See, also, *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000) (Nebraska court must first determine whether

issuing state appears to have continuing exclusive jurisdiction under jurisdictional prerequisites enumerated in Uniform Child Custody Jurisdiction Act; if issuing state no longer has continuing exclusive jurisdiction, custody decree may be modified by Nebraska court if Nebraska itself has jurisdiction under NCCJA). The *Hamilton* court said, "The NCCJA, Nebraska's version of the Uniform Child Custody Jurisdiction Act (UCCJA), speaks to the jurisdiction of courts of this state to modify child custody decisions initially determined in the courts of other states." 260 Neb. at 892, 620 N.W.2d at 110.

[10,11] "The state which initially enters a custody decree may lose continuing exclusive jurisdiction to modify the decree if it loses all or almost all connection with the child." *Hamilton v. Foster*, 260 Neb. at 894, 620 N.W.2d at 111. When a child and all parties have moved away from the state in which an initial custody decree was granted, deference to that state's continuing jurisdiction is no longer required because the issuing state no longer meets the jurisdictional prerequisites of § 43-1203(b). *Hamilton v. Foster, supra.*

[12] We first look to whether Wyoming retains continuing exclusive jurisdiction over the custody matter. The Wyoming court initially granted Debbi custody of Daniel pursuant to the parties' dissolution action in 1991. The Wyoming court also modified the decree in 1995, granting Keith custody of all three children. By the time the Wyoming court's 1995 modification decree was entered, Keith and the children had moved to Arizona. In 2000, Daniel moved to Nebraska to live with Debbi, and he has lived there ever since. Thus, Daniel has lived in either Arizona or Nebraska since 1995, and there is no evidence that Daniel has had any connection with Wyoming since 1995. Moreover, Keith has not lived in Wyoming since the dissolution action and Debbi has not lived there since 1998. Because both parties and Daniel have moved from Wyoming and have had no connection thereto for several years, deference to Wyoming's continuing jurisdiction is not required. See *Hamilton v. Foster, supra*. We now turn to whether Nebraska has jurisdiction. See *id.* (when issuing state no longer has continuing exclusive jurisdiction, it is unnecessary to also show that issuing state declined jurisdiction).

[13,14] Pursuant to § 43-1203(1), a Nebraska court has jurisdiction to decide custody matters by modification if

> (a) [t]his state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state.

For purposes of the NCCJA, "home state" is defined as

> the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months . . . . Periods of temporary absence of any of the named persons shall be counted as part of the six-month or other period.

§ 43-1202(5).

In its November 4, 2004, order, the Custer County District Court found that Daniel had resided in Nebraska since May 2000 and that the Custer County District Court had had jurisdiction since October 2001. Daniel came to Nebraska in May 2000 so that Debbi could exercise her summer visitation. In August 2000, the parties agreed to allow Daniel to reside with Debbi for at least the 2000-2001 school year, and possibly longer. In May 2001, Keith wanted Daniel to come back to Arizona, but Debbi chose to exercise her 2001 summer visitation. Daniel continued to live in Nebraska with Debbi from 2001 until the time of trial, as we have recounted above in the "Factual and Procedural Background" portion of our opinion, although he did visit Keith in Arizona.

[15] Keith argues that Daniel was only in Nebraska because of the parties' agreement and that Daniel was merely "visiting" Nebraska. Brief for appellant at 15. The plain and ordinary meaning of the statute says that in order for Nebraska courts to have jurisdiction, Daniel must have "lived" in Nebraska with a parent for the 6 months immediately preceding the action. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002) (statutory language is to be given its plain and ordinary meaning). Webster's Encyclopedic Unabridged Dictionary of the English Language 838 (1989) defines "live" as "to dwell

or reside." Daniel was staying in Debbi's home and going to school in Nebraska from August 2000 until the time of trial. She had power of attorney as of August 11, 2000, "to do all acts and sign and execute all necessary documents pertaining to the education, health, welfare, and safety" of Daniel. The document granting Debbi power of attorney has on its face no time limit, and while the evidence is in conflict as to whether the parties' oral agreement included a time limit, the crucial fact is that the evidence undisputedly shows that Daniel has been living in Nebraska since the summer of 2000. Nebraska is Daniel's "home state," and the Custer County District Court had jurisdiction over the custody proceedings.

Jurisdiction to Modify Child Support.

[16-19] Keith asserts that the district court had no authority to modify the Wyoming child support order. Although Keith did not raise the issue of subject matter jurisdiction before the Nebraska district court, lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. See *Paulsen v. Paulsen*, 11 Neb. App. 582, 658 N.W.2d 49 (2003). Initially, we observe that the NCCJA does not confer subject matter jurisdiction upon a Nebraska court to modify a child support order issued by another state. See § 43-1202 (for purposes of NCCJA, child custody determination shall not include decision relating to child support or any other monetary obligation of any person). See, also, *In re Marriage of Zinke*, 967 P.2d 210 (Colo. App. 1998) (Uniform Child Custody and Jurisdiction Act does not confer subject matter jurisdiction upon court to modify child support order issued in another state). Thus, we address the modification of the Wyoming child support order under the Uniform Interstate Family Support Act (UIFSA), Neb. Rev. Stat. §§ 42-701 to 42-751 (Reissue 2004).

> The general purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders. . . . The goal of UIFSA is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction

> to establish or modify a child support order. . . . UIFSA provides a system where only one child support order may be in effect at any one time. . . . UIFSA allows, under certain circumstances, a Nebraska court to enforce or modify a support order issued in another state or to establish a support order on behalf of a nonresident of this state when a Nebraska court has jurisdiction over the person obligated to pay support. . . . However, UIFSA does not create an independent duty of support. The purpose of UIFSA in regard to child support is to enforce or establish a child support order against someone who has a duty to pay support or to modify an existing child support order when interstate aspects are involved. . . . UIFSA's provisions may only be used to enforce an existing support order, establish a support order where no order has previously been established, or modify an existing support order.

(Citations omitted.) *Hamilton v. Foster*, 260 Neb. 887, 899-900, 620 N.W.2d 103, 114 (2000).

[20] Section 42-746 provides in part that "upon petition[,] a tribunal of this state may modify a child support order issued in another state which is registered in this state, if after notice and hearing" the tribunal finds that (1) neither the child nor the individual obligee nor the obligor resides in the issuing state, a petitioner who is a nonresident of Nebraska seeks modification, and the respondent is subject to the personal jurisdiction of the Nebraska district court or (2) Nebraska is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the Nebraska district court, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for the Nebraska district court to modify the support order and assume continuing exclusive jurisdiction.

[21-23] It is clear that under § 42-746, the first predicate for a Nebraska court to have subject matter jurisdiction to modify another state's child support order is registration in Nebraska of such order—in this case, the Wyoming child support order. Section 42-744 provides that a party seeking to modify a child support order issued in another state shall register that order in Nebraska in accordance with §§ 42-736 to 42-739 if the order has not been previously registered. Section 42-737 provides:

> (a) A support order . . . may be registered in this state by sending the following documents and information to the appropriate [district court] in this state:
>
> (1) a letter of transmittal to the tribunal requesting registration and enforcement;
>
> (2) two copies, including one certified copy, of the order to be registered, including any modification of the order;
>
> (3) a sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
>
> (4) the name of the obligor and, if known:
>
> (i) the obligor's address and social security number;
>
> (ii) the name and address of the obligor's employer or other payor and any other source of income of the obligor; and
>
> (iii) a description and the location of property of the obligor in this state not exempt from execution; and
>
> (5) except as otherwise provided in section 42-725, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.
>
> (b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as a foreign judgment, together with one copy of the documents and information, regardless of their form.
>
> (c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed at the same time as the request for registration or later. The pleading shall specify the grounds for the remedy sought.

Substantial compliance with the registration requirements is expected. See, *Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999); *In re Interest of Chapman*, 973 S.W.2d 346 (Tex. App. 1998); Unif. Interstate Family Support Act § 602, comment, 9 U.L.A. 243 (2005). Failure to register an order as required under the act precludes a trial court from modifying the issuing state's child support order. See, *Auclair v. Bolderson*, 6 A.D.3d 892, 775 N.Y.S.2d 121 (2004) (petitioner failed to demonstrate that Florida judgment was registered in New York; this failure to prove registration prevented New York courts from

obtaining subject matter jurisdiction under both UIFSA and Full Faith and Credit for Child Support Orders Act to modify child support order from another state); *Rivera v. Ramsey County*, 615 N.W.2d 854 (Minn. App. 2000) (registration is prerequisite to modifying existing child support order issued in another state). See, also, *Jolly v. Jolly*, 130 S.W.3d 783 (Tenn. 2004) (failure to register Kansas divorce decree in Tennessee precluded Tennessee court, under UIFSA, from enforcing child support provisions in decree).

[24] There is no evidence before us that the Wyoming child support order, issued as part of the 1995 modification decree, has been registered in Nebraska pursuant to § 42-737 or that Debbi has even sought registration of such order. The only evidence in the record that arguably suggests prior registration of the Wyoming child support order is a document from the Nebraska Department of Health and Human Services certifying a "true copy of the official record of support order payments, balances, and arrearages," which document shows that Debbi owes Keith $3,785.79 in past-due child support. Such a document makes it conceivable that the Wyoming order was registered under the Nebraska Uniform Enforcement of Foreign Judgments Act (UEFJA), Neb. Rev. Stat. § 25-1587.01 et seq. (Reissue 1995), which perhaps explains the generation of the document by the Nebraska Department of Health and Human Services. However, even if Keith or Debbi had previously registered the Wyoming order under the UEFJA, the law is clear that doing so does not confer subject matter jurisdiction on a Nebraska court to modify the foreign order with respect to payments to be made in the future. See *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992) (trial court did not have subject matter jurisdiction to modify child support provisions of foreign divorce decree registered in state under UEFJA, and former wife's compliance with provisions of UEFJA did not invoke separate provisions of Revised Uniform Reciprocal Enforcement of Support Act). We note that the provisions of the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 to 42-7,105 (Reissue 1988 & Cum. Supp. 1992), were repealed by 1993 Neb. Laws, L.B. 500, § 61, and replaced by UIFSA, operative January 1, 1994, the statutes involved in the present case.

[25] But, the lack of evidence of registration is only one reason why the Nebraska district court lacked subject matter jurisdiction. Section 42-746(a)(1) allows a district court to modify a registered child support order issued in another state when, among other requirements, the petitioner seeking modification is a nonresident of Nebraska. Debbi, who petitioned for modification, is clearly a resident of Nebraska. While the district court could have obtained subject matter jurisdiction under § 42-746(a)(2) if "all of the parties who are individuals ha[d] filed consents in a record in the issuing tribunal [Wyoming] for a tribunal of this state [Nebraska district court] to modify the support order and assume continuing, exclusive jurisdiction." However, there is no evidence of any such consents by Keith and Debbi in our record.

Therefore, the Custer County District Court was without subject matter jurisdiction to modify the child support order issued by the Wyoming court. We reverse and vacate the Custer County District Court's order concerning child support.

Custody of Daniel.

[26] Keith asserts that the district court erred in granting Debbi custody of Daniel, because there was not a material change in circumstances, nor was it in Daniel's best interests. A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. *Mace v. Mace*, 13 Neb. App. 896, 703 N.W.2d 624 (2005). The party must also show that a change in custody is in the child's best interests.

In the record, the report of the district court commissioner from the Wyoming district court includes a "Basis for Findings and Recommendations" section which provides the reasons the Wyoming court granted Keith custody of the children in 1995, the order that Debbi seeks to modify. The Wyoming court found that Debbi was "unwilling to foster" frequent and liberal contact between the children and Keith. The court stated that Debbi's conduct in involving the children in her "struggle to either keep [Keith] or at least to eliminate any other relationships he may

develop" was inappropriate. The court found that Debbi was a full-time student with no income other than child support and student loans or grants and that Keith was an airline pilot who earned "sufficient income" to support the children. The court found that Debbi did not show stability because she was unemployed and had changed her major after 3 years of school. The Wyoming court concluded that it was in the best interests of the children to live with Keith.

At the time of the August 31, 2004, trial in the Custer County District Court, Debbi had moved to Nebraska, obtained employment, and gotten married, all of which were a change in circumstances from the time of the 1995 modification decree. As for Keith's life since the 1995 modification decree, he has been charged on two different occasions with domestic assault, has been married twice, and has gotten divorced twice. He also has filed for bankruptcy, which proceeding has not been discharged, and is paying child support for three children resulting from the marriage with Michelle. We find that these changes to Debbi's and to Keith's lives clearly constitute a material change in circumstances.

We now turn to whether a change in custody is in Daniel's best interests. Daniel testified at the modification hearing that he "feel[s] very comfortable with both parents" and that he "kinda ha[s] mixed feelings" about living with Debbi for the reason that he does not want to have to decide between his two parents, because he is afraid he is "eventually going to hurt one person." Daniel has been doing well in his current school in Nebraska. The guardian ad litem stated in her report that according to school reports, Daniel was "very withdrawn and under socialized" when he entered school in Nebraska. However, 2 years later, he was "very well adjusted and his socialization skills were much improved." At the time of trial, Daniel had lived in Nebraska with Debbi for 4 years, and he had initially wanted to live with her because he had "troubles" with Michelle, Keith's third wife.

From this record, and we have purposefully omitted from this opinion a number of salacious details, we have no illusions that either parent offers a perfect environment for Daniel. Debbi's husband is a "practicing alcoholic," and she testified that she is

"stuck" in the marriage "for financial stability." Debbi works about 17 hours per week at $8 per hour. However, Debbi has provided for Daniel for 4 years without any child support from Keith. Keith has been divorced a total of three times and is now cohabitating with his latest girl friend. Keith has been involved in two instances of domestic assault and has filed for bankruptcy, despite earning a salary of over $135,000 in 2003. Keith pilots international flights and, according to his testimony, is home between 15 and 25 days each month.

The guardian ad litem recommended that Debbi be granted custody of Daniel, finding that the guardian ad litem's paramount concern is Daniel's best interests and that Debbi "would place the best interest of [Daniel] as her primary goal." The guardian ad litem stated that her only concern about Debbi is her husband. The guardian ad litem opined that Keith's occupation provides an unpredictable schedule, that he lacks stability in regard to his relationships with the opposite sex, and that he has a criminal history relating to domestic abuse. Based on the record, the Nebraska district court did not abuse its discretion in determining that granting Debbi custody of Daniel was in Daniel's best interests.

CONCLUSION

The Nebraska district court had jurisdiction over the custody matter and did not err in granting Debbi custody of Daniel. However, that court did not have subject matter jurisdiction over the issue of child support. Therefore, we affirm the Nebraska district court's order concerning child custody, but we reverse and vacate the district court's order requiring Keith to pay child support.

AFFIRMED IN PART, AND IN PART
REVERSED AND VACATED.

TERRY BRONZYNSKI, APPELLANT, V. MODEL ELECTRIC, INC., APPELLEE.

707 N.W.2d 46

Filed December 20, 2005. No. A-05-054.

1. **Workers' Compensation.** In the context of body as a whole injuries, an applicant who must fulfill the requirements set forth in Neb. Rev. Stat. § 48-141 (Reissue 2004) by demonstrating a change in incapacity must establish both a change in the employee's physical condition, or impairment, and a change in the employee's disability.
2. **Workers' Compensation: Words and Phrases.** The term "impairment" is a medical assessment, while the term "disability" is a legal issue.
3. ____: ____. Under the workers' compensation law, "disability" refers to loss of earning capacity and not to functional or medical loss alone.
4. ____: ____. As a legal term, "disability" is construed in terms of "impairment" and its effect on earning capacity.
5. ____: ____. "Disability," for the purpose of the workers' compensation statutes, is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.
6. ____: ____. Showing a change in "incapacity," as provided in Neb. Rev. Stat. § 48-141 (Reissue 2004), requires a showing of change in impairment and change in disability.
7. ____: ____. An impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury.
8. **Workers' Compensation.** A modification to a Nebraska Workers' Compensation Court award cannot be applied retroactively to a date earlier than that on which the application for modification was filed.
9. ____. After a Nebraska Workers' Compensation Court award is given, an employee's further impairment and treatment due to a work-related injury do not automatically entitle the employee to further temporary total disability payments.
10. ____. An application to modify a Nebraska Workers' Compensation Court award is essential before a determination can be made as to the merit of a claim for further temporary benefits.
11. ____. Neb. Rev. Stat. § 48-121(5) (Reissue 2004) makes clear that an employee is entitled to temporary total disability benefits for vocational rehabilitation purposes only if the employee is actively undergoing rehabilitation.
12. **Workers' Compensation: Attorney Fees: Time.** Where there is no reasonable controversy regarding an employee's entitlement to workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes an award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent compensation payments.
13. **Workers' Compensation: Words and Phrases.** "Compensation," as used in Neb. Rev. Stat. § 48-125(1) (Reissue 2004) in reference to additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death.

14. **Workers' Compensation: Penalties and Forfeitures.** A waiting-time penalty is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of medical payments.
15. **Workers' Compensation: Attorney Fees: Interest.** When an attorney fee is allowed pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004), interest shall be assessed on the final award of weekly compensation benefits.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Ross A. Stoffer, of Mueting & Stoffer, for appellant.

James D. Hamilton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Terry Bronzynski appeals an order of a three-judge review panel of the Nebraska Workers' Compensation Court, which reversed in part, and in part affirmed a decision of a single judge of the Workers' Compensation Court upon an application to modify an award of benefits. Bronzynski asserts that the review panel erred in reversing the trial court's decision to increase his permanent partial disability award, in failing to award further temporary total disability benefits, and in failing to award additional penalties and fees. We conclude that in cases involving an application to modify a prior award of permanent partial disability benefits, wherein the applicant must demonstrate a change in incapacity, a showing of change in the applicant's impairment and disability is required. We find that while Bronzynski showed a change in impairment, he failed to satisfy his burden because he did not also demonstrate that he sustained a change in disability. Additionally, we find that the trial court appropriately awarded attorney fees regarding an award of delinquent medical payments. The trial court was also correct in not awarding a 50-percent waiting-time penalty, because under the pertinent 50-percent waiting-time penalty provision, such a penalty is not available for an award of delinquent medical expenses. Further, the trial court was correct in not awarding interest, since interest is assessable only on "weekly compensation benefits" under

Neb. Rev. Stat. § 48-125 (Reissue 2004). Therefore, we affirm the order of the review panel.

II. BACKGROUND

1. Procedural History

Bronzynski suffered a work-related injury on April 24, 2000, while working for Model Electric, Inc. He fell several feet from the top of a ladder, striking his head on the floor. On January 22, 2002, a hearing was held before the Nebraska Workers' Compensation Court to determine the extent of Bronzynski's injuries. In the award filed February 8, the Workers' Compensation Court determined that Bronzynski's injury resulted in a 15-percent loss of earning power. *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 (Neb. Work. Comp. Ct. Feb. 8, 2002). The court awarded temporary total disability benefits for the period of April 3 to August 13, 2001, permanent partial disability benefits for loss of earning power, future medical expenses, and vocational rehabilitation. *Id.*

On March 28, 2003, Bronzynski filed a motion to enforce the award, seeking payment of various medical expenses and disability benefits. The court dismissed Bronzynski's motion to enforce on April 23, and Bronzynski did not appeal.

Bronzynski filed his application to modify the February 8, 2002, award on November 5, 2003, seeking payment of various medical expenses, temporary total disability benefits for the period of December 17, 2001, to June 16, 2003, vocational rehabilitation benefits, and penalties and fees. A hearing on the application to modify the award was held by a single judge of the Nebraska Workers' Compensation Court on March 31, 2004. In the application, Bronzynski alleged that he "was required to undergo revision fusion surgery of his cervical spine on January 16, 2003 based on findings of a nonunion/pseudoarthrosis at the site of his previous fusion." He asserted that due to this surgery, he was entitled to further temporary total disability benefits, additional loss of earning power benefits, additional vocational rehabilitation, a 50-percent waiting-time penalty, attorney fees, and interest.

In its award entered June 4, 2004, the trial court concluded that Bronzynski "experienced a material and substantial increase of incapacity . . . sufficient to entitle him to a 25 percent loss of earning power . . . from and after November 5, 2003, the date the Application to Modify Award was filed." The court ordered payment by Model Electric of medical expenses totaling $35,156.14 and attorney fees in the amount of $1,500. However, the court denied Bronzynski's request for other temporary total disability benefits for the period of December 17, 2001, to June 16, 2003. The court explained that the requested period for benefits preceded the date of the application to modify the award, which application was filed on November 5, 2003, and that it was precluded from modifying an award retroactively prior to such date. Model Electric appealed, and Bronzynski cross-appealed.

A review hearing was held by a three-judge panel on October 26, 2004. Model Electric alleged that the trial court had erred in awarding attorney fees and in finding that Bronzynski experienced an increase of incapacity entitling him to an increase in loss of earning power benefits. On cross-appeal, Bronzynski alleged that the trial court had erred in failing to award further temporary total disability benefits, interest, penalties, and attorney fees. In its order of December 29, the review panel reversed the trial court's finding that Bronzynski was entitled to an increase in permanent partial disability benefits and affirmed the court's order of attorney fees and denial of temporary total disability benefits, interest, and penalties. Bronzynski timely appeals this decision.

2. Medical Treatment

As noted above, on April 24, 2000, Bronzynski suffered a work-related accident, falling several feet from a ladder and striking his head on the floor. "He experienced nearly immediate loss of hearing and ringing in his ears, blurry vision and 'slight pain' in his neck." *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 at *1 (Neb. Work. Comp. Ct. Feb. 8, 2002). Bronzynski's neck pain was subsequently diagnosed as "a 'huge C5C6 disc herniation.' " *Id.*

The record reveals that at least four doctors and a rehabilitation consultant were involved in Bronzynski's case and treatment,

Dr. J.R.S. Froggatt, Dr. Mark Puccioni, Dr. Ric Jensen, Dr. James Bertus, and David Utley. Bronzynski states that Dr. Froggatt performed an "anterior cervical diskectomy and interbody fusion" on his spine on April 3, 2001. Brief for appellant at 7. On May 23, Dr. Froggatt opined that Bronzynski "should probably be fit to attempt to return to the work force." One week later, Dr. Froggatt gave Bronzynski work restrictions, indicating that he could lift or carry a "maximum of 25 to 30 lbs[.]" but was "not to lift at or above the shoulder level."

Dr. Puccioni examined Bronzynski and recorded his findings on September 19, 2001. He recommended that Bronzynski seek pain management and stated that "there were no objective tests that [Dr. Puccioni] could see that would limit [Bronzynski's] work."

On December 4, 2001, Bronzynski was referred to Utley, the rehabilitation consultant, who prepared a "Loss of Earning Capacity Analysis." In the analysis, Utley reported that he considered, inter alia, the lifting restrictions that Dr. Froggatt imposed and Dr. Froggatt's opinion that Bronzynski suffered a " '7% total body disability.' " Utley concluded that Bronzynski "is employable but has sustained a loss of earning capacity of approximately 15%."

On December 17, 2001, Dr. Jensen evaluated Bronzynski and recommended that he obtain conservative treatments for his physical condition and that he undergo "dynamic plain films (flexion/extension) of the cervical spine . . . to assess the status of the fusion with regards to stability and bony consolidation." According to Dr. Jensen, Bronzynski was suffering "sustained posterior cervical pain and bilateral shoulder pain since the time of his operative therapy with regards to the anterior cervical fusion."

On January 18, 2002, Dr. Jensen reported that the flexion-extension dynamic plain films Bronzynski underwent indicated "sagittal rotation at the site of [Bronzynski's] previous fusion at the C5-6 intersegmental level." Dr. Jensen reported that he intended to perform a high-resolution "CT scan" and to follow up with Bronzynski. In his correspondence to Dr. Bertus dated January 21, 2002, Dr. Jensen noted that "[Bronzynski] appears to have reached a maximum level of medical improvement with

respect to his cervical fusion." Subsequently, the Nebraska Workers' Compensation Court held a hearing on January 22 and entered the original February 8 award, wherein it stated that it had relied on, inter alia, the "Loss of Earning Capacity Analysis" by Utley indicating that Bronzynski suffered a 15-percent loss of earning capacity. *Bronzynski v. Model Electric, Inc., supra.*

On February 18, 2002, Dr. Jensen evaluated Bronzynski, and in subsequent correspondence to Dr. Bertus, he reported that the

> [f]lexion/extension dynamic plain film images of the cervical spine have indicated that [Bronzynski] may have a pseudoarthrosis with evidence of sagittal rotation at the C5-6 intersegmental level (site of previous fusion). Additionally, high resolution CT scan imaging of the cervical spine performed at my request on 1/30/02 reveals evidence of pseudoarthrosis and bony non-union at the C5-6 intersegmental level.

At this time, Dr. Jensen indicated the possibility of "revision cervical fusion." On February 18, Dr. Jensen had also provided Bronzynski with a "Return to Work or School" note remarking, "[Bronzynski] is to remain off work until further notice. Cervical spine surgery is planned."

The record indicates that Bronzynski properly requested vocational rehabilitation services as required in the February 8, 2002, award. However, on March 25, 2002, Utley declined to initiate Bronzynski's vocational rehabilitation due to the results of the CT scan imaging and Dr. Jensen's "Return to Work or School" note.

Although the February 8, 2002, award limited the duration of temporary total disability benefits to the period of April 3 to August 13, 2001, Bronzynski requested in a letter dated February 20, 2002, and again in subsequent correspondence of March 7 and 29 and April 30, that Model Electric pay further temporary total disability benefits. These requests appear to have been based on the facts that Bronzynski required additional surgery for his neck and that he had continued to remain in off-work status. However, Model Electric "denied the surgery" and no such payments were tendered.

Bronzynski reports that on January 16, 2003, he underwent a "cervical spinal fusion procedure" performed by Dr. Jensen.

Brief for appellant at 10. Bronzynski was discharged with instructions to "engage in moderate activities only until further notice." On February 17, Dr. Jensen instructed Bronzynski that he was to "maintain light activity restrictions for 1 month additional." On April 10, Dr. Jensen rated Bronzynski's "permanent partial impairment . . . of the whole person with respect to the cervical spine at 14 percent." He further indicated that Bronzynski would reach a maximum level of medical improvement on June 16.

Dr. Jensen recommended that a "Functional Capacity Evaluation [would] further clarify reduction in range of motion of [Bronzynski's] cervical spine and [enable] the assessment and establishment of permanent activity restrictions." The record lacks evidence of any such evaluation subsequent to Bronzynski's January 2003 procedure. Dr. Jensen performed a "Lumbar Spine Physical Capacity Evaluation" on June 6 which indicated work restrictions regarding the length of time Bronzynski could sit, stand, and walk, as well as lifting and carrying limitations. However, Bronzynski's lumbar spine injury was unrelated to the work-related accident in question, and thus, the evaluation as it related to that injury was not relevant to Bronzynski's work restrictions due to the work-related accident.

III. ASSIGNMENTS OF ERROR

Bronzynski assigns, restated, that the Nebraska Workers' Compensation Court review panel erred (1) in reversing the trial court's finding that he suffered an increase in loss of earning power, (2) in failing to award certain temporary total disability benefits, and (3) in failing to award attorney fees, interest, and waiting-time penalties.

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.

Morris v. Nebraska Health System, 266 Neb. 285, 664 N.W.2d 436 (2003); *Meredith v. Schwarck Quarries*, 13 Neb. App. 765, 701 N.W.2d 387 (2005).

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Id.* 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.* However, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

V. ANALYSIS

1. Permanent Partial Disability

Bronzynski alleges that the review panel erred in reversing the trial judge's finding that his loss of earning power had increased from 15 percent at the time of the February 8, 2002, award to 25 percent at the time of the June 4, 2004, award. He asserts that there was sufficient evidence to support the trial court's factual conclusions and that the review panel erred in substituting its view of the facts. He contends that the review panel relied on his statement that "as far as he knew, his restrictions were the same as before the second surgery; however, [he had not] worked since before the first trial." Brief for appellant at 13. He further contends that he did not obtain the "Functional Capacity Evaluation" recommended by Dr. Jensen after the January 16, 2003, procedure "because of Model Electric's refusal to pay benefits." *Id.* We agree with the review panel and find that the trial court erred in finding an increase in incapacity and, therefore, in awarding an increase in permanent partial disability benefits. Bronzynski did not fulfill the statutory requirements for modification of an award pursuant to Neb. Rev. Stat. § 48-141 (Reissue 2004).

To obtain a modification, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). The applicant must prove there exists a material and substantial change for the better or worse in the condition—a

change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made. *Id.*

Section 48-141 provides, in pertinent part, that

> the amount of any agreement or award payable periodically may be modified as follows: . . . after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of *incapacity* due solely to the injury.

(Emphasis supplied.)

[1] In the context of body as a whole injuries, an applicant who must fulfill the requirements set forth in § 48-141 by demonstrating a change in incapacity must establish both a change in the employee's physical condition, or impairment, and a change in the employee's disability. See *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998) (finding that without showing of change in applicant employee's physical condition and that such change was cause of change in earning capacity, modification of prior award was improper).

[2-5] The term "impairment" is a medical assessment, while the term "disability" is a legal issue. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Under the workers' compensation law, "disability" refers to loss of earning capacity and not to functional or medical loss alone. See *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959). Therefore, as a legal term, "disability" is construed in terms of "impairment" and its effect on earning capacity. Contrary to Bronzynski's apparent position, it is not self-evident that an increase in physical impairment results in an increase in disability.

> [D]isability for purposes of [the workers' compensation] statute[s] is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.

Wolfe v. American Community Stores, 205 Neb. 763, 765-66, 290 N.W.2d 195, 197-98 (1980). Accord, *Miller v. Peterson*, 165 Neb. 344, 85 N.W.2d 700 (1957); *Shotwell v. Industrial Builders, Inc.*, 187 Neb. 320, 190 N.W.2d 624 (1971).

[6] The terminology has been further clarified by the Nebraska Supreme Court, which explained that " ' " ' [p]ermanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or *occupational* demands, or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment.' " ' " (Emphasis supplied.) *Green v. Drivers Mgmt., Inc.*, 263 Neb. at 204-05, 639 N.W.2d at 102 (quoting *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring)). Given the foregoing definitions, showing a change in "incapacity," as provided in § 48-141, requires a showing of change in impairment and change in disability.

[7] A comparison of the conclusions of Drs. Froggatt and Jensen indicates that Bronzynski had suffered an increase in physical impairment since the January 2002 hearing. In the award entered as a result of that hearing, the court expressed that it had relied on an opinion of Dr. Froggatt wherein Bronzynski was determined to have a 7-percent impairment rating. *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 (Neb. Work. Comp. Ct. Feb. 8, 2002). Dr. Jensen now indicates that Bronzynski has a "permanent partial impairment rating of the whole person with respect to the cervical spine [of] 14 percent." However, an impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). Bronzynski relies on *Swanson* for the proposition that the court can award an increased loss of earning capacity rating "[o]nce an employee submits evidence of either a permanent impairment or physician-ordered permanent physical restrictions." Brief for appellant at 15. Yet, *Swanson* also indicates that " 'the ultimate issue is not the extent of anatomical disability but that of vocational disability, the percentage of which does not definitively depend on the medical proof regarding a percentage of anatomical disability.' " 267 Neb. at 143, 672 N.W.2d at 414-15.

The trial court reviewed the evidence and found:

> Dr. Jensen reported that [Bronzynski] reached maximum medical improvement subsequent to the second cervical

> fusion on June 16, 2003, and experienced a 14 percent permanent functional impairment of the whole person . . . . His evaluation of permanent impairment is twice the degree of impairment first assessed by Dr. Frogg[a]tt . . . . [Bronzynski] described his current limitations regarding activities. From the medical evidence and the testimony of [Bronzynski], which was credible, I find [that he] has experienced a material and substantial increase of incapacity due solely to the original accident and cervical injury, sufficient to entitle him to a 25 percent loss of earning power . . . from and after November 5, 2003, the date the Application to Modify Award was filed.

Nowhere does Bronzynski argue that he has sustained an increase in loss of earning capacity. Indeed, his argument is based upon the premise that an increase in physical impairment is synonymous with an increase in incapacity. As previously indicated, this is not the law in Nebraska. Moreover, Bronzynski's testimony indicates that there has been little change in his condition since the initial award. When asked as follows by Model Electric's attorney whether the restrictions Dr. Froggatt imposed after the first surgical procedure were an accurate assessment of his current abilities, Bronzynski responded thus:

> Q. [Y]ou've had a chance to review [Dr. Froggatt's medical report of May 30, 2001]. Do you recall seeing . . . the last paragraph that says lifting maximum of 25 to 30 pounds carrying, not to lift at or above shoulder level?
>
> A. Yes.
>
> Q. Was that an accurate assessment of your abilities at that time?
>
> A. As far as I know. As I remember.
>
> Q. Has Dr. Jensen since your surgery of January of 2003 given you any idea of what your permanent restrictions are?
>
> A. As far as I know it's basically the same.
>
> Q. Okay.
>
> A. Stuff above my head.
>
> Q. Same restrictions?
>
> A. Basically, yeah.
>
> Q. Okay. In fact, isn't it true that there hasn't been . . . any real change in your abilities after the surgery of January

2003 [as compared to] those abilities you had prior to January of 2003, isn't that right?

A. You mean on restrictions?

Q. Yes.

A. As far as I know.

Bronzynski argues that he did not have a basis of knowledge of current restrictions because he had been unable to work since before the first trial. Additionally, he asserts that he was unable to obtain a "Functional Capacity Evaluation to determine the impact these restrictions would have on his ability to obtain employment" because Model Electric had refused to pay benefits. Brief for appellant at 13. However, Bronzynski was required to show a substantial change in incapacity and, pursuant to Nebraska law, was obligated to show a change in disability or earning capacity. The record lacks evidence of a change in Bronzynski's disability or earning capacity. Therefore, we conclude that the trial court was clearly wrong in finding that Bronzynski proved by a preponderance of the evidence that there had been a substantial increase in his incapacity. We find no merit to Bronzynski's assigned error that the Workers' Compensation Court review panel erred in reversing the trial judge's finding that Bronzynski's loss of earning power had increased.

2. Temporary Total Disability

Bronzynski's application to modify the award requests temporary total disability benefits from December 17, 2001, to June 16, 2003, the date by which Bronzynski had reached maximum medical improvement after the January 2003 procedure according to Dr. Jensen. Bronzynski assigns that the Workers' Compensation Court review panel erred in failing to award "temporary total disability benefits from at least February 18, 2002, which is the date Dr. Jensen took [him] off work pending surgery . . . until such time as [he] completes his vocational rehabilitation." All the above dates predate the November 5, 2003, filing of the application to modify.

(a) Retroactive Modification

Bronzynski contends that temporary total disability benefits should be expressly awarded for the requested time period because Model Electric had refused to pay medical benefits as

dictated by the original award. More specifically, Bronzynski argues, Model Electric's refusal should be construed by the court as a de facto application for modification, and as such, all the statutory burdens associated with an application for modification fall on Model Electric to fulfill. Consequently, Bronzynski argues that Model Electric attempted to "unilaterally modify" the award by refusing to pay for his requested medical expenses and that therefore, we must construe the filing date for Model Electric's de facto application to modify as the date of Model Electric's refusal, June 28, 2002.

This argument is without merit. Model Electric denied medical benefits to Bronzynski; i.e., he wanted surgery performed, and Model Electric would not pay for it. The fact that this denial related to future medical benefits and not to disability benefits previously ordered in the 2002 award is critical. Bronzynski is equating apples to oranges, or, rather, previously awarded medical benefits to previously awarded disability benefits. Therefore, the filing date of Bronzynski's "Application to Modify Award" must be construed as the operative date for awarding retroactive benefits, and we affirm the decision of the review panel upholding the trial court's determination that it was precluded from modifying the award retroactively prior to the filing date of Bronzynski's application.

[8] It is well established that a modification to a Nebraska Workers' Compensation Court award cannot be applied retroactively to a date earlier than that on which the application for modification was filed. See, *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001); *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000); *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

[9] Bronzynski was originally awarded temporary total disability benefits for the period of April 3 to August 13, 2001, the latter being the date by which Dr. Froggatt considers Bronzynski to have reached maximum medical improvement. See *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 (Neb. Work. Comp. Ct. Feb. 8, 2002). The record reveals that such payments were made and that there was no cessation of payments related to the award of temporary total disability benefits. The

fact that Bronzynski had further impairment and treatment due to the work-related injury does not automatically entitle him to further temporary total disability payments.

[10] Bronzynski's correspondence to Model Electric indicates that he requested temporary total disability benefits based on the "Return to Work or School" note from Dr. Jensen and an "X-ray report dated 1/30/02." However, this request was incongruent with the original 2002 award of temporary total disability benefits, and all those benefits had been paid. Bronzynski's request for further temporary total disability benefits would have properly been the subject of an application for modification when he became aware of the need for further medical treatment. An application to modify the original award is essential before a determination can be made as to the merit of a claim for further temporary benefits. As such, temporary total disability benefits cannot be awarded retroactively prior to the date on which the application to modify was filed in this case. See, *Hagelstein v. Swift-Eckrich, supra*; *Sheldon-Zimbelman v. Bryan Memorial Hosp., supra*; *Starks v. Cornhusker Packing Co., supra.*

Therefore, we affirm the review panel's decision upholding the trial court's determination that it was precluded from modifying the 2002 award to include temporary total disability benefits prior to the filing date of the application to modify. Bronzynski's argument is without merit.

(b) Nonparticipation in Vocational Rehabilitation

Bronzynski maintains that Model Electric "would have been liable for temporary total disability payments during the time [he] was participating in the vocational rehabilitation plan and likewise[,] Model Electric . . . should be liable for temporary total disability payments for preventing [him] from participating in a vocational rehabilitation plan." Brief for appellant at 27. He contends that Model Electric's refusal to pay medical expenses delayed his revision fusion surgery and that as a result, Utley declined to initiate his vocational rehabilitation. Therefore, Bronzynski argues, he was unable to participate in vocational rehabilitation and, thus, was entitled to temporary total disability benefits. However, this argument is not supported in the law, and therefore, it is without merit.

Neb. Rev. Stat. § 48-121(5) (Reissue 2004) articulates:

> The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing physical or medical rehabilitation and while undergoing vocational rehabilitation whether such vocational rehabilitation is voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court.

[11] Section 48-121(5) makes clear that Bronzynski was entitled to temporary total disability benefits for vocational rehabilitation purposes only if he was actively undergoing rehabilitation. Bronzynski offers no authority, and we have found none, that supports his contention. Whatever the reason for his nonparticipation in a rehabilitation program, the record reflects that Bronzynski was not actively receiving vocational rehabilitation and was therefore not entitled to compensation.

Hence, we affirm the trial court's determination that Bronzynski is not entitled to the requested temporary total disability benefits, and we find that the review panel did not err in affirming the trial court's finding. Bronzynski's argument is without merit.

3. Other Penalties

Bronzynski's application to modify the award requested "a 50% waiting penalty, interest and attorney's fees." Bronzynski now assigns as error that the Workers' Compensation Court review panel failed to award interest, a 50-percent waiting-time penalty, attorney fees, and costs. He argues that "no reasonable controversy existed" and that "[o]nly by [the court's] enforcing the penalty provisions set out in the workers[′] compensation statutes will employers quit placing the burden of going back before the court to enforce the award previously entered on employees and follow the modification procedures." Brief for appellant at 28-29. The trial court awarded attorney fees based on its award of delinquent medical payments, finding that "no reasonable controversy existed regarding the necessity and reasonableness of the second cervical fusion." We affirm the review panel's findings that attorney fees were properly ordered

concerning the award for medical expenses and that no interest or waiting-time penalty was appropriate.

Section 48-125 provides, in pertinent part:

> (1) Except as hereinafter provided, all amounts of *compensation* payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court. . . . Whenever the employer refuses payment of compensation or *medical payments* subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay *medical payments* subject to such section after thirty days' notice has been given of the obligation for *medical payments*, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award. . . .
>
> (2) When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . . Interest shall apply only to those *weekly compensation benefits* awarded which have accrued at the time payment is made by the employer.

(Emphasis supplied.)

[12,13] Where there is no reasonable controversy regarding an employee's entitlement to workers' compensation, § 48-125 authorizes an award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent compensation payments. See *Roesler v. Farmland Foods*, 232 Neb. 842, 442 N.W.2d 398 (1989). However, it is important to understand the meaning of "compensation" as it is used in § 48-125. The Nebraska Supreme Court explained in *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 553, 451 N.W.2d 910, 920 (1990), that " '[c]ompensation,' used in § 48-125(1) in reference to

additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death." The Nebraska Legislature further clarified matters when it later amended § 48-125 regarding attorney fees only, adding language providing specifically for attorney fees for delinquent "medical payments." See *id.*

[14,15] Taken together, these authorities make it apparent that a 50-percent waiting-time penalty cannot be awarded on the basis of an award of delinquent medical payments; a waiting-time penalty is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of "medical payments." Additionally, we have acknowledged above that when an attorney fee is allowed pursuant to § 48-125, interest shall be assessed on the final award of weekly compensation benefits. Thus, § 48-125 makes clear that interest, which would otherwise be assessed when attorney fees are awarded, is not proper in the instant case because an award of medical payments is plainly not one of "weekly compensation benefits." See *id.*

The trial court modified the original award only to the extent that it increased Bronzynski's permanent partial disability benefits and ordered Model Electric to pay medical expenses. The review panel reversed the trial court's finding with regard to the permanent partial disability benefits, and as such, no attorney fee, waiting-time penalty, or interest could properly be assessed with regard to that portion of the award. However, the trial court found that "no reasonable controversy existed regarding the necessity and reasonableness of the second cervical fusion." In addition, the court determined that "[t]he medical expenses were provided [to Model Electric] more than 30 days in advance of trial." As such, the court's award of attorney fees regarding the delinquent medical expenses was proper, pursuant to § 48-125. Therefore, Bronzynski's assignment of error is without merit, and we affirm the decision of the review panel as it relates to attorney fees, waiting-time penalties, and interest.

VI. CONCLUSION

The judgment of the Workers' Compensation Court review panel is affirmed. The review panel properly reversed the trial

court's award of further permanent partial disability benefits, and it properly affirmed the court's denial of temporary total disability benefits and further attorney fees, interest, and waiting-time penalties.

AFFIRMED.

AZIZ Y. ANIS, M.D., APPELLANT, V. BRYANLGH HEALTH SYSTEM, A CORPORATION, APPELLEE.

707 N.W.2d 60

Filed December 27, 2005. No. A-04-661.

1. **New Trial: Jury Misconduct: Proof.** In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
2. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
3. **Jurors: Verdicts.** A quotient verdict is one in which the jurors, for the purpose of arriving at a verdict, agree that each should write on his or her ballot a sum representing his or her judgment, that the aggregate should be divided by the number of jurors, and that the jurors will be bound by the quotient as their verdict.
4. **Verdicts.** Quotient verdicts are generally considered invalid.
5. **Juries: Verdicts.** The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict is whether the jury agreed beforehand to be bound by the result reached.
6. **Jury Misconduct: Proof.** The burden of establishing prejudice rests on the party claiming jury misconduct.
7. **Jury Instructions: Presumptions.** It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.
8. **Jury Misconduct: Trial.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.
9. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.
10. **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 Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Thomas M. Locher, Joel E. Feistner, and Doug Krenzer, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

Dean J. Sitzmann, Stephen L. Ahl, and Justin E. Driscoll, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Aziz Y. Anis, M.D., appeals the order of the district court for Lancaster County which overruled his motion for new trial in his tort action against BryanLGH Health System (BryanLGH). Because we conclude that Anis failed to meet his burden of proving by clear and convincing evidence that he was prejudiced by alleged jury misconduct, we affirm.

BACKGROUND

Anis initiated a negligence action against BryanLGH for injuries Anis suffered when he slipped and fell on some ice in a parking garage owned and operated by BryanLGH. At the conclusion of the trial, the jury was instructed, inter alia, as follows:

> The law forbids you to return a verdict determined by chance. You may not, for instance, agree in advance that each juror will state an amount to be awarded in damages, that all of those amounts will be added together, that the total will be divided by the number of jurors, and that the result will be returned as the jury's verdict.
>
> A verdict determined by chance is invalid.

This instruction is identical to the pattern jury instruction. See NJI2d Civ. 4.02. During the formal jury instruction conference, Anis did not specifically object to this instruction. Anis offered proposed instructions and verdict forms, which the trial court rejected and none of which addressed the topic of a verdict determined by chance. At the close of the conference, counsel for Anis stated:

> The only other matter that I would just raise for the purpose of the record, Judge, [Anis] would object to the instructions

> as a whole. It's not accurately stating the law and failing to instruct the jurors on the specific instructions that have been offered and marked for purposes of that.

Read in context, this broad objection merely notes the divergence between the court's instructions and verdict forms and those particular instructions and verdict forms requested by Anis, none of which spoke to the subject of a verdict determined by chance. This objection served only to further preserve Anis' objection to the trial court's refusal to use the particular instructions and verdict forms preferred by Anis.

During deliberations, the jury submitted a single set of written questions to the trial court which the trial court answered, as follows:

> We have found both parties to be neglectful.
>
> Question A.: Do we have to unanimously agree on the percentage of neglect? If other than 50-50?
>
> Answer: Please reread the instructions.
>
> Question B.: Can we have a calculator?
>
> Answer: No
>
> Question C.: What is our time situation[?]
>
> Answer: What time situation are you referring to?
>
> Question D.: % of neglect

ex.	P[laintiff]	D[efendant]	Do we add these up and divide by 12?
	60	40	
	50	50	
	70	30	

> Answer: Please reread the instructions.

Both parties and their counsel waived their appearances at the reading of the verdict. The jury found BryanLGH to be 32 percent negligent and Anis to be 68 percent negligent. Following the court's instructions, the jury returned a verdict for BryanLGH. After the jury announced its verdict, the court polled each of the jurors and each confirmed the verdict. The court entered judgment pursuant to the jury's verdict. Anis moved for a new trial, alleging that the jury's verdict was not sustained by the evidence "and/or" was contrary to law. After a hearing at which neither party offered any evidence, the trial court denied the motion for new trial. Anis appeals to this court.

ASSIGNMENTS OF ERROR

Anis alleges that (1) the verdict rendered by the jury was an improper quotient verdict based upon chance and lottery, and must therefore be set aside, and (2) the trial court abused its discretion in overruling Anis' motion for new trial without conducting any independent evaluation of all the circumstances of the case and without making specific findings for review based upon that evaluation.

STANDARD OF REVIEW

[1,2] In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion. *Id.*

ANALYSIS

Evidence of Quotient Verdict.

[3-5] Anis alleges that the jury's verdict was an improper quotient verdict based on chance and lottery. A quotient verdict is one in which the jurors, for the purpose of arriving at a verdict, agree that each should write on his or her ballot a sum representing his or her judgment, that the aggregate should be divided by the number of jurors, and that the jurors will be bound by the quotient as their verdict. See *Haarberg v. Schneider*, 174 Neb. 334, 117 N.W.2d 796 (1962). Quotient verdicts are generally considered invalid. See *id.* They do not represent the deliberate judgment of the jurors, are subject to manipulation, and evoke the nature of a lottery. See *Winston v. Davis*, 187 Neb. 522, 192 N.W.2d 413 (1971). An after-the-fact agreement to use an average does not invalidate the verdict. See *McGuire v. Thompson*, 152 Neb. 28, 40 N.W.2d 237 (1949).

> "The invalidity of quotient verdicts depends not upon the method of arriving at the verdict, or the result reached, but on the previous agreement to be bound by the result of the quotient process. The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict

> is whether the jury agreed beforehand to be bound by the result reached . . . ."

Spreitzer v. State, 155 Neb. 70, 76, 50 N.W.2d 516, 522 (1951), quoting 53 Am. Jur. *Trial* § 1031 (1945).

[6] Anis argues that the jury's questions during deliberations raise a reasonable inference that the jury agreed on a quotient process to determine the outcome of the trial. The burden of establishing prejudice rests on the party claiming jury misconduct. See *In re Petition of Omaha Pub. Power Dist., supra.* While we could infer the existence of an agreement to be bound by a quotient process from the final question of the set of questions submitted by the jury during deliberations, it is equally possible to infer that the jury reread the instructions as advised by the court and did not agree to be bound by a quotient verdict. As such, Anis has not sustained his burden of proof. See *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995) (where inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with facts proved, plaintiffs do not sustain their position by reliance alone on inferences which would entitle them to recover).

[7] The same can be said of Anis' argument that the "odd numbers" of the verdict prove that the verdict was based on a prior agreement to adhere to a quotient process. Brief for appellant at 11. Even if we were to make the unlikely inference that the jury's assessment of comparative fault demonstrates an agreement to be bound by a quotient verdict, the facts lend equal—if not greater—support to the inference that the jurors assessed fault after thoughtful deliberation and unanimous agreement. It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004). We cannot find the required affirmative showing merely from an inference which is no stronger than the opposing inference.

Moreover, Anis did not object to the court's response to the jury's questions. Indeed, the argument on the motion for new trial suggests that Anis' counsel had approved of the court's answers to the jury's questions. Also, recalling that the moving party bears

the burden of establishing prejudice from the alleged misconduct, we observe that all of the examples of allocations of Anis' negligence provided in the jury question—60, 50, and 70 percent, respectively—were numbers greater than or equal to the percentage of negligence sufficient to bar Anis' claim. See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). We conclude that Anis did not satisfy his burden of proving by clear and convincing evidence that prejudice occurred, and therefore, we conclude that the trial court did not abuse its discretion in overruling Anis' motion for new trial.

Independent Evaluation and Specific Findings.

[8] Anis contends that the trial court abused its discretion in overruling Anis' motion for new trial without conducting any independent evaluation of all the circumstances of the case and without making specific findings for review based upon that evaluation. In *Hunt v. Methodist Hosp.*, 240 Neb. 838, 849, 485 N.W.2d 737, 744-45 (1992), the Nebraska Supreme Court set forth the trial court's duties in determining whether jury misconduct has occurred as follows:

> "When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed."

Quoting *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). The *Hunt* court concluded: "Thus, a judge must conduct an evidentiary hearing to determine whether a party was denied a fair trial; in any event, should the court conclude that no misconduct or prejudice occurred, it must make adequate findings so that the ruling may be reviewed." 240 Neb. at 849, 485 N.W.2d at 745.

In the instant case, by providing Anis with the opportunity to present evidence upon his motion for new trial, the district court

provided the evidentiary hearing contemplated in *Hunt*. As discussed above, Anis did not support his allegations of jury misconduct with any evidence. He relies solely on the jury's questions to the trial court during deliberations. Despite having the opportunity to present evidence at the hearing on Anis' motion for new trial, Anis merely argued the motion.

On appeal to this court, Anis argues:

> As noted during the hearing on [Anis'] [m]otion for [n]ew [t]rial, after the jury question was submitted but before the verdict was read, counsel for [Anis] requested that the [t]rial [c]ourt poll the jurors to ensure that the verdict was proper, as it appeared, based upon the jury['s] question, that the jurors had agreed to render a quotient verdict.

Brief for appellant at 12. This argument fails for two reasons.

[9] First, the bill of exceptions does not contain any of the proceedings between the close of the formal jury instruction conference and the return of the jury to the courtroom for the receipt of the jury's verdict. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Ondrak v. Matis*, 270 Neb. 46, 699 N.W.2d 367 (2005). Anis failed to include in the record his request for polling of the jury, and thus, the record does not support Anis' contention regarding the specific nature of that request.

Second, the record does show that the jury was polled in precisely the manner specified by Neb. Rev. Stat. § 25-1124 (Reissue 1995). What Anis seems to be suggesting, however, is that when polling the jury, the trial court had the obligation to go beyond the procedure specified by § 25-1124 and inquire into the basis for the jury's determination of the percentage of Anis' negligence. We reject Anis' contention that the trial court was required to make that inquiry, because it could not have done so without invading the province of the jury.

Neb. Rev. Stat. § 27-606(2) (Reissue 1995) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from

> the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

In *Lambertus v. Buckley*, 206 Neb. 440, 293 N.W.2d 110 (1980), the Nebraska Supreme Court affirmed the trial court's refusal to admit jurors' affidavits stating that they had misunderstood and misapplied the court's quotient verdict instruction. The court in *Lambertus* explained that the jurors' understanding of the quotient verdict instruction and details regarding the calculation of damages inhered in the verdict and did not constitute extraneous, prejudicial information.

[10] Anis also argues that he was prejudiced by the trial court's failure to make specific findings in ruling upon Anis' motion for new trial. Even assuming, without deciding, that the trial court erred in not making specific findings, such error is harmless. Under § 27-606(2), the lower court could have reviewed only the written questions from the jury, and this court is in the same position. Because we conclude that the jury's questions do not constitute clear and convincing evidence of prejudice from jury misconduct, the absence of specific findings did not prejudice Anis. See *In-Line Suspension v. Weinberg & Weinberg*, 12 Neb. App. 908, 687 N.W.2d 418 (2004) (motion for new trial is to be granted only when error prejudicial to rights of unsuccessful party has occurred).

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not abuse its discretion in overruling Anis' motion for new trial, and we affirm.

AFFIRMED.

IRWIN, Judge, participating on briefs.

IRENE M. HARVEY, APPELLANT, V. RANDY C. HARVEY, APPELLEE.

707 N.W.2d 444

Filed December 27, 2005. No. A-04-846.

1. **Judgments.** A judgment is the final determination of the rights of the parties in an action.
2. ____. If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment.
3. ____. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
4. **Divorce: Final Orders.** If any substantial rights of the parties remain undetermined and the cause is retained for further action, the order, including the dissolution of the marriage, is interlocutory and not final.

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

Michael E. Piccolo, of Dawson & Piccolo, for appellant.

James C. Bocott, of McCarthy, Moore & Hall, for appellee.

IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Irene M. Harvey appeals from the order of the district court for Lincoln County which denied the parties' motions for new trial after their marriage was dissolved. Irene challenges the district court's distribution of property and award of alimony in the decree of dissolution. We conclude that the district court's distribution of property is a conditional judgment, the impact of which is speculative. As a result, the dissolution decree entered by the district court fails to determine substantial rights of the parties concerning the distribution of marital property and is not a final order for the purpose of appeal. The appeal is dismissed, and the case is remanded with directions.

II. BACKGROUND

Irene and Randy C. Harvey were married on December 30, 1970. Irene filed a petition for dissolution of the marriage on

August 14, 2003. Randy filed an answer on August 22. The district court entered a decree on June 2, 2004.

In the decree, the district court purported to distribute the marital property and debts, ordered Randy to pay alimony, and ordered Randy to pay an attorney fee on Irene's behalf. Relevant to our resolution of this appeal is the district court's purported distribution of the marital home, the primary asset of the parties. With respect to the home, the court decreed as follows:

> The Court finds that the home of the parties . . . should be awarded to [Randy] if he is able to obtain refinancing in his name only and remove [Irene's] name from the mortgage and second mortgage upon the property. If he is unable to do so within 60 days, the Court finds that the property should be sold, and any proceeds remaining after the costs of sale should be divided equally, and any liabilities due and owing after the costs of sale should be divided equally. The Court finds that the value of the property is the sum of $197,400 which is the market analysis less a realtor's fee. Based on that, the Court finds that [Randy] should pay to [Irene] the sum of $6,200 as her interest in the property for the equity remaining. Should [Randy] elect not to take the property, it shall be sold as setout [sic] above.

Irene filed a motion for new trial on June 8, 2004. Randy filed a similar request on June 14. The district court entered an order denying the requests for new trial on June 22. This appeal followed.

III. ASSIGNMENTS OF ERROR

Irene has assigned six errors, including five that concern the district court's purported distribution of the marital home and one that concerns the district court's alimony award.

IV. ANALYSIS

All of the assignments of error presented in this appeal relate to the district court's distribution of the marital home. As noted above, Irene has made several assignments of error which specifically challenge the court's purported award of the home to Randy, and she has also assigned an error concerning the alimony award, which award the district court specifically based in part on "the house payment" which Randy might have assumed

under the court's purported distribution of the home. We conclude that the district court's purported distribution of the marital home is a conditional order because it leaves to speculation and conjecture what its final effect may be; the order fails to resolve the substantial rights of the parties concerning the marital property and is not a final, appealable order.

[1-3] In Nebraska, a judgment is the final determination of the rights of the parties in an action. Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2004). However, if a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001). A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Vogel v. Vogel, supra.*

The district court's purported distribution of the marital home is a conditional order because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect will be. The effect of the order on the net distribution of property depends entirely on whether Randy is able to obtain refinancing in his name only or is either forced or elects to attempt to sell the home. If Randy obtains the requisite refinancing, the order appears to determine the value of the home and Irene's share of the equity; however, if the home is to be sold, whatever unknown amount of equity there might be in the sale proceeds is to be divided "equally." At the present time, there is no way for this court to know what amount Irene is to receive or what effect the order will ultimately have.

[4] The Nebraska Supreme Court has said: "[I]f any substantial rights of the parties remain undetermined and the cause is retained for further action, the order, including the dissolution of the marriage, is interlocutory and not final." *Kimball v. Kimball*, 228 Neb. 702, 705-06, 424 N.W.2d 122, 125 (1988). In the instant case, the district court's order fails to finally resolve the property distribution because it fails to finally distribute the marital home. After the decree was entered, and after a notice of appeal was already filed, a substantial number of motions and orders were filed by the parties with the court concerning the home. We believe that these filings further illustrate

the fact that the court's purported distribution of the home left to speculation and conjecture what its effect would be.

On August 20, 2004, Randy filed for an extension of time within which to secure refinancing, asking the court for an additional 60 days. On August 25, Irene objected to Randy's request for an extension. On August 27, Randy's attorney filed an affidavit attesting to Randy's attempts to refinance. Also on August 27, the district court entered an order finding that the home "may be lost if no action is taken by the Court" and granting Randy's request for an additional 60 days to complete refinancing.

On September 24, 2004, Randy filed a request for the court to compel Irene to execute a quitclaim deed. Randy alleged that he had proffered to Irene her interest in the home, but that she had rejected the money proffered. On October 4, the district court ordered Irene to execute the quitclaim deed. On October 13, Irene filed a motion asking the court to reconsider. On November 2, Irene filed a request for approval to have the home listed for sale. On November 9, the district court entered an order granting Irene's request, but specifically indicating that if Randy "receives financing on the [marital] home within twenty days, the marital home shall not be listed for sale."

Based on the record presented, it is apparent that the effect of the purported distribution of the home in the June 2, 2004, decree is left to speculation and conjecture. Not only does the plain language of the decree leave uncertain what amount Irene will ultimately be entitled to as a share of the home, but the subsequent actions of the parties and the court thoroughly demonstrate the uncertainty of the provision's effect. The court continued to enter further orders concerning the marital home, and even the last such order contained in the transcript presented to this court purports to order one course of action, listing the home for sale, but makes the action contingent on the uncertain occurrence of another event, Randy's failure to secure refinancing within another 20 days.

The substantial rights of the parties concerning their property distribution remain undetermined. The district court has continued to take further action concerning this property distribution. Further, the district court's alimony award was premised specifically on the uncertain outcome of the purported distribution of

the home. As such, substantial rights of the parties remain undetermined, the case has been retained for further action, and the order is interlocutory and not final. See *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984). There being no final order, the appeal must be dismissed. See *id.*

V. CONCLUSION

The appeal is ordered dismissed because the district court's purported distribution of the marital home was a conditional order and was not a final resolution of the substantial rights of the parties. The district court is ordered to, within 5 days of the entry of the mandate from this court, determine all issues between these parties and make findings and orders as to all issues between them. See *id.*

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

CARLSON, Judge, participating on briefs.

JOHN H. WELLS, APPELLANT, V. GOODYEAR TIRE & RUBBER COMPANY, APPELLEE.

707 N.W.2d 438

Filed December 27, 2005. No. A-05-202.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. ____: ____. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
5. **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.
6. **Workers' Compensation: Jurisdiction: Equity.** The Workers' Compensation Court does not have the jurisdiction of a court of equity.
7. **Workers' Compensation.** The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act.

8. **Judgments: Jurisdiction: Appeal and Error.** As a necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a court lacking subject matter jurisdiction and was thus void, an appellate court has the power and duty to vacate the void order and, if appropriate, remand the cause for further proceedings.

Appeal from the Nebraska Workers' Compensation Court. Appeal dismissed, and cause remanded with directions.

Rolf Edward Shasteen, of Shasteen, Brock & Scholz, P.C., for appellant.

Rod Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., also filing brief and arguing on behalf of the Rehm law firm.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

The present appeal arises out of a workers' compensation action wherein John H. Wells sought compensation for injuries sustained in an accident arising out of and in the course of his employment with Goodyear Tire & Rubber Company (Goodyear). Subsequent to the trial court's award of certain benefits to Wells, a dispute arose over the division of the attorney fee between Wells' first attorneys, Rehm Law Firm, P.C. (the Rehm law firm), and Wells' second attorney, Rolf Edward Shasteen. A series of determinations by the trial court and review panel regarding the attorney fee issue ensued and culminated in the present appeal. This appeal has been filed by Shasteen, ostensibly on Wells' behalf. A cross-appeal has been filed by Rod Rehm on behalf of the Rehm law firm. Because we find that the trial court lacked jurisdiction to consider the dispute between the Rehm law firm and Shasteen, this court also lacks jurisdiction to consider the matter on appeal. Accordingly, we dismiss for lack of jurisdiction both the appeal and the cross-appeal.

BACKGROUND

Wells retained the Rehm law firm to represent him in his workers' compensation case on or about October 25, 1999. A fee agreement or contract was signed which provided that Wells

would pay a sum equal to 22.5 percent of any and all amounts recovered before a hearing and a sum equal to 30 percent of any and all amounts recovered after a hearing. There was nothing in the fee agreement regarding how much, if any, Wells was to pay the Rehm law firm in the event it was discharged as Wells' counsel. Wells was represented by Daniel Fix, an employee of the Rehm law firm, until Fix's resignation from the firm effective February 1, 2000. Wells discharged the Rehm law firm on June 19 and subsequently retained Shasteen to represent him in Wells' workers' compensation case. On September 27, Shasteen filed a petition in the compensation court on Wells' behalf. The trial court entered an award of certain benefits to Wells on March 14, 2002.

Prior to the March 14, 2002, award, the Rehm law firm was given a lien for attorney fees, the amount of which lien was to be determined at a later date. On April 30, the Rehm law firm filed a motion referencing the previously sought lien and seeking "a hearing on said request since negotiations have failed." The Rehm law firm's motion was heard by the trial court on May 24. At the May 24 hearing, the trial court heard testimony from Rehm, Wells, Fix, and Goodyear's attorney and received various exhibits. Because we resolve this appeal on jurisdictional grounds, we need not detail the evidence further.

On May 28, 2002, the trial court ordered Shasteen to pay to the clerk of the Nebraska Workers' Compensation Court the sum of $6,135 and ordered the clerk to hold the sum until further order of the court. On October 15, the court entered an order dividing the $6,135 sum between the Rehm law firm and Shasteen. The court concluded that the Rehm law firm was entitled to a reasonable attorney fee, which it set at $1,250. The court then ordered the clerk to pay out the sum of $1,250 to the Rehm law firm and the sum of $4,885 to Shasteen.

Shasteen, on behalf of Wells, appealed to the review panel the October 15, 2002, order of the trial court. Following a hearing, the review panel entered an "Order of Affirmance in Part and Reversal in Part and Remand in Part on Review" on July 7, 2003. The review panel affirmed the award of the trial court to the extent that it determined that the Rehm law firm was entitled to a reasonable fee, but the review panel reversed the

amount awarded as clearly excessive and remanded for a finding regarding a reasonable attorney fee. No appeal was taken from this order.

The trial court entered an "Order on Remand" on March 30, 2004. The trial court again awarded a fee of $1,250 to the Rehm law firm, finding that such amount was an "equitable distribution of the fee based upon the services performed by each of the lawyers."

Following the trial court's March 30, 2004, order, Shasteen again appealed to the review panel, which entered an "Order of Reversal and Remand on Review" on February 7, 2005. The review panel found that the trial court's findings on remand were contrary to both Nebraska's appellate jurisprudence and the order of the review panel. The review panel again remanded the matter to the trial court with instructions to determine from the existing record both the hours expended and a reasonable hourly rate for the services rendered. Shasteen subsequently perfected his appeal to this court, and Rehm perfected his cross-appeal.

ASSIGNMENTS OF ERROR

Shasteen generally assigns that the trial court erred in awarding any portion of the attorney fee to the Rehm law firm because it failed to carry its burden of proof establishing the fee as fair, reasonable, and necessary. On cross-appeal, Rehm generally assigns that the review panel abused its discretion in finding the attorney fee awarded to the Rehm law firm by the trial court to be unreasonable.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Gabel v. Polk Cty. Bd. of Comrs., supra.* Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction

sua sponte. *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002). When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

[5-7] As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). The Workers' Compensation Court does not have the jurisdiction of a court of equity. *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991). The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

The discussion between the trial court and those present at the May 24, 2002, hearing on the Rehm law firm's motion to determine attorney fees reflected a general confusion as to how the motion should be treated by the compensation court. The trial court initially stated: "Okay. To be quite correct, we don't really have [a] plaintiff." During the course of the hearing, a colloquy ensued between the trial court, Rehm, Shasteen, and Goodyear's attorney. The discussion involved the court's having given the Rehm law firm a lien on the attorney fees award and reveals that Goodyear's attorney had issued a check for attorney fees to Shasteen and Wells jointly. Shasteen then deposited the check in his business account. At the May 24 hearing, the discussion turned to where the $6,135 should be held and reflects a general agreement that Shasteen's business account was not the proper place. The trial court initially ordered Shasteen to deposit the money back into Shasteen's trust account and then, after further discussion, ordered Shasteen to pay the money to the clerk of the Workers' Compensation Court. The trial court correctly observed, "It's Mr. Wells' money." See *Sarpy County v. Gasper*, 149 Neb. 51, 30 N.W.2d 67 (1947) (overruling holding in earlier compensation court case that while attorney fees are allowed and awarded to client, they actually belong to attorney; holding that

only when provided for by statute can attorney fees be allowed and taxed as costs and that when provided for by statute, fees are payable to party statute designates).

The power of the Workers' Compensation Court to award attorney fees is derived from Neb. Rev. Stat. § 48-108 (Reissue 2004), which provides as follows:

> No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the Nebraska Workers' Compensation Act shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial or, in case of settlement without trial, by a judge of the Nebraska Workers' Compensation Court. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation. When the employee's compensation is payable by the employer in periodical installments, the compensation court shall fix, at the time of approval, the proportion of each installment to be paid on account of legal services and disbursements.

This court has interpreted § 48-108 as limiting the compensation court's regulation and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. In *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992), this court addressed, among other things, the issue of whether a health care insurer who is reimbursed as the result of an injured employee's successful workers' compensation suit is obligated to pay attorney fees to the employee's attorney. The claim in *Kaiman* was brought in the district court. The *Kaiman* court examined the question of jurisdiction and concluded that jurisdiction was properly with the district court rather than the compensation court. In reaching this conclusion, the *Kaiman* court considered the effect of § 48-108 and examined *Dysart v. Yeiser*, 110 Neb. 65, 192 N.W. 953 (1923), *affirmed* 267 U.S. 540, 45 S. Ct. 399, 69 L. Ed. 775 (1925) (first case to construe section essentially identical to present § 48-108). Based on its

examination of *Dysart*, the *Kaiman* court held that § 48-108 limits the Workers' Compensation Court's regulation of attorney fees and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. The *Kaiman* court observed, under the predecessor to Neb. Rev. Stat. § 48-120 (Reissue 2004), that a health care insurer cannot be a party to the underlying workers' compensation case which, if successful, results in the reimbursement of the health care insurer, nor can it be later joined after a successful result, due to the absolute prohibition of that section. The *Kaiman* court concluded that therefore, § 48-108 does not give the Workers' Compensation Court subject matter jurisdiction to determine whether a health care insurer or a health maintenance organization is obligated to share in the cost of obtaining reimbursement when the injured worker successfully asserts a claim for workers' compensation benefits.

We have found no Nebraska cases directly discussing the issue of whether the compensation court has jurisdiction to consider an attorney fee dispute between an injured party's current attorney and his or her former attorney; however, our research has yielded a case from a Pennsylvania court which addressed the issue. In *Pitt v. W.C.A.B. (McEachin)*, 161 Pa. Commw. 60, 62, 636 A.2d 235, 236 (1993), the appellate court addressed the question: "Where a claimant fires one attorney and hires another and the referee, in addition to granting the claimant's petition for benefits, awards counsel fees, does the referee also have jurisdiction to decide a fee dispute between the lawyers and may he apportion the counsel fees?" The court answered the question in the negative. The applicable Pennsylvania statute considered by the court is similar to Nebraska's § 48-108, but the Pennsylvania statute differs in that it states that the referee is to approve " 'all counsel fees, agreed upon by claimant and his attorneys.' " (Emphasis omitted.) 161 Pa. Commw. at 62, 636 A.2d at 237. The Pennsylvania court stated that the independent cause of action arising under the Pennsylvania statute was distinct from any claim which a discharged lawyer might assert against his former client, or that client's subsequent counsel, over his discharge and replacement. The court further stated that the first attorney in that case was not representing a party to the workers' compensation

claim and litigation but was litigating on his own behalf a cause of action which was a common-law claim for breach of contract, a claim on principles of quantum meruit, or an equitable claim for damages under a theory of unjust enrichment.

As discussed above, this court has previously interpreted § 48-108 as limiting the compensation court's regulation and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. Also relevant to our consideration of the jurisdictional issue in the present case is Neb. Rev. Stat. § 48-162.03(1) (Reissue 2004), which provides as follows:

> The Nebraska Workers' Compensation Court or any judge thereof may rule upon any motion addressed to the court *by any party to a suit or proceeding*, including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial or motions for reconsideration. Several objects may be included in the same motion, if they all grow out of or are connected with the action or proceeding in which it is made.

(Emphasis supplied.)

In the present case, the Rehm law firm, neither a party to nor at that time representing a party to Wells' proceeding in the compensation court, filed a motion asking the compensation court to determine the attorney fee dispute between the Rehm law firm and Shasteen. Stated another way, the Rehm law firm was asking the compensation court to take money awarded to Wells on his claim and divide the money between individuals who were not parties to that claim.

We conclude that the compensation court did not have jurisdiction to determine the dispute between the Rehm law firm and Shasteen over the division of the attorney fee awarded to Wells in his claim before the compensation court. Nebraska case law interprets § 48-108 as limiting the compensation court's regulation and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. The dispute in the present case arose not between Wells and Shasteen, but between the Rehm law firm and Shasteen. Further, § 48-162.03(1) grants the compensation court the authority to

hear motions brought only by parties to a suit or proceeding before the court. The Rehm law firm is not a party to a proceeding before the compensation court, nor did it represent a party to such a proceeding at the time it filed its April 30, 2002, motion. We conclude that the compensation court lacked jurisdiction to consider the issue raised by the Rehm law firm's motion. Accordingly, this court lacks jurisdiction to consider the merits of the present appeal and cross-appeal and must dismiss both the appeal and the cross-appeal.

CONCLUSION

[8] Because the trial court lacked jurisdiction to consider the dispute between the Rehm law firm and Shasteen, we dismiss for lack of jurisdiction both the appeal and the cross-appeal. The cause is remanded to the review panel with instructions to direct the trial court both to vacate its orders awarding attorney fees and to dismiss the motion of the Rehm law firm. As a necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a court lacking subject matter jurisdiction and was thus void, an appellate court has the power and duty to vacate the void order and, if appropriate, remand the cause for further proceedings. *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999).

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

IN RE INTEREST OF CHELSEY D., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. CHELSEY D., APPELLEE.

707 N.W.2d 798

Filed December 27, 2005. No. A-05-334.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

2. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Affirmed as modified.

Jon Bruning, Attorney General, Royce N. Harper, and Bradley Gianakos, Special Assistant Attorney General, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The State of Nebraska appeals from that portion of the order of the separate juvenile court of Lancaster County which prohibited any change in the placement of Chelsey D. without prior court approval. We conclude that the juvenile court exceeded its statutory authority in imposing that restriction, and we therefore modify the order to delete that provision, but otherwise affirm.

BACKGROUND

Following a hearing on June 6, 2002, the juvenile court adjudicated Chelsey as a child within the provisions of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2002). On June 21, the court committed Chelsey to the custody of the Department of Health and Human Services, Office of Juvenile Services (OJS), for a residential evaluation and ordered that Chelsey be returned to the court for further hearing upon completion of the evaluation. On July 19, the court committed Chelsey to the custody of OJS for placement at the group-home level and ordered that she remain in detention at the Lancaster County juvenile detention center until the court approved a less restrictive placement. In an order filed on October 23, the court found that Chelsey's level of custody should be upgraded, and the court committed her to the custody of OJS for placement at a residential treatment center.

On February 9, 2005, the court held a hearing to review the commitment to OJS. No sworn testimony was offered during the hearing, but the court received two exhibits: a court report prepared January 27, 2005, and a letter from Chelsey dated February 7, 2005, wherein Chelsey stated that she did not feel she would be safe at home and that she would feel safer at a foster home. The court report stated that Chelsey had been in placement at "Cedars Tur[n]ing Point Treatment Group Home" since August 2004 and that the placement was meeting all of her treatment and safety needs. A case plan—labeled "Draft Only" —included within the court report showed a permanency objective of reunification with a target date of July 1, 2005, and a concurrent plan of guardianship with a target date of December 31, 2005. On the same date as the hearing, the court entered an order approving the plan of OJS but prohibiting any change in Chelsey's placement without prior court approval. The State timely appeals from that February 9 order.

ASSIGNMENT OF ERROR

The State alleges that the juvenile court erred in prohibiting any change in Chelsey's placement without prior court approval.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003).

ANALYSIS

Although it is clear that the juvenile court maintains jurisdiction over any juvenile committed to the custody of OJS until such time as the juvenile is discharged from OJS' custody, Neb. Rev. Stat. § 43-408(2) (Reissue 2004), this appeal raises the issue of whether Nebraska statutes grant to the juvenile court the authority to enter an order prohibiting any change without prior court approval in the placement of a juvenile committed to OJS' custody.

[2,3] As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been

conferred on it by statute. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

Section 43-408(4) addresses the transfer of juveniles committed to the custody of OJS from one place of treatment to another and states in pertinent part:

> (a) Except as provided in subdivision (b) of this subsection, if [OJS] proposes to transfer the juvenile from a less restrictive to a more restrictive place of treatment, a plan outlining the proposed change and the reasons for the proposed change shall be presented to the court which committed the juvenile. Such change shall occur only after a hearing and a finding by the committing court that the change is in the best interests of the juvenile . . . . ;
>
> (b) [OJS] may make an immediate temporary change without prior approval by the committing court only if the juvenile is in a harmful or dangerous situation, is suffering a medical emergency, is exhibiting behavior which warrants temporary removal, or has been placed in a non-state-owned facility and such facility has requested that the juvenile be removed. Approval of the committing court shall be sought within fifteen days of making an immediate temporary change, at which time a hearing shall occur before the court. . . . ; and
>
> (c) If the proposed change seeks to transfer the juvenile from a more restrictive to a less restrictive place of treatment or to transfer the juvenile from the juvenile's current place of treatment to another which has the same level of restriction as the current place of treatment, [OJS] shall notify the juvenile, the juvenile's parents, custodian, or legal guardian, the committing court, the county attorney, the counsel for the juvenile, and the guardian ad litem of the proposed change. The juvenile has fifteen days after the date of the notice to request an administrative hearing with [OJS], at which time [OJS] shall determine whether

> it is in the best interests of the juvenile for the proposed change to occur . . . . If the juvenile is aggrieved by the administrative decision of [OJS], the juvenile may appeal that decision to the committing court within fifteen days after [OJS'] decision.

Under § 43-408(4)(a), OJS cannot transfer a juvenile to a more restrictive place of treatment without assent by the juvenile court. However, an order such as the juvenile court's in the instant case prohibiting any change in placement without prior approval clearly usurps OJS' authority to make an immediate temporary change under § 43-408(4)(b) and also infringes on OJS' ability to transfer a juvenile to a less restrictive place or to a place of the same level of restriction when the juvenile does not request a hearing on and review of the proposed transfer.

In *In re Interest of David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997), this court concluded that although a juvenile court's jurisdiction over an adjudicated minor continued after the juvenile was committed to a treatment center under the control of OJS, the juvenile court did not have the power to require OJS to submit a treatment and placement plan prior to the juvenile's release, to notify the court before release or parole, to report any change of placement to the court, or to submit monthly progress reports. Similarly, in the instant case, it does not appear that the juvenile court has the power to enter a blanket order prohibiting OJS from making any change in placement without the court's approval.

We are mindful of the Nebraska Supreme Court's decision in *In re Interest of Tamantha S.*, 267 Neb. 78, 79, 672 N.W.2d 24, 26 (2003), where the juvenile court placed the juvenile in the custody of OJS and later ordered that the juvenile be placed under a "Conditions of Liberty contract" for 1 year unless such period was extended or revoked by the court. OJS appealed, claiming that the court did not have authority to order such a contract for a prescribed period of time and that the order improperly deprived OJS of the power to discharge the juvenile from OJS' custody. OJS relied on *In re Interest of David C., supra*, to support its argument, but the Nebraska Supreme Court recognized that the Legislature amended the juvenile code after the decision in *In re Interest of David C.*, observed that those

amendments were controlling, and therefore concluded that it would not "rely entirely" on *In re Interest of David C.* in resolving the appeal. *In re Interest of Tamantha S.*, 267 Neb. at 81, 672 N.W.2d at 27. The Supreme Court stated that although § 43-408(2) referenced juveniles' being " 'discharged from [OJS' custody],' " the statute did not state that OJS discharges the juveniles, and that "while OJS may make an initial determination with regard to the advisability of the discharge of a juvenile committed to OJS, the committing court, as a result of its statutorily imposed continuing jurisdiction, must approve the discharge of the juvenile." *In re Interest of Tamantha S.*, 267 Neb. at 82, 672 N.W.2d at 28. The Supreme Court thus concluded that the juvenile court's imposition of a 1-year time limit on the "Conditions of Liberty contract" was "merely an exercise of the court's responsibility to review the placement and treatment of committed juveniles," that the court's "statutorily mandated continuing jurisdiction would be rendered meaningless" if the court were not permitted to conduct such periodic review, that the court's order did not usurp OJS' authority to assess the advisability of a juvenile's discharge, and that the order "merely provide[d] a time limit for the Conditions of Liberty contract but d[id] not provide that [the juvenile] would be discharged at the end of the 1-year time period." *Id.* at 83, 672 N.W.2d at 28.

In the instant case, however, the juvenile court's order cannot be characterized as a mere exercise of its jurisdiction or of its responsibility to review placements of a juvenile. The language and framework of § 43-408 provide juvenile courts with the ability to review placements by OJS, but that section also provides OJS with the authority to make certain placements without prior approval by the juvenile court. We conclude that the restriction prohibiting any change in the placement of Chelsey without prior court approval is void for the reason that the provision exceeds the statutory authority of the juvenile court.

CONCLUSION

The juvenile court exceeded its statutory authority to the extent that it attempted to prohibit any change in Chelsey's placement without court approval. We therefore modify the juvenile court's February 9, 2005, order to delete the provision which

states, "IT IS FURTHER ORDERED that the placement of Chelsey . . . shall not be changed without the prior approval of the Court."

AFFIRMED AS MODIFIED.

JON S. MCKENZIE ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

708 N.W.2d 286

Filed January 10, 2006. No. A-04-1134.

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. **Statutes: Appeal and Error.** Statutory interpretation presents 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.
3. **Municipal Corporations: Ordinances: Statutes: Appeal and Error.** In analyzing a municipal ordinance, a legislative enactment, an appellate court will follow the same rules as those of statutory analysis.
4. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
6. ____. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
7. ____. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
8. **Administrative Law: Municipal Corporations: Ordinances.** Administrative ordinances deal with the organization and activities of the municipality itself.
9. **Contracts: Municipal Corporations: Ordinances.** Contract ordinances are ordinances providing for contracts or authorizing an agreement between the municipality and another party.
10. **Municipal Corporations: Ordinances.** A municipality is not allowed to violate its own ordinance.
11. **Municipal Corporations: Ordinances: Words and Phrases.** The term "ordinance" is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality.

12. **Municipal Corporations: Ordinances.** A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance.
13. **Administrative Law: Municipal Corporations: Ordinances.** The crucial test for determining that which is legislative (ordinance) from that which is administrative or executive (resolution) is whether the action taken was one making a law, or executing or administering a law already in existence.
14. **Municipal Corporations: Ordinances.** A municipality cannot do by resolution what its charter mandates must be done by ordinance.
15. **Ordinances.** Whether an action is an ordinance or a resolution depends not on the name given to it but on the substance of the action.
16. **Words and Phrases.** "Or" may be employed as a coordinate conjunction introducing a synonymous word or phrase, or it may join different terms expressing the same idea or thing.
17. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is ultimately 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: JAMES T. GLEASON, Judge. Affirmed.

John P. Fahey, of John P. Fahey Law Office, P.C., for appellants.

Michelle Peters, Assistant Omaha City Attorney, for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The appellants (Firefighters) in this case are a group of Omaha firefighters who contend that a contract for services between the Millard Suburban Fire Protection District (Millard) and the Omaha Fire Department triggered Omaha Mun. Code (OMC), ch. 23, art. III, § 23-148 (1980), so as to entitle them to a pay increase. The district court for Douglas County granted the motion of the City of Omaha (City) for summary judgment. Because we conclude that the Firefighters were not "senior in rank, grade or class" to the former Millard personnel under the plain language of OMC § 23-148, we affirm.

BACKGROUND

In November 1997, the City contracted to provide fire protection services to Millard beginning January 1, 1998. As a result,

sworn Millard personnel became employees of the City's fire department as of 11:59:59 p.m. on December 31, 1997. According to the contract,

> (b) all such sworn personnel shall be classified as "Firefighters" in the City's standard classification, and paid at the City's pay step which gives full effect and is based on all years of service with [Millard's] Fire Department, but in no event shall such step placement be greater than [the City's highest pay step for the classification of firefighter], (c) all benefits and seniority shall be th[ose] of a new City Fire Department sworn employees [sic] as of the date when employment with the City starts. Certain of those benefits are set forth by the parties [in a statement of conditions and understandings] in order to avoid confusion and lend clarity to this Agreement . . . .

The statement of conditions and understandings addresses the treatment of former Millard firefighters regarding sick leave, "trade time," "call back," health and dental insurance, staffing, personal leave days, probationary status, and employee evaluations. In particular, the sections on trade time and employee evaluations take years of employment at Millard into account. The statement concludes, "In all other respects such [Millard] employees shall be considered regular sworn employees of the City Fire Department as provided for and subject to the [collective bargaining agreement between the City and an Omaha labor union] and all other City rules and regulations."

The Omaha City Council approved the contract by ordinance No. 34398, as required by the Omaha City Charter, art. V, § 5.17 (1996), which provides in part, "All contracts involving the payment of money from appropriations of more than one fiscal year of the City Government shall be approved by Ordinance."

On July 10, 2001, the Firefighters filed a petition against the City in the district court, seeking to collect backpay. The petition alleged that at the time of the contract, some of the former Millard firefighters who were placed in the City's system were classified as firefighters at the top step of the pay scale. The Firefighters, however, had not yet completed sufficient length of service with the City to reach the top firefighter pay step and remained at lower pay steps. The Firefighters claimed that they

were entitled to pay increases by OMC § 23-148, which states, in pertinent part:

> When a uniformed member of the fire or police department is paid at a rate which exceeds that at which such member's senior in rank, grade or class is being paid, such senior officer or officers shall be increased to the next higher step within the assigned pay range irrespective of the date of last increase. . . . This provision shall not apply when a member has been reduced in pay, grade or class for disciplinary reasons or when he has not been granted a pay increase due to unsatisfactory performance; neither shall it apply when such condition is the result of use of the two-step salary increase provision.

In their prayer, the Firefighters requested backpay and related relief.

The case first came before this court on the Firefighters' interlocutory appeal after the district court sustained the City's motion to disqualify one of the Firefighters' counsel. On September 2, 2003, we reversed and vacated the order and remanded the matter to the district court for further proceedings. See *McKenzie v. City of Omaha*, 12 Neb. App. 109, 668 N.W.2d 264 (2003).

Both sides filed motions for summary judgment. The parties agreed that no genuine issue of material fact existed, and each side contended that it was entitled to judgment as a matter of law in its favor. The district court conducted a hearing on the motions and received exhibits. We have summarized most of the evidence above and will summarize additional relevant evidence in the analysis portion of this opinion. On September 9, 2004, the district court entered an order sustaining the City's motion and overruling the Firefighters' motion. The Firefighters now appeal.

ASSIGNMENTS OF ERROR

The Firefighters allege that the district court erred in (1) sustaining the City's motion for summary judgment, denying the Firefighters' motion for summary judgment, and dismissing the Firefighters' petition for declaratory and monetary relief; (2) ruling that OMC § 23-148 should be read in pari materia with the merger agreement, which was passed as an ordinance as required

by the Omaha City Charter; and (3) ruling that OMC § 23-148 was construed to mean that certain new Millard firefighters were " 'senior officers' " to the Firefighters, who were members of the City's fire department prior to the merger.

STANDARD OF REVIEW

[1] 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. *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

[2] Statutory interpretation presents 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. *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

ANALYSIS

General Principles of Interpreting Ordinances.

The Firefighters argue that OMC § 23-148 does not contain any ambiguity calling for construction of its plain language. While we agree that OMC § 23-148 is not ambiguous, we reject the Firefighters' interpretation of its language. We begin by summarizing the principles governing the interpretation of OMC § 23-148.

[3-7] In analyzing the OMC, a legislative enactment, we follow the same rules as those of statutory analysis. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005). An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491

(2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004). We therefore address whether it is proper to consider OMC § 23-148 and ordinance No. 34398 in pari materia.

Considering Contract Ordinance In Pari Materia.

[8-10] The Firefighters classify OMC § 23-148 as an administrative ordinance and ordinance No. 34398 as a contract ordinance and argue that the two cannot be construed in pari materia. Administrative ordinances deal with the organization and activities of the municipality itself; they provide the machinery for performing the functions of municipal government. See 1 Thomas A. Matthews et al., Municipal Ordinances § 5.02 (2d ed. 1998). Contract ordinances are "[o]rdinances providing for contracts or authorizing an agreement between the municipality and another party . . . ." *Id.*, § 5.03 at 64.

> [A]n ordinance . . . has the force of law over the community in which it is adopted.
>
> . . . A municipality is not allowed to violate its own ordinance. . . .
>
> . . . .
>
> Where applicable, an ordinance enters into and forms a part of a contract by operation of law. . . . A contract authorized by and entered into under an ordinance is not given by the ordinance the force of law.

5 Eugene McQuillin et al., The Law of Municipal Corporations § 15:12 at 126-32 (3d ed. 2004). Even though OMC § 23-148 and ordinance No. 34398 may fall into the categories proposed by the Firefighters, the authorities cited by the Firefighters do not support the Firefighters' contention that such classification precludes considering the ordinances in pari materia. Both ordinances reflect the Omaha City Council's intent, and we assume that ordinance No. 34398 did not violate OMC § 23-148, but, rather, was consistent with it.

[11-15] The Firefighters also assert that ordinance No. 34398 is nothing more than a resolution and was not meant to be read

in pari materia with an ordinance. Ordinances and resolutions are distinguishable:

> The term *ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality. 5 Eugene McQuillin, The Law of Municipal Corporations § 15.01 (3d ed. 1996). A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance. Charles S. Rhyne, The Law of Local Government Operations § 8.1 (1980 & Supp. 1985). . . . "[T]he crucial test for determining that which is legislative [ordinance] from that which is administrative or executive [resolution] is whether the action taken was one making a law, or executing or administering a law already in existence." *Kelley v. John*, 162 Neb. 319, 321, 75 N.W.2d 713, 715 (1956).

Kubicek v. City of Lincoln, 265 Neb. 521, 529-30, 658 N.W.2d 291, 298 (2003). See, also, *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005) (distinguishing ordinance and resolution). A municipality cannot do by resolution what its charter mandates must be done by ordinance. See 5 McQuillin, *supra*, § 15:2. Whether an action is an ordinance or a resolution depends not on the name given to it but on the substance of the action. See *id.*

The Omaha City Charter requires contracts like the one in this case to be approved by ordinance. Such was done with the agreement between the City and Millard, which agreement was approved as part of ordinance No. 34398 after discussion by the Omaha City Council. However, it appears that the substance of ordinance No. 34398 fits the definition of a resolution. Regardless of whether ordinance No. 34398 is a resolution, we find no authority which would forestall us from considering an ordinance conjunctively with a resolution for the purpose of interpreting the ordinance. We consider OMC § 23-148 and ordinance No. 34398 in pari materia and proceed to interpret OMC § 23-148 accordingly.

Interpretation of OMC § 23-148.

OMC § 23-148 provides, "When a uniformed member of the fire or police department is paid at a rate which exceeds that at which such member's senior in rank, grade or class is being paid, such senior officer or officers shall be increased to the next higher step within the assigned pay range . . . ." The Firefighters contend that OMC § 23-148 clearly pertains only to police or firefighters employed by the City and that police or firefighters from other municipalities cannot "bring their seniority with them." Brief for appellants at 15. However, the Firefighters implicitly read the key phrase as the equivalent of "such member's senior in length of service within the same rank, grade or class." In our opinion, this reading errs in two critical and interrelated respects.

First, the Firefighters equate the words "such member's senior" with someone who has greater seniority in length of service. Second, the Firefighters treat the phrase as comparing individuals of the same rank, grade, or class. We consider both of these readings to be inconsistent with the plain meaning of OMC § 23-148. Correctly interpreted, "such member's senior in rank, grade or class" refers to an officer who has a greater or higher rank, grade, or class than the "uniformed member" being compared. See *id.*

This interpretation naturally flows from the paramilitary nature of police and fire organizations. By its terms, OMC § 23-148 applies to the City's police department as well as its fire department. The purpose can be readily understood and easily demonstrated in the more familiar ranks of a typical police department. The ordinance simply contemplates the possibility that for some unspecified reason, a lower ranking officer such as a sergeant might be paid more than a higher ranking officer such as a lieutenant. In that situation, OMC § 23-148 operates to resolve the disparity between rank and pay by increasing the pay of the higher ranking officer. That purpose is completely absent in the instant case. The legislative history for OMC § 23-148—which consists of a very brief letter from an assistant city attorney to the Omaha City Council—paraphrases the language of the ordinance and does not affect our interpretation of the ordinance's plain language.

The evidence before us demonstrates that all of the Millard personnel absorbed by the City and all of the Firefighters are of the same "rank," namely the rank of "firefighter," which is the lowest rank within the bargaining unit of the City's fire department. Although at the time of the contract, the Millard personnel held various ranks at Millard, the contract placed all of the former Millard personnel at the rank of "firefighter" in the City's fire department. None of the Millard personnel were granted a higher rank within the City's hierarchy of firefighting personnel. By deduction, none of the Millard personnel were granted any greater or higher rank than any of the Firefighters. Length of service is simply irrelevant in this comparison.

Similarly, the City's salary schedule for the "fire bargaining unit" is entitled "Classifications - Fire Bargaining Unit" and lists various ranks, such as "Firefighter," "Firefighter/Paramed.," "Fire Apparatus Engineer," and "Fire Captain," under the heading "Class Title." Hence, the term "class," as used in OMC § 23-148, is synonymous with "rank" and likewise does not depend on length of service. For the same reason explained above, the Firefighters and the absorbed Millard personnel were placed in the same classification or "class" within the meaning of OMC § 23-148.

[16] We find no exhibit illustrating the meaning of "grade." However, considering that rank and class have the same meaning and that those two terms are joined with "grade" by the word "or," we deduce that the three terms express an " 'alternative of terms, definitions, or explanations of the same thing in different words.' " See *Phillips v. State*, 154 Neb. 790, 804, 49 N.W.2d 698, 707 (1951) (quoting *Smith v. R. F. Brodegaard & Co.*, 77 Ga. App. 661, 49 S.E.2d 500 (1948)). See, also, *State v. Ramsey*, 311 S.C. 555, 430 S.E.2d 411 (1993) ("or" may be employed as coordinate conjunction introducing synonymous word or phrase, or it may join different terms expressing same idea or thing). Therefore, like "rank" and "class," "grade," as used in OMC § 23-148, does not depend on length of service. Therefore, we conclude that the district court did not err in sustaining the City's motion for summary judgment and overruling the Firefighters' motion.

Although our analysis does not require us to consider OMC § 23-148 in pari materia with ordinance No. 34398, we undertake that comparison for the sake of completeness. Both OMC § 23-148 and, by reference, ordinance No. 34398 address rank, grade, or class and compensation. Therefore, we may consider them conjunctively and construe them in pari materia in determining the meaning of "senior in rank, grade or class." See, OMC § 23-148; *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003) (when considering series or collection of statutes pertaining to certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine intent of Legislature, so that different provisions of act are consistent and sensible).

Ordinance No. 34398 approved the services agreement between the City and Millard and incorporated the language of the agreement by reference. The agreement states, in part:

> [Former Millard firefighters] shall be classified as "Firefighters" in the City's standard classification, and paid at the City's pay step which gives full effect and is based on all years of service with [Millard's] Fire Department, but in no event shall such step placement be greater than [the City's highest pay step for the classification of firefighter].

This language, incorporated as part of the ordinance, is consistent with our interpretation of the language in OMC § 23-148. As noted above, because the Millard personnel entered the employ of the City as "firefighters," they entered the City's employment at the same "rank, grade or class" as that of the Firefighters. See *id.*

[17] We recognize that our reasoning differs in some respects from that of the district court. Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

CONCLUSION

We conclude that under the plain language of OMC § 23-148, the Firefighters were not "senior in rank, grade or class" to the

former Millard personnel. Therefore, we conclude that the district court did not err in sustaining the City's motion for summary judgment and overruling the Firefighters' motion, and we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JAY E. BRUNA, APPELLANT.

710 N.W.2d 329

Filed January 10, 2006. No. A-05-529.

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. **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. ____: ____. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. ____: ____. When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
5. **Judges.** Neb. Rev. Stat. § 24-303 (Reissue 1995) allows a district judge of this state to hold court for another district judge of this state upon request, and such request need not be in writing.
6. **Constitutional Law: Judges.** Article V, § 12, of the Nebraska Constitution authorizes judges of the district court to hold court for each other.
7. **Statutes: Judges.** Neb. Rev. Stat. § 24-734 (Cum. Supp. 2004) provides that a judge of any court of this state, at chambers anywhere within the state, shall, in any case in which that judge is authorized to act, have power to exercise the powers conferred upon a judge and upon a court, and specifically to, with the consent of the defendant, hear and determine pretrial and posttrial matters in criminal cases.
8. **Due Process: New Trial: Convictions: Sentences.** Due process of law requires that vindictiveness against a defendant for having successfully attacked the defendant's first conviction must play no part in the sentence the defendant receives after a new trial.
9. **New Trial: Convictions: Sentences: Presumptions.** The application of the presumption of vindictiveness where a sentence has been increased after a new trial arising from a successful challenge of a prior conviction is limited to cases which pose a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority.
10. **Judges: Sentences: Presumptions.** There is no presumption of judicial vindictiveness in cases in which the defendant successfully appealed an initial sentence by one judge only to receive a greater sentence upon resentencing by a different judge.

11. **Judges: Sentences: Appeal and Error.** A defendant may prevail on a claim of judicial vindictiveness by showing actual vindictiveness in resentencing.
12. **Appeal and Error.** Absent plain error, an appellate court will not consider errors that were neither assigned nor argued.
13. **Sentences: Evidence.** A sentencing authority is to be accorded very wide discretion in determining an appropriate sentence and should be allowed to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.
14. **Sentences.** Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Sarpy County: JAMES T. GLEASON, Judge. Affirmed.

Lawrence G. Whelan for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Jay E. Bruna appeals his resentencing for first degree sexual assault on a child because it exceeded the original sentence, which had been vacated. We conclude (1) that the presumption of vindictiveness in sentencing set forth in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), does not apply when the second sentencing judge is someone other than the initial sentencing judge and (2) that Bruna failed to prove actual vindictiveness. We therefore affirm.

BACKGROUND

Pursuant to a jury verdict, Bruna was convicted in the district court for Sarpy County, Nebraska, of first degree sexual assault on a child. One of the district judges for the Second Judicial District—which includes Sarpy County—sentenced Bruna to 15 to 50 years in prison. Bruna appealed to this court, alleging,

inter alia, that the first judge made inappropriate remarks during sentencing. We found merit in this claim, and we vacated the sentence and remanded the cause with directions that Bruna be resentenced by a different judge. See *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

Upon remand, a new sentencing hearing was held in Douglas County, Nebraska, before one of the district court judges for the Fourth Judicial District, which consists of only Douglas County. Bruna, his counsel, and counsel for the State were present at the hearing, and no one raised any objection to the hearing's being held in Douglas County. The record does not show that Bruna expressly consented to the location of the hearing.

Before pronouncing the new sentence, the second judge noted that Bruna's presentence report had not been updated since the previous sentencing and that the judge had reviewed the court file and presentence report. The judge then sentenced Bruna to 20 to 50 years' imprisonment. Bruna appeals.

ASSIGNMENT OF ERROR

Bruna alleges that the district court abused its discretion and violated Bruna's right to due process of law under the 14th Amendment by imposing a harsher sentence on remand than was imposed by the original sentencing judge.

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. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005).

ANALYSIS

Jurisdiction.

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005). When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is

the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

[5,6] We begin by noting that the second judge is a district judge for the Fourth Judicial District. See Neb. Rev. Stat. § 27-201 (Reissue 1995) (court may take judicial notice of facts if those facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). It is unclear from the record how this matter came to be assigned to the second judge. However, Neb. Rev. Stat. § 24-303 (Reissue 1995) allows a district judge of this state to hold court for another district judge of this state upon request, and such request need not be in writing. See *Iron Bear v. Jones*, 149 Neb. 651, 32 N.W.2d 125 (1948). Moreover, the Nebraska Constitution authorizes judges of the district court to hold court for each other. See Neb. Const. art. V, § 12. Thus, the fact that the second judge was not one of the regular judges for the Second Judicial District does not raise a jurisdictional issue.

[7] The sentencing hearing at issue in this case was held in Douglas County rather than Sarpy County. Neb. Rev. Stat. § 24-734 (Cum. Supp. 2004) provides:

> (1) A judge of any court of this state, . . . at chambers anywhere within the state, shall, in any case in which that judge is authorized to act, have power to exercise the powers conferred upon a judge and upon a court, and specifically to:
>
> . . . .
>
> (d) With the consent of the defendant, hear and determine pretrial and posttrial matters in criminal cases.

The second judge apparently proceeded with sentencing—a posttrial matter—outside of Sarpy County, pursuant to the authority granted by § 24-734(1)(d). Bruna was present and spoke at the sentencing hearing in Douglas County, but the record does not show that he expressly consented to that venue. We find no Nebraska cases stating whether under § 24-734(1)(d), the defendant's consent must be expressed or may be implied, nor do we find any legislative history elucidating the issue.

We find a similar factual scenario in the Texas case of *Rodriguez v. State*, 918 S.W.2d 34 (Tex. App. 1996). In that

case, the defendant was arrested for possession of marijuana in Kenedy County, Texas, and was indicted for the offense by a grand jury in Kleberg County, Texas, which is in the same judicial district as Kenedy County. Texas' code of criminal procedure provided that the offense of possession of marijuana could be prosecuted in the county where the offense occurred or, " 'with the consent of the defendant,' " in a county adjacent to and in the same judicial district as the county where the offense occurred. *Id.* at 36. On appeal, the defendant alleged that the Kleberg County grand jury lacked jurisdiction to indict him. The Texas Court of Appeals observed that the defendant had not objected to his case's being presented to the Kleberg County grand jury, that the defendant did not seek to either quash the indictment or object to being tried in Kleberg County, and that following voir dire examination and the swearing in of the jury, both parties announced that they were ready for the case to proceed. The court referred to Texas' penal code and defined consent as "assent in fact, whether express or apparent." *Id.* The court concluded that the defendant had consented to the case's being tried in Kleberg County.

While we found no Nebraska cases on point, the holding in *Rodriguez v. State, supra*, appears to be consistent with the view of consent in Nebraska. The Nebraska Supreme Court has construed a defendant's failure to object to a continuance of a hearing date as consent to the continuance. See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). In the context of tort law, the Nebraska Supreme Court has defined "consent" as a willingness in fact for conduct to occur which may be expressed by action or inaction, and it has defined "apparent consent," in the same context, as words or conduct reasonably understood by another to be intended as consent. See *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

In the instant case, Bruna participated in the sentencing hearing and, like the defendant in *Rodriguez v. State, supra*, raised no objection as to venue. Bruna's conduct implied consent to the venue of the sentencing proceedings. We conclude that Bruna's implied consent was sufficient to satisfy the consent requirement of § 24-734(1)(d) and that the second judge had jurisdiction to conduct the sentencing hearing in Douglas County. Because

the district court possessed jurisdiction, we have jurisdiction to consider Bruna's appeal and now turn to the issue he raises on appeal.

Presumption of Vindictiveness.

[8] Bruna argues that the increased sentence violated his constitutional right to due process because, he claims, it was the product of vindictiveness. In *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), the U.S. Supreme Court held that due process prohibited a defendant from receiving a harsher sentence at resentencing after the defendant's successful attack of the first conviction, which success triggered vindictiveness on the part of the sentencing judge. The Court stated:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

395 U.S. at 725-26. The Court recognized that the U.S. Constitution does not absolutely bar the imposition of a more severe sentence upon reconviction. Courts have construed *Pearce* as applying a presumption of vindictiveness where a sentence has increased after a new trial arising from a successful challenge of a prior conviction. See *Wasman v. United States*, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984). Bruna contends that he is entitled to the presumption of vindictiveness.

[9] Subsequent U.S. Supreme Court cases have refined the holding of *Pearce*. The Court has limited the application of the *Pearce* rule to cases which pose a " 'reasonable likelihood' . . . that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Alabama v. Smith*, 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) (quoting *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)).

In *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972), the U.S. Supreme Court held that the presumption of vindictiveness does not apply when the harsher sentence is imposed by the higher court in a two-tiered trial system. In *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), the U.S. Supreme Court held that the rule does not apply when one jury imposes the initial sentence and another jury imposes a harsher sentence after retrial. The Court explained:

> [T]he second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.

412 U.S. at 27.

In *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986), the defendant was convicted and sentenced by a jury to 20 years in prison. The case was retried before a jury in front of the same judge who had presided over the first trial. The jury convicted the defendant, and the judge sentenced him to 50 years in prison, basing the increased sentence on new evidence. The Court stated:

> Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks an acquittal. . . . We decline to adopt the view that the judicial temperament of our Nation's trial judges will suddenly change upon the filing of a successful post-trial motion. The presumption of

> *Pearce* does not apply in situations where the possibility of vindictiveness is this speculative . . . .
>
> The presumption is also inapplicable because different sentencers assessed the varying sentences that [the defendant] received. In such circumstances, a sentence "increase" cannot truly be said to have taken place. . . . Here, the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more, particularly since trial judges must be accorded broad discretion in sentencing.

Texas v. McCullough, 475 U.S. at 139-40.

The *McCullough* Court further declined to read *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), as governing situations in which there are two different sentencing judges. The Court noted:

> *Pearce* itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. . . . That fact, however, may not have been drawn to the Court's attention and does not appear anywhere in the Court's opinion in *Pearce*. Clearly the Court did not focus on it as a consideration for its holding.

Texas v. McCullough, 475 U.S. at 140 n.3.

In the instant case, Bruna was sentenced by two different judges, and we find no Nebraska case applying the presumption of vindictiveness to such a situation. We recognize that *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997), involved two trials and two different sentencing judges. In that case, the defendant argued that the second sentencing court had erred in imposing a sentence that was harsher than the first sentence, which had been overturned on a motion for postconviction relief. The Nebraska Supreme Court discussed some of the foregoing authority and concluded: "Because events in the second trial shed new light on the defendant's character and because the reasons for imposing a heavier sentence appeared in the record, any presumption of vindictiveness under *Pearce* is effectively

rebutted." *State v. Wilson*, 252 Neb. at 657, 564 N.W.2d at 255. The court in *Wilson* did not focus on whether the presumption of vindictiveness applied.

[10] Other jurisdictions have declined to apply the presumption of judicial vindictiveness in cases in which the defendant successfully appealed an initial sentence by one judge only to receive a greater sentence upon resentencing by a different judge. See, e.g., *Gauntlett v. Kelley*, 658 F. Supp. 1483 (W.D. Mich. 1987); *State v. Parmelee*, 121 Wash. App. 707, 90 P.3d 1092 (2004); *State v. Mitchell*, 670 N.W.2d 416 (Iowa 2003); *State v. Hilton*, 291 S.C. 276, 353 S.E.2d 282 (1987). Based on the foregoing authorities, we decline to apply the presumption in this case also.

In the case before us, the procedural history does not support Bruna's position that his successful appeal was the motivation for the greater sentence. The second judge did not have a personal stake in the first sentence or a personal motive for vindication, and like the U.S. Supreme Court in *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986), we decline to base the presumption on speculations of judicial vindictiveness. We recognize that judges bring their varying life experiences to the bench, which circumstances can result in judges' imposing different sentences after having reviewed the same evidence. This is a natural consequence of the standard which allows judges to use their discretion in sentencing. See *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005) (enumerating factors judge may consider in imposing sentence). Because the judge who imposed Bruna's second sentence is not the same judge who imposed the first sentence, we conclude that there is no reasonable likelihood that vindictiveness contributed to the sentence appealed in this case.

Actual Vindictiveness.

[11-14] A defendant may still prevail on a claim of judicial vindictiveness by showing actual vindictiveness in resentencing. See *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Bruna alleges vindictiveness in resentencing, based on the increase between his first and second sentences. He does not argue that his second sentence resulted from actual

vindictiveness, and absent plain error, we will not consider errors that were neither assigned nor argued. See *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). We find no evidence of actual vindictiveness in the record. A sentencing authority "is to be accorded very wide discretion in determining an appropriate sentence" and should be allowed to consider "any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *Wasman v. United States*, 468 U.S. 559, 563, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984). Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Anglemyer, supra*. The second judge based the sentence on permissible considerations and apparently viewed the situation differently from the original sentencing judge. We conclude that Bruna has failed to prove actual vindictiveness by the judge in the resentencing of Bruna.

CONCLUSION

For the foregoing reasons, we conclude that the presumption of vindictiveness in sentencing set forth in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith, supra*, does not apply when the second sentencing judge is someone other than the initial sentencing judge and that Bruna failed to prove actual vindictiveness. We therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ADOLFO MONTANEZ HOLGUIN, APPELLANT.

708 N.W.2d 295

Filed January 17, 2006. No. A-05-091.

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. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause.
3. ____: ____: ____. The magistrate who is evaluating a probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
4. **Probable Cause.** Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found.
5. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
6. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
7. **Search Warrants: Police Officers and Sheriffs.** Observations by a fellow officer engaged in a common investigation are a reliable basis for a search warrant.
8. **Search Warrants: Affidavits: Hearsay.** An affidavit for a search warrant may be based on hearsay information and need not reflect the direct observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions.
9. **Search Warrants: Affidavits: Police Officers and Sheriffs: Proof.** Although, in general, no special showing of reliability is necessary where an affidavit for a search warrant indicates the source of information to be a law enforcement officer, there must be some basis revealed in the affidavit beyond the fact that one officer informed another, who then made the affidavit.
10. **Search Warrants: Affidavits: Hearsay.** An affidavit for a search warrant should include the veracity and basis of knowledge of persons supplying hearsay information.
11. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
12. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** Where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to deference, but, rather, must be reviewed de novo.

13. **Search Warrants: Affidavits: Judges: Motions to Suppress.** Evidence obtained pursuant to an invalid search warrant should be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid.
14. **Search Warrants: Affidavits: Probable Cause.** In determining whether a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court looks to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, to determine whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.
15. **Search and Seizure: Motions to Suppress: Records: Appeal and Error.** In assessing the totality of the circumstances for the purpose of the exclusionary rule's good faith exception, set out in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the appellate court may look to the record of the suppression hearing.
16. **Search Warrants: Affidavits: Words and Phrases.** A "bare bones" affidavit for a search warrant is one which relies on uncorroborated tips or mere suspicion.
17. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for a new trial.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Matthew M. Enenbach for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

Adolfo Montanez Holguin (Montanez) appeals his conviction in the Scotts Bluff County District Court for aiding and abetting in the manufacture of a controlled substance other than

marijuana, premising one of his assignments of error on the trial court's denial of his motion to suppress. We find that the search warrant relied on in this case was invalid and that a good faith exception to the exclusionary rule does not apply. Thus, the evidence seized from Montanez' motel room pursuant to that warrant should not have been received in evidence. Therefore, we reverse the conviction and remand the cause for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2004, Montanez was charged by information in the Scotts Bluff County District Court with the manufacture or distribution of a controlled substance (cocaine), or possession for such purpose, pursuant to Neb. Rev. Stat. § 28-416(1)(a) (Supp. 2003), and with conspiracy to manufacture a controlled substance (cocaine), pursuant to § 28-416(1)(a) and Neb. Rev. Stat. § 28-202(1)(a) (Reissue 1995). The dates in the information were amended, and such amended information was filed on October 26. The charges against Montanez were based on evidence seized, pursuant to a search warrant, during a June 18 search of a Scottsbluff, Nebraska, motel room (room No. 11), registered to Montanez. The evidence obtained in the search included a beer bottle containing eight clear plastic sandwich baggies with corners cut off, a black leather wallet with identification cards, $560 in cash, a digital scale, a small piece of tinfoil with a white powdery substance, a soft drink can with suspected marijuana residue, two 200-count boxes of 6¾- by 8-inch sandwich baggies, a corner of a clear plastic sandwich baggie with suspected cocaine residue, a gum wrapper with suspected cocaine residue, a pair of small blue scissors, a yellow-handled razor knife, and a motel receipt for room No. 11 in Montanez' name.

The affidavit in support of the warrant to search room No. 11 was signed by Scotts Bluff County Deputy Sheriff Trent Zwickl. Zwickl's affidavit stated that on June 17, 2004, while performing road patrol, he identified a red 1993 Mazda that he believed had expired in-transit stickers. Zwickl executed a traffic stop and made contact with the driver. Deputy Bob DeLara, a Spanish-speaking officer, was called to the scene because the driver appeared not to speak English. The driver was asked to

exit the vehicle based on a strong odor of alcohol and suspicious activity. Zwickl worked his drug detection dog around the vehicle, and the dog alerted on the vehicle. Upon searching the vehicle, an officer "found nine individually packaged small plastic baggies of a white substance possibly cocaine, inside a larger clear plastic baggy, between the [console] and the front passenger seat." Chemical field tests performed at the scene indicated a positive result for cocaine. A drug investigator, Det. Kent Ewing, was called to the scene. The driver identified himself as Julio Mendoza. After Mendoza was placed under arrest, officers placed him in one patrol car and then transferred him to another patrol car. After transferring Mendoza to the other patrol car, a search was conducted of the first patrol car and the officers recovered two corner pieces of plastic baggies with small amounts of residue of a white powdery substance.

The affidavit stated that during an interview with Mendoza, a key to room No. 11 was found on Mendoza's person. Permission to search the motel room was requested of Mendoza, but he refused, stating that the room belonged to someone else.

Zwickl stated in the affidavit that he, Ewing, and DeLara went to the motel, where Ewing was informed by an employee of the motel that the registered occupant of room No. 11 was "Alfredo [sic] Montanez." Zwickl stated that he was "aware that . . . Ewing as a member of [a] Drug Task Force ha[d] intelligence regarding . . . Montanez traveling back and forth between Greeley, Colorado and Scottsbluff . . . while transporting Cocaine." Zwickl's affidavit then concluded that there was probable cause to believe that "cocaine, paraphernalia associated with the use of cocaine, paraphernalia used for the measuring of cocaine, [and] paraphernalia for packaging and distributing cocaine, including but not limited to scales, baggies, baggie ties, mirrors, razor blades, needles, tubes and [vials]," were being kept in room No. 11.

On September 14, 2004, Montanez filed a motion to suppress the evidence seized in the search of room No. 11. Following an October 2004 hearing on the motion, the trial court overruled it, finding that "there was probable cause from the affidavit" to issue the warrant.

At trial, Montanez renewed his motion to suppress and made the necessary objections to preserve the matter of the legality of the search of room No. 11 for appellate review. At the conclusion of the jury trial, Montanez was found guilty of aiding and abetting the manufacture of cocaine and not guilty of conspiracy to manufacture cocaine. Montanez was sentenced to 2 to 4 years' imprisonment, with credit for 223 days served. Montanez appeals the conviction and sentence.

ASSIGNMENTS OF ERROR

Montanez asserts that the trial court erred in (1) overruling his motion to suppress evidence seized at the motel pursuant to a search warrant and (2) imposing an excessive sentence.

STANDARD OF REVIEW

[1] 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. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

ANALYSIS

Did Affidavit Make Showing of Probable Cause?

Montanez contends that the trial court erred in overruling his motion to suppress because the affidavit was not sufficient to establish probable cause for the search warrant and because the statement in the affidavit regarding Montanez' transportation of cocaine between Greeley and Scottsbluff tainted the affidavit, as there was no corroborating information supporting such statement.

[2-4] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Hernandez*, 268 Neb. 934, 689 N.W.2d 579 (2004). The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*

Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found. *State v. Shock*, 11 Neb. App. 451, 653 N.W.2d 16 (2002).

[5,6] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Hernandez, supra*. The question for the appellate court is whether, under the totality of the circumstances, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. See *id.*; *State v. Shock, supra*.

The essence of the affidavit before us is that after Zwickl stopped a red Mazda, driven by Mendoza, with suspected expired in-transit stickers, another officer found nine individually packaged small plastic baggies of what field tests showed to be cocaine inside a larger, clear plastic baggie within that vehicle. Officers also uncovered two corner pieces of plastic baggies with small amounts of residue of a white powdery substance. Mendoza had a motel room key in his pocket upon his arrest, and the motel room was registered to Montanez. And, Ewing, a member of a drug task force, had "intelligence" regarding Montanez' "traveling back and forth between Greeley . . . and Scottsbluff . . . while transporting Cocaine."

At the October 2004 suppression hearing, the trial court said:

> In overruling [Montanez'] Motion to Suppress, also, the Court finds there was probable cause from the affidavit to authorize Judge Lippstreu to issue a warrant to search Room 11 at [the] Motel because what was in that basis for the warrant was that [the driver of the red Mazda who was identified in the affidavit as Mendoza] had just been found with a pile of cocaine and key to a motel which one could infer cocaine came from, and evidence concerning it could still be there because he was alone, no one else would know. And, since he had access to that room, access to the car, and had cocaine in his possession, it's reasonable to

> infer that there was evidence of how he got that cocaine in his car from that motel.

When one focuses on "probability," the foregoing inferences by the trial court are not practical and commonsensical inferences; nor do they reveal a substantial basis upon which the warrant was issued, unless it was by use of the claim that Montanez was known to be transporting cocaine between Greeley and Scottsbluff. Mendoza's concurrent possession of cocaine and somebody else's motel room key does not make it probable, without more information, that Mendoza's cocaine came from such motel room—bearing in mind (1) the numerous other ways that Mendoza could have come to possess the cocaine and (2) that the affidavit lacks any information that other collaborative investigation had revealed this motel room to be a cocaine trafficking location.

[7-10] Thus, Ewing's "intelligence" about Montanez, asserted by Zwickl in the affidavit, becomes crucial, and we turn to whether Zwickl's statement that Ewing had "intelligence" regarding Montanez' transporting cocaine between Greeley and Scottsbluff is entitled to any recognition in the issuing magistrate's determination that there was probable cause that evidence of cocaine possession or trafficking would be found in room No. 11. Although observations by a fellow officer engaged in a common investigation are a reliable basis for a search warrant, *State v. Bockman*, 11 Neb. App. 273, 648 N.W.2d 786 (2002), Ewing's "intelligence" regarding Montanez' transportation of cocaine was not explained in Zwickl's statement in the affidavit as being Ewing's personal knowledge from firsthand observation, from investigation, or from informants. The affidavit simply does not explain how Ewing obtained this "intelligence"—for example, from an informant who had been shown to be reliable. See *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998) (discussing how reliability of various types of informant is established), *disapproved in part on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Thus, the affidavit reveals no "underlying circumstances" supporting the assertion that Montanez was transporting cocaine between Greeley and Scottsbluff. See *State v. Huggins*, 186 Neb. 704, 706, 185 N.W.2d 849, 851 (1971) (affidavit may be based on hearsay and need not reflect direct

observations of affiant so long as magistrate is informed of some of underlying circumstances supporting affiant's conclusions). Although, in general, no special showing of reliability is necessary where the affidavit indicates the source of information to be a law enforcement officer, see *State v. Bockman, supra*, there must be some basis revealed in the affidavit beyond the fact that one officer informed another, who then made the affidavit. See *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998) (affidavit should include veracity and basis of knowledge of persons supplying hearsay information). Because Zwickl asserted what Ewing, another officer, knew, some basis for Ewing's "intelligence" about Montanez had to be in the affidavit. Without such basis, the magistrate could not properly evaluate the statement that Ewing had "intelligence" that Montanez was transporting cocaine.

[11] Also lacking in the affidavit is any information as to when Montanez was allegedly transporting cocaine between Greeley and Scottsbluff in relation to the seizure of cocaine from Mendoza's vehicle—whether it was recently or years before is unsaid. See *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). See, also, *State v. Johnson, supra* (proof of probable cause justifying issuance of search warrant generally must consist of facts so closely related to time of issuance of warrant as to justify finding of probable cause at that time), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). For these reasons, neither the issuing magistrate, the suppression hearing judge, nor this court can consider the claim that Ewing had "intelligence" that Montanez was transporting cocaine between Greeley and Scottsbluff.

[12] "[W]here the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to [great] deference, but, rather, must be reviewed de novo." *State v. Lee*, 265 Neb. at 678, 658 N.W.2d at 683. The remaining pertinent information in the affidavit was that upon the traffic stop of the red Mazda driven by Mendoza, an officer found nine individually packaged small plastic baggies of what field tests showed to be cocaine inside a larger, clear plastic baggie within that vehicle. Officers also uncovered

two corner pieces of plastic baggies with small amounts of residue of a white powdery substance in the police cruiser where they first placed Mendoza while searching the Mazda. Additionally, Mendoza had a motel room key in his pocket upon his arrest, and such motel room was determined to be registered to Montanez.

In *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999), *overruled on other grounds, State v. Davidson, supra*, Michael E. Johnson argued that the affidavit upon which a search of his home was premised was insufficient for the magistrate to have found probable cause. Johnson was arrested pursuant to a warrant for failure to pay child support. Upon his arrest, the arresting officer searched him and found a "small, clear plastic vial" on his person which field tests showed to contain methamphetamine. *State v. Johnson*, 256 Neb. at 135, 589 N.W.2d at 112. A search of Johnson's vehicle produced "a plastic bag containing two small paper packets" that the officer suspected to be " 'snow seals,' " which, according to the affidavit, were containers commonly used in the sale of controlled substances. *Id.* at 136, 589 N.W.2d at 112. The arresting officer, in preparing the affidavit, requested a warrant to search Johnson's home for controlled substances, drug paraphernalia, currency, weapons, and other items "generally associated with illicit drug trafficking." *Id.* However, the quantity of the methamphetamine found was not specified within the affidavit. The affidavit stated that the arresting officer was aware from training and experience and from information received from other officers that individuals frequently keep controlled substances at their residences and that Johnson was a person known to have engaged in the use and sale of controlled substances and who had " 'previously been convicted of drug charges.' " *Id.* A warrant was issued, and Johnson's residence was searched.

Johnson filed motions to suppress the seized evidence, alleging that the warrant was not supported by probable cause; the motions were overruled, and Johnson appealed. We reversed, finding that the affidavit did not establish probable cause because it "contained generalizations about the habits of users and dealers of controlled substances but lacked 'articulable facts . . . to support a finding of probable cause that these generalizations

applied to Johnson.' " *Id.* at 138, 589 N.W.2d at 113, quoting *State v. Johnson*, 6 Neb. App. 817, 578 N.W.2d 75 (1998). The Nebraska Supreme Court affirmed our decision, analyzing the facts and merits as follows:

> [T]he general statements in the affidavit concerning Johnson's prior conviction and involvement with controlled substances do not provide the temporal nexus necessary to establish probable cause. However, that nexus is present with respect to the methamphetamine and snow seals which were found in Johnson's possession hours before the search warrant was requested. The question, then, is whether these facts establish probable cause to believe that evidence of a crime would be found at Johnson's residence.

State v. Johnson, 256 Neb. 133, 144, 589 N.W.2d 108, 116 (1999), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). The *Johnson* court continued its analysis, finding "nothing in the affidavit which would lead to a reasonable inference that Johnson was engaged in the sale of controlled substances at or near the time of his arrest." 256 Neb. at 144, 589 N.W.2d at 117. The court reasoned:

> The general statement that [the affiant arresting officer] was aware of Johnson's previous conviction of "drug charges" would not support such an inference, since there is no indication of the date of the conviction or whether it involved the sale, as opposed to possession, of controlled substances. Likewise, the fact that Johnson was in possession of an unspecified quantity of methamphetamine and three snow seals, described in the affidavit as "[items] used for the sale of controlled substances," provides no basis for inferring that Johnson was a seller of controlled substances, rather than a purchaser. Thus, even if we were to accept the State's premise that incriminating evidence is likely to be found in the homes of drug dealers, the affidavit on its face contains no facts from which it could reasonably be inferred that Johnson was a drug dealer at or near the time of his arrest. For these reasons, the district court's findings of fact upon which it denied Johnson's motions to suppress were clearly erroneous, and the Court of Appeals correctly concluded that [the officer's] affidavit

> did not establish probable cause to justify the search of Johnson's residence.

Id. at 144-45, 589 N.W.2d at 117.

Here, the only information contained in the affidavit connecting Mendoza to room No. 11 was that he had a key to it. The fact that Mendoza possessed an unspecified amount of cocaine contained in nine small baggies, as well as a motel key, does not provide a basis for inferring that Mendoza was a seller of cocaine, rather than a purchaser for personal use, or a basis for inferring that evidence of any such sales by Mendoza would probably be found in someone else's motel room. In looking within the four corners of the affidavit, one cannot infer that there was a fair probability that contraband or evidence of a crime would be found in room No. 11, remembering that according to the affidavit, the room was registered not to Mendoza, the driver of the red Mazda, but, rather, to Montanez—and any assertion of any connection between Montanez and Mendoza must be ignored, as discussed above. Moreover, there were no facts recited in the affidavit to even suggest that room No. 11 had been investigated or watched by police, let alone that such investigation or surveillance produced something suggestive of drug trafficking. Because the affidavit did not make a showing of probable cause that evidence of a crime would be found in room No. 11, the search warrant for that motel room was invalid.

Good Faith Exception to Warrant Requirement.

[13,14] However, when a search warrant is invalid, we still must consider the "good faith exception" to the exclusionary rule, which exception had its genesis in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). A concise explanation thereof, as well as the appellate court's analytical task in the case of an invalid warrant, is found in *State v. Edmonson*, 257 Neb. 468, 485-86, 598 N.W.2d 450, 463 (1999):

> [P]ursuant to *Leon*, evidence obtained pursuant to an invalid search warrant should be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly

abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In determining whether a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court looks to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, to determine whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.

[15] The record reveals that only category 3 from *State v. Edmondson, supra*, is involved in this case. Therefore, for the purpose of this issue, we look outside the affidavit to the evidence adduced at the suppression hearing to determine whether the police officers who searched room No. 11 acted in objectively reasonable good faith in relying on the warrant. And, clearly, the only place we can look to assess the "totality of the circumstances" is within the record of the suppression hearing. See *U.S. v. Leach*, 80 Fed. Appx. 444 (6th Cir. 2003) (collecting cases holding that information possessed by officers, but not included in affidavit, can be considered for application of good faith exception set forth in *United States v. Leon, supra*). Obviously, the fruits of the search cannot be used to establish good faith. In short, we examine the evidence from the suppression hearing to determine what the involved officers knew and when they knew it.

The nature and extent of the connection between Montanez, Mendoza, and room No. 11, as well as Ewing's "intelligence" about Montanez, are the key analytic elements in this case when

we examine the totality of the circumstances. Ewing's testimony reveals that he is a seasoned member of a drug task force with significant experience in investigating drug cases, although this was apparently the first affidavit for a search warrant written entirely by Zwickl.

At the suppression hearing, evidence was admitted that Mendoza was the driver of the vehicle involved in a sale of cocaine to a confidential informant in a "controlled buy" on May 29, 2004, in Gering, Nebraska. While this buy was originally going to occur at a house in Gering which officers had under surveillance for drug trafficking due to "stop and go" traffic, the sellers changed the location to a bowling alley in Gering. A Scottsbluff Police Department investigator testified that the red Mazda Mendoza was driving on June 17 was the same vehicle the sellers used in the controlled buy on May 29, and, as noted above, there was evidence that Mendoza was the driver of the vehicle involved in the sale at the bowling alley. The evidence shows that the packaging and quantities of cocaine acquired from the controlled buy on May 29 and from the seizure from Mendoza on June 17 were very similar. Thus, from the totality of the circumstances, we conclude that the officers were aware, prior to the search of room No. 11, that Mendoza was a "drug dealer." However, there was no evidence adduced at the suppression hearing that Montanez, the man to whom room No. 11 was registered, was involved in the controlled sale to the confidential informant on May 29.

Moreover, there was no evidence of any prior surveillance of room No. 11 except that when describing finding the key to that room on Mendoza's person on June 17, 2004, Zwickl testified: "I found a key to Room No. 11 [of] the . . . Motel. . . . Ewing was, also, on [the] scene, and he had further information involving Room No. 11 at [that] Motel." But, when Ewing testified at the suppression hearing, he responded as follows to the State's attorney's questions:

> Q. Who applied for the search warrant?
>
> A. . . . Zwickl applied for the warrant.
>
> Q. And, what was the location they were asked in [sic] the search?

A. Room at the . . . Motel. I believe it was No. 11.

Q. Why did they seek to search Room No. 11?

A. . . . Zwickl had information — I believe he might have found a room key to the . . . Motel that had that number on it.

Q. Did you assist in the execution of the search warrant at the . . . Motel?

A. Yes, I did.

Therefore, Zwickl's testimony that Ewing had "further information" about room No. 11 was not substantiated in any way when Ewing was given an open-ended question as to why the room was searched—Ewing said only that it was because of the key found on Mendoza. He said nothing regarding his "intelligence" about Montanez' moving cocaine between Greeley and Scottsbluff, nothing about "further information" he had on room No. 11, nothing about any connection between Montanez and the house in Gering where the above-described controlled buy was originally to occur, and nothing about a connection between Montanez and the known drug dealer Mendoza. For completeness, we note that the record reveals that the surveillance of the house in Gering revealed that a white Mercury automobile was part of the traffic observed there, but Montanez was not connected to that vehicle, in the evidence before us, until he was arrested on the morning after the search, at which time he was driving that vehicle, which was registered to him. But, significantly, this connection was made after the search and does nothing to help make a showing of "good faith" as contemplated in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

[16] In this case, the issue of the *Leon* good faith exception comes down to the statement in the affidavit that Ewing had "intelligence" that Montanez transported cocaine between Greeley and Scottsbluff and Zwickl's testimony that Ewing had "further information" about room No. 11. But, these statements are not substantiated, explained, or shown to be reliable in any respect by any evidence at the suppression hearing from Ewing or anyone else. Thus, on the record before us, Zwickl's unsubstantiated assertions about Montanez' transportation of cocaine or "further information" possessed by Ewing about room No. 11

provide no basis for any police officer with a reasonable knowledge of what the law prohibits, judged on an objective standard, to believe that reliance could be placed on the warrant. This is because the affidavit is so clearly lacking in indicia of probable cause on its face, being what has frequently been called a " 'bare bones' " affidavit in previously decided cases, see *U.S. v. Koons*, 300 F.3d 985, 991 (8th Cir. 2002) ("bare bones" affidavit is one which relies on uncorroborated tips or mere suspicion). Without the "intelligence" or "further information," Mendoza and Montanez are only tenuously connected by a motel room key and nothing else. While Ewing's "intelligence" or "further information" may have been such that he could reasonably believe that room No. 11 probably contained evidence of drug trafficking, the problem is that no basis for reliance on that belief is found anywhere in the record, and the standard is an objective one for a police officer with a reasonable knowledge of what the law prohibits, rather than a subjective one of what Ewing knew but did not disclose in the suppression hearing or in the affidavit.

The connection between Mendoza and Montanez is the solitary fact that Mendoza had a key to a motel room that was registered in Montanez' name. The fact that Mendoza, a cocaine dealer, has a key to a motel room does not make it probable that evidence of cocaine trafficking will be in that motel room, particularly when it is not registered to him, and the police, at least on the record before us, had no knowledge or even reason to believe—prior to the execution of the warrant—that Montanez or room No. 11 was involved with Mendoza's cocaine selling activities. For the *Leon* good faith exception to apply in the instant case, it must be "probable" from the totality of the circumstances that the officers objectively and reasonably believed that incriminating evidence would be found in room No. 11.

In conclusion, even when the totality of the circumstances is considered, the affidavit seeking a warrant for the search of room No. 11 was so lacking in indicia of probable cause as to render official belief in the existence of such cause entirely unreasonable. In this regard, Ewing's "intelligence" about Montanez' transportation of drugs between Greeley and Scottsbluff may well have filled the gaps, but no evidence about such transportation was introduced at the suppression hearing.

And, if Ewing had "further information" about room No. 11, as Zwickl said, that evidence might also have plugged the gaps; but likewise, no evidence was offered on that point. We cannot speculate about what the officers knew and when they knew it to fill in the gaps in the proof, and we apply an objective standard to the officers, not a subjective one. In others words, Ewing may well have had in hand plenty of evidence to link Mendoza and Montanez, to link Montanez to the transportation of cocaine from Greeley to Scottsbluff, or to link Montanez to the house in Gering, but such evidence must be in the record before we can consider it in the totality of the circumstances test under the good faith exception set out in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In short, this case reveals a failure of proof, not "bad faith" by the officers. Therefore, the good faith exception does not apply here and the trial court erred in overruling Montanez' motion to suppress. The fruit of the illegal search—the items seized from room No. 11 pursuant to a search on June 18, 2004—should have been suppressed.

Remedy and Resolution.

[17] In deciding, based on the erroneously admitted evidence, whether to remand this cause for a new trial, we must determine whether the evidence presented by the State was sufficient to sustain the conviction. The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). Although the evidence derived from the unlawful search of room No. 11 was erroneously admitted, we consider it in our analysis of the sufficiency of the evidence. See *id.* Considering such evidence and the other trial evidence, the evidence was clearly sufficient to sustain Montanez' conviction for aiding and abetting the manufacture of cocaine. Therefore, Montanez may be retried, but without the fruits of the unlawful search of room No. 11. We therefore reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

MIKE ROSELAND ET AL., APPELLEES AND CROSS-APPELLANTS, V. STRATEGIC STAFF MANAGEMENT, INC., APPELLANT AND CROSS-APPELLEE.

708 N.W.2d 841

Filed January 24, 2006. No. A-04-627.

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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed.

Jeffrey A. Silver for appellant.

Mary L. Hewitt, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Strategic Staff Management, Inc. (Strategic), appeals the decision of the Douglas County District Court finding that Mike Roseland, Tim Brotzki, Tom Lentz, and Loyce Meister (formerly known as Loyce Farnan), hereinafter referred to collectively as "the appellees," were entitled to be compensated for accrued but unused vacation time in the amount of $8,788.29 plus attorney fees of $2,197.07. The appellees have cross-appealed, contending that the district court erred in denying their request for attorney fees in excess of the statutory minimum and in denying their request for an additional recovery of one to two times the amount of unpaid wages to be placed in a fund to be distributed to the common schools of Nebraska.

STATEMENT OF FACTS

Strategic is a Nebraska corporation engaged in leasing employees. The appellees have all been employees of Strategic as follows: Roseland was president, Lentz was vice president,

Brotzki was director of client services, and Meister was a marketing assistant.

In May 1998, Roseland, Brotzki, and Lentz each voluntarily submitted a notice of resignation of employment with Strategic. In July, Meister voluntarily submitted her notice of resignation of employment with Strategic. At the time of the voluntary resignations, the appellees had the following weeks of accrued vacation time: Roseland and Brotzki each had 3 weeks, Lentz had 1 week, and Meister had 2 weeks. Strategic did not pay the appellees for their accrued vacation time. In March 2000, the appellees each sent letters demanding payment for their unused vacation time, which Strategic has refused to pay.

On April 21, 2000, the appellees filed a lawsuit seeking judgment against Strategic in the amount of $8,788.29 under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004). They also sought an award of all costs, reasonable attorney fees of not less than 25 percent of unpaid wages, an additional recovery of one to two times the amount of unpaid wages to be placed in a fund to be distributed to the common schools of Nebraska, and such other further relief as the court deemed just and proper.

On the day of trial, the parties agreed to submit the matter to the court upon the following stipulated facts: At the time of the resignations, each party had accrued vacation time, and each party's salary or rate of pay was accurately listed in the petition. Roseland was requesting 3 weeks of accrued vacation pay valued at $4,038.45, Brotzki was requesting 3 weeks of accrued vacation pay valued at $2,307.69, Lentz was requesting 1 week of accrued vacation pay valued at $1,346.15, and Meister was requesting 2 weeks of accrued vacation pay valued at $1,096.

Additionally, various exhibits were received into evidence. Exhibits established that Strategic's employee handbook provides that for regular full-time employees, "[t]he amount of paid vacation time employees receive each year increases with the length of their employment." After 1 year of continuous service, employees are eligible for 1 week of paid vacation. After 2 years of continuous service, employees are eligible for 2 weeks of paid vacation. After 5 years of continuous service, employees are eligible for 3 weeks of paid vacation. According to Strategic's

employee handbook, "[y]our year of service begins on your hire date; i.e. if you began employment on April 15, you would be eligible for one week of vacation on April 15 of the following year, etc."

Exhibits established that the benefit modification policies and procedures incorporated into Strategic's employee handbook as of November 1, 1997, provided: "In the event that available vacation is not used by the end of the benefit year, it will not be carried over. Upon termination, employees will not be paid for unused vacation time." (Emphasis in original.) A revision made in April 1998 states: "Accrued but unused vacation will not be carried over from year to year. **Upon resignation or termination, employees will not be paid for vacation time available.**" (Emphasis in original.) It is undisputed that with regard to vacation pay, the exhibits set forth the policies in force at the time of resignation. Strategic's employee handbook also states: "In the event any statement or policy in this handbook conflicts with state or federal laws, it shall be deemed automatically amended to comply with all such state or federal laws."

Also admitted into evidence was an affidavit from the appellees' counsel setting forth that attorney fees and costs through September 30, 2003, were $7,323.87. The affidavit further set forth:

> This simple wage and hour matter has been unusually time consuming and costly in that [Strategic's] actions in this litigation appeared to serve the sole purpose of requiring counsel for the [appellees] to expend additional time and efforts to pursue this litigation which were unreasonable in light of the amount of damages sought to be recovered.

On November 19, 2003, the district court filed an order holding that Strategic's "policy of refusing to pay an employee for unused vacation time directly conflicts with state law and is, therefore, void." Thus, the court awarded the appellees the total amount of $8,788.29 requested for unused vacation time. Additionally, the court determined that because the appellees employed an attorney, they are entitled to attorney fees worth not less than 25 percent of the unpaid wages, or $2,197.07. Further, the court found that there was a reasonable dispute as to the fact that the wages were owed, and thus, the court declined to order Strategic to pay to the

common schools fund an amount equal to the judgment. Finally, the court did not find that Strategic's conduct was willful and therefore declined to order Strategic to pay to the school fund an amount double the unpaid wages. Strategic has timely appealed to this court, and the appellees have filed a cross-appeal.

ASSIGNMENTS OF ERROR

[1] On appeal, Strategic contends the district court erred in determining that contrary to Strategic's employee handbook, pay for accrued but unused vacation time can be collected upon a voluntary resignation. In Strategic's brief, it also argues that it is entitled to a credit for the 2 weeks' wages paid to the appellees at the time of their resignations and for which they performed no services for Strategic. However, this was not assigned as an 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. *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004); *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004). Therefore, we refuse to further consider this issue.

On cross-appeal, the appellees contend that the district court erred in denying their request for attorney fees in excess of the statutory minimum and in denying their request for an additional recovery of one to two times the amount of unpaid wages to be placed in a fund to be distributed to the common schools of Nebraska.

STANDARD OF REVIEW

[2] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

ANALYSIS

Issues Raised by Strategic on Appeal.

Strategic contends the district court erred in determining that contrary to Strategic's employee handbook, pay for accrued but unused vacation time can be collected upon a voluntary resignation.

Section 48-1230 provides in part: "Whenever an employer, other than a political subdivision, separates an employee from the payroll, the unpaid wages shall become due on the next regular payday or within two weeks of the date of termination, whichever is sooner." "Wages" are defined under the Nebraska Wage Payment and Collection Act as "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." See § 48-1229(4). The term "fringe benefits" includes "sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans or benefit programs regardless of whether the employee participates in such plans or programs." See § 48-1229(3).

As applied to the instant case, pursuant to the Nebraska Wage Payment and Collection Act, wages include fringe benefits, such as vacation leave plans, "when previously agreed to and conditions stipulated have been met by the employee." See § 48-1229(4). According to Strategic's employee handbook, vacation leave was determined by years of employment. Thus, once an employee had completed 1 year of continuous service, he or she had earned 1 week of vacation. The only "condition" required by Strategic in order to earn vacation leave was continuous service for the requisite period of time.

However, Strategic's employee handbook also clearly states that employees will not be paid for unused vacation time upon the employee's resignation or termination of employment. In other words, there are no conditions in Strategic's employee handbook that would allow for payment of unused vacation time upon an employee's resignation or termination of employment.

In *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004), the Nebraska Supreme Court considered whether a terminated employee was entitled to earned but unused vacation leave pay. The court found that "vacation and sick leave pay is characterized as an 'employee benefit plan' under the terms of the Nebraska Wage Payment and Collection Act." *Id.* at 114, 680 N.W.2d at 187. The court referred to the provisions of the company's employee handbook to determine whether the employee

was entitled upon termination of employment to receive his earned but unused vacation leave pay. Such employee handbook provided that " '[n]o payment for vacation shall be payable for termination during the work year,' " with some exceptions. *Id.* The court found that the employee's case fell within one of the listed exceptions and that thus, he was entitled to receive payment for his accrued but unused vacation time. In other words, the employee met the "conditions stipulated" by the employer for payment, as set forth under the Nebraska Wage Payment and Collection Act.

The Nebraska Supreme Court in *Rosno, supra*, did not specifically address whether the controlling language of the company's employee handbook was contrary to state statute, which differs from the facts in the instant case wherein the district court found that the language contained in Strategic's employee handbook conflicted with state law. However, we infer from the language used by the Supreme Court in *Rosno, supra*, that the court's determination of the issue of entitlement to payment for unused vacation time was based upon the language of the company's employee handbook, not upon a finding that the provisions of such handbook violated the Nebraska Wage Payment and Collection Act or that a policy limiting an employee's right to payment for unused vacation time violates the act.

In sum, *Rosno* provided that the issue of entitlement to payment for unused vacation time upon termination of employment depends upon the language contained in a company's employee handbook. In the instant case, Strategic's employee handbook specifically provides that employees will not be paid for vacation time available upon the employee's resignation or termination of employment. Based upon the clear language of Strategic's employee handbook, the appellees are not entitled to payment for unused vacation time upon resignation or termination of employment. Thus, the district court erred as a matter of law in awarding the appellees judgment for the unused vacation time. It likewise follows that the district court's award of $2,197.07 in attorney fees is reversed.

Issues Raised by Appellees on Cross-Appeal.

The appellees contend that the district court erred in denying their request for attorney fees in excess of the statutory minimum

and in denying their request for an additional recovery of one to two times the amount of unpaid wages to be placed in a fund to be distributed to the common schools of Nebraska. Because judgment should not have been entered in favor of the appellees, it follows that these claims are denied.

CONCLUSION

In sum, we find that the district court erred as a matter of law in awarding the appellees judgment for the unused vacation time. Thus, the judgment in favor of the appellees is reversed, as is the district court's award of $2,197.07 in attorney fees.

REVERSED.

INBODY, Chief Judge, dissenting.

I must respectfully dissent from the portion of the majority opinion that finds that the district court erred as a matter of law in determining that the issue of entitlement to payment for unused vacation time is based upon the wording of a company's employee handbook. The majority relies on *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004), for the proposition that the language contained in a company's employee handbook is dispositive of whether an employee is entitled to be paid for earned but unused vacation time upon the employee's termination of employment or resignation. However, I think an equally reasonable inference of the *Rosno* opinion is that a determination of whether that particular company's employee handbook was in violation of Nebraska law was unnecessary because the employee's situation fell within one of the enumerated exceptions listed in such employee handbook, thus requiring payment of vacation benefits.

If such an analysis had been necessary, I believe that *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), is instructive. In that case, the Nebraska Supreme Court held that an employment agreement that defines wages contrary to the Nebraska Wage Payment and Collection Act's statutory definition of wages is void. This is because a company cannot circumvent the statutory definition of wages through its employment agreement. *Id.*

Pursuant to the Nebraska Wage Payment and Collection Act, wages include fringe benefits, such as vacation leave plans, "when

previously agreed to and conditions stipulated have been met by the employee." See Neb. Rev. Stat. § 48-1229(4) (Reissue 2004). It is undisputed that the appellees had each accrued the vacation time they claimed. Thus, the appellees had met the only "condition" required for entitlement of that vacation leave, and upon termination of employment, they were entitled to be paid for their accrued, but unused, vacation leave. The appellees' vacation leave is classified as "wages" by the Nebraska Wage Payment and Collection Act and was required to be paid either on the next regular payday or within 2 weeks of the date of termination of employment, whichever is sooner. See Neb. Rev. Stat. § 48-1230 (Reissue 2004).

The provisions of Strategic's employee handbook which provide to the contrary, i.e., that payment for earned but unused vacation time is forfeited upon resignation or termination of employment, are in direct violation of the Nebraska Wage Payment and Collection Act. Therefore, these provisions of Strategic's employee handbook are void. Further, I note that Strategic's employee handbook states: "In the event any statement or policy in this handbook conflicts with state or federal laws, it shall be deemed automatically amended to comply with all such state or federal laws." I would affirm the district court's order granting judgment in favor of the appellees in the amount of $8,788.29 and awarding attorney fees in the amount of $2,197.07.

WILLIAM M. THEISEN, APPELLANT, V.
KAREN S. THEISEN, APPELLEE.

708 N.W.2d 847

Filed January 31, 2006. No. A-05-103.

1. **Modification of Decree: Child Support.** Modification of child support is entrusted to the discretion of the trial court.
2. **Modification of Decree: Judgments.** A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.
3. **Stipulations: Parties: Trial: Courts.** Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and

enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.

4. **Child Support.** Child support orders are always subject to review and modification.
5. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
6. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children.
7. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification.
8. **Modification of Decree: Child Support.** In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded with directions.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Lisa M. Meyer and David D. Ernst, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

William M. Theisen appeals from an order of the district court for Douglas County denying his application to modify the decree dissolving his marriage to Karen S. Theisen. Under that decree, William was required to pay $15,000 per month in child support. On appeal, William argues that the trial court erred in failing to terminate his child support obligation. For the reasons set forth below, we reverse, and remand with directions.

BACKGROUND

On June 15, 2000, the district court entered a decree dissolving the marriage of William and Karen. Within that decree, William's child support was set out as follows:

> [William] shall have a child support obligation of $15,000.00 per month commencing July 1, 2000 and the

> first day of the month thereafter. Said child support shall not be paid through the Clerk of the District Court of Douglas County and shall be paid as set forth in the Settlement Agreement entered into between the parties. Said child support shall continue until the youngest child reaches majority or until further order of the Court.

The relevant portion of the parties' settlement agreement states:

> The parties agree that current monthly support payments of $15,000 are being made to [Karen] for the benefit of the minor Theisen children by the Trustee of the Theisen Second II Irrevocable Trust. Because of the agreement by the Trustee of the Theisen Second II Irrevocable Trust to make these monthly support payments until May, 2002, there is no need at this time for additional child support to be paid by either of the parties. However, the parties agree that if the Trustee of the Theisen Second II Irrevocable Trust shall at any time reduce or eliminate the monthly support payments of $15,000, or if the circumstances of the parties should change such that this payment amount is not adequate, either party shall be entitled to seek a modification of any decree entered concerning payment of child support by [William] and/or [Karen]. [William] reserves the right in any future child support proceeding to take a position as to the reasonable child support amount pursuant to the Nebraska child support guidelines.

The record shows that William and Karen are the parents of five children, four of whom were minors at the time of the parties' dissolution action: Crystal, born February 8, 1982; Arielle, born April 12, 1985; Jasmin, born December 6, 1985; and Cody, born October 16, 1987. In the decree, the parties were awarded joint legal custody of the minor children. Karen was awarded primary physical custody of Arielle and Jasmin, and neither party was awarded custody of Crystal or Cody, given that Crystal was "currently living on her own" and Cody "[wa]s presently under the jurisdiction of the Douglas County, Nebraska Juvenile Court."

The record shows that at the time of William and Karen's divorce, none of the minor children were residing with Karen in

her California home. As noted in the record, Crystal was living on her own, Arielle and Jasmin were at boarding school, and Cody was at a residential facility for children with behavioral problems. The record also shows that in addition to the $15,000 per month child support payments, the trust agreed to pay the children's living expenses and the trust purchased Karen's California home so that the children would have a place "to call their home."

Prior to entering into their settlement agreement, the parties received a letter from U.S. Bank, as trustee of the trust. In that letter, U.S. Bank indicated that the trust would pay Karen $15,000 per month to maintain a household for the Theisen children and that the trust would pay Karen this amount "for a period of 2 years, until May 1, 2002, at which time the distribution will be reevaluated." The letter further stated that in addition, the trust agreed to pay certain bills and expenses for the minor children, and that these expenses would be considered separate from the $15,000 monthly payment. The record shows that the trust began the $15,000 monthly payments on May 1, 2000, and continued making the $15,000 per month child support to Karen through December 2003.

In November 2003, William became aware that the trust was going to discontinue the $15,000 monthly child support payments. On November 25, William filed an application to modify his child support obligation, alleging that a material change in circumstances had occurred which warranted the termination of his child support obligation. William requested that the termination of his child support obligation be made retroactive to December 1, 2003, the first day of the month following the filing of his application to modify the decree. Subsequently, Karen filed a resistance to William's application to modify.

On November 22, 2004, a hearing was held. The record shows that at the time William filed his application to modify, Arielle, Jasmin, and Cody were still minors. However, by the time of trial, only Jasmin and Cody were still minors, and Jasmin turned 19 approximately 2 weeks after the November 22 hearing. The record also shows that subsequent to the entry of the parties' divorce decree, Arielle, Jasmin, and Cody continued to live away from home. At the time of the modification hearing, Arielle and

Jasmin were attending college and coming back to Karen's home on breaks and Cody remained in a residential facility.

Although the trust discontinued the $15,000 monthly child support payment, the trust continued to pay all of Arielle's and Jasmin's major expenses—including tuition, room and board, and motor vehicle and travel expenses—in addition to Cody's costs at his residential facility. Specifically, from November 2003 through October 2004, the trust paid the sum of $221,957.56, or $18,496.46 per month, for the benefit of Arielle, Jasmin, and Cody. Karen presented evidence showing that for the year 2004, she had spent an average of approximately $1,000 per month on these three children.

William testified that at the time he entered into the settlement agreement, he was supporting himself by liquidating his $1 million share of marital assets. William testified that his $15,000 monthly child support obligation was not set according to the Nebraska Child Support Guidelines using his income, but, rather, it was based on how much the trust was willing to pay. William testified that his adjusted gross income for 2003 was $591,531 from his involvement and ownership in five restaurants. The record shows that Karen was not employed at the time of the modification hearing. When asked if Karen needed $15,000 per month to support the minor children, she stated that if she continued to receive $15,000 monthly, she and the children could do more things together. Karen also testified that if Cody was living with her, she would have an increased need for support because Cody needs a lot of therapy and other assistance. Karen testified that she hoped that Cody would be able to live with her at some point, but she did not state when that might be. The record shows that both parties signed the settlement agreement and were represented by counsel.

In an order filed January 14, 2005, the trial court overruled William's application to modify, stating that William remained obligated to pay Karen child support of $15,000 per month. Specifically, the court found that it had been contemplated that the trust would fund William's child support obligation for a finite period of time and that therefore, the trust's discontinuance of the $15,000 monthly child support payments did not constitute a material change of circumstances. William appeals.

ASSIGNMENT OF ERROR

On appeal, William contends that the trial court erred in failing to grant his application to terminate his child support obligation.

STANDARD OF REVIEW

[1] Modification of child support is entrusted to the discretion of the trial court. *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005).

ANALYSIS

On appeal, William contends that the trial court erred in failing to grant his application to terminate his child support obligation. The trial court found that William remained obligated to pay child support of $15,000 per month, given that he failed to show a material change of circumstances. An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Wilkins v. Wilkins, supra.*

Karen contends that William remains obligated to pay $15,000 per month in child support until Cody reaches the age of majority, referencing the portion of the decree which states:

> [William] shall have a child support obligation of $15,000.00 per month commencing July 1, 2000 and the first day of the month thereafter. Said child support shall not be paid through the Clerk of the District Court of Douglas County and shall be paid as set forth in the Settlement Agreement entered into between the parties. Said child support shall continue until the youngest child reaches majority or until further order of the Court.

We note, though, that this paragraph must be read in conjunction with the parties' settlement agreement which the decree references. The settlement agreement states in relevant part:

> The parties agree that current monthly support payments of $15,000 are being made to [Karen] for the benefit of the minor Theisen children by the Trustee of the Theisen Second II Irrevocable Trust. Because of the agreement by the Trustee of the Theisen Second II Irrevocable Trust to make these monthly support payments until May, 2002, there is no need at this time for additional child support to

> be paid by either of the parties. However, the parties agree that if the Trustee of the Theisen Second II Irrevocable Trust shall at any time reduce or eliminate the monthly support payments of $15,000, or if the circumstances of the parties should change such that this payment amount is not adequate, either party shall be entitled to seek a modification of any decree entered concerning payment of child support by [William] and/or [Karen]. [William] reserves the right in any future child support proceeding to take a position as to the reasonable child support amount pursuant to the Nebraska child support guidelines.

[2,3] Clearly, William, by filing a modification action, has exercised his right under the settlement agreement. That agreement was signed by both parties, who were represented by counsel. A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties. *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992). Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004); *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002).

[4] Additionally, we note that the settlement agreement's language giving either party the right to seek a modification of the decree pertaining to child support is in accordance with Nebraska law. Child support orders are always subject to review and modification. *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000).

Karen argues and the trial court found that the trust's discontinuance of the $15,000 per month child support payments to Karen does not constitute a material change of circumstances. Specifically, the trial court found that "it was contemplated between the parties that the Theisen children's trust would fund [William's] obligation to pay child support for a finite period of time."

We disagree with the trial court's findings. At the modification hearing, William offered evidence, without objection, showing that prior to entering into the parties' settlement agreement, they received a letter from U.S. Bank, as trustee of the trust. In that letter, U.S. Bank indicated that the trust would pay Karen $15,000 per month to maintain a household for the Theisen children "for a period of 2 years, until May 1, 2002, at which time the distribution will be reevaluated." The record also shows that the trust began paying Karen $15,000 per month on May 1, 2000, and made such payments through December 2003—for over 3½ years.

Therefore, it is clear that the parties included the provision allowing either party to modify upon certain conditions, not because the trust's payments were for a certain time, but because the length of the trust's payments was uncertain or speculative. The parties' agreement regarding a subsequent modification is an acknowledgment by both parties that if the trust stopped making the payments, or if the payments continued but were inadequate, a material change of circumstances had occurred.

Additionally, the record clearly shows that the amount of $15,000 per month was not set according to the Nebraska Child Support Guidelines using William's income, but, rather, was the amount the trust was willing to pay Karen to maintain a household for the Theisen children. At the modification hearing, William testified that he did not have a source of income when he signed the parties' settlement agreement, but, rather, he was supporting himself by liquidating his $1 million share of the marital assets. For these reasons, we conclude that the trial court abused its discretion in finding that a material change in circumstances had not occurred. We go on to modify William's child support obligation accordingly, giving due deference to the best interests of the children.

[5] The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Gartner v. Hume*, 12 Neb. App. 741, 686 N.W.2d 58 (2004).

[6] The Nebraska Child Support Guidelines are to be applied as a rebuttable presumption to both temporary and permanent

support, and any deviation from the guidelines must take into consideration the best interests of the children. *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005).

Neb. Rev. Stat. § 42-364.16 (Reissue 2004) states in part:

> Child support shall be established in accordance with such guidelines, which guidelines are presumed to be in the best interests of the child, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

The evidence shows that William's adjusted gross income for 2003 was $591,531 from his involvement and ownership in five restaurants. The record shows that Karen was not employed at the time of the hearing. Paragraph C of the Nebraska Child Support Guidelines states:

> Deviations from the guidelines are permissible under the following circumstances:
>
> . . . .
>
> 3. if total net income exceeds $10,000 monthly, child support for amounts in excess of $10,000 monthly may be more but shall not be less than the amount which would be computed using the $10,000 monthly income unless permissible deviations exist.

Therefore, the minimum amount of monthly child support William would pay under the guidelines using $10,000 as the parties combined monthly net income is $2,645 for three children, $2,326 for two children, and $1,654 for one child. Indeed, given William's income level, the appropriate child support amount might be an upward deviation were it not for the trust's payment of the children's expenses.

In the instant case, William contends that a different deviation from the guidelines must be considered, given that the trust is paying all of the children's significant expenses. Paragraph C(5) of the Nebraska Child Support Guidelines states that a deviation from the guidelines is permissible "whenever the application of the guidelines in an individual case would be unjust or inappropriate." William argues that because the trust is paying for all of the children's major expenses, his child support should be terminated.

The record shows that at the time William filed his petition to modify in November 2003, three children—Arielle, Jasmin, and Cody—were still minors, but that by the time of the modification hearing on November 22, 2004, only Jasmin and Cody were minors, and that Jasmin turned 19 approximately 2 weeks after the November 22 hearing. The record also shows that subsequent to the entry of the decree, Arielle, Jasmin, and Cody continued to live away from home. At the time of trial, Arielle and Jasmin were attending college and coming back to Karen's home on breaks and Cody remained in a residential facility.

Additionally, after the trust discontinued the $15,000 monthly child support payment, the trust continued to pay all of Arielle's and Jasmin's major expenses—including tuition, room and board, and motor vehicle and travel expenses—in addition to Cody's costs at his residential facility. Specifically, from November 2003 through October 2004, the trust paid the sum of $221,957.56, or $18,496.46 per month, for the benefit of Arielle, Jasmin, and Cody.

Karen argues that she has a continuing need for child support because she continues to incur expenses for the children aside from the amount that the trust pays. Karen also argues that her expenses would increase if Cody would come back to live with her, although she testified that she did not know when that might be. Karen presented evidence showing that from December 2003 through December 2004, she had spent $1,304.70 on Arielle (the amount incurred only before Arielle reached the age of majority), $4,382.32 on Jasmin, and $558.12 on Cody—for a total of $6,245.14.

Karen also entered into evidence an exhibit stating that from December 2003 through December 2004, she had incurred a total of $4,629 for the benefit of all five Theisen children. This amount includes restaurant expenses, "[s]chool [s]hopping," a medical bill, and some hotel expenses. None of the expenses delineate the specific children for whom the expense was incurred. Given that two children were no longer minors at the start of 2004, at most three-fifths, or $2,777.40, of $4,629 is attributable to the three Theisen children who remained minors in 2004. Therefore, from December 2003 through December 2004, Karen spent approximately $9,022.54 ($6,245.14 +

$2,777.40) on Arielle, Jasmin, and Cody, for a monthly average of $694.04.

Given the evidence that the trust is paying all of the major expenses of the minor children, we conclude that it is both equitable and in the children's best interests to deviate from the child support guidelines in setting William's child support obligation. The record clearly shows that ordering William to pay according to his income would be both unjust and inappropriate, given the evidence that the trust pays all of the children's expenses except some minor expenses still being incurred by Karen.

Therefore, on this record we set William's child support obligation using the evidence of Karen's expenses for the children. Given that Karen incurred approximately $700 in monthly expenses for the children from December 2003 through December 2004, we order William to pay Karen child support of $700 per month. William should pay this amount until Cody reaches the age of majority under Nebraska law, becomes emancipated, becomes self-supporting, marries, or dies, or until further order of the court.

[7,8] Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification. *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003). In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Id.* Given the record before us, we can see no reason why William's child support obligation should not be applied retroactively, and yet we do not use December 1, 2003, the first day of the month following the filing date of William's application to modify the decree. This is because the trust made a $15,000 payment to Karen in December 2003. Therefore, we find that William's child support obligation should begin on January 1, 2004.

CONCLUSION

After reviewing the record, we conclude that the trial court abused it discretion in failing to find that a material change of circumstances had occurred after the trust stopped paying Karen $15,000 per month in child support. We conclude that William's

child support obligation should be modified, and we reverse, and remand to the trial court with directions to set William's child support in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WORKSHEET 1. BASIC NET INCOME AND SUPPORT CALCULATION

		Mother	Combined	Father
1.	Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)*	$ 0		$10,000
2.	Deductions**			
	a. Taxes***			
	b. FICA			
	c. Health insurance****			
	d. Retirement			
	e. Child support previously ordered for other children			
	f. Regular support for other children			
	g. Total deductions			
3.	Monthly net income (line 1 minus line 2g)	0		10,000
4.	Combined monthly net income		$10,000	
5.	Combined annual net income (line 4 times 12)		10,000	
6.	Percent contribution of each parent (line 3, each parent, divided by line 4)*****	0%		100%
7.	Monthly support from table 1		2,645	
8.	Each parent's monthly share (line 7, times line 6, for each parent)	0		2,645

*Court will require copies of last 2 years' tax returns to verify "total income" figures and copies of present wage stubs to verify the pattern of present wage earnings, except where a party is claiming an allowance of depreciation as a deduction from income, in which case a minimum of 5 years' tax returns shall be required. Income should be annualized and divided by 12 to arrive at monthly amounts.

**All claimed deductions should be annualized and divided by 12 to arrive at monthly amounts.

***Deductions for taxes will be based on the annualized income and the number of exemptions provided by law.

****The increased cost to the parent for health insurance for the child(ren) of the parent shall be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium.

*****In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet.

WORKSHEET 5. DEVIATIONS TO CHILD SUPPORT GUIDELINES

This worksheet may be completed by the Court and filed with the clerk in the event of a deviation or deviations under paragraph C. of the Child Support Guidelines.

			Mother		Father
1.	Net income of the parties as computed under worksheet 1		$ 00.00		$10,000
2.	Combined monthly income			$10,000	
3.	Monthly support for 3 child(ren) from table 1			$ 2,645	
4.	Percent contribution of each parent		0%		100%
5.	Each parent's monthly share (line 3 times line 4)		$ 00.00		$,645
6.	Further deviations (specify)				
	a. Payments by Trust	(+/-)	$		$ 1,895
	b.	(+/-)	$		$
	c.	(+/-)	$		$
	d. Total	(+/-)	$		$
7.	Each parent's monthly share (line 5 above)		$ 00.00		$ 2,645
8.	(+/-) Line 6D	(+/-)	$ 00.00		$ 1,945
9.	Adjusted child support obligations		$ 00.00		$ 700

Dated: _____

_____
Judge

IN RE INTEREST OF ENRIQUE P. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SHANNON P., APPELLANT, AND OMAHA TRIBE OF NEBRASKA, INTERVENOR-APPELLEE.

709 N.W.2d 676

Filed January 31, 2006. No. A-05-606.

1. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

2. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **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.
4. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
6. **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.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
9. **Final Orders: Appeal and Error.** A substantial right is affected if an 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 he or she is appealing.
10. **Indian Child Welfare Act: Actions: Parental Rights.** Any Indian child who is the subject of any action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of Neb. Rev. Stat. §§ 43-1504 to 43-1506 (Reissue 2004).
11. **Indian Child Welfare Act: Federal Acts.** The federal Indian Child Welfare Act was enacted to promote the stability and security of Indian tribes and families through the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.
12. **Indian Child Welfare Act: Proof.** Any party seeking to effect a foster care placement of 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.
13. **Indian Child Welfare Act: Evidence: Expert Witnesses.** No foster care placement may be ordered in an involuntary proceeding in state court involving an Indian child 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.

14. **Juvenile Courts: Parental Rights: Jurisdiction: Appeal and Error.** In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Mona L. Burton for appellant.

Stuart J. Dornan, Douglas County Attorney, and Nicole Brundo Goaley for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Shannon P. appeals an order by the separate juvenile court of Douglas County which denied (1) a petition to invalidate previous court orders and (2) a motion to dismiss. The petition and motion were based on an alleged failure to comply with both the federal and the state implementations of the Indian Child Welfare Act (ICWA). We affirm.

BACKGROUND

On June 11, 2003, the State filed a petition in the separate juvenile court of Douglas County alleging that Shannon's four children, Enrique P. (born June 29, 1993), Carina P. (born December 11, 1995), Christian P. (born November 5, 1999), and Christianna P. (born December 20, 2001), were children within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The petition alleged that the four children lacked proper parental care by reason of the faults or habits of Shannon. The petition stated that Shannon was currently incarcerated, making her unable to care for the children; that the family relative who had been caring for the children was unable to care for the children any longer; and that due to the facts alleged above, the children were at risk for harm.

In addition to the petition, the State also filed a motion for temporary custody that same day. The motion for temporary custody was based on an "Affidavit for Removal of Minor Child(ren) From Parent or Custodial Home" made by an Omaha, Nebraska,

police officer. The affidavit stated that the officer had received a radio call to go to a particular address and check on the well-being of four children. When the officer arrived, she spoke with the above-mentioned relative, who stated that Shannon was in jail and that the relative could no longer care for Shannon's four children. The officer then placed the children in temporary foster care. An order placing the children's immediate custody with the Nebraska Department of Health and Human Services (DHHS) was also entered on June 11, 2003. The children have remained in the custody of DHHS throughout the case.

A detention hearing was held on June 18, 2003; Shannon was advised of her rights, an attorney was appointed to represent her, and the matter was continued. On June 25, the State filed an amended petition, which alleged that one child was a registered member of the Omaha Tribe and that the other three children were eligible for enrollment with the Omaha Tribe. The petition also included new allegations against Shannon—that her use of alcohol or controlled substances placed the children at risk of harm and that Shannon did not have safe, stable, and independent housing to provide to the children. The continued detention hearing was held on June 26. Shannon did not appear, but was represented by counsel. The continued detention proceedings are not included in the bill of exceptions, however, and thus, it is not clear whether Shannon objected to the children's continued detention. An order granting continued detention with DHHS was entered on that day.

An adjudication hearing on the amended petition was held on September 22, 2003. Shannon admitted to several of the allegations in the petition, including that one of her children was a member of the Omaha Tribe and that the others were eligible for enrollment. Shannon also admitted her use of alcohol or controlled substances; that she did not have safe, stable, and independent housing to provide to her children; and that her children were at risk for harm due to the facts alleged.

Before accepting the admission, the court informed Shannon of her right to a trial and stated, "If the Court makes a finding prior to your admission, that these are Indian children, at trial, the burden of proof would be by clear and convincing evidence, which is a higher standard than [in] typical cases." Documents

from the Omaha Tribe regarding the four children's tribal enrollment status were admitted into evidence (indicating that not one but two of the children were enrolled members), a factual basis for filing the amended petition was given, and the court accepted Shannon's admission. The court then made a verbal finding that the ICWA was applicable "from this point forward" and stated that notice of the hearing would be provided to the Omaha Tribe. Shannon's attorney requested that the court order random urine analysis for Shannon and that it order Shannon to complete a psychological evaluation prior to the disposition hearing. The court so ordered on September 23, 2003, adjudicating the children under § 43-247(3)(a) by a preponderance of the evidence, based on the admission plea. Shannon did not appeal the adjudication order.

On September 25, 2003, the court entered a nunc pro tunc order, stating that the adjudication order had omitted the following: "On motion of the parties and based on the evidence before the Court, this Court finds that the [ICWA], both Federal and State, is applicable to these proceedings, AND IT IS SO ORDERED."

A "disposition and permanency planning hearing" was held on November 13, 2003. Although the record does not contain the actual notice provided to the Omaha Tribe, the tribe appeared through counsel at this hearing, thereby implying that the tribe received notice. The DHHS case plan and court report were discussed during the hearing and adopted. In addition, the court made another specific verbal finding that the ICWA would be applicable to the proceedings. In its order, the court reiterated that the ICWA was applicable to the proceedings and stated that "reasonable efforts have been made to return the minor children to the parental home and to finalize permanency," thereafter reciting the efforts. The court also found that it would be contrary to the health, safety, and welfare of the children for them to be returned home and that it was in their best interests and welfare to remain in the temporary custody of DHHS. Shannon did not object to the continued custody of the children with DHHS. Shannon did not appeal from the disposition order.

On February 12, 2004, the Omaha Tribe filed a notice of intervention and a notice of intent to transfer the matter to the Omaha

Tribal Court. A "review and permanency planning hearing" was also held that day. The case plan and court report were discussed. The court noted that "some additional pleadings have been filed by the Omaha Tribe, and they have been scheduled for hearing at a later date." In its order, entered February 12, the court again found that "reasonable efforts have been made to return the minor children to the parental home and to finalize permanency." The court also found again that it was contrary to the health, safety, and welfare of the children for them to be returned home and that it was in their best interests and welfare to remain in the temporary custody of DHHS.

The Omaha Tribe's motion to intervene and notice of intent to transfer were heard on March 2, 2004. The court treated the notice of intent to transfer as a motion to transfer. No party objected to the motion to intervene, and it was sustained. The motion to transfer was next addressed. Shannon's attorney did not object to the transfer, but the State, the children's guardian ad litem, and DHHS noted their concerns with the transfer. The motion to transfer was denied. No appeal was taken from the order denying the transfer.

After this, a series of "review and permanency planning" hearings occurred, on May 5, August 2, and November 15, 2004. Likewise, the court orders from these hearings stated that "reasonable efforts" at reunification had been made and that it was contrary to the health, safety, and welfare of the children for them to be returned home and in their best interests to stay in the temporary custody of DHHS. Shannon did not object to the continued custody of the children with DHHS at these review hearings. At the May 5 review hearing, Shannon objected to a recommendation that visitation with her children take place only in "therapeutic," not merely "supervised," settings and asked that the visits remain supervised. Shannon did not appear for the August 2 review hearing, and Shannon's counsel made no comments at that hearing beyond requesting a continuance and assenting to the introduction of a report, because she had not had an opportunity to review the recommendations with Shannon. The continuance was denied. Shannon did not appear at the November 15 review hearing either, and Shannon's attorney again made no comments, except to request a continuance, which was denied, and to object

to a concurrent plan of reunification and adoption after assenting to the introduction of another report. The court adopted DHHS' recommendations at each hearing. Shannon did not appeal any of the review orders.

On April 12, 2005, Shannon's attorney filed a petition to invalidate a number of the juvenile court's previous orders in the case, under Neb. Rev. Stat. § 43-1507 (Reissue 2004), and a motion to dismiss. The petition and motion were based on an alleged lack of compliance with the ICWA. The orders the petition sought to invalidate included those from the adjudication, the disposition, and the four subsequent review and permanency planning hearings. The petition stated that it was error for the court to adjudicate the children by a "preponderance of the evidence," rather than by " 'clear and convincing evidence' " (emphasis omitted) as required under Neb. Rev. Stat. § 43-1505(5) (Reissue 2004). Also, the petition stated that the court erred when in its orders upon the subsequent five hearings, the court found that " 'reasonable efforts' " had been made to return the children to the parental home, instead of " 'active efforts' " (emphasis omitted) as required by § 43-1505(4). In summary, the petition claimed that the juvenile court's orders violated § 43-1505(4) and (5) and thus should be invalidated under § 43-1507.

Shannon's attorney based the motion to dismiss specifically on a lack of jurisdiction. The motion claimed that because at the adjudication hearing, the court failed to use the proper burden of proof (clear and convincing evidence) and also failed to make a finding that a qualified expert would have testified that the continued custody of the children with Shannon was likely to result in serious emotional damage or physical damage to them, the court never acquired proper jurisdiction. The motion claimed that because of this, the matter should be dismissed and her children returned to her.

The juvenile court heard the petition to invalidate and the motion to dismiss on April 21, 2005, and denied both in an April 25 order. Shannon appeals from that order.

ASSIGNMENTS OF ERROR

Shannon asserts two errors on appeal. First, Shannon claims that the separate juvenile court erred when it denied her petition

to invalidate several previous court orders, under § 43-1507, for failure to comply with the federal and Nebraska implementations of the ICWA. Second, Shannon claims that the court erred when it denied her motion to dismiss, alleging that by using the incorrect burden of proof under the ICWA at the adjudication hearing, the court never acquired jurisdiction over Shannon.

[1] The State argues in its brief that § 43-1507 is unconstitutionally vague because it does not set any time parameters within which a petition to invalidate previous court orders must be filed. Whatever merit the argument may have, we cannot address the issue, as it was not raised in the juvenile court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003). This argument will not be addressed further.

STANDARD OF REVIEW

[2,3] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.* A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Id.*

ANALYSIS

Jurisdiction.

[4,5] As noted above, Shannon appeals from an order (1) denying her petition to invalidate the previous court orders and (2) denying her motion to dismiss. 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., supra.* 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.*

[6-8] In Nebraska, 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.*; Neb. Rev. Stat. § 25-1902 (Reissue 1995). The order at issue herein did not fall into the first or third categories, as it did not determine the action and was not made on summary application after the entry of a judgment. Orders which fall into the second category of § 25-1902 must meet two requirements: A substantial right must be affected, and the court's order must be made in a special proceeding. *In re Interest of Brittany C. et al., supra.* A "substantial right" is an essential legal right, not a mere technical right. *Id.* A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *Id.* Thus, we must consider the order which dismissed Shannon's petition to invalidate and motion to dismiss and what parental rights, if any, were affected by the order.

[9] A substantial right is affected if an 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 he or she is appealing. *Id.* Several Nebraska cases have addressed whether a juvenile court order is a final order for the purpose of an appeal. See, *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (preadjudication order granting continued detention of child affects parent's substantial right and is thus final order and appealable), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998); *In re Interest of Brittany C. et al., supra* (preadjudication order denying transfer of matters to tribal court is final, appealable order). Compare, *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000) (mother's motion to dismiss State's motion to terminate parental rights based on improper retroactive application of statutory amendment was not final order because issue could be preserved at termination hearing and considered on appeal therefrom); *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998) (order denying continued detention of juvenile prior to adjudication does not affect substantial right of State).

Shannon and the State both claim that the order denying the petition to invalidate and the motion to dismiss was in fact a final, appealable order. We agree, finding the analysis and decision in *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005), to be instructive. We conclude that the order denying the petition to invalidate pursuant to § 43-1507 and the motion to dismiss affected a substantial right and is thus a final order for the purpose of an appeal.

Petition to Invalidate Previous Court Orders.

[10] Shannon first claims that the separate juvenile court erred when it denied her petition to invalidate previous court orders for failure to comply with both the federal and Nebraska implementations of the ICWA. Shannon filed her petition under the enforcement provisions of the federal ICWA, 25 U.S.C. § 1914 (2000), and of the Nebraska ICWA, § 43-1507. The two statutes are similar, and the Nebraska version, captioned "Petition to invalidate actions in violation of law," provides as follows:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 43-1504 to 43-1506.

§ 43-1507.

[11] Shannon claims that several of the juvenile court's orders violated § 43-1505(4) and (5) of the Nebraska ICWA (25 U.S.C. § 1912(d) and (e) (2000) of the federal ICWA) and thus should be invalidated under § 43-1507 (25 U.S.C. § 1914). In addressing Shannon's arguments, we are mindful of the purpose of the ICWA, recited below as explained by the Nebraska Supreme Court in *In re Interest of C.W. et al.*, 239 Neb. 817, 825, 479 N.W.2d 105, 112 (1992):

> The ICWA was enacted to promote the stability and security of Indian tribes and families through the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.

> When Congress enacted the ICWA, it had two main goals: (1) protecting the best interests of the Indian children and (2) promoting the stability and security of Indian tribes and families. See 25 U.S.C. § 1902. The act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interests. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).

Neb. Rev. Stat. § 43-1502 (Reissue 2004) of the Nebraska ICWA, enacted in 1985, expresses the purpose of the state ICWA as implementation of the federal ICWA and recognizes Nebraska's policy of cooperating fully with Indian tribes in the state in order to ensure that the intent and provisions of the federal ICWA are enforced.

[12,13] The provisions that Shannon asserts were violated in this case are § 43-1505(4) and (5), which mirror 25 U.S.C. § 1912(d) and (e) of the federal ICWA. The Nebraska provisions state:

> (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 such proceeding 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.

§ 43-1505.

[14] The State argues that Shannon cannot attack the adjudication, disposition, and subsequent review orders because these orders were not timely appealed as required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004) (appeal of final order must be made within 30 days of issuance of order). Generally, it has been held that adjudication and disposition orders are final, appealable orders. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). Further, in the absence of a direct

appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *Id.*; *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002); *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001).

Section 43-1507 and its federal counterpart, 25 U.S.C. § 1914, do not contain any language which specifies a time limit for petitioning a court to invalidate an action for foster care placement or termination of parental rights. Nebraska courts have not addressed the operation of § 43-1507 in any respect. In searching case law from other jurisdictions under § 1914, we have found that a time limit for filing a petition to invalidate is rarely discussed. However, the Iowa Court of Appeals addressed its state error preservation rules and § 1914 in *In Interest of J.D.B.*, 584 N.W.2d 577 (Iowa App. 1998). In that case, after the mother's parental rights were terminated, she appealed, claiming that the termination proceeding should be invalidated under § 1914 because prior proceedings in the case had violated 25 U.S.C. § 1912(e) (requiring expert testimony whenever foster care placement is involved). The appellate court found that the mother was barred from challenging the trial court's previous orders because she did not raise the issue at trial, properly preserving it for appeal. The appellate court asked whether its rules of error preservation were preempted under federal law and concluded, "[W]e find nothing in [the] ICWA which expressly or impliedly preempts a state's error preservation rules. . . . Moreover, we are mindful that to allow a party to make untimely challenges to prior [children-in-need-of-assistance] proceedings would needlessly delay permanency for the children." (Citations omitted.) *In Interest of J.D.B.*, 584 N.W.2d at 581. Because state law required that a party preserve error to have an issue reviewed on appeal, the court held that the mother did not appeal from any of the children-in-need-of-assistance proceedings and the time for appeal had passed. Therefore, the § 1914 action was not allowed and the termination was affirmed.

The Alaska Supreme Court in *Matter of Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989), held that Alaska's time limit regarding the finality of an adoption was incorporated into the federal ICWA's previous-orders invalidation statute. In that case, the

mother consented to the adoption of her child but later brought a § 1914 petition in the trial court to vacate the adoption, claiming that her consent was invalid because it was not " 'recorded before a judge' " as required by the ICWA. 781 P.2d at 974. The trial court denied the petition to vacate, basing its decision on state law relevant to adoption decrees, which provided that an adoption decree may not be questioned on any ground 1 year after its issuance. The Alaska Supreme Court found that since the invalidation statute had no explicit time limitation, the state law relevant to adoption decrees should be incorporated into the federal invalidation statute. The court noted that a parent's interest in a § 1914 action must be balanced against an adoptive family's interests.

In *In re S.B.*, 130 Cal. App. 4th 1148, 30 Cal. Rptr. 3d 726 (2005), the mother appealed from the termination of her parental rights as to her daughter. Following detention, jurisdictional (adjudication), and dispositional hearings, it was learned that the daughter had Indian ancestry. At that point, the social worker involved in the case attempted to give notice pursuant to the ICWA. Although the notice did not comply with the applicable requirements, it did reach the tribe and the tribe did respond. The mother filed a motion to invalidate the juvenile court's previous findings and orders because the court and the government children's services agency involved in the case had failed to inquire whether the daughter was an Indian child. The motion to invalidate was denied, and the court proceeded to terminate the mother's parental rights. On appeal, the *In re S.B.* court affirmed this denial, finding that the mother had waived her claim of belated compliance with a notice provision of the ICWA by failing to object on ICWA grounds at the previous hearings. The court noted that while a parent cannot waive a tribe's right to notice, where the tribe appeared and did not ask on its own behalf for the court to invalidate any prior actions, the parent's independent right to invalidate prior orders can be waived.

Numerous cases exist from other jurisdictions where § 1914 petitions to invalidate were addressed on appeal without mention of time limitations or whether the issue was properly preserved for appeal. A majority of these cases involves situations where the appropriate ICWA notice was not given to the tribe or parent.

See, *In re Adoption of Baby Girl B.*, 67 P.3d 359 (Okla. Civ. App. 2003) (reversing trial court's denial of father and tribe's joint petition to invalidate, for lack of notice compliance under ICWA, termination of father's parental rights and court's consent to adoption); *State ex rel. Juv. Dept. v. Tucker*, 76 Or. App. 673, 710 P.2d 793 (1985) (affirming denial of mother's § 1914 motion; failure to comply with ICWA at jurisdictional and dispositional proceedings not error because trial court had no reason to know child was Indian at those points; tribe properly notified prior to termination order); *Matter of S.Z.*, 325 N.W.2d 53 (S.D. 1982) (reversing trial court's grant of § 1914 petition; ICWA notice requirement substantially complied with); *In re Dependency of T.L.G.*, 126 Wash. App. 181, 108 P.3d 156 (2005) (§ 1914 used to collaterally attack child custody determination where ICWA notice not given). In cases where an invalidation is sought for lack of notice, it would be unreasonable to impose a time limitation of the § 1914 procedure upon the party claiming lack of notice. In the present case, there is no claim that the appropriate notice was not given to the tribe or Shannon. The record reveals that Shannon was notified of the applicability of the ICWA and that the tribe intervened and sought transfer of the case under Neb. Rev. Stat. § 43-1504(2) and (3) (Reissue 2004).

Cases exist from other jurisdictions wherein § 1914 has been used to attempt to invalidate orders entered by a court which did not use the appropriate burden of proof or make the requisite findings under 25 U.S.C. § 1912(d) and (e). In a recent case, *In re S.M.H.*, 33 Kan. App. 2d 424, 103 P.3d 976 (2005), the Court of Appeals of Kansas reversed an adjudication order for failure to apply the standards of proof set forth in the ICWA. In that case, the mother appealed from an adjudication order in which the trial court found that her children were in need of care and that she was unable to provide adequate care and control necessary for the children's physical, mental, or emotional health. It was undisputed that the ICWA applied to the proceedings; however, the trial court did not make specific findings, as it was required by law to do, that the children were Indian children and that the ICWA was applicable to the proceedings. Initially, the *In re S.M.H.* court noted that the mother failed to raise this issue in the trial court. Nevertheless, the *In re S.M.H.* court allowed the

mother to assert the claim on appeal, recognizing that § 1914 allows a parent to " 'petition any court of competent jurisdiction to invalidate [an action for foster care placement] upon a showing that such action violated any provision of [the ICWA].' " 33 Kan. App. 2d at 430, 103 P.3d at 981. The court found that § 1912(e)—which requires that foster care placement of an Indian child be supported by clear and convincing evidence, including qualified expert witness testimony, that continued custody of the child by the Indian parent is "likely to result in serious emotional or physical damage to the child"—was not applied but should have been. The court examined the determination of whether the children were in need of care under its usual standard of review for adjudications, finding that the evidence supported the determination that the children were without the care and control necessary for their physical, mental, or emotional health. However, because the ICWA was not properly applied regarding continued custody by the mother (see § 1912(e)) and because the State of Kansas failed to present " 'qualified expert testimony,' " *In re S.M.H.*, 33 Kan. App. 2d at 434, 103 P.3d at 984, the court reversed the adjudication order. In reaching its conclusion, the court recognized that courts considering prior cases had found that substantial compliance with the ICWA was satisfactory or that any error resulting from lack of strict compliance was harmless. Under the facts of the case, the *In re S.M.H.* court could not say with any certainty that the outcome of the case would have been the same if expert testimony had been received, and it thus concluded that the error was not harmless.

The Court of Appeals of Iowa addressed a § 1914 argument in an appeal from a termination of parental rights case in *In Interest of J.W.*, 528 N.W.2d 657 (Iowa App. 1995). One of the mother's arguments in that case was that the termination should be reversed because the lower court violated § 1912(e) when it placed the children in temporary foster care and continued their placement at subsequent dispositional hearings without the testimony of qualified expert witnesses. The mother relied on § 1914 to support her claim. On the facts of the case, the appellate court declined to extend the language of § 1914 to invalidate the termination. It stated that § 1914 " 'does not provide for invalidation of a valid separate action because of an invalid

prior one.' " *In Interest of J.W.*, 528 N.W.2d at 661. The appellate court noted that in terminating the mother's parental rights, the lower court did not rely exclusively on its earlier findings, and that three qualified ICWA experts gave the requisite testimony under § 1912(e) at the termination proceeding.

In *In re G.S.*, 312 Mont. 108, 59 P.3d 1063 (2002), the Montana Supreme Court addressed a mother's § 1914 challenge to a dispositional order wherein the lower court continued its previous order granting temporary legal custody of the children to a public health and human services agency. The mother challenged the lower court's finding that the agency employed active efforts to prevent breaking up the Indian family as required under § 1912(d). The appellate court first discussed the lack of an evidentiary standard in § 1912(d), as opposed to § 1912(e), the latter of which explicitly requires clear and convincing evidence of harm in connection with a need for foster care placement. The appellate court determined that § 1912(d) should also be governed by clear and convincing evidence and found that although this standard was not identified by the lower court in making its finding under § 1912(d), the clear and convincing evidence standard was met in connection with the lower court's determination that the agency employed active, yet unsuccessful, efforts to provide remedial and rehabilitative services designed to prevent the breakup of the family.

In *In re S.B.*, 130 Cal. App. 4th 1148, 30 Cal. Rptr. 3d 726 (2005), despite holding that the mother had waived her claim of belated compliance with a notice provision of the ICWA, as discussed above, the appellate court went on to conduct a "harmless error" analysis with respect to the § 1912(d) requirement. In that case, the juvenile court had found at the jurisdictional and dispositional hearing that "reasonable efforts" had been made to prevent or to eliminate the need for removal of the daughter from the home, in conformity with state law. *In re S.B.*, 130 Cal. App. 4th at 1165, 30 Cal. Rptr. 3d at 736. The appellate court recognized that before making a foster care placement, the juvenile court in an ICWA case has to find, based upon clear and convincing evidence, that " 'active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts ha[d] proved

unsuccessful.' " *Id.* at 1164, 30 Cal. Rptr. 3d at 736, quoting § 1912(d). The appellate court cited previous case law from its jurisdiction that said that " 'the standards in assessing whether "active efforts" were made to prevent the breakup of the Indian family, and whether reasonable services under state law were provided, are essentially undifferentiable.' " *In re S.B.*, 130 Cal. App. 4th at 1165, 30 Cal. Rptr. 3d at 736. The court concluded that this principle was applicable under the facts of the case, finding, "On this record, we see no reason to suppose that [if] the juvenile court had been asked to find whether 'active efforts' had been made, rather than 'reasonable efforts,' it would have made a different finding." *Id.* at 1165, 30 Cal. Rptr. 3d at 736-37.

Similar approaches have been followed in other appellate courts in reviewing ICWA determinations where the exact language of the ICWA was not contained in the court's findings, in cases which did not involve § 1914 challenges. In *In re M.D.M.*, 313 Mont. 51, 59 P.3d 1142 (2002), the Montana Supreme Court affirmed the termination of a father's parental rights as to a child subject to the ICWA. The lower court found that the child would be exposed to serious emotional or physical damage unless the father's parental rights were terminated; however, it did not declare, in precise terms, that the State of Montana had satisfied its burden of proving the likelihood of such harm "beyond a reasonable doubt" as required by § 1912(f). *In re M.D.M.*, 313 Mont. at 55, 59 P.3d at 1146. After noting the principle that " '[t]he law respects form less than substance,' " *id.*, the appellate court concluded that it was implicit in the lower court's finding that the required burden of proof was met.

What we have gleaned from the foregoing case law concerning the ICWA is that each case is dependent upon its particular facts and circumstances. In our de novo review, we are required to reach a conclusion independent of the trial court's findings. We find the following facts to be of significance in the present case: At the adjudication hearing, Shannon admitted to the pertinent allegations in the amended petition. Because Shannon admitted to the allegations of the amended petition—including that one of her children was a member of the Omaha Tribe and the others were eligible for enrollment; that she used alcohol or controlled substances; that she did not have safe, stable, and

independent housing to provide to the children; and that the children were at risk for harm due to the facts alleged—it was unnecessary for the State to adduce evidence at the adjudication hearing. Before accepting Shannon's admission, the juvenile court notified Shannon that if the adjudication went to trial, the burden of proof would be clear and convincing evidence. After accepting Shannon's admission, the juvenile court made a specific finding that the ICWA was applicable to the proceedings "from this point forward." The juvenile court adjudicated the children under § 43-247(3)(a) by a preponderance of the evidence, based on the admission plea. Shannon did not object to the adjudication. At the disposition and subsequent review hearings, the juvenile court found that reasonable efforts had been made to return the children to the parental home and to finalize permanency; that it would be contrary to the health, safety, and welfare of the children to be returned home; and that it was in the best interests and welfare of the children to remain in the custody of DHHS for appropriate care and placement. Shannon made some objections to certain provisions in the case plans offered at these hearings; however, she did not object to the continued foster home placement, and she did not adduce evidence to show that the case plans were not in the children's best interests. Shannon did not appeal from any of the adjudication or dispositional orders, but, rather, approximately 18 months later, filed the instant petition to invalidate. Clearly, Shannon has been aware of the applicability of the ICWA since the filing of the State's amended petition and during all of the hearings of which she now complains. Further, the tribe has been properly notified and has participated in the proceedings.

Under our general appellate jurisprudence, Shannon would be precluded from asserting error in the adjudication and dispositional orders by virtue of her failure to preserve any error by a timely appeal. However, because we conclude that any error with respect to these orders is harmless in this case, we need not determine whether our rules of error preservation or waiver preclude Shannon from petitioning to invalidate previous court orders under § 43-1507 and 25 U.S.C. § 1914. We conclude, based upon the pleadings, factual background, and admission of Shannon, that it was not error to find that the children came within the

purview of § 43-247(3)(a) in that they were lacking proper parental care by reason of the faults or habits of Shannon. Further, it was not error for the juvenile court to make this finding based upon a preponderance of the evidence. However, with respect to the foster care placement of the children, the juvenile court did not articulate a standard by which it made its findings; nor did it make a finding, supported by testimony of qualified expert witnesses, that active but unsuccessful efforts had been made to prevent the breakup of the Indian family or that continued custody of the children by Shannon was likely to result in serious emotional or physical damage. See, § 43-1505(4) and (5); 25 U.S.C. § 1912(d) and (e). Based upon our de novo review, we find that any error related to the juvenile court's failure to specifically state the foregoing was harmless error in that the evidence would have supported these ICWA findings.

In sum, we first find that there was clear and convincing evidence to support a finding that active efforts had been made to prevent the breakup of this family—which efforts included therapy, placement, case management, psychiatric and chemical dependency evaluations, visitation services, transportation assistance with visitation, parenting and domestic violence classes, and random urine analysis—and that such efforts were unsuccessful. Second, because Shannon did not challenge the continued out-of-home placement of the children, no expert testimony was given regarding the likelihood that continued custody with Shannon was likely to result in serious emotional or physical damage. However, the evidence adduced by the State at the dispositional hearing clearly and convincingly supports such a finding of harm. Shannon's psychological evaluation indicated that Shannon had a history of drug and alcohol abuse, and her diagnoses included major depressive disorder, alcohol dependence, adjustment disorder with anxiety, and antisocial and depressive personality features. The conclusions of the evaluation indicated that Shannon's parenting problems stemmed from her addiction, rather than a psychopathology, and that while Shannon completed her inpatient chemical dependency treatment, she failed to complete outpatient treatment and did not provide verification that she was attending Alcoholics Anonymous or Narcotics Anonymous meetings or that she had obtained a "sponsor."

Shannon did not submit to all of the requested urinalysis screenings. In addition, Shannon did not address her domestic violence issues through a group setting or through individual therapy; nor did she attend parenting classes. Shannon had no proper housing or employment, and her visitation with her children was sporadic. Based upon the psychological evaluation and the caseworkers' court reports, it has been clearly and convincingly shown that custody with Shannon would result in serious emotional or physical damage to the children.

Following our de novo review of the particular facts and circumstances of this case, we conclude that the juvenile court did not err in denying Shannon's petition to invalidate the previous court orders.

Motion to Dismiss.

Shannon asserts that the juvenile court erred in denying her motion to dismiss. Shannon argues that by using the incorrect burden of proof under the ICWA at the adjudication, the court never acquired jurisdiction over her. As stated above, the adjudication was proper and the evidence supported the required ICWA findings. Further, in the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). This assignment of error is without merit.

CONCLUSION

The juvenile court did not err in denying Shannon's petition to invalidate the previous adjudication and dispositional orders, as the evidence supported the required ICWA findings. Likewise, the juvenile court did not err in denying Shannon's motion to dismiss for lack of jurisdiction.

AFFIRMED.

LAURIE SMITH CAMP, APPELLEE AND CROSS-APPELLANT, v. JON A. CAMP, APPELLANT AND CROSS-APPELLEE.

709 N.W.2d 696

Filed February 7, 2006. No. A-04-685.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge; this standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
3. **Judgments.** It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
4. ____. The function of a nunc pro tunc order is to correct a clerical or scrivener's error.
5. ____. A money judgment must state with certainty the amount to be paid.
6. **Contempt.** A civil contempt is instituted to preserve and enforce the rights of private parties to a suit, to compel obedience to orders and decrees made to enforce such rights, and to administer the remedies to which the court has found the parties to be entitled.
7. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.
8. **Judgments: Interest.** Interest does not accrue under the postjudgment interest statute until the debt becomes due.
9. ____: ____. As a general rule, interest on a judgment or debt is computed up to the time of the first payment, and that payment is first applied to interest and the balance to principal.
10. **Divorce: Property Division.** In a dissolution action, the court will consider all pertinent facts in reaching an award that is just and equitable. The ultimate test for determining an appropriate division of marital property is one of reasonableness. The division must, most of all, be reasonable.

Appeal from the District Court for Lancaster County: ROBERT R. STEINKE, Judge. Affirmed as modified.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

John W. Ballew, Jr., and Gary B. Schneider, of Ballew, Schneider, Covalt, Gaines & Engdahl, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

This appeal arises out of the dissolution of the marriage of Jon A. Camp and Laurie Smith Camp. Jon appeals the order of the district court for Lancaster County that enforced the judgment which we had affirmed and modified on direct appeal. Laurie cross-appeals. We conclude that (1) the law-of-the-case doctrine precludes us from considering Jon's argument that the district court should have considered certain liabilities in dividing certain accounts; (2) by granting a money judgment, the district court enforced the original judgment dividing marital property but improperly expanded the original judgment by awarding interest on the money judgment retroactive to the date of the original decree; (3) the district court did not abuse its discretion in applying payments on the judgment first to interest and then to the principal; and (4) the district court did not abuse its discretion in denying Laurie's request that Jon reimburse her for partnership and corporation income which she did not receive but for which she paid taxes. We therefore affirm as modified.

II. BACKGROUND

1. PROCEDURAL BACKGROUND

The parties' marriage was dissolved by the district court on April 10, 2002. At the time of the dissolution, Jon and Laurie each owned a 39.95-percent interest in the Haymarket Square Partnership (HMS). The parties and other partners in HMS had also established CH, Ltd., a corporation with the same division of ownership as HMS. Henceforth, we refer to HMS and CH collectively as "the entities." The district court decreed:

> Jon and Laurie shall each receive 39.95 percent of the cash accumulated in all HMS and CH checking and savings accounts as of December 31, 2000. Jon shall pay to Laurie her appropriate 39.95 percent of these accounts within thirty (30) days of this order, regardless of the current balances in such accounts.

Additionally, the decree ordered Jon to pay a money judgment to Laurie in the amount of $3,266,152 in annual installments of

$500,000 plus accrued interest at the rate of 5.442 percent per year, with the first payment to be due within 60 days of the decree. This money judgment included Laurie's interest in the entities, but not the cash in the entities' checking and savings accounts. The district court authorized Jon to prepay the judgment at any time. On July 26, 2002, Jon filed a notice of his intent to appeal the dissolution decree to this court.

On October 15, 2002, Laurie filed a supplemental petition for declaratory judgment in the dissolution action. She alleged that after she had filed her 2001 federal and state income tax returns in which she declared distributions from the entities, Jon had submitted "K-1 forms" to the Internal Revenue Service and the Nebraska Department of Revenue attributing to Laurie income from HMS that she did not receive. Laurie stated that as a result, she filed amended tax returns and paid additional taxes. Laurie requested a declaratory judgment to determine her liability for "past and future 'phantom income' " from the entities. In response, Jon filed a demurrer. The district court sustained Jon's demurrer, stating that it would not act on Laurie's petition for declaratory judgment while the appeal to this court was pending.

On December 16, 2003, we released our opinion in *Camp v. Camp*, No. A-02-832, 2003 WL 22948124 (Neb. App. Dec. 16, 2003) (not designated for permanent publication) (*Camp I*). Jon complained that the district court had erred in several respects in its division of the parties' property. In part, we addressed the district court's award of 39.95 percent of the entities' cash accounts to Laurie as follows:

> Jon contends that the trial court erred in requiring him to pay to Laurie 39.95 percent of the HMS and CH checking and savings accounts as of December 31, 2000, within 30 days of the order, "regardless of the current balances in such accounts." Jon's first argument is that the court lacked jurisdiction over these funds owned by the entities when neither Jon nor Laurie, acting alone, controlled the affairs of either entity. We reject this claim. As we said a good number of pages ago, the court has the equitable power to distribute the parties' assets, and that is all it has done by the portion of its decree under discussion here.

> Jon also argues that Laurie should not be awarded the cash in the bank accounts of the entities, since the trial court relied upon [Laurie's appraiser's] income theory rather than a liquidation theory. [Laurie's appraiser] did not use the cash balances of the entities in calculating his valuation because it was based on net operating income. Jon asserts that it is irrational to give Laurie 39.95 percent of the assets in the bank at yearend 2000 without making her responsible for the then-existing debts or liabilities which Jon pegged at over $156,000 as of April 29, 2001.
>
> While the decree does not contain the amount in the accounts on such date, and we have not found it ourselves in the voluminous record, making an equal division between the two parties of the cash held by two entities which are admittedly marital property and which are being divided equally is not irrational or an abuse of discretion. This assignment of error is without merit.

Camp I, 2003 WL 22948124 at *16. This court adjusted Jon's payment schedule, recalculated the valuation of buildings owned by the entities, and reduced the judgment accordingly as follows:

> As a result of our decision, the judgment awarded to Laurie against Jon is reduced to $2,819,511 with interest accruing at 5.442 percent per annum from and after April 10, 2002, until the judgment is paid in full. This is a reduction of the trial court's judgment by $446,641. The judgment is to be paid by an installment of $325,000 plus accrued interest 60 days after the date of our mandate, followed by like payments on the yearly anniversary of our mandate together with accrued interest until the judgment is paid in full. The judgment is secured by Jon's interest in HMS and CH, and it may be prepaid in full or part at any time.

Camp I, 2003 WL 22948124 at *20. We affirmed the district court's decree, as modified.

On February 3, 2004, Laurie filed a motion to spread the mandate and for supplemental orders regarding reconciliation of the payment schedule on the revised money judgment and supplemental orders "requiring disbursement to [Laurie] of her 39.95% of [the entities'] checking and savings accounts as of December 31, 2000 in the amount of $130,595.33."

On March 9, 2004, Laurie filed an amended petition for declaratory judgment and supplemental money judgment. Laurie reiterated the allegations in her petition for declaratory judgment and additionally alleged that after she had prepared and submitted federal and state income tax returns for 2002, Jon submitted K-1 forms to the Internal Revenue Service and the Nebraska Department of Revenue, which forms attributed to Laurie income from the entities that she had not received. Laurie complained that as a result, she had to file amended state and federal income tax returns for 2002 and pay additional taxes for income from the entities which she did not receive. Laurie requested a declaratory judgment determining her status both as a partner in HMS and as a shareholder in CH in 2001 and 2002, and Laurie requested a supplemental money judgment against Jon for the income from the entities which Laurie did not receive but for which she paid taxes.

On March 24, 2004, Jon filed a motion for an order nunc pro tunc to clarify the terms of the decree. Specifically, Jon asked the court to clarify the judgment to provide that the amount due Laurie from the entities' accounts was the net amount after the payment of accounts payable and to include in the money judgment the amount due from Jon to Laurie from the entities' accounts. Also on March 24, Jon filed a motion to settle money judgment, requesting that any early payments he made on the judgment be applied first to the principal amount and then to accrued interest.

On March 25, 2004, the district court conducted a hearing on the parties' various motions. We divide our summary of the evidence into sections pertaining to the topics raised in the parties' various motions and relevant to this appeal.

2. Evidence at Trial

(a) Entities' Accounts

Laurie testified and presented other evidence that the balances of the entities' accounts as of December 31, 2000, totaled $326,896.96, and requested 39.95 percent of that sum, or $130,595.34, plus interest accruing since April 10, 2002, the date of the dissolution decree. Laurie testified that Jon did not make the account information available at the time of the

original trial and that she did not receive the entities' bank statements until March 17, 2003. Laurie admitted that she did not request the information from the bank.

The district court received evidence summarizing the entities' assets and liabilities as of December 31, 2000. Jon testified that as of that date, there were outstanding liabilities that had not been paid. According to Jon, the entities' liabilities include such things as accounts payable, tenants' deposits, payroll liabilities, and real estate taxes. Jon requested that the district court award Laurie 39.95 percent of $82,443, an amount which takes into account the entities' liabilities as of December 31, 2000. Jon testified that he would have brought the liabilities to the district court's attention at the time of the initial trial but that the necessary tax returns had not been prepared at that time.

(b) K-1 Forms

Laurie stated that on her 2001 and 2002 income tax returns, she initially declared only the distributions from the entities which she had received. According to Laurie, after her income tax returns were due and filed for each of those years, she received K-1 forms from Jon "passing through" to her 39.95 percent of the income tax liability for the entities for 2001 and 2002. The figures on the K-1 forms included income which Laurie did not receive. Laurie testified that as a result, she filed amended state and federal returns for both 2001 and 2002 reflecting the income figures on the K-1 forms and declaring income from the entities which she did not receive. Laurie summarized that in 2001 and 2002, she paid income tax on $48,892 which she did not receive, and that she requested a money judgment in that amount.

Laurie testified that when she was a part of the entities, distributions would not be made until all debt was paid and interest holders would receive all amounts listed on K-1 forms. This continued until 2000, when Jon terminated distributions to Laurie and the other interest holders. Laurie admitted that distributions from the entities were not taxable as ordinary income and that the income and losses from the entities passed through directly to the interest holders in proportion to their respective holdings. Laurie acknowledged that the K-1 form reflects the recipient's share of the earnings and losses for the year.

Jon testified that he prepared the K-1 forms. He explained that the K-1 forms show each partner's or shareholder's share of the corporation's income. Jon denied preparing the K-1 forms from phony books or a double set of books, and he denied attributing phantom income to Laurie.

Ron Ecklund, a certified public accountant and certified financial planner, testified that on a year-by-year basis, there is not a direct dollar-for-dollar correlation between K-1 forms and actual distributions made to shareholders and partners. He explained that many cash disbursements do not result in expense deductions for the entity and that some cash receipts, such as borrowing or sale of assets, do not result in income for the entity. Ecklund stated that over a long period of time, there is an indirect relationship between the income of the partnership or corporation and the disbursements to partners and shareholders, but that "it will vary" on a year-by-year basis. Ecklund testified that in his opinion, it would be inappropriate to treat distributions as income for individual tax return purposes and the proper practice would be to request a K-1 form from the corporation or partnership.

(c) Payments on Judgment

The district court received records from the clerk of the district court demonstrating that on August 6, 2002, Jon began paying on the dissolution decree's money judgment, and that he made substantial payments thereafter. The district court also received an amortization schedule which showed the effect of applying Jon's payments first to interest owing on the judgment and then to the principal, as opposed to applying payments first to the principal and then to the interest.

Ecklund testified regarding whether early payments toward debt should go first to the principal or the interest. Ecklund stated that he did not know whether general accounting principles address the issue. However, he stated that banking regulations in the area of agricultural lending provide that such payments go first to the principal and then to the interest.

3. Resolution

The district court found that any payments Jon made toward this court's reduced judgment must be first applied to interest and

then to the principal. The district court denied Jon's request for an order nunc pro tunc, noting that Laurie was, in effect, awarded a judgment against Jon for her 39.95-percent share of the entities' accounts and that an order nunc pro tunc cannot be used to enlarge the judgment originally rendered. The district court granted Laurie's motion to spread mandate and for issuance of supplemental orders. The court found that Laurie's 39.95-percent share of the entities' accounts as of December 31, 2000, was $130,595.33 and entered judgment in favor of Laurie, along with interest at the rate of 5.442 percent per year from and after April 10, 2002. The district court denied Laurie's amended petition for declaratory judgment and supplemental money judgment, because the evidence showed no direct relationship between the cash distributions and taxable income from the entities; nor was there evidence that Jon had erroneously prepared the K-1 forms or charged Laurie with nonexistent taxable income.

Jon appeals the district court's order on the various motions, and Laurie cross-appeals.

III. ASSIGNMENTS OF ERROR

Jon assigns that the district court erred in (1) granting a supplemental money judgment in favor of Laurie and (2) failing to credit Jon's prepayment of the judgment first to the principal and then to the accrued interest.

On cross-appeal, Laurie assigns that the district court erred in overruling her amended petition for declaratory judgment and supplemental money judgment.

IV. 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. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

V. ANALYSIS

1. Entities' Accounts

[2] Jon argues that the district court erred in not considering the entities' outstanding checks, taxes, and tenant security

deposits in determining Laurie's share of the entities' accounts. We addressed this argument in *Camp I*, 2003 WL 22948124 at *16, as follows:

> Jon asserts that it is irrational to give Laurie 39.95 percent of the assets in the bank at yearend 2000 without making her responsible for the then-existing debts or liabilities which Jon pegged at over $156,000 as of April 29, 2001.
>
> While the decree does not contain the amount in the accounts on such date, and we have not found it ourselves in the voluminous record, making an equal division between the two parties of the cash held by two entities which are admittedly marital property and which are being divided equally is not irrational or an abuse of discretion.

Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004). By necessary implication, in *Camp I*, we rejected Jon's argument that the district court erred in not considering the entities' liabilities in dividing the entities' accounts. That finding has become the law of the case, and we are precluded from reconsidering it.

[3,4] We also note that Jon attempted to raise the issue of entity liabilities via a request for an order nunc pro tunc, asking the court to clarify the terms of the decree. As the district court correctly observed, it is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. See *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). The function of a nunc pro tunc order is to correct a clerical or scrivener's error. *Id.* The liabilities issue was not the proper subject for a nunc pro tunc order, and we conclude that the district court did not err in overruling Jon's request for such an order.

Several of Jon's other arguments attack the original dissolution decree and this court's opinion in *Camp I*. In essence, Jon questions "whether it was equitable to order the distribution of

the entities['] cash to Laurie." Brief for appellant at 13. As discussed above, our opinion in *Camp I* is the law of the case, and we decline to revisit those issues.

[5] Jon contends that the portion of the dissolution decree which ordered him to pay Laurie "her appropriate 39.95 percent" of the entities' accounts did not constitute a money judgment and that the order from which he now appeals therefore constitutes a supplemental money judgment. Because that portion of the decree did not order Jon to pay Laurie a specific dollar amount, we agree that the dissolution decree was not a money judgment. See, *Lee Way Motor Freight, Inc. v. Welch*, 764 P.2d 191 (Okla. 1988) (money judgment must state with certainty amount to be paid); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997). Under the same reasoning, we reject the district court's characterization of this court's affirmance in *Camp I* as a money judgment. Although not a money judgment, we recognize that the disputed portion of the original decree and our affirmance specified a means for determining a specific amount. See *U. S. v. Schaefer Brewing Co.*, 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 721 (1958) (final judgment for money must, at least, determine amount or specify means for determining amount). Of course, the problem in this case was that in the trial prior to *Camp I*, for whatever reason, the parties did not present evidence of the balances of the entities' accounts.

[6,7] Because the record lacked information relevant to the enforcement of this court's mandate, Laurie filed a motion for supplemental orders "requiring disbursement to [Laurie] of her 39.95% of [the entities'] checking and savings accounts as of December 31, 2000 in the amount of $130,595.33." Jon suggests that the original decree could have been enforced through contempt proceedings. A civil contempt is instituted to preserve and enforce the rights of private parties to a suit, to compel obedience to orders and decrees made to enforce such rights, and to administer the remedies to which the court has found the parties to be entitled. *McDermott v. McDermott*, 8 Neb. App. 860, 602 N.W.2d 676 (1999). See *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). While a contempt proceeding may have been effective in enforcing the judgment, it is not the sole means of doing so. A court that has jurisdiction to make a decision also

has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003). To the extent that the district court determined the principal amount represented by Laurie's 39.95-percent share of the checking and savings accounts, the court's ruling on Laurie's motion for supplemental orders only enforced a judgment, rendered in equity, determining the division of the parties' property. Jon characterizes the district court's ruling as an increased money judgment, a supplemental money judgment, or a new money judgment, but in merely enforcing the judgment as to the principal sum of the amount originally ordered to be paid by Jon, the district court did not expand or alter any existing provision.

[8] We do, however, conclude that the district court expanded the judgment when it awarded Laurie interest on her share of the entities' accounts. Having concluded that there was no previous money judgment on the issue of Laurie's share of the entities' accounts, we find that it was improper for the district court to assess interest accruing from and after April 10, 2002, the date of the dissolution decree. See *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999) (interest does not accrue under post-judgment interest statute until debt becomes due). Jon's obligation to pay Laurie her share of the accounts did not become a money judgment until the court granted Laurie's motion for supplemental orders, at which time the district court enforced the original order by entry of a money judgment. Thus, we modify the district court's judgment to provide that interest shall accrue on the entities' accounts judgment as of May 6, 2004, the date of the enforcement judgment, at the rate of 3.008 percent per annum, the rate of interest as of that date.

2. Payments on Judgment

[9] We concluded in *Camp I* that interest on the modified judgment was to accrue from April 10, 2002, the date of the original decree. See *Gallner v. Gallner, supra*. Jon made payments on the judgment before April 10 and argues that the district court erred in crediting his prepayments on the judgment first to accrued interest and then to the principal. As a general rule, interest on a judgment or debt is computed up to the time

of the first payment, and that payment is first applied to interest and the balance to principal. *Ramaekers, McPherron & Skiles v. Ramaekers*, 4 Neb. App. 733, 549 N.W.2d 662 (1996). Although Jon characterizes his payments as "prepayments"—asserting that the fact that *Camp I* authorized Jon to prepay the judgment means that payments cannot be applied first to interest—we disagree that the characterization of his payments as "prepayments" changes the general rule.

In *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995), a dissolution case, the Nebraska Supreme Court likened monthly payments of interest and principal on a cash property division to amortized loan payments on a home loan. In *Thiltges*, the appellant argued that the district court did not equitably divide the parties' marital estate because it failed to require the payment of interest on her deferred property award, which was payable over 12 years. The Nebraska Supreme Court has found that under Neb. Rev. Stat. § 45-103 (Reissue 2004), interest on a judgment providing for installment payments is to accrue on each individual installment from the date it becomes due, and that a trial court may, in its discretion, award interest on deferred installments payable as part of a marital property distribution. See *Thiltges v. Thiltges, supra*. The court in *Thiltges* modified the decree to require interest to be paid from the date of the decree. In determining that an award of interest would not impose an undue burden on the appellee, the court observed:

> Here, appellee has been ordered to make monthly principal payments of a fixed amount over a relatively long period of time. Uniform monthly payments over a long term call for monthly payments of interest in addition to principal, similar to the type of payments made on most home mortgages, commonly referred to as "amortized loans." Glenn G. Munn, Encyclopedia of Banking and Finance 47 (F.L. Garcia ed., 8th ed. 1983). Payments made on amortized loans are of a fixed amount, such payments allocated first to interest and then to principal. Early in the loan, most of the fixed payment is allocated to interest, but as the principal is paid down, a greater portion of each payment is allocated to principal.

Thiltges, 247 Neb. at 380, 527 N.W.2d at 859-60.

Although, as Jon points out in his brief, the payments in the instant case are annual rather than monthly, we find *Thiltges* to be instructive. Consistent with the dicta in *Thiltges v. Thiltges, supra*, and with the general rule in *Ramaekers, McPherron & Skiles v. Ramaekers, supra*, we conclude that the district court did not abuse its discretion in applying Jon's payments first to accrued interest and then to the principal.

3. K-1 Forms

On cross-appeal, Laurie argues that the district court erred in denying her request for a money judgment in the amount of income from the entities, which income she did not receive but for which she paid taxes. Laurie contends that while she does not dispute the district court's determination that there is a difference between the distributions which interest holders receive and the amount for which they pay taxes, "in the context of this marital dissolution proceeding it is patently unfair and inequitable that she be required to pay tax on income that inures to the benefit of Jon and enhances the value of assets awarded to Jon." Brief for appellee on cross-appeal at 22. Laurie argues that because she no longer has an interest in the entities, she derives no benefit from the income which was not distributed to her, unlike interest holders in the entities—mainly Jon.

The answer to Laurie's argument rests in timing. Ecklund testified that on a year-by-year basis, the K-1 forms do not directly correlate with distributions to interest holders, because many cash disbursements do not result in expense deductions for a partnership or corporation and some cash receipts do not result in income for the entity. He explained that over a long period of time, there may be an indirect correlation between the K-1 forms and actual distributions to interest holders. Pursuant to the dissolution decree and this court's affirmance, Laurie received a money judgment for her 39.95-percent interest in the entities, apart from the cash in the entities' checking and savings accounts. Jon was ordered to make yearly installment payments for the judgment, to continue until paid in full, with interest to accrue from April 10, 2002. Under the judgment, Laurie will receive undistributed entity income long after she has ceased paying taxes on entity income, and part of the judgment will

include income for which Laurie has already paid taxes. In effect, because the judgment correlates with Laurie's interest in the entities, Laurie was awarded her share of the entities' income for which she paid taxes in 2001 and 2002; she was merely receiving it over an extended period of time.

[10] In a dissolution action, the court will consider all pertinent facts in reaching an award that is just and equitable. The ultimate test for determining an appropriate division of marital property is one of reasonableness. The division must, most of all, be reasonable. *Halouska v. Halouska*, 7 Neb. App. 730, 585 N.W.2d 490 (1998). Because the effect of the judgment was to award Laurie the entity income for which she paid taxes in 2001 and 2002, we conclude that the district court did not abuse its discretion in denying her request for a money judgment.

VI. CONCLUSION

Concerning Laurie's share of the entities' accounts, we modify both the date from which interest is to accrue and the interest rate, but we otherwise affirm the district court's order.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. SYLVIA A. BONNER, APPELLEE, V. FREDERICK E. MCSWINE, APPELLANT.

709 N.W.2d 691

Filed February 7, 2006. No. A-05-146.

1. **Due Process: Appeal and Error.** Determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law, regarding which an appellate court is obligated to reach its own conclusions independent of those reached by the trial court.
2. **Contempt: Child Support.** A finding that a judgment debtor is not in contempt does not discharge or otherwise impair the underlying judgment for child support.
3. **Judgments: Judges: Intent.** Generally, in cases tried to a court, a successor or substitute judge may not render a judgment for a predecessor judge who conducted the trial even if the predecessor had indicated the decision that the predecessor intended to make.
4. **Judges: Judgments.** A successor judge may sign a judgment or order prepared, but not signed, by the judge to whom the matter had been submitted.
5. **Judges: Jurisdiction: Final Orders.** The purely ministerial act of signing an order is not deemed the exercise of jurisdiction inconsistent with the power of the judge who had the matter under advisement.

6. **Child Support: Actions: Final Orders.** Pursuant to Neb. Rev. Stat. § 43-1613 (Reissue 2004), in any and all cases referred to a child support referee by the district court, the parties shall have the right to take exceptions to the findings and recommendations made by the referee and to have a further hearing before the district court for final disposition.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Frederick E. McSwine, pro se.

Robert E. Harkins for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Frederick E. McSwine appeals from an order for garnishment entered by the district court for Douglas County based upon a child support judgment originally entered in a paternity action. While we easily reject McSwine's principal argument that an earlier court order vacating a contempt citation somehow affected the validity of the underlying judgment, we ordered this matter submitted without oral argument pursuant to Neb. Ct. R. of Prac. 11E (rev. 2005) and address McSwine's contention that a second district judge had no authority to issue the final order for garnishment.

BACKGROUND

By a judgment entered on June 21, 1994, McSwine was determined to be the father of two minor children. McSwine was ordered to pay child support at the rate of $184 per month commencing on July 1 and continuing until the support obligation for the first child terminated and at the rate of $164 per month thereafter until the support obligation for the other child terminated.

On March 1, 1995, an authorized attorney filed an affidavit and application seeking to have McSwine held in contempt for failing to pay child support pursuant to the decree. The matter was referred to a district court referee. In due course, the referee recommended that the show cause order be dismissed, and on September 26, a district court judge so ordered. The records and

files in this case show no further activity until August 31, 2004, when an authorized attorney filed an affidavit for garnishee summons. This affidavit alleged that McSwine, who was incarcerated, was now indebted to the State for back child support in the amount of $23,922.82, including interest, and that the garnishee had some of McSwine's property. In response to the garnishee summons duly issued by the district court clerk, McSwine filed an objection in which he claimed that he could not be delinquent in making child support payments because the court had discharged his child support obligation in 1995. On October 1, 2004, a hearing was held before the child support referee, during which hearing McSwine discussed the basis for the objection. The referee continued the hearing in order to review the court's files and records.

On November 8, 2004, prior to resumption of the hearing before the referee, Judge Gregory M. Schatz signed an "Order for Garnishment" which is identical in every respect—except for the date of signing and the judge's signature—to the formal "Order for Garnishment" subsequently signed by Judge Richard J. Spethman. When it became apparent that the November 8, 2004, order should not have been signed because of McSwine's pending objection, such order was vacated by a docket entry on November 17.

The matter was again heard before the child support referee on November 12, 2004. On November 17, the referee filed a report setting forth a finding that court records indicated the 1995 show cause order had been dismissed but that there was nothing within the court files or records to suggest McSwine's underlying child support obligation had ever been dismissed. The referee recommended that the district court "enter the proposed order of garnishment as proffered by the [a]uthorized [a]ttorney."

Also on November 17, 2004, McSwine filed a motion to dismiss in which he again insisted that his child support obligation had been terminated in 1995. The district court treated the motion as an exception to the referee's report. Following a hearing before Judge Sandra L. Dougherty, the district court stated that it had carefully reviewed the matter and had found no indication that the court had previously vacated or terminated

its child support order. By a written order signed by Judge Dougherty, the court overruled McSwine's exception, adopted the referee's recommendation, and ordered the State to submit the proposed order for garnishment. A few days later, for reasons not in the record, Judge Spethman, rather than Judge Dougherty, signed the order for garnishment which, except for the date and signature of the judge, was identical in content to the order first signed by Judge Schatz on November 8. This order stated that the garnishee was indebted to McSwine in the amount of $705.46 and ordered the garnishee to remit that amount to the Nebraska Child Support Payment Center. McSwine appeals to this court.

ASSIGNMENTS OF ERROR

Summarized and restated, McSwine's assigned errors are that the district court and referee failed to find his child support obligation was terminated in 1995 and that the order for garnishment is invalid because it was signed by a substitute judge.

STANDARD OF REVIEW

[1] Determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law, regarding which an appellate court is obligated to reach its own conclusions independent of those reached by the trial court. *Conn v. Conn*, 13 Neb. App. 472, 695 N.W.2d 674 (2005).

ANALYSIS

1995 Proceedings.

McSwine contends that he cannot possibly be in arrears on his child support obligation because the obligation was terminated in 1995. He argues that he did not receive notice of some of the hearings in the matter and that some of his discovery motions were improperly denied.

[2] The record in this case clearly indicates that in 1994, McSwine appeared personally at the hearings, McSwine admitted paternity, and a judgment was entered requiring McSwine to pay child support in periodic installments. While the record shows that a show cause order was dismissed in 1995, the record contains no indication whatsoever that McSwine's child

support obligation was ever terminated. A finding that a judgment debtor is not in contempt does not discharge or otherwise impair the underlying judgment for child support. See, *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980); *Maryott v. State*, 124 Neb. 274, 246 N.W. 343 (1933). McSwine's complaints pertaining to the termination of his child support obligation are wholly without merit.

Substitute Judge.

[3] McSwine asserts that the order for garnishment is invalid because it was signed by Judge Spethman instead of Judge Dougherty, the judge who held the hearing on McSwine's exception to the referee's findings. In making this argument, McSwine has directed us to *Newman v. Rehr*, 10 Neb. App. 356, 630 N.W.2d 19 (2001), *affirmed on other grounds* 263 Neb. 111, 638 N.W.2d 863 (2002), in which this court found that a garnishee had been deprived of due process of law because a successor judge entered the judgment even though the evidence had been heard and the trial conducted by a different judge. This court noted that "the majority view holds that in cases tried to a court, a successor or substitute judge may not render a judgment for a predecessor judge who conducted the trial even if the predecessor had indicated the decision that the predecessor intended to make." *Id.* at 360, 630 N.W.2d at 22.

[4,5] In analyzing the situation in *Newman*, this court relied heavily on Annot., 84 A.L.R.5th 399 (2000), which addressed the power of a successor or substitute judge, in a civil case, to render a decision or enter judgment on testimony heard by a predecessor. The annotation fully reported the decision in *In re Marriage of Seyler*, 559 N.W.2d 7 (Iowa 1997), in which the Iowa Supreme Court reiterated the general rule proscribing a successor or substitute judge from entering judgment in such circumstances. However, the Iowa Supreme Court also noted an exception that the successor judge may sign a judgment or order prepared, but not signed, by the judge to whom the matter had been submitted. This exception recognized that "[t]he purely ministerial act of signing the order was not deemed the exercise of jurisdiction inconsistent with the power of the judge who had the matter under advisement." *Id.* at 11.

[6] In the instant case, the matter was initially assigned to a child support referee pursuant to Neb. Rev. Stat. § 43-1608 et seq. (Reissue 2004). Section 43-1613 provides:

> In any and all cases referred to a child support referee by the district court, the parties shall have the right to take exceptions to the findings and recommendations made by the referee and to have a further hearing before the district court for final disposition. The district court upon receipt of the findings, recommendations, and exceptions shall review the child support referee's report and may accept or reject all or any part of the report and enter judgment based on the district court's own determination.

The record reflects that a proposed form of the order for garnishment was submitted by the authorized attorney at some point prior to the resumption of the hearing before the child support referee. The record also shows that a hearing was held before the child support referee, who recommended that an order directing payment of garnished funds be adopted in the form proposed by the authorized attorney. The referee's report also noted McSwine's exception to the report and recommendation. Judge Dougherty held a hearing on the recommendation, received no additional evidence, and took the matter under advisement. Judge Dougherty subsequently signed an order in which she adopted the referee's recommendation, rejected McSwine's exception, denied other motions that he had filed, and ordered the authorized attorney to submit a formal order. By adopting the referee's recommendation—that the proposed order for garnishment "proffered" by the authorized attorney be adopted—Judge Dougherty's order in effect directed the rendition and entry of the same order for garnishment form that had earlier been signed by Judge Schatz by mistake. Judge Dougherty's order was duly entered by the district court clerk. At that point, all that remained was the purely ministerial task of signing the formal order for garnishment that Judge Dougherty had directed to be signed. Although the reason that Judge Dougherty did not immediately sign the "proffered" order for garnishment is not explicitly set forth in the record, it is reasonable to infer that the order for garnishment form furnished by the authorized attorney had already been signed by Judge Schatz and was not available to be signed

by Judge Dougherty until another copy was provided. The formal order for garnishment contemplated by Judge Dougherty's order was then signed by Judge Spethman and entered by the district court clerk.

We find that the circumstances in the instant case are distinguishable from those in *Newman v. Rehr*, 10 Neb. App. 356, 630 N.W.2d 19 (2001), *affirmed on other grounds* 263 Neb. 111, 638 N.W.2d 863 (2002), because of the purely ministerial action of Judge Spethman in signing the formal order for garnishment contemplated by Judge Dougherty. It was Judge Dougherty who reviewed the referee's report containing findings of fact and recommendations, as well as McSwine's exceptions. It was Judge Dougherty who accepted the referee's recommendations, rejected McSwine's exceptions, and made her own determination in the matter. Judge Dougherty then directed the authorized attorney to prepare a formal order for garnishment, and Judge Dougherty's adoption of the referee's recommendation makes it clear that the form of this order was to be precisely the same as the form previously submitted. It was that same form of the order for garnishment that was eventually signed by Judge Spethman.

Judge Spethman's act did not constitute "the exercise of jurisdiction inconsistent with the power of the judge who had the matter under advisement." See *In re Marriage of Seyler*, 559 N.W.2d 7, 11 (Iowa 1997). Our conclusion would be different had Judge Spethman's action " 'involve[d] the exercise of judgment and the application of legal knowledge and judicial deliberation to facts known only to the predecessor.' " See *id.* at 11, quoting 46 Am. Jur. 2d *Judges* § 30 (1994). Instead, Judge Spethman merely signed the order for garnishment that had already been drafted by the authorized attorney, submitted to the child support referee, recommended by the referee for approval, and approved by Judge Dougherty. Under the specific facts of this case, we reject McSwine's argument that the order for garnishment was invalid because it was signed by Judge Spethman.

CONCLUSION

We conclude that the district court did not err in finding that McSwine's child support obligation had never been terminated.

We further conclude that the district court entered a valid order for garnishment. Accordingly, the district court's order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID J. GONZALES, APPELLANT.
709 N.W.2d 707

Filed February 14, 2006. No. A-04-299.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
4. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant.
5. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based on a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Mark T. Bestul, of Vincent M. Powers & Associates, for appellant.

David J. Gonzales, pro se.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

David J. Gonzales appeals from the district court's denial, without an evidentiary hearing, of Gonzales' motion for postconviction relief and appointment of counsel. On appeal, Gonzales asserts that the court erred in denying an evidentiary hearing on Gonzales' claim that his trial counsel was ineffective and in failing to appoint counsel. We find that Gonzales' motion alleges sufficient facts to entitle him to an evidentiary hearing. Accordingly, we reverse, and remand for further proceedings.

II. BACKGROUND

Gonzales was arrested in November 1999 and initially charged with two counts of second degree murder and two counts of use of a deadly weapon in the commission of a felony. The factual circumstances giving rise to the charges are detailed in the opinion in *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002), the appeal of a codefendant, Juan L. Leonor. As a result of plea negotiations, Gonzales pled guilty to amended charges of one count of manslaughter, one count of second degree murder, and one count of use of a deadly weapon in the commission of a felony. Gonzales was sentenced to a term of 19 to 20 years' imprisonment on the manslaughter conviction, a concurrent term of 30 to 40 years' imprisonment on the second degree murder conviction, and a consecutive term of 10 to 20 years' imprisonment on the use of a deadly weapon conviction. Gonzales appealed the sentences to this court, which summarily affirmed the sentences. See *State v. Gonzales*, 11 Neb. App. xlvi (No. A-02-517, Oct. 25, 2002). Gonzales was represented by the same counsel on appeal as at trial.

On January 15, 2004, Gonzales filed a motion for postconviction relief in which he alleged that his plea was the result of ineffective assistance of counsel. Gonzales alleged that his trial counsel advised him to plead guilty and provided ineffective assistance in two different regards: in advising Gonzales that "the State was going to use the same identical evidence and witnesses used in [Leonor's] trial" and in telling Gonzales that he

would be convicted, just like Leonor, and that Gonzales "would receive two life sentences without the possibility of parole." Gonzales alleged that he "had no choice but to plead guilty based upon the wrongly given advice of counsel." Gonzales requested an evidentiary hearing and appointment of counsel by the court.

On February 10, 2004, the district court entered an order denying postconviction relief. The district court found that Gonzales' motion included allegations about what a reasonable jury might have done at trial, that the court could not speculate about what a jury might have done at trial, and that Gonzales therefore "failed to demonstrate with reasonable probability that, but not [sic] for counsel's deficient performance, the result of the proceedings would have been different." The court denied both an evidentiary hearing and appointment of counsel. This appeal followed.

III. ASSIGNMENTS OF ERROR

Gonzales' assignments of error on appeal are that the district court erred in denying an evidentiary hearing and in failing to appoint counsel.

IV. ANALYSIS

Gonzales asserts that the district court erred in finding that his motion for postconviction relief did not demonstrate ineffective assistance of counsel and prejudice sufficient to warrant the granting of both an evidentiary hearing and appointment of counsel. Specifically, Gonzales asserts that his counsel was ineffective concerning advice about both the evidence which would be used against Gonzales at trial and the potential sentences Gonzales might receive if convicted of the original charges.

1. Standard of Review

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002). However, when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

2. Movant's Burden of Proof

We first note that the district court appears to have mistaken Gonzales' burden of proof. The district court, after reviewing Gonzales' motion for postconviction relief, correctly noted that much of Gonzales' motion discusses testimony given at Leonor's trial and whether such testimony would or would not have been admissible at Gonzales' trial. The district court then stated: "The Court may not engage in guessing what the outcome would have been had [Gonzales] gone to trial." The court quoted Gonzales' assertion in his motion that a reasonable jury might have acquitted him of the charges. The district court then held that Gonzales had "failed to demonstrate with reasonable probability that, but not [sic] for counsel's deficient performance, the result of the proceedings would have been different."

It appears that the district court was mistakenly holding Gonzales to a burden of having to prove that a trial would have resulted in an outcome different from the conviction that resulted from his plea. To the extent the district court was so holding, the court was holding Gonzales to the wrong burden of proof.

[3,4] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Zarate, supra*; *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002). In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant. *State v. Zarate, supra*. See *State v. Thomas, supra*.

[5,6] The Nebraska Supreme Court has held that normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Zarate, supra*. When a conviction is based on a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, *the*

defendant would have insisted on going to trial rather than pleading guilty. Id.

In the present case, the district court appears to have mistakenly believed the prejudice requirement demanded Gonzales to show that the outcome of a trial would likely have been different, instead of simply to show that he would have insisted on going to trial rather than pleading guilty. Nonetheless, it is firmly established that in a postconviction proceeding, an evidentiary hearing should be denied when the motion does not contain factual allegations which, if proven, constitute an infringement of the movant's constitutional rights, when the motion alleges only conclusions of fact or law, and when the records and files affirmatively show that the defendant is entitled to no relief. See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). As such, because we review questions of law independent of the lower court, we will proceed to review the sufficiency of Gonzales' motion on each of the asserted grounds for relief set forth above.

3. Counsel's Advice About Evidence

Gonzales asserts that his trial counsel provided ineffective assistance when advising Gonzales that "the State was going to use the same identical evidence and witnesses used in [Leonor's] trial against [Gonzales] if he had proceeded to trial" and that because Leonor was convicted, "the same would happen to [Gonzales] if he would have decided to go to trial." Gonzales asserts that the evidence used in Leonor's trial consisted largely of testimony of witnesses concerning statements that Leonor made to them indicating that Gonzales had shot the victims in the incident leading to this case. A review of Gonzales' motion and of the factual background in *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002), indicates that there was evidence presented at Leonor's trial which implicated Gonzales and that this evidence consisted of statements made by Leonor to various witnesses.

At this stage of the proceedings, the question presented for resolution is whether Gonzales' motion alleges facts which, if proven, would entitle him to relief. Because Gonzales is alleging that his plea was involuntary and was the result of ineffective assistance of counsel, the question becomes whether the advice

Gonzales alleges his counsel gave, if proven to have been given, comports with the advice that would have been given by a criminal lawyer with ordinary training and skill in the area and whether that advice prejudiced Gonzales in his case. See *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Because the district court denied Gonzales an evidentiary hearing, the only record for us to review in making this determination is Gonzales' motion itself and the Nebraska Supreme Court's opinion in *State v. Leonor, supra.*

The allegations of Gonzales' motion, if proven, demonstrate that Gonzales' counsel advised him that the exact same evidence used at Leonor's trial would be used in Gonzales' trial, that the evidence used at Leonor's trial which implicated Gonzales consisted entirely of testimony by witnesses of statements made by Leonor, and that the statements were admissible against Leonor because they were his own statements being offered against himself, but those statements could be argued to be hearsay if offered against Gonzales.

Because no evidentiary hearing was granted, we are unable to determine why counsel might have believed Leonor's out-of-court statements would be admissible against Gonzales. Although it is entirely possible that counsel had a reason for such belief or a reason for advising Gonzales that the statements would be admissible, there is simply no way for this court to know without an evidentiary hearing, and speculation at this time would be improper. At this stage of the proceedings, there is no way for this court to know if the advice was even given, let alone whether the advice was correct. It is sufficient that the allegations of the motion, if proven, demonstrate Gonzales might be entitled to relief and that the records and files do not affirmatively demonstrate he is entitled to no relief. As such, we reverse, and remand for an evidentiary hearing on Gonzales' motion for postconviction relief.

4. Remaining Issues

We need not further discuss the remaining issues. Inasmuch as we have already remanded for an evidentiary hearing, we need not further specifically determine whether Gonzales' assertions concerning the advice given about his potential sentences would

merit an evidentiary hearing or whether the court erred in failing to appoint counsel. In light of our ruling that Gonzales is entitled to an evidentiary hearing, the district court's ruling on Gonzales' request for court-appointed counsel is also reversed and the issue is remanded for a new determination.

V. CONCLUSION

We reverse, and remand for further proceedings. The allegations of Gonzales' motion for postconviction relief are sufficient to merit an evidentiary hearing.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DIXIE R. HAMPTON, FORMERLY KNOWN AS DIXIE R. GRASMICK, APPELLANT, V. BYERS SHAW, JR., M.D., ET AL., APPELLEES.

710 N.W.2d 341

Filed February 21, 2006. No. A-04-819.

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. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) 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: Proof.** A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief.
3. **Pleadings: Appeal and Error.** When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
4. **Limitations of Actions: Malpractice.** The continuous treatment doctrine applies when there has been either a misdiagnosis upon which incorrect treatment is given or when there has been a continuing course of negligent treatment. It does not apply when there have been only isolated acts of negligence.
5. **Malpractice: Physician and Patient.** Allowing a physician an opportunity to correct any malpractice and not disrupting the physician-patient relationship are the primary considerations underlying the continuing treatment doctrine in Nebraska.
6. **Physician and Patient.** The continuing treatment doctrine is premised upon an ongoing and continuous relationship between physician and patient.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

John P. Weis for appellant.

Thomas J. Shomaker, of Sodoro, Daly & Sodoro, P.C., for appellee Byers Shaw, Jr.

David L. Welch and Donald J. Kleine, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees Jean Botha and Wendy Grant.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

Dixie R. Hampton, formerly known as Dixie R. Grasmick, sued Drs. Byers Shaw, Jr., Jean Botha, and Wendy Grant (hereinafter collectively the defendant doctors), claiming surgical error. Hampton now appeals the order of the Douglas County District Court dismissing her complaint with prejudice because the complaint was filed beyond the 2-year statute of limitations and because there was no exception, specifically the continuing treatment doctrine, which tolled the limitations period. We find that the continuing treatment doctrine does not operate to toll the statute of limitations because the removal of the surgical staples, which allegedly extends the statute of limitations, even if deemed "treatment," was not performed by the defendant doctors.

FACTUAL AND PROCEDURAL BACKGROUND

On February 25, 2004, Hampton filed a complaint in the Douglas County District Court alleging professional malpractice against the defendant doctors. The defendant doctors filed an answer and moved to dismiss the complaint because Hampton had not complied with the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 2004). Hampton moved to file an amended complaint, and the court granted such motion and overruled the motion to dismiss. Hampton filed an amended complaint, which for simplicity we will refer to as the "complaint." Hampton alleged in the complaint that the defendant doctors were physician health care providers defined by, qualified according to, and subject to the provisions of the Nebraska Hospital-Medical Liability Act. Hampton alleged that she was referred to Shaw in December 2001 for examination and possible

care and treatment for a hemangioma located on the right lobe of her liver. A hemangioma is a benign tumor of dilated blood vessels. See Dorland's Illustrated Medical Dictionary 740-41 (28th ed. 1994).

The complaint alleged that on or about February 15, 2002, Hampton underwent "a partial hepatic resection-posterior segment, right lobe surgical procedure," and that the defendant doctors jointly participated in such procedure. As a result of the February 15 surgery, Hampton's spleen was damaged and removed, and she was left with "an extensive, disfiguring scar" across her abdomen. Hampton was discharged from the hospital on February 20. The complaint alleged that none of the defendant doctors had informed her that the removal of her spleen or the disfiguring scar was a potential risk of the surgery.

Hampton alleged in her complaint that upon discharge, she was released to the care of her local physician, and that on February 25, 2002, she saw her local physician for the removal of the staples used in the February 15 surgical procedure and to begin followup care and treatment. Her local physician is not named as a defendant in this claim and was not alleged to be negligent when removing the staples. Hampton's complaint stated that after she was released from the followup care of her local physician, she became aware of the defendant doctors' breach of the standard of care.

The complaint asserted that the defendant doctors' failure both to fully inform Hampton of the inherent and known risks of the surgical procedure and to obtain informed consent were breaches of the standard of care. Hampton also alleged that had the defendant doctors followed the accepted standard of medical care or practice, a patient undergoing a partial hepatic resection-posterior segment, right lobe surgical procedure would not have sustained an injury to the spleen necessitating the removal of the spleen and would not have incurred "an extensive, disfiguring scar" across the abdomen. Hampton also alleged that she sustained damages as a result of the breach of duty by the defendant doctors.

The defendant doctors moved the district court to dismiss the complaint pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) because the complaint failed to state a cause

of action and because the action was barred by the statute of limitations, see § 44-2828. Following a hearing on the motion to dismiss, the trial court granted the motion as to the defendant doctors, reasoning that the applicable statute of limitations is 2 years, which began to run on February 15, 2002. The court found that because the continuing treatment doctrine did not apply, Hampton's February 25, 2004, complaint was filed out of time. The trial court dismissed the complaint with prejudice. Hampton timely appeals to this court.

ASSIGNMENTS OF ERROR

Hampton asserts that the trial court erred in (1) dismissing her amended complaint with prejudice and (2) failing to allow her to amend her pleadings further.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(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. *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

[2,3] A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. *Rohde v. Knoepfel*, 13 Neb. App. 383, 693 N.W.2d 564 (2005). When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff. *Id.*

ANALYSIS

Hampton's complaint was filed pursuant to the rules for notice pleading. See, Neb. Rev. Stat. § 25-801.01 (Cum. Supp. 2004); Neb. Ct. R. of Pldg. in Civ. Actions (rev. 2003). And, this case is controlled by the Nebraska Hospital-Medical Liability Act. The Nebraska Hospital-Medical Liability Act provides, in relevant part, a 2-year statute of limitations for medical malpractice claims unless the cause of action could not have been reasonably discovered within the 2 years, and then the action may be brought within 1 year from the date of discovery. See § 44-2828.

Accepting the allegations in the complaint as true, Hampton's surgery was performed on February 15, 2002, and her complaint was filed on February 25, 2004. Thus, her complaint is barred by the 2-year statute of limitations unless a tolling exception applies, which exception Hampton argues is the continuous treatment doctrine.

[4] The Nebraska Supreme Court in *Frezell v. Iwersen*, 231 Neb. 365, 369, 436 N.W.2d 194, 198 (1989), stated: "The continuous treatment doctrine applies when there has been either a misdiagnosis upon which incorrect treatment is given or when there has been a continuing course of negligent treatment. It does not apply where there have been only isolated acts of negligence."

In *Frezell v. Iwersen, supra*, Dr. Frank Iwersen performed surgery on Marcelyn Frezell on February 2, 1981, to partially remove a degenerative lumbar disk. During the surgery, Iwersen packed the wound with Surgicel and then left the Surgicel in the wound to control postoperative bleeding. After the surgery, Frezell lost bladder control and developed severe pain and weakness in her legs which, according to a postoperative consultation report, was partially caused by the Surgicel. Another surgery was performed on February 5, 1981, to remove the Surgicel. Iwersen treated Frezell for the postoperative complications until October 8, 1985. Frezell did not discover her condition was permanent until June 1985.

The Nebraska Supreme Court found that the action was barred by the 2-year statute of limitations. However, the court also considered whether the continuous treatment doctrine applied, tolling the statute of limitations. Iwersen did not dispute that he treated Frezell until June 24, 1985, for the complications that followed the February 2, 1981, surgery. However, the *Frezell* court found "Frezell d[id] not allege [that] the treatment after the surgery was negligent" or that the original diagnosis was wrong, and the trial court found the specific acts of negligence occurred on February 2. *Id.* at 369-70, 436 N.W.2d at 198. Thus, the Supreme Court held, "The amended petition and record support only an isolated act of negligence, which precludes the application of the continuous treatment exception." *Id.* at 370, 436 N.W.2d at 198. See, also, *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985) (failure to allege that continuous

treatment received was negligent prevented plaintiff from relying on continuous treatment doctrine to toll statute of limitations, and claim was dismissed on summary judgment; statute of limitations begins to run at end of isolated acts of negligence).

In the instant case, Hampton's surgery was performed on February 15, 2002, and she was discharged from the hospital on February 20. Hampton argues that she received continuous treatment until February 25, when the staples were removed by her local physician, who is not named as a defendant, rather than by the defendant doctors who performed the surgery. Hampton, similar to the plaintiff in *Frezell v. Iwersen, supra*, did not allege in her complaint that the removal of the staples was negligent or that there was a misdiagnosis upon which incorrect treatment was given. Nor did Hampton allege any course of continuous treatment which would toll the statute of limitations under *Frezell v. Iwersen, supra*. But, we must be mindful that *Frezell* was a code pleading case and that the instant matter is a notice pleading case which was dismissed pursuant to a rule 12(b)(6) motion. Consequently, a new and unique situation is presented.

We have said that a complaint filed under notice pleading will not be dismissed under rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. *Rohde v. Knoepfel*, 13 Neb. App. 383, 693 N.W.2d 564 (2005). Thus, the question is whether there is any set of facts that Hampton can prove which would make the continuing treatment doctrine applicable so as to toll the statute of limitations.

Therefore, the first question becomes whether the removal of the staples constitutes "continuing treatment" for purposes of the doctrine. But, it seems that by definition, the removal of the staples on February 25, 2002, cannot be continuous treatment because it was done by Hampton's local physician and not by the defendant doctors. In short, the admissions in Hampton's complaint show that the defendant doctors did not continue to treat her after her discharge from the hospital on February 20. If removal of the staples is not "continuing treatment," then the statute of limitations is not tolled.

[5] Examination of the purpose of the continuing treatment doctrine, as comprehensively detailed in the Nebraska Supreme

Court's opinion in *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001), is helpful to demonstrate that such doctrine is inapplicable in the present case. The *Casey* court stated:

> "[I]t is just to the physician and surgeon that he [or she] may not be harassed by premature litigation instituted in order to save the right of the patient in the event there should be substantial malpractice. The physician and surgeon must have all reasonable time and opportunity to correct the evils which made the observation and treatment necessary and to correct the ordinary and usual mistakes incident to even skilled surgery. The [continuing treatment doctrine] is conducive to that mutual confidence which is highly essential in the relation between surgeon and patient. The treatment and employment should be considered as a whole, and if there occurred therein malpractice, the statute of limitations should begin to run when the treatment ceased." *Williams v. Elias*, 140 Neb. 656, 662-63, 1 N.W.2d 121, 124 (1941).
>
> It is apparent that allowing a physician an opportunity to correct any malpractice and not disrupting the physician-patient relationship are the primary considerations underlying the continuing treatment doctrine in Nebraska. *Id.* See, also, *McDermott v. Torre*, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 1112, 452 N.Y.S.2d 351, 355 (1982) ("the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure [and] implicit in the policy is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so"). It is the trust relationship that may make discovery of a claim difficult. See *Miller v. United States*, 458 F. Supp. 363, 366 (D. Puerto Rico 1978) ("[t]he rationale for the [continuing treatment doctrine] is the protection of the confidential physician-patient relationship . . . as well as the fear that the treating physician, 'knowing of his actionable mistake, might be able to conceal it from his patient or continuously to lull the patient into failing to institute suit within the ordinarily permissible time period' ").

261 Neb. at 8, 621 N.W.2d at 487-88.

[6] In *Casey v. Levine, supra*, the Nebraska Supreme Court held that a claim for malpractice against a hospital based upon the negligence of its nursing staff accrues when the patient is discharged from the hospital and that the continuing treatment doctrine does not toll the statute of limitations for subsequent admissions to the hospital authorized by the patient's affiliated but independent physician. In reaching this conclusion, the Nebraska Supreme Court began with the premise that to toll the statute of limitations against a hospital, most courts require that there be an ongoing physician-patient relationship for the continuing treatment doctrine to apply. The *Casey* court then cited a number of cases from other jurisdictions. Of particular interest for the instant case is the reference in *Casey* to *Wheeler v. Schmid Laboratories, Inc.*, 451 N.W.2d 133 (N.D. 1990), which case the Nebraska Supreme Court noted as declining to adopt the continuing treatment doctrine where, after surgery, the defendant physician had only written a prescription for the patient and had not examined her because " '[t]he continuing treatment concept is premised upon an ongoing and continuous relationship between patient and physician.' " *Casey v. Levine*, 261 Neb. 1, 10, 621 N.W.2d 482, 489 (2001), quoting *Wheeler v. Schmid Laboratories, Inc., supra.*

Returning to the policy considerations for the continuing treatment doctrine as described by the Nebraska Supreme Court in *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941), and discussed above, there were no "evils" in the instant case that the defendant doctors needed an opportunity to correct after Hampton's surgery on February 15, 2002—her spleen had been removed, and it obviously was not going to be replaced. See *Healy v. Langdon*, 245 Neb. 1, 4-5, 511 N.W.2d 498, 501 (1994), quoting *Williams v. Elias, supra* (" 'physician and surgeon must have all reasonable time and opportunity to correct the evils which made the observation and [subsequent] treatment necessary and to correct the ordinary and usual mistakes incident to even skilled surgery' "). Hampton's spleen was damaged during the hemangioma surgery and was therefore removed. Further treatment for the removal of the spleen did not occur, as evidenced by Hampton's discharge and release from the defendant doctors' care on February 20, 2002.

Moreover, Hampton admitted in her complaint that "[*a*]*s a result of the February 15, 2002 surgery* mentioned above, [her] spleen was damaged and removed and [she] was left with an extensive, disfiguring scar across her abdomen." (Emphasis supplied.) Thus, in the complaint, Hampton admitted that the removal of the spleen during the hemangioma surgery was an isolated act by the defendant doctors which was completed on February 15. The alleged "treatment"—assuming it can be properly characterized as such—by the local physician when the staples were removed was not continuing treatment by the defendant doctors to attempt to remedy their alleged surgical mistake. See *Frezell v. Iwersen*, 231 Neb. 365, 436 N.W.2d 194 (1989) (continuing treatment doctrine does not apply when there have been only isolated acts of negligence). We note that Hampton alleged a failure to warn of the dangers of the spleen's removal and of extensive scarring resulting therefrom as part of the risk of her hemangioma surgery. However, such alleged failure was obviously an isolated action, or inaction, which occurred before the surgery, and as such, the continuous treatment doctrine would have no application.

CONCLUSION

We conclude that there is no set of facts that Hampton can prove which would demonstrate that the continuing treatment doctrine is applicable to the removal of the surgical staples on February 25, 2002, so as to toll the running of the statute of limitations. The complaint alleged the occurrence of an isolated act of surgical negligence as well as a failure to warn, plus it admitted facts showing that Hampton's physician-patient relationship with the defendant doctors ended with her discharge on February 20, 2002. Finally, to the extent that the removal of the staples could be considered "treatment," it was not treatment by the defendant doctors, a fundamental predicate for the application of the continuing treatment doctrine. Thus, Hampton's complaint filed on February 25, 2004, is barred by the 2-year statute of limitations. The district court did not err in dismissing her amended complaint.

Hampton's second assignment of error asserts that the trial court erred in failing to allow her to amend her amended complaint. Because we find that no facts could be proved which

would avoid the bar of the statute of limitations, amending the complaint would have been futile. Therefore, the district court did not err in dismissing the claim without granting Hampton another opportunity to amend her complaint.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CLINT R. BROWN, APPELLANT.

710 N.W.2d 337

Filed February 21, 2006. No. A-05-683.

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. **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. **Prior Convictions: Pleas: Collateral Attack: Records: Right to Counsel: Waiver.** At an enhancement hearing, a criminal defendant may not challenge the constitutional validity of a prior plea-based conviction offered for enhancement purposes. However, the defendant may challenge the validity of such a conviction based upon the failure of the record to disclose whether the defendant had or waived counsel at the time the plea was entered.
4. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** When using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel.
5. **Right to Counsel: Waiver: Evidence.** A checklist or other such docket entry which shows waiver of counsel made by one authorized to make such entry imports verity and stands as evidence of waiver.
6. **Prior Convictions: Collateral Attack: Right to Counsel: Waiver: Proof.** In a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.

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. Judgment of District Court affirmed.

Thomas C. Riley, Douglas County Public Defender, and William R. Harry for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Clint R. Brown appeals the Douglas County District Court's decision that Brown's September 22, 2000, plea-based driving under the influence (DUI) conviction was properly found by the Douglas County Court to be valid for enhancement purposes. Following this determination, the district court affirmed Brown's conviction of second-offense DUI. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On December 9, 2004, pursuant to a plea agreement, Brown pled guilty in the Douglas County Court to a charge of DUI. The State adduced evidence of a prior DUI conviction from September 22, 2000. On the county court's "Journal Entry & Order" form from September 2000, the word "Waived" was handwritten in the space for the entry of the name of defense counsel. Under the heading "arraignment and advisement" on that form, a box was checked next to, and text was stricken by hand from, the following paragraph:

> [Brown] advised of the nature of the above charges, all possible penalties, and each of the following rights: Counsel; Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Request Transfer ~~to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt. (clear and convincing in cases of probation violations)~~

The next two lines on the form each contained a checked box followed by the words "[Brown] waived each of the above and foregoing rights" and "[p]lea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found; [Brown] advised of right to appeal conviction and sentence," respectively.

The county court determined that the prior conviction could be used to enhance Brown's current conviction to that of a second-offense DUI. Brown was sentenced to probation for 18 months, a $500 fine, and 5 days in jail, and his driver's license was revoked for 1 year. Brown appealed to the district court, contending that the county court erred in determining that his prior DUI conviction was valid for enhancement purposes. The district court affirmed the county court's findings that Brown's prior conviction could be used for enhancement purposes and that his current offense was, in fact, a second-offense DUI and affirmed Brown's current conviction and sentence. Brown has timely appealed to this court.

ASSIGNMENT OF ERROR

On appeal, Brown challenges the district court's affirmance, contending that the county court erred in finding that his September 22, 2000, plea-based DUI conviction was valid for enhancement purposes because it was obtained in violation of Brown's Sixth Amendment right to counsel.

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. Schulte*, 12 Neb. App. 924, 687 N.W.2d 411 (2004); *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004); *State v. Schulte, supra.*

ANALYSIS

Brown contends that his September 22, 2000, plea-based DUI conviction was invalid for enhancement purposes because it was obtained in violation of his Sixth Amendment right to counsel.

[3] At an enhancement hearing, a criminal defendant may not challenge the constitutional validity of a prior plea-based conviction offered for enhancement purposes. However, the defendant may challenge the validity of such a conviction based upon the failure of the record to disclose whether the defendant had or waived counsel at the time the plea was entered. See *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

[4,5] When using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). A checklist or other such docket entry which shows waiver of counsel made by one authorized to make such entry imports verity and stands as evidence of waiver. *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).

On the Douglas County Court's "Journal Entry & Order" form from Brown's prior conviction, the word "Waived" was handwritten in the space for the entry of the name of defense counsel. This stands as evidence of Brown's waiver of counsel. However, we continue our analysis because Brown also claims that since the county court crossed out certain sections of the rights advisory set forth on that form (specifically those relating to a defendant's presumption of innocence and the State's burden of proof beyond a reasonable doubt), Brown's waiver of his Sixth Amendment right to counsel in the prior proceeding was not voluntary and "he entered a guilty plea [in the prior proceeding] without being fully advised of his rights and with no attorney present." Brief for appellant at 4. Thus, the question before this court is whether the county court's alleged failure to advise Brown of the presumption of innocence and the State's burden of proof beyond a reasonable doubt rendered Brown's September 2000 waiver of his right to counsel involuntary.

[6] In *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004), the U.S. Supreme Court considered the extent to which a trial judge must elaborate on the right to representation before accepting a guilty plea from an uncounseled defendant. The defendant therein, charged with third-offense operating a motor vehicle under the influence of alcohol, challenged one of

his prior plea-based convictions on the basis that his waiver of counsel was not " 'full[y] knowing, intelligent, and voluntary' " because he " 'was never made aware by the court . . . of the dangers and disadvantages of self-representation.' " *Id.* at 85. The U.S. Supreme Court noted that "in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel." *Id.* at 92. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. *Iowa v. Tovar, supra.*

In the instant case, the county court's September 2000 journal entry and order establishes that Brown was informed by the county court as to the nature of the charge against him, of the possible penalties, and of his right to counsel. The fact that other portions of the rights advisory were crossed out did not render Brown's waiver of his Sixth Amendment right to counsel involuntary.

CONCLUSION

The district court properly affirmed the county court's determination that Brown's September 22, 2000, plea-based DUI conviction was valid for enhancement purposes. Consequently, Brown's conviction and sentence are affirmed.

AFFIRMED.

PRECISION ENTERPRISES, INC., A NEBRASKA CORPORATION, AND RYAN STEELE, APPELLEES, V. DUFFACK ENTERPRISES, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS BELLEVUE TOYOTA, APPELLANT.

710 N.W.2d 348

Filed February 28, 2006. No. A-04-756.

1. **Pleadings: Equity: Trial.** In a case involving a plaintiff's legal claim and a defendant's equitable counterclaim, both can be adjudicated by the same court in the same action, but the plaintiff's claim must be adjudicated at law and the defendant's counterclaim in equity.

2. **Pleadings: Replevin: Judgments: Appeal and Error.** A counterclaim for replevin is legal in nature, and in an appeal from a judgment in replevin where a jury has been waived, the findings and disposition of the district judge have the effect of a jury verdict and are not to be disturbed unless clearly wrong.
3. **Pleadings: Equity: Proof.** The determination of whether a claim or counterclaim involves a matter sounding in equity or in law affects the appropriate burden of proof that must be met to prove such claim or counterclaim.
4. **Fraud.** A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.
5. ____. Nebraska law imposes a duty of ordinary prudence upon a party claiming fraudulent misrepresentation.
6. **Pleadings: Equity: Proof.** The determination of whether affirmative defenses sound in equity or in law affects the appropriate burden of proof that must be met to prove the affirmative defenses.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Michael T. Levy and Kathy Pate Knickrehm for appellant.

Wesley S. Dodge for appellees.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Precision Enterprises, Inc., and Ryan Steele, owner of Precision Enterprises (collectively Precision), sued Duffack Enterprises, Inc., doing business as Bellevue Toyota (Bellevue Toyota), in an amended petition for specific performance, alleging that the parties entered into a valid contract and asking the court to direct Bellevue Toyota to comply with the terms of the contract. In Bellevue Toyota's answer, it pled two affirmative defenses and filed counterclaims for replevin and damages. Bellevue Toyota appeals from an order of the district court for Sarpy County, Nebraska, awarding judgment to Precision and dismissing Bellevue Toyota's counterclaims. Bellevue Toyota contends that the district court erred in failing to find that Precision had fraudulently misrepresented or concealed the fact that a 2002 Ford Explorer Sport Trac which Precision traded as partial payment for receipt of a new Toyota Camry had been previously damaged. Because Bellevue Toyota failed to prove by a preponderance of the evidence its legal counterclaims

based on fraudulent misrepresentation and fraudulent concealment and because Bellevue Toyota failed to prove by a preponderance of the evidence or by clear and convincing evidence its affirmative defenses of fraudulent misrepresentation and fraudulent concealment, we hold that the district court was correct in concluding that Precision should prevail in its action for specific performance.

II. BACKGROUND

On March 9, 2002, Steele reported to Precision's automobile insurance company that the 2002 Ford Explorer had been in an accident wherein the driver "lost control and [the vehicle] went into a ditch." The vehicle was inspected for damage, photographs were taken, and a damage estimate was created. Testimony at trial revealed that the vehicle sustained damage requiring, inter alia, replacement of two airbags and replacement of the frame of the vehicle. The total value of the loss was estimated to be $12,406.49. Photographs admitted into evidence show the condition of the vehicle after the accident. These photographs reveal obvious damage to the front end of the vehicle, including damage to the windshield, hood, front side panels, bumper, headlights, and grill.

Precision received payment of its insurance claim, less $500 for the deductible, amounting to $11,906.49. In April 2002, Steele authorized repairs in the amount of $4,200 to be performed on the vehicle. Evidence adduced at trial revealed that when an inspection of the vehicle was performed in January 2003 at Bellevue Toyota's request, "a poor quality repair" was discovered. The co-owner of an automotive collision repair company testified that he performed that inspection and discovered that there were "[m]issing bolts, welds that were left off, poor fits on the sheet metal, holes that were reamed out on the fenders[, and] twist ties to hold parts of the vehicle together."

On December 26, 2002, Steele visited four competing dealerships in the course of shopping for a new vehicle. While at Bellevue Toyota, he negotiated for Precision Enterprises' purchase of a Toyota Camry, using the 2002 Ford Explorer as a trade-in. The trade-in vehicle was appraised by Jim Duffack, the owner of Bellevue Toyota, who noticed that the hood on the

vehicle was "out of alignment." Duffack testified at trial that after noticing the condition of the hood, he asked Steele whether the vehicle had ever been damaged. Steele replied, "[N]o." At trial, Bellevue Toyota presented no photographic evidence depicting the condition of the vehicle at the time of the trade-in.

Duffack explained that although he was uncomfortable with the condition of the trade-in vehicle, he was "trying to make a car deal." He testified that he, a sales person, and the general sales manager had asked Steele whether the vehicle had been damaged. Duffack explained that while the hood did not align properly, it "doesn't mean that the [vehicle] had been wrecked like it had been. It could have been jammed or [had] something fall on it."

After some negotiations, Steele was not satisfied and announced that he was leaving. However, an employee of Bellevue Toyota indicated he was unable to find the keys to the 2002 Ford Explorer. Subsequently, another employee of Bellevue Toyota asked, "[W]hat's it going to . . . take to get you to buy a vehicle today[?]" At that time, negotiations continued and a purchase price was agreed upon at an amount $500 less than a previously proffered price. On December 26, 2002, Steele, on behalf of Precision Enterprises, signed a "Nebraska Purchase Contract" with Bellevue Toyota, which contract indicated a trade allowance of $20,169 for the 2002 Ford Explorer. Steele departed the dealership in the Toyota Camry, leaving the trade-in vehicle at Bellevue Toyota. Steele returned to Bellevue Toyota on December 30, 2002, for the purpose of completing the sale and signing documents.

Another document that Steele signed on December 26, 2002, was a questionnaire containing information about the trade-in vehicle. The questionnaire asked, "Has the vehicle sustained any previous body work or damage?" and "Has the vehicle sustained damage over $5,000?" After each question, a corresponding box for "No" was checked. On the "Customer Signature" line, the initials "R.S." are written. At trial, Steele was questioned whether the responses were truthful statements. He replied that the response to whether the trade-in vehicle had sustained any previous body damage was not correct but that he did not recall filling out the questionnaire.

In addition to the purchase agreement Steele signed on December 26, 2002, he signed another "Nebraska Purchase Contract" on December 30. After the December 30 contract was finalized, Bellevue Toyota requested that the above-mentioned automotive collision repair company perform the inspection on the trade-in vehicle. As a result of this inspection, Steele received a telephone call on January 3, 2003, from Bellevue Toyota demanding that the Toyota Camry be returned to the dealership and that the 2002 Ford Explorer be returned to Precision. Steele refused the demand, replying that the contract was in force. In a letter to Steele dated January 11, 2003, counsel for Bellevue Toyota wrote:

> Because of . . . fraud and misrepresentation, Bellevue Toyota does hereby notify you that the purchase agreement . . . is hereby declared void and of no validity as of the date of its execution on December 26, 2002. Demand is hereby made of you to immediately return to Bellevue Toyota the 2003 Toyota Camry, possession of which you fraudulently obtained from Bellevue Toyota, and to again take possession of the 2002 Ford Explorer.

On February 28, 2003, Steele filed a "Petition for Specific Performance" in the district court for Sarpy County, and on April 3, Precision filed an amended complaint alleging that Precision and Bellevue Toyota had "entered into a sales contract in regard to [the 2003 Toyota Camry]" and that Precision had "complied with all conditions of the contract and wishe[d] to register [the 2003 Toyota Camry] and continue with the financing agreement that was associated with such contract." Precision asked the court "for an order compelling [Bellevue Toyota] to deliver the title to [Precision] and [to comply] with the remainder of the previously entered into contract."

Bellevue Toyota filed an answer admitting the existence of the December 26, 2002, contract. The answer also contained two counterclaims—one for replevin and one for damages. In addition, the answer alleged that Bellevue Toyota "was defrauded by [Precision]" and also alleged affirmative defenses of fraudulent misrepresentation and fraudulent concealment.

A hearing on the amended complaint and counterclaims was held on February 17, 2004. The court found that Bellevue

Toyota's reliance on responses made on the questionnaire was misplaced. In addition, the court concluded that "it was not reasonable on the part of an owner of a car dealership to observe a truck with obvious damage, yet rely on the seller's statement that it had never sustained damage. The element of reasonable reliance to constitute a fraudulent misrepresentation claim is lacking." The court ultimately found that Precision had "sustained [its] burden of showing the parties entered into a valid contract for the sale of the Toyota Camry and that [Bellevue Toyota was] responsible under that contract to deliver the necessary documents, including the title to the vehicle, to [Precision]." As to the affirmative defenses and counterclaims, the court found that Bellevue Toyota failed to sustain its burden of showing that Precision had "committed fraud so as to invalidate the contract and require either replevin and/or payment of damages." This timely appeal followed.

III. ASSIGNMENT OF ERROR

Bellevue Toyota's sole assignment of error is that the trial court erred in failing to find that Precision had fraudulently misrepresented or concealed the fact that the vehicle it traded in had been previously damaged.

IV. ANALYSIS

1. Standard of Review

To determine the appropriate standard of review, it is necessary to determine whether a claim or a counterclaim is an action at law or an action sounding in equity. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). See, also, *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). Whether the nature of a claim or counterclaim is at law or in equity is determined from its main object, as disclosed by the averments of the pleadings and the relief sought. See *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

[1] It is not uncommon that an appeal may involve several claims and counterclaims, one or more sounding in equity and one or more sounding in law. See, e.g., *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998) (determining that plaintiff's

action sounded in equity and defendant's counterclaim was action at law); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). When appeals involve claims and counterclaims, one or more sounding in equity and one or more sounding in law, the question of what standard of review the court must apply becomes a bit more involved. The Nebraska Supreme Court discussed this situation in *Fisbeck v. Scherbarth, Inc., supra*, finding that in a case involving a plaintiff's legal claim and a defendant's equitable counterclaim, both can be adjudicated by the same court in the same action, but the plaintiff's claim must be adjudicated at law and the defendant's counterclaim in equity.

An appellate court reviews a claim or counterclaim that sounds in equity de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). See, also, *Hoff v. Ajlouny, ante* p. 23, 703 N.W.2d 645 (2005). On review of a legal claim or counterclaim, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. See, *Fitl v. Strek*, 269 Neb. 51, 690 N.W.2d 605 (2005); *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

With the above information, we turn to the case before us and determine the standard of review for the following claims and counterclaims: (1) Precision's claim for specific performance, (2) Bellevue Toyota's counterclaim for replevin, and (3) Bellevue Toyota's counterclaim for damages.

First, Precision's action for specific performance is equitable in nature. We review that portion of the appeal accordingly, trying factual questions de novo on the record and, as to questions of both fact and law, reaching a conclusion independent from the conclusion reached by the trial court. See *Vande Guchte v. Kort*, 13 Neb. App. 875, 703 N.W.2d 611 (2005).

[2] Second, Bellevue Toyota's counterclaim for replevin is legal in nature. In an appeal from a judgment in replevin where a jury has been waived, the findings and disposition of the district

judge have the effect of a jury verdict and are not to be disturbed unless clearly wrong. *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989).

Third, the Nebraska Supreme Court has addressed the issue of damages in an action for fraud similar to Bellevue Toyota's counterclaim for damages. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005). In actions for damages alleging fraudulent representations, the Nebraska Supreme Court has used a legal standard of review to determine whether damages were proven, asking whether a trial court's ultimate determination of damages was clearly wrong. See *id.* Accord, *Stein v. Jung*, 492 S.W.2d 139 (Mo. App. 1973) (determining that in suit for damages based on fraud and misrepresentation, appellate court does not set aside judgment unless it is clearly erroneous); *Borland-McBrearty v. Bianco*, 22 Mich. App. 42, 176 N.W.2d 712 (1970) (recognizing that in action for damages resulting from misrepresentation, review of record is for clear error).

2. Legal Counterclaims Based on Fraudulent Misrepresentation and Fraudulent Concealment

Bellevue Toyota asserts that the trial court erred in failing to find that Bellevue Toyota had met its burden of proving fraudulent misrepresentation or fraudulent concealment. Bellevue Toyota argues that the element of reasonable reliance was met, because Bellevue Toyota was not required to conduct any investigation in order to ascertain the falsity of Steele's representation that the 2002 Ford Explorer had not been damaged. Bellevue Toyota argues that it was therefore entitled to rescind the purchase agreement and to the relief requested in the counterclaims. We disagree and find that Bellevue Toyota's reliance on Steele's assertions that the 2002 Ford Explorer had not been damaged was not reasonable.

[3] The determination of whether a claim or counterclaim involves a matter sounding in equity or in law affects the appropriate burden of proof that must be met to prove such claim or counterclaim. If the claim or counterclaim is an action at law, the burden of proof is by the preponderance of the evidence. See *Huffman v. Poore*, 6 Neb. App. 43, 569 N.W.2d 549 (1997). If the

claim or counterclaim is an equitable action, the burden of proof is by clear and convincing evidence. See *id.* However, it has been held that in suits at law, fraud must be proven by a preponderance of the evidence. See *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). Bellevue Toyota's counterclaims for replevin and damages, based on fraudulent misrepresentation and fraudulent concealment, are legal counterclaims. See, *Nelson v. Cool, supra*; *Eicher v. Mid America Fin. Invest. Corp., supra.* Bellevue Toyota's allegations of fraud, therefore, must be proven by the preponderance of the evidence.

The elements that must be alleged and proven to establish fraudulent misrepresentation are (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it be relied upon; (5) that the alleging party reasonably did so rely; and (6) that the alleging party suffered damage as a result. See *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

The elements that must be alleged and proven to establish fraudulent concealment are (1) that the opposing party had a duty to disclose a material fact; (2) that the opposing party, with knowledge of the material fact, concealed the fact; (3) that the material fact was not within the alleging party's reasonably diligent attention, observation, and judgment; (4) that the opposing party concealed the fact with the intention that the alleging party act in response to the concealment or suppression; (5) that the alleging party, reasonably relying on the fact or facts as he or she believed them to be as the result of the concealment, acted or withheld action; and (6) that the alleging party was damaged by the opposing party's action or inaction in response to the concealment. See *Ord v. AmFirst Invest. Servs., ante* p. 97, 704 N.W.2d 796 (2005). In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact. See *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000).

[4,5] Whether a party's reliance upon a misrepresentation was reasonable is a question of fact. *Cao v. Nguyen, supra.* A party is justified in relying upon a representation made to the party as a

positive statement of fact when an investigation would be required to ascertain its falsity. *Id.* However, Nebraska law imposes a duty of ordinary prudence upon a party claiming fraudulent misrepresentation. *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996). In regard to this duty, the Nebraska Supreme Court has stated: " '[W]hile no action will lie where ordinary prudence would have prevented the deception, that rule is generally applied where the means of discovering the truth was in the hands of the party defrauded.' " *Id.* at 343, 549 N.W.2d at 182. In *Schuelke v. Wilson, supra*, the court found that the buyer of a franchise business was not justified in relying upon the representations set forth by the seller that the business' expenses and weekly sales would be a certain amount, because the buyer had all the documents necessary to have the expenses reviewed to ascertain their accuracy but took no action.

A party to a business transaction has a duty to disclose facts basic to the transaction when he or she knows another party is about to enter into the transaction under a mistake as to those facts and that the other party would reasonably expect a disclosure of those facts because of the relationship between the parties, the customs of the trade, or other objective circumstances. *Streeks v. Diamond Hill Farms, supra*. Where a defendant has a legal or equitable obligation to reveal material information, the defendant's failure to do so is equivalent to a misrepresentation and may therefore support a claim of actionable fraud where the remaining elements of fraud are proven. *Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, 5 P.3d 940 (Ariz. App. 2000).

Precision represented that the 2002 Ford Explorer, the trade-in vehicle, had not sustained previous damage, and such representation was false as shown by the evidence that the vehicle was involved in an accident in 2002. An officer of the Bellevue Police Department investigated the sales transaction between Precision and Bellevue Toyota. On January 17, 2003, the officer met with Steele regarding that sales transaction. The officer testified at trial that Steele stated he "knew it was wrecked, referring to the Ford Explorer, but [he] wasn't going to mention it." As such, we know that the representation was known to be false and was made as a positive assertion. In addition, Duffack testified that the actual value of the trade-in vehicle was approximately $10,500.

Therefore, we know that Bellevue Toyota was damaged as a result of reliance on the representation. All elements of fraudulent misrepresentation are undisputed except whether Bellevue Toyota reasonably relied upon the representation.

Similar to the situation in *Schuelke v. Wilson, supra*, in the instant case, the means of discovering the condition of the trade-in vehicle were in Bellevue Toyota's possession. Duffack appraised the 2002 Ford Explorer on December 26, 2002, and was aware of a problem with the alignment of the hood. Duffack testified:

> I took the keys and the appraisal sheet that — up to . . . the general sales manager, and I said, I'm uncomfortable, the [trade-in vehicle] has so much mud on it from being driven on mud roads that I can't do a proper appraisal on this [vehicle], and I see that the hood doesn't fit right, I can't see much else, I couldn't determine much else, you ask the man if the [vehicle has] ever been wrecked when you go in and do these finalized figures.
>
> . . . I personally asked [Steele] as the owner of [Precision Enterprises] if the [vehicle] had ever been damaged before [and h]e said no. And [the sales manager] asked him the very same question.

Bellevue Toyota retained possession of the trade-in vehicle for several more days and took no action to ascertain the accuracy of Precision's representations. As previously stated, whether Bellevue Toyota's reliance on Precision's statements was reasonable is a question of fact. Bellevue Toyota was in possession of the means of discovering the actual condition of the trade-in vehicle and had a duty of ordinary prudence. See, *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000); *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996). In addition, the record contains photographic evidence of the condition of the trade-in vehicle, where the damage is obviously visible, and no contradictory evidence was produced at trial indicating that the appearance of the vehicle was different while it was in Bellevue Toyota's possession.

Duffack testified at trial that he was the current owner of Bellevue Toyota and had previously owned Bluffs Toyota for 30 years. He testified that he had "been in the automobile business [for f]orty-three years." In addition, he speculated the average

number of cars he sells in a year is 1,200. Duffack appraised Precision's trade-in vehicle on December 26, 2002, and discovered that the hood was out of alignment and that the vehicle had "so much mud on it . . . that [one could not] do a proper appraisal." Given Duffack's history in the automobile business and his duty to exercise ordinary prudence, the trial court did not err in concluding that it was unreasonable for Bellevue Toyota to rely on Precision's representations. It was not error for the trial court to conclude that Bellevue Toyota, having an automobile dealership owner with a 43-year history in the business who sells an average of 1,200 vehicles a year, would not be reasonable in relying on a buyer's representation that a trade-in vehicle had not sustained prior damage, when such vehicle is covered in mud and the hood is out of alignment.

Given these facts, we cannot find that Bellevue Toyota reasonably relied upon the representation that the trade-in vehicle had sustained no prior damage. Therefore, the allegation of fraudulent misrepresentation was not proven by a preponderance of the evidence, as required for an action at law, and the district court correctly found that Bellevue Toyota had failed to meet its burden of proof concerning such counterclaim.

As to the allegation of fraudulent concealment, it is unnecessary to determine whether Precision had a duty to disclose a material fact and concealed the fact, because the remaining elements of fraudulent concealment were not proven. See *In re Interest of Anthony P.*, 13 Neb. App. 659, 698 N.W.2d 457 (2005) (recognizing that appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it). Duffack personally appraised Precision's trade-in vehicle and testified at trial that he knew there was a problem with the hood. The fact that the vehicle had sustained damage was within Bellevue Toyota's reasonably diligent attention, observation, and judgment. Again, we cannot find that Bellevue Toyota reasonably relied upon the facts as it believed them to be as a result of the concealment and acted on that reliance. Therefore, the allegation of fraudulent concealment was not proven by a preponderance of the evidence, as required for an action at law, and the district court did not err in finding that Bellevue Toyota failed to meet its burden of proof concerning

the counterclaims. This part of Bellevue Toyota's assignment of error is without merit.

3. Affirmative Defenses of Fraudulent Misrepresentation and Fraudulent Concealment

Bellevue Toyota asserts that the trial court erred in failing to find Bellevue Toyota had met its burden of proving its affirmative defenses of fraudulent misrepresentation and fraudulent concealment. Bellevue Toyota asserts that all elements of its affirmative defenses were proven and that accordingly, Bellevue Toyota is entitled to relief. The trial court found that "[Bellevue Toyota] has not sustained its burden of showing that [Precision] committed fraud so as to invalidate the contract and require either replevin and/or payment of damages." We find that Bellevue Toyota did not meet its burden of proving its affirmative defenses of fraudulent misrepresentation and fraudulent concealment, and we hold that the trial court did not err in finding the same.

[6] We are mindful that the determination of whether affirmative defenses sound in equity or in law is normally important. One reason, as previously illustrated, is that the determination of whether an appeal involves a claim sounding in equity or in law will determine the degree of deference appellate courts will give to the finder of fact. Thus, the determination of whether affirmative defenses sound in equity or in law affects the appropriate burden of proof that must be met to prove the affirmative defenses.

Stoural v. Blue Cross and Blue Shield, 1 Neb. App. 669, 510 N.W.2d 357 (1993), is the most recent decision that contemplates the problem regarding the differing natures of claims and defenses and the appropriate burdens of proof. *Stoural* is an appeal wherein there existed claims and defenses sounding in law and in equity, respectively. The "majority" in *Stoural* affirmed the trial court's opinion, and the two-judge concurrence reached the same result but had a different rationale for coming to its conclusion.

In *Stoural*, citing *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982), this court held that the trial court properly treated the defendant's rescission argument, based on allegations of fraudulent misrepresentation, as an equitable defense raised in the course of a legal action. The *Stoural* court concluded

that the defendant had to prove its rescission argument by a preponderance of the evidence, rather than by clear and convincing evidence which would be required in an equity action. We glean from this that the *Stoural* court concluded that if an equitable defense is raised in an action at law, such defense need only be proven by the lower burden of proof reserved for actions at law. In other words, the *Stoural* court effectively held that an action at law converted an equitable defense into one bearing the burden of proof of an action at law, which proof is a preponderance of the evidence.

In *Stoural*, the two-judge concurrence stated that "an action at law does not convert an equitable defense into one bearing the burden of an action at law." 1 Neb. App. at 675, 510 N.W.2d at 360. However, although for a different reason, the concurrence, like the "majority" in *Stoural*, affirmed the trial court's conclusion that the correct burden of proof for the defendant's affirmative defense was a preponderance of the evidence. The concurrence held that the defense as pled was one at law, not one in equity. Therefore, the concurrence held that the burden of proof was one at law, i.e., the preponderance of the evidence.

Nebraska law does not conclusively answer the question whether an equitable defense is to be reviewed as falling under the penumbra of the action to which the defendant has answered and, as such, whether the degree of burden the defendant carries in proving such equitable defense is by a preponderance of the evidence or is by clear and convincing evidence. Therefore, we lack direction as to which burden of proof should be applied to Bellevue Toyota's affirmative defenses of fraudulent misrepresentation and fraudulent concealment. Nonetheless, we conclude that the above question need not be resolved in the present case because, as we stated above, Bellevue Toyota failed to prove fraudulent misrepresentation and fraudulent concealment even under the lower, legal burden of proof—a preponderance of the evidence.

We have already affirmed the district court's finding that Bellevue Toyota failed to prove by a preponderance of the evidence its legal counterclaims based on fraudulent misrepresentation and fraudulent concealment. We read the trial court's order to find that Bellevue Toyota has similarly failed to prove by a

preponderance of the evidence its affirmative defenses of fraudulent misrepresentation and fraudulent concealment. It necessarily follows, then, that Bellevue Toyota failed to prove by the higher degree of clear and convincing evidence its affirmative defenses of fraudulent misrepresentation and fraudulent concealment. Regardless of whether the affirmative defenses are considered legal or equitable, and regardless of the appropriate burden of proof, Bellevue Toyota failed to prove fraudulent misrepresentation and fraudulent concealment. We affirm the decision of the trial court that Bellevue Toyota "has not sustained its burden of showing that [Precision] committed fraud so as to invalidate the contract." Bellevue Toyota's assignment of error is without merit.

V. CONCLUSION

We determine that Bellevue Toyota's legal counterclaims based on fraudulent misrepresentation and fraudulent concealment were not proven by a preponderance of the evidence and that Bellevue Toyota's affirmative defenses were not proven by a preponderance of the evidence or by clear and convincing evidence. Therefore, we affirm the decision of the trial court on Precision's petition for specific performance and find that the trial court properly dismissed Bellevue Toyota's counterclaims.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ANDREW TOMPKINS, APPELLANT.

710 N.W.2d 654

Filed February 28, 2006. No. A-05-212.

1. **Search and Seizure: Probable Cause.** When a structure is divided into more than one residential unit, or where two residences are located on a single parcel of property, there must be cause to search each unit.
2. ____: ____. The requirement that a search or seizure of a person be supported by probable cause particularized with respect to that person cannot be undercut or avoided by simply pointing to the fact that coincidentally, there exists probable cause to search or seize another person.
3. **Probable Cause: Warrants.** Implicit within the concept of probable cause is the notion that the government may pursue multiple, perhaps even divergent, lines of

investigation so long as the government establishes probable cause as to each suspect prior to the issuance of any warrant.

4. **Search Warrants: Affidavits: Probable Cause.** Where an affidavit in support of a search warrant fails to show how an item found in the trash was used in the commission of marijuana offenses, the affiant's assertions that he or she found such item with a white residue inside and has seen similar items used to ingest powdered controlled substances are insufficient to support a determination of probable cause to believe that marijuana offenses had been or were being committed.
5. ____: ____: ____. When an affidavit in support of a search warrant for each unit of a duplex contains information that contraband was found in the duplex's trash, but such trash is not connected to either unit or tenant through venue items or other indicia of ownership, such trash or contraband cannot be affirmatively attributed to either unit or tenant and cannot create a basis for finding probable cause as to each.
6. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. However, whether the proof satisfies this test is determined by the circumstances of each case.
7. **Evidence: Search Warrants: Affidavits: Time.** An important factor to be considered in determining whether evidence, or information in an affidavit in support of a search warrant, is stale is the character of the crime or the thing to be seized.
8. **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.
9. **Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence: Search and Seizure.** Even in the absence of a valid affidavit to support a search warrant, evidence seized pursuant to the warrant need not be suppressed where police acted in objectively reasonable good faith reliance upon the warrant.
10. **Search Warrants: Affidavits: Police Officers and Sheriffs: Search and Seizure: Appeal and Error.** In assessing the good faith of an officer's conducting a search pursuant to a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.
11. **Search Warrants: Affidavits: Probable Cause: Police Officers and Sheriffs: Appeal and Error.** When evaluating whether a warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court should address whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Andrew Tompkins appeals from his convictions and sentences for distribution of a controlled substance on or near a playground, possession of a firearm while in violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2004) (making it unlawful to, inter alia, knowingly or intentionally distribute a controlled substance), and possession of drug paraphernalia. Tompkins contends that the district court erred in failing to sustain his supplemental motion to suppress and his motion for new trial. While we find that the affidavit in support of the search warrant at issue in this case was inadequate to support a finding of probable cause as to Tompkins, we hold that a good faith exception to the suppression rule applies, and therefore, we affirm.

II. BACKGROUND

Det. Mark Overman of the Scottsbluff Police Department, who was assigned to a drug crime investigation unit, received an anonymous tip regarding possible drug trafficking at a duplex located in Scottsbluff, Nebraska. The duplex was divided into an upstairs and a downstairs unit, each of which had a separate entrance. The separate entrance for the upstairs apartment, occupied by Jacob Snow, was located at the front of the house, with steps leading to it from the main sidewalk. The separate entrance for the downstairs apartment, occupied by Tompkins, was located by the driveway and had a set of stairs and a railing. Additionally, a common entrance may have existed on the side of the house.

There are differing accounts of when that first tip was provided to Overman, but Overman received the tip "sometime [in] late June or in July [2004]." The first anonymous tipster (Citizen No. 1) contacted Overman by telephone "five or seven" times from the time of the first tip until "sometime in August" and had initially "called for information on what signs to look for [of criminal activity because she] believed there was some type of drug activity going on [at the duplex]."

Citizen No. 1 provided Overman with the name of the upstairs tenant in the duplex, Snow. Overman instructed Citizen No. 1 to "try to get license plate numbers from . . . vehicles," and Citizen

No. 1 subsequently provided several license plate numbers from vehicles that had stopped at the duplex. At the time of Citizen No. 1's deposition in November 2004, she had destroyed her record of the license plate numbers. Overman testified at the suppression hearing, "Some of the license plate numbers [belonged] to people that had drug intelligence with the [drug crime investigation u]nit and some did not."

Citizen No. 1 submitted that visitors entered both the upstairs and downstairs apartments of the duplex, but that she did not count or have knowledge of how many people visited Tompkins' downstairs apartment. Citizen No. 1 believed that one visitor was a family member of one of the duplex residents.

Citizen No. 1 provided an account of an incident which occurred at her home on July 21, 2004, where a woman mistakenly came to her door looking for "Paula." Citizen No. 1 informed her that "Paula did not live there." The woman "disagreed with [Citizen No. 1, saying] that she was at the right house," and asked Citizen No. 1 whether she "would sell her a dime bag." Citizen No. 1 informed the woman that "they," perhaps referring to Paula and others, "hang out at Jake's house." We assume that the reference made by Citizen No. 1 to "Jake's house" is alluding to the residence of Snow. Citizen No. 1 reported to Overman that the woman left her door and headed toward the duplex. However, Citizen No. 1 did not watch the woman walk into the residence and therefore did not report to Overman which door the woman may have entered.

Based on the reports of Citizen No. 1, Overman began an independent investigation of Snow and Tompkins. Overman contacted a representative of the duplex's landlord in order to confirm the ownership of the duplex and the identity of the tenants. Overman did not ascertain whether there was a common door to the two units in addition to the separate entrance to each.

Overman's independent investigation included surveillance of the duplex. On one occasion, Overman conducted what he described as "real surveillance," having "[a]ctually [spent] some time watching the place"; Overman also drove by the duplex for surveillance purposes approximately "a dozen" times. Overman's "real surveillance" consisted of parking near the duplex and observing activity there for "[t]wenty to 30 minutes," during which

he observed one vehicle arrive with two occupants. On the occasions when Overman simply drove by the duplex, he "never stopped and watched to see if there was stop and go traffic, but [he] would certainly see a number of cars parked there [and] people in and around the place."

While parked near the duplex conducting surveillance, Overman was approached by Citizen No. 2, who inquired about Overman's presence in the neighborhood. Overman informed Citizen No. 2 that he was conducting surveillance on the duplex. Citizen No. 2 reported to Overman that "there was a lot [of] in and out traffic, that there were a lot of stop and go people running in and out, that there appeared to be a bouncer at the door [of the duplex]." Citizen No. 2 indicated that he thought there was a bouncer because "[someone] was meeting a person on the front lawn [and] had a golf club and seemed to greet people as if he were — keeping them from the front door, keeping them from going in." He specified that the bouncer "was on the steps or in the front yard."

On another occasion, Citizen No. 2 notified Overman of an incident where a person "had driven down the street, passed the [duplex], parked on another street, walked back to the [duplex], was there for 10 to 15 minutes, left and walked back up the other street." Citizen No. 2 reported the license plate number of this person's vehicle to Overman.

Citizen No. 2 also reported that he had seen four vehicles stop at the duplex during a 20-minute time period, "pull[ing] up [to the duplex] facing the wrong way in the street." "[T]he passenger would run inside . . . the house and then come back out 10 or 15 minutes later." When asked whether these visitors entered through the front door, which leads to Snow's upstairs unit, Citizen No. 2 replied that he had seen one person go through that door and was unable to see or recall where the other visitors entered the house.

On August 20, 2004, as part of Overman's independent investigation, he collected the garbage that had been placed on the duplex's curb for regularly scheduled pickup. Overman accompanied the driver of an empty city refuse collection truck to the duplex, where one garbage receptacle had been placed out for collection. The contents of the collected garbage were at least

three separate bags containing garbage, two of which were separately attributable to Snow and Tompkins through venue items within, and garbage that was not separated into bags but loose in the garbage receptacle.

On August 26, 2004, Overman requested the issuance of a search warrant through an "Affidavit in Support of Search Warrant." Overman's affidavit contained a paragraph of background information describing his training and experience with the Scottsbluff Police Department, specifically with drug investigation and drug law enforcement, and a paragraph describing the duplex and relating the fact that its two separate units were occupied individually by Snow and Tompkins. Other pertinent portions of the affidavit are detailed below.

On the same date, a search warrant was issued and subsequently executed. The warrant authorized a search of Snow, Tompkins, their vehicles, and the duplex property for " 'marijuana, drug related paraphernalia, scales, monies that are the result of marijuana sales, packaging material, police scanners, firearms, records of transactions of marijuana purchases and records of contacts with persons that sell or purchase marijuana.' "

On September 2, 2004, the State filed an information charging Tompkins with one count of distribution of a controlled substance on or near a playground, one count of possession of a firearm while in violation of § 48-416(1), and one count of possession of drug paraphernalia. The charges against Tompkins were based on evidence and statements obtained as a result of the search of his residence and a finding that his residence was located within 1,000 feet of a school.

On October 1, 2004, Tompkins filed a motion to suppress all evidence seized and statements obtained as a result of the August 26 search. In a supplemental motion to suppress he filed on October 21, Tompkins alleged that in seeking the search warrant, "[Overman] made a deliberate falsehood and/or acted with reckless disregard for the truth" and that "omissions in the affidavit used to obtain the search warrant [were] misleading because the facts contained in the omitted material tend[ed] to weaken or damage the inferences which [could] logically be drawn." Tompkins made 19 arguments in support of suppression, including arguments that "[Overman] did insufficient investigation and did not

set forth in his affidavit what specific door the 'stop and go' traffic was going into" and that "[t]he information was skewed in an attempt to establish probable cause for both the upstairs and downstairs apartments, when in fact if there was probable cause at all, it was for the upstairs apartment."

On December 23, 2004, the court held a hearing on Tompkins' supplemental motion to suppress. Tompkins asserted that the court must "look at [the affidavit in support of the search warrant] a second time to determine if there's probable cause for one apartment versus the other apartment." He maintained that the garbage collected in Overman's investigation must be sorted out to determine which garbage belonged to each tenant. Additionally, he challenged the reliability of the citizen informants.

After hearing the evidence, the court denied Tompkins' supplemental motion to suppress. A bench trial was conducted on January 5, 2005, on stipulated facts, at which time Tompkins preserved objections based on the "Fourth and Fourteenth Amendment[s to the U.S. Constitution] and article 1, Section 7 [of the Nebraska Constitution] as to the illegality . . . of the search and statements made . . . ." Thereafter, the court found Tompkins guilty of all three charges. The court sentenced Tompkins to a term of 24 to 48 months' imprisonment, less 2 days' credit for time served, for count I; to a consecutive term of 6 to 12 months' imprisonment for count II; and to pay a fine of $100 for count III. Tompkins timely appeals from these convictions and sentences and from the court's denial of a motion for new trial filed by him on January 14, 2005.

III. ASSIGNMENTS OF ERROR

On appeal, Tompkins contends, restated, that the district court erred in denying his supplemental motion to suppress evidence and in denying his motion for new trial.

IV. ANALYSIS

1. Standard of Review

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. Lykens*, 13 Neb. App. 849, 703 N.W.2d 159 (2005). 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.* However, to the extent questions of law are involved, we as an appellate court have an obligation to reach conclusions independent of the decisions reached by the courts below. See *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

2. SUFFICIENCY OF AFFIDAVIT

Tompkins expressly contends that the district court erred in overruling his supplemental motion to suppress and, thus, impliedly contends that the warrant to search his place of residence was invalid, because (1) the portions of the affidavit relating to Tompkins were insufficient to support a finding of probable cause and (2) the warrant was obtained, in part, on the strength of anonymous tips, but the informants' reliability was not established.

A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003). In evaluating the validity of a search warrant, the duty of a reviewing court is to ensure that the magistrate issuing the warrant had a substantial basis for determining that probable cause existed. *State v. Swift, supra.* Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *State v. March, supra.*

In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. *Id.* The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *Id.* In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id.*

Our review of the record reveals that the trial court's factual determinations were not clearly erroneous. In addition, the motion to suppress was properly overruled despite the fact that the "Affidavit in Support of Search Warrant" was legally insufficient to support a finding of probable cause to search Tompkins and his residence. Suppression of the evidence is not an appropriate remedy in this case because police acted in objectively reasonable good faith reliance on the warrant.

(a) Independent Investigation: Garbage Pickup

In challenging the sufficiency of the affidavit, Tompkins argues that there is no nexus between the garbage recovered in Overman's independent investigation and Tompkins' activities. The State asserts that "whether the trash from both apartments was intermixed is immaterial, given that the incriminating evidence would relate to one or the other places/persons [sic] to be searched." Brief for appellee at 13. We disagree and find that probable cause had to be found as to each unit and each resident of the duplex. The garbage collected in Overman's investigation did not support a finding of probable cause as to Tompkins.

[1-3] When a structure is divided into more than one residential unit, or where two residences are located on a single parcel of property, there must be cause to search each unit. *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983). The U.S. Supreme Court held in *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), that the requirement that a search or seizure of a person be supported by probable cause "particularized with respect to that person" could not be "undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another [person]." Implicit within the concept of probable cause is the notion that the government may pursue multiple, perhaps even divergent, lines of investigation so long as the government establishes probable cause *as to each suspect* prior to the issuance of any warrant. *U.S. v. Moody*, 762 F. Supp. 1491 (Ga. 1991).

In the instant case, the affidavit details what Overman found in his search of the garbage. Specifically, the affidavit states:

> On August 20, 2004, [Overman] rode with an empty City of Scottsbluff Environmental Services Department truck, and

picked up the trash container that was located in the front of [the duplex] in Scottsbluff, Scotts Bluff County, Nebraska. [Overman] states that this was a small plastic trash container intended for that residence. The driver dumped the trash at a city facility so officers could search it.

. . . During the search of the container, [Overman] and [another detective of the drug crime investigation unit] located the following items:

1) Inside a plastic bag, officers found a partial "Paper Mate" pen barrel with a white residue inside. [Overman] has seen similar items many times, used to ingest powdered controlled substances[.] Officers also found an empty envelope addressed to [Tompkins at the duplex]. The return address on the envelope is "Office of the County Attorney, Box Butte County, PO Box 660, Alliance NE 69301.["] The envelope was postmarked on August 4, 2004.

2) Inside another plastic bag, officers found an empty, fold top plastic baggie with marijuana residue, a broken glass pipe with marijuana residue, and a "savings withdrawal" form from First State Ban[k], Scottsbluff, dated 6-15-04 in the name of . . . Snow, [addressed to Snow at the duplex, and] containing the signature of . . . Snow.

3) Inside another plastic bag, officers found a piece of notebook paper with two hand drawn marijuana leaves, and two phrases, "Smoke Weed Everyday," and "Bud Smokers Only," also large, bold numbers "4:20" and the words "Fire it up" directly beneath the numbers. [Overman] knows through training and experience that "weed" and "bud" are two slang terms for marijuana. [Overman] also knows that the term "4:20" is a slang term among drug users, particularly marijuana users, that encourages smoking marijuana. There was also a small amount of marijuana inside this plastic bag.

4) Officers also located a portion of a marijuana plant, approximately 12 inches long by 8 inches wide. This item was loose inside the trash container.

In *State v. Shock*, 11 Neb. App. 451, 653 N.W.2d 16 (2002), a police investigator's assertions in the affidavit submitted in support of a search warrant—inter alia, that individuals engaged in

methamphetamine production often discard fruits of their efforts into trash bags, that officers examining trash attributable to the suspects in the case found discarded coffee filters and aluminum foil containing residue, and that those officers found numerous syringes and empty suphedrine boxes—were insufficient to support a determination of probable cause to believe that the suspect had committed, or was committing, methamphetamine offenses, where the affidavit failed to show how any items found in the trash were used to manufacture methamphetamine.

[4] In the instant case, the only garbage material that can be directly attributed to Tompkins is that contained in the bag which included an envelope addressed to him by name. As was the case with the affiant officer's assertions in *State v. Shock, supra*, Overman's assertions in the affidavit in this case that he found a pen barrel with a white residue inside and has seen similar items used to ingest powdered controlled substances were insufficient to support a determination of probable cause to believe that marijuana offenses had been or were being committed, where the affidavit in this case failed to show how the pen barrel found in the trash was used in commission of such offenses.

Additionally, the garbage contained in the bag that included an envelope addressed to Snow by name cannot reasonably be attributed to Tompkins.

The garbage that was not connected to either tenant through venue items or any other indicia of ownership or possession does not create a substantial basis for determining that probable cause existed as to Tompkins. While it may be considered as part of the overall "totality of the circumstances," such garbage does not individually or collectively with other evidence give rise to a finding of probable cause.

In *State v. Jackson*, 937 P.2d 545 (Utah. App. 1997), the Court of Appeals of Utah considered whether garbage collected from the appellants' curb could be affirmatively attributed to the appellants. The appellants argued that the contraband found in the garbage could have been placed in the garbage receptacles by strangers or neighbors. *Id.* The court determined that based on venue items included in the garbage, the contraband could be affirmatively attributed to the appellants rather than to a passer-by or neighbor. *Id.*

[5] In the instant case, we find that the garbage that was loose in the garbage receptacle or contained in bags without venue items or other indicia of ownership could have been placed there by someone other than Tompkins, namely Snow. Such garbage can be attributed to *either* Tompkins or Snow, and as such, we cannot affirmatively attribute it to either. As noted above, while such garbage may be considered under the totality of the circumstances, we find that it does not individually or collectively with other evidence create a substantial basis for finding that probable cause existed as to Tompkins.

(b) Criminal Record

Tompkins reminds us that in reviewing "the strength of [the] affidavit submitted as a basis for finding probable cause to issue a search warrant," we must apply the " 'totality of the circumstances' rule." Brief for appellant at 13. The State asserts that in addition to assessing the trash contents and information from citizen informants, Overman's independent investigation included researching the criminal history of Snow and Tompkins. However, the criminal history, as it related to Tompkins, was insufficient to support a finding of probable cause or suggest that evidence of a crime would be found in his residence.

As previously stated, in reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003). The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *Id.*

[6] Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003); *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). However, whether the proof satisfies this test is determined by the circumstances of each case. *State v. Groves, supra.*

The affidavit contains two paragraphs relating to Tompkins' criminal history. The affidavit reads:

> [Overman] states that according to Scottsbluff Police Department records . . . Tompkins was arrested for [driving under the influence of alcohol or drugs] on February 1, 2004. [Overman] states that a search of the vehicle Tompkins was driving yielded a small amount of marijuana and drug paraphernalia. However, a passenger in the vehicle was charged with the drug violations, and Tompkins was not.
>
> [Overman] states that according to Scottsbluff Police Department records . . . Tompkins was charged with possession of drug paraphernalia on April 12, 2004.

[7] In a similar case where an affidavit in support of a search warrant was presented to a magistrate requesting search warrants for more than one residence, the Court of Appeals of Oregon found in *State v. Johnson*, 186 Or. App. 186, 62 P.3d 861 (2003), that the information in the affidavit as it related to two of the appellants was insufficient to establish probable cause. In its analysis, the court determined that information regarding a prior drug conviction of one of those appellants, information 8 years old, was stale. In addition, the court found that the conviction, which was for possession of less than 1 ounce of marijuana, was not enough reason "to infer that, because [that appellant] previously ha[d] possessed less than an ounce of marijuana, [h]e probably [wa]s engaged in the production of marijuana." *Id.* at 193, 62 P.3d at 864. Supporting its contention, the court noted that an important factor to be considered in determining whether evidence is stale is the character of the crime or the thing to be seized. *Id.*

The fact that Tompkins was arrested for driving under the influence of alcohol or drugs and a passenger in his vehicle was charged with drug violations 6 months prior to the submission of the affidavit in this case does not make it probable that Tompkins would have presently possessed controlled substances. See, *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003); *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996). Likewise, a charge for possession of drug paraphernalia 4 months prior to the submission of the affidavit in this case does not bolster the circumstances to support a finding that contraband or evidence of a crime would be found. See, *People v. Rodriguez*, 303 A.D.2d 783, 758 N.Y.S.2d 172 (2003) (finding that search warrant was

issued without probable cause where allegation of criminal activity contained in application for search warrant was stale inasmuch as it was based on single purchase of cocaine which occurred 28 days prior to search); *State v. Jackson*, 937 P.2d 545 (Utah App. 1997) (determining upon review of affidavit that prior criminal conviction of appellant constituted stale and irrelevant information which should not have been considered by magistrate in making probable cause determination).

In the instant case, we must consider the character of the previous crimes alleged in the affidavit. That Tompkins was arrested for driving under the influence of alcohol or drugs and charged with, but not necessarily convicted of, possession of drug paraphernalia is less than persuasive that Tompkins would be involved in marijuana distribution. Additionally, Tompkins' criminal history was not so closely related to the time of the issuance of the search warrant as to justify a finding of probable cause at the time of such issuance. See, *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003); *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991); *State v. Valdez*, 5 Neb. App. 506, 562 N.W.2d 64 (1997).

(c) Citizen Informants

Tompkins argues that the affidavit offered in support of the search warrant failed to establish probable cause because it did not establish the reliability or veracity of the informants. The State contends that the information provided by Citizen No. 1 and Citizen No. 2 was not the sole means of establishing probable cause, but was only a starting point for Overman's investigation. As such, the State asserts, the informants' reliability did not have to be conclusively established. Even if we were to assume that Tompkins' argument is without merit and that the reliability of the informants was established by the informants' being "citizen informants," the information they provided is neither individually nor collectively with other evidence sufficient to establish probable cause.

[8] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *In re Interest of Anthony P.*, 13 Neb. App. 659, 698 N.W.2d 457 (2005).

The affidavit in support of the search warrant contains five paragraphs outlining information relevant to the citizen informants and detailing the information they provided to Overman. We refer the reader to the background section of this opinion, which details information provided by the citizen informants.

The citizen informants' information, certainly alone, fails to show that contraband could be found at the duplex. When combined with the fact that there was excessive "stop and go" traffic seen at the duplex and Overman's testimony that some duplex visitors "had drug intelligence with the [drug crime investigation u]nit," the citizen informants' information does not provide more than a reasonable suspicion—not probable cause—that contraband could be found in Tompkins' residence.

The results of Overman's independent investigation, combined with the information from the citizen informants, do not separately or collectively with other evidence create a substantial basis for determining that probable cause existed or suggest with fair probability that contraband or evidence of a crime would have been found. See, *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003); *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996). Therefore, Tompkins' assignment of error has merit.

3. Good Faith Reliance

Even though we have determined that the affidavit lacked a substantial basis for determining that there was probable cause as to Tompkins to support issuance of the search warrant, we must still consider whether the evidence obtained as a result of the warrant is admissible pursuant to the good faith exception to the search warrant requirement. See *State v. Shock*, 11 Neb. App. 451, 653 N.W.2d 16 (2002). The parties did not argue whether the police acted in good faith reliance in executing the search warrant, but we, sua sponte, address this issue and determine that the good faith exception applies in this case. As such, the motion to suppress was properly overruled.

The U.S. Supreme Court, in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), examined the question of whether evidence should be allowed in a prosecution's case in chief when such evidence was obtained by officers acting in reasonable reliance on a search warrant issued by a

detached and neutral magistrate but ultimately found to be unsupported by probable cause. The Court considered the deterrent effect the exclusionary rule would have on law enforcement if "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *United States v. Leon*, 468 U.S. at 918. The Court concluded that the exclusionary rule should not be applied to deter objectively reasonable law enforcement activity. *United States v. Leon, supra.*

[9] Therefore, even in the absence of a valid affidavit to support a search warrant, evidence seized pursuant to the warrant need not be suppressed where police acted in objectively reasonable good faith reliance upon the warrant. See, *id.*; *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

Suppression would remain an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard for the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid. *United States v. Leon, supra*; *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000); *State v. Edmonson*, 257 Neb. 468, 598 N.W.2d 450 (1999). If none of the aforementioned circumstances exist, then the evidence should not be suppressed. *Id.*

[10] In assessing the good faith of an officer's conducting a search pursuant to a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit. *State v. Davidson, supra*; *State v. Edmonson, supra.*

[11] When evaluating whether a warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court

should address whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant. *State v. Davidson, supra*; *State v. Edmonson, supra.* See *United States v. Leon, supra* (indicating that standard of objective reasonableness requires officer executing warrant to have reasonable knowledge of what law prohibits).

In order to dispose of this appeal, it is necessary to consider whether the good faith exception is properly applied to these circumstances.

There is no evidence that the judge was misled by information in the affidavit that Overman knew was false or would have known was false except for reckless disregard for the truth on his part, no evidence that the judge wholly abandoned his judicial role, and no evidence that the warrant was so facially deficient that the officers executing it could not have reasonably presumed it to be valid. Therefore, the only remaining question is whether the warrant was based on information so lacking in indicia of probable cause as to render a law enforcement officer's belief in its existence entirely unreasonable.

Overman is a well-trained police officer. Overman details in the affidavit his extensive training, including "training and experience in the investigation of drug offenses and crimes of violence" and "training through the Nebraska Law Enforcement Training Center, Nebraska State Patrol, National College of District Attorneys, [and] Drug Enforcement Administration." Overman further states that he has "a B.A. degree in Criminal Justice" and "graduated from the FBI National Academy in 1995." It is reasonable to conclude that based on his experience and training, Overman has a reasonable knowledge of what the law prohibits.

Overman offered facts that would lead a well-trained police officer to believe that contraband or evidence of a crime would likely be found at the duplex. He was careful to separate in the affidavit the information that was provided by the informants and information obtained upon his subsequent investigation, indicating that he believed that the informants' allegations of illegal activity occurring at the duplex were corroborated by his own investigation. In the affidavit, Overman stated that he "kn[ew]

through training and experience that a large amount of brief stop and go traffic is often indicative of drug trafficking."

Lastly, we note that at the time of the issuance of the search warrant in this case, no Nebraska jurisprudence directly on point existed regarding a salient issue of first impression in the present case: whether, in the context of facts such as those of the present case, an affidavit in support of a search warrant for multiple individuals and multiple residential units contains a substantial basis for determining that there is probable cause specific to one of those individuals. We cannot conclude that a law enforcement officer who had reasonable knowledge of what the law required regarding probable cause relating to multiple suspects and multiple residential units would, at the time of the execution of the search warrant in this case, have been unreasonable in relying in good faith on the warrant issued by the magistrate in this case.

Additionally, the information Overman presented to the issuing judge was not completely devoid of indicia of probable cause, and such information, viewed as a whole, arguably supports the conclusion that there was a fair probability that evidence of illegal drug activity would be found at Tompkins' and Snow's residences. See, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000); *State v. Edmonson*, 257 Neb. 468, 598 N.W.2d 450 (1999). Therefore, we conclude that there was an objectively reasonable basis for believing that the warrant was valid.

4. Motion for New Trial

Because our resolution of Tompkins' first assignment of error is dispositive of this appeal, we need not consider his remaining assignment of error. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *In re Interest of Anthony P.*, 13 Neb. App. 659, 698 N.W.2d 457 (2005).

V. CONCLUSION

Although we conclude that the search warrant used to obtain evidence upon which Tompkins was convicted was not based on an affidavit with sufficient indicia of probable cause as to

Tompkins, we hold that the officers who executed the warrant acted with objectively reasonable good faith. Hence, we affirm.

AFFIRMED.

SHARON DEMPSEY HOWE, APPELLANT, V.
LAURI HINZMAN, APPELLEE.

710 N.W.2d 669

Filed March 7, 2006. No. A-04-683.

1. **Trial: Jurors: Appeal and Error.** The decision to retain or reject a juror is a matter of discretion with the trial court, and such decision is reviewed for an abuse of discretion.
2. **Judges: Words and Phrases.** An abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Trial: Jurors: Presumptions: Proof.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.
4. **Trial: Judges: Jurors.** A trial judge is not required to excuse a juror when the juror is able to decide the case fairly and impartially.
5. **Trial: Jurors: Appeal and Error.** An appellate court defers to the trial court's decision whenever a juror is unequivocal that he or she can be fair or impartial.
6. **Criminal Law: Trial: Jurors: Presumptions: Proof.** In a criminal case, when an improper communication with a juror is shown to have taken place, a rebuttable presumption of prejudice arises, and the burden is on the State to prove that the communication was not prejudicial.
7. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
8. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
9. **Juries: Verdicts.** A jury, by its general verdict, pronounces upon all or any issues in favor of the prevailing party.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Vincent M. Powers and Mark T. Bestul, of Vincent M. Powers & Associates, for appellant.

Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Sharon Dempsey Howe's negligence claim against Lauri Hinzman, arising from an automobile accident, resulted in a jury verdict finding both parties to have been negligent and reducing Howe's award for damages accordingly. Howe appeals. Because we conclude that (1) the district court did not abuse its discretion by refusing to strike a juror who maintained that he could be fair and impartial after disclosing that he had received a message from a legal assistant to Hinzman's counsel regarding that attorney's representation of the juror's daughter in an unrelated case and (2) Howe suffered no prejudice when the district court overruled Howe's motion for a directed verdict on the issue of Hinzman's negligence, we affirm.

BACKGROUND

On July 6, 2001, shortly before 2:30 p.m., two automobiles, operated respectively by Howe and Hinzman, collided near the intersection of 23d and Q Streets in Lincoln, Nebraska. On August 19, 2002, Howe filed a petition against Hinzman, alleging that Hinzman's negligence had proximately caused injuries to Howe and praying for damages. In an answer, Hinzman alleged that any injuries Howe suffered had been caused by Howe's own negligence and prayed that Howe's petition be dismissed. The district court conducted a jury trial on April 5 through 7, 2004.

Near the intersection of 23d Street, a two-way street, and Q Street, a one-way, westbound street, Q Street consists of two traffic lanes separated by a white dashed line. The south lane is approximately twice as wide as the north lane. The southern portion of the south lane serves as a parking lane. The division of the south lane is not marked. The approximate point of impact between the parties' vehicles was in the intersection of 23d and Q Streets, 10 feet 6 inches north of the south curb line of Q Street and 2 feet 6 inches west of the east curb line of 23d Street. Including the two travel lanes and the parking lane, Q Street is 36 feet wide. Photographs of the scene on the day of the accident depict a clear and dry road surface and sunny weather.

The parties gave conflicting accounts of the accident. Hinzman testified that immediately before the accident, she was

traveling west on Q Street in the south travel lane. Hinzman stated that as she approached the intersection of 23d and Q Streets, she slowed down, engaged her left turn signal, began to turn left, and collided with Howe's vehicle. Hinzman testified that she thought Howe had attempted to pass her by traveling in the parking lane. Hinzman admitted that she did not see Howe's vehicle until the collision, that she did not look over her left shoulder or in her rearview mirror before turning, that she was ticketed for an improper turn, and that she paid the fine for the ticket. Hinzman admitted that she did not look in her side mirror before turning left, but she also testified that if she checked her side mirror, it was before she turned on her turn signal. Hinzman testified that she did not think anyone would be traveling in the parking lane. Hinzman's vehicle sustained damage on the left front portion, and Howe's vehicle sustained damage on the right front portion.

Howe testified that she was traveling in the south travel lane on Q Street and that Hinzman was in the north travel lane. Howe testified that she was traveling faster than Hinzman and was next to, but not yet fully alongside, Hinzman's vehicle when Hinzman attempted to turn left onto 23d Street, causing the collision. Howe denied seeing Hinzman's left turn signal. According to Howe, the collision occurred before the two vehicles reached the intersection. Howe testified that she spoke to Hinzman after the accident and that Hinzman gave her the impression that Hinzman did not know where Howe's vehicle had come from.

A Lincoln police officer who was the first officer at the scene of the accident testified that when he arrived, the parking lane on Q Street was empty for one-half block east of the intersection with 23d Street. The officer had spoken with both parties at the scene of the accident. The officer testified that Hinzman initially told him she had been traveling in the north travel lane and had stopped before turning but that she later told him she had been traveling in the south travel lane at the time of the collision and had only slowed down before turning. Hinzman testified that when she initially spoke to the officer, she was nervous and indicated to him the lane she had been in by pointing. Hinzman denied having used the word "north" in her conversation with the

officer at the scene, but admitted that she may have agreed with the officer's confirmatory statement that she had been in the north lane. Hinzman did not recall telling the officer that she came to a stop before turning.

On the last day of trial, one of the jurors informed the district court that he had received a message on his answering machine sometime the previous day from an individual at the law firm of Hinzman's attorney, which message indicated that Hinzman's attorney was representing the juror's daughter in another case. The court conducted a hearing on the matter, outside the presence of the jury.

The juror stated that his daughter was 24 years old, did not reside with him, and was involved in litigation arising out of a car accident. He assured the court that he could separate his daughter's case from the instant case, that he could remain fair and impartial, and that he would base his decision in the instant case on the facts presented at trial. Upon questioning by counsel for both parties, the juror gave further assurances that the coincidence would not influence his decision in the instant case and that he would follow the instructions of the court. The juror reported that he had not spoken to Hinzman's attorney. The juror stated that he had come forward with the information because he wanted to "let you guys know I was playing square."

At the end of the hearing on that matter, Howe moved to strike the juror. The district court overruled Howe's motion, and the jury returned to finish hearing the evidence. At the close of evidence, Howe moved for a directed verdict, arguing that Hinzman failed to keep a proper lookout. The district court overruled the motion, stating that it could not say as a matter of law that Hinzman had a duty to look into the parking lane before turning.

Following the jury instruction conference, the district court received the affidavit of the legal assistant who left the message on the juror's answering machine. According to the legal assistant's affidavit, the message was intended for the juror's daughter, whom Hinzman's attorney was defending in a lawsuit unrelated to the instant case. Hinzman's attorney had asked the legal assistant to arrange a meeting between the attorney, the juror's daughter, and other defendants in the lawsuit in which the juror's

daughter was involved. The juror's telephone number was listed in his daughter's file. When the legal assistant left the message, she did not know that she was telephoning the residence of a juror in the instant case, and she did not speak to the juror.

The district court instructed the jury regarding Howe's claims that Hinzman was negligent, specifically in failing to keep a proper lookout, making an improper turn, failing to yield the right-of-way, and failing to keep proper control of her vehicle. The jury was also instructed concerning Hinzman's claims that Howe was negligent, specifically in failing to keep a proper lookout, failing to exercise reasonable control over her vehicle, failing to yield the right-of-way, and traveling too fast for the conditions. The instructions stated:

> If you find that [Howe] has met her burden of proof and [Hinzman] has met her burden of proof th[e]n you must determine to what extent or degree the negligent conduct of each contributed to the damages of [Howe] expressed as a percentage of 100%.
>
> If you find that the negligence of [Howe] was equal to or greater than the negligence of [Hinzman], then you must find for [Hinzman]. . . .
>
> If . . . you find that [Howe's] negligence is less than [Hinzman's] negligence you must first determine [Howe's] total damages without regard to the percentage or degree of negligence attributable to . . . each party. You must then reduce the total damages by the percentage of negligence attributable to [Howe].

The jury found that both parties were negligent. The jury attributed 49 percent of the fault to Howe and 51 percent to Hinzman and adjusted Howe's award of damages accordingly. The district court accepted the jury's verdict and entered judgment. Howe moved for a new trial, and the court overruled her motion. Howe now appeals.

ASSIGNMENTS OF ERROR

Howe alleges, rephrased, that the district court erred in (1) failing to grant her motion to strike the juror and (2) submitting the issue of Hinzman's negligence to the jury rather than finding her negligent as a matter of law.

STANDARD OF REVIEW

[1] The decision to retain or reject a juror is a matter of discretion with the trial court, and such decision is reviewed for an abuse of discretion. See *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

[2] An abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005).

ANALYSIS

Motion to Strike Juror.

[3-5] Howe contends that the district court erred in failing to grant her motion to strike the juror. The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998); *Schindler v. Walker*, 7 Neb. App. 300, 582 N.W.2d 369 (1998), *affirmed* 256 Neb. 767, 592 N.W.2d 912 (1999). A trial judge is not required to excuse a juror when the juror is able to decide the case fairly and impartially. See *id.* An appellate court defers to the trial court's decision whenever a juror is unequivocal that he or she can be fair or impartial. See *id.* This rule applies both to the issue of whether a potential juror should be removed for cause prior to trial and to the situation of whether a juror should be removed after the trial has commenced. See *id.*

In the present case, the juror, of his own volition, informed the court that someone from the law office of Hinzman's attorney had left a message for the juror regarding the representation of his adult daughter in an unrelated lawsuit. Upon questioning, the juror gave unequivocal assurances that he could separate his daughter's case from the instant case, that he could remain fair and impartial, that he would base his decision on the facts presented at trial, that the coincidence would not influence his

decision, and that he would follow the instructions of the court. We therefore consider Howe's arguments which attempt to escape the conclusion that the district court did not abuse its discretion in overruling Howe's motion to strike the juror.

[6] Howe alleges that the juror's revelation gave rise to a rebuttable presumption of prejudice which was not rebutted. In a criminal case, when an improper communication with a juror is shown to have taken place, a rebuttable presumption of prejudice arises, and the burden is on the State to prove that the communication was not prejudicial. See *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002).

We are not convinced that a message left on a juror's answering machine by the legal assistant of counsel for one of the parties regarding an unrelated matter involving the juror's adult daughter is the sort of contact contemplated by cases which recognize a rebuttable presumption of prejudice. Nonetheless, even assuming, without deciding, that a presumption of prejudice arose in this case, such presumption was effectively rebutted. At a hearing outside of the presence of the jury, the juror repeatedly and unequivocally asserted his impartiality. Howe asserts, "[M]ere recitation from a juror that he can remain fair and impartial is not sufficient." Brief for appellant at 12. However, as noted above, Nebraska law entrusts the trial courts with the discretion to assess the veracity of such statements. See, e.g., *Schindler v. Walker*, 7 Neb. App. 300, 582 N.W.2d 369 (1998), *affirmed* 256 Neb. 767, 592 N.W.2d 912 (1999).

Howe also claims that Hinzman's opposition to Howe's motion to strike was a "tactical decision" intended to avoid utilizing an alternate juror. Brief for appellant at 12. This argument assumes that Howe suffered some manner of prejudice from the retention of the juror. The record also fails to support this argument.

Howe next argues that the district court should have removed the juror after his "implied bias" became apparent. *Id.* at 11. She relies on *Kusek v. Burlington Northern RR. Co.*, 4 Neb. App. 924, 552 N.W.2d 778 (1996). In *Kusek*, Pat J. Kusek brought suit against Burlington Northern Railroad Company (Burlington Northern), his employer. The trial court allowed as jurors current employees of Burlington Northern who were coemployees of

Kusek and allowed the jury to decide issues between the parties. On appeal, Burlington Northern argued that such railroad employee jurors, some of whom served on the jury and some of whom were struck with peremptory challenges, should have been removed from the jury pool. This court observed that employees may harbor feelings of loyalty or animosity for their employers and held that because of implied bias, "all employees of a party are ineligible to serve on a jury in a case involving their employer . . . irrespective of what they might say or know about the particular case or the parties, or how impartial they say they can be." *Id.* at 931-32, 552 N.W.2d at 782-83. We determined that the trial court had no discretion in the matter.

In *Schindler v. Walker, supra*, we again discussed the doctrine of implied bias and emphasized that the application of the doctrine depends on a connection between the juror and the party. In that case, Mary E. Schindler brought a wrongful death action against the University of Nebraska Medical Center (UNMC) and various medical professionals after her husband died at UNMC. A bench trial was conducted on the claims against UNMC and a medical resident, and a jury trial was conducted on Schindler's remaining claims. On appeal, Schindler alleged that the trial court erred in refusing to strike from the jury pool individuals closely related to UNMC, employees and former employees of UNMC, and coemployees of two of the defendant physicians. We declined to extend the holding of *Kusek, supra*, noting that UNMC was not a party to the issues being decided by the jury and that therefore, no implied bias could exist on the part of UNMC employees deciding issues concerning the defendant physicians. We also observed that none of the potential jurors were coemployees of the defendant physicians, who were not considered to be employees of UNMC.

Unlike *Kusek*, the instant case did not involve an employment relationship between a juror and a party. In fact, the connection in this case did not involve a juror and a party; rather, the juror's adult daughter was being represented in an unrelated case by counsel for one of the parties. As we pointed out in *Kusek*, an employee is highly likely to have certain feelings about his or her employer, be they positive or negative. No such sentiments are necessarily incumbent where, as in the instant case,

the connection involves the parent of an adult who happens to be represented by the same attorney as one of the parties. We decline to extend the implied bias doctrine to the facts of this case. Having rejected Howe's arguments, we conclude that the district court did not abuse its discretion in overruling Howe's motion to strike the juror.

Motion for Directed Verdict.

[7] Howe also assigns that the district court erred by refusing to find Hinzman negligent as a matter of law in failing to look to the left before turning left. A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *LeRette v. American Med. Security*, 270 Neb. 545, 705 N.W.2d 41 (2005). The district court overruled Howe's motion for a directed verdict and submitted the issue of Hinzman's comparative negligence to the jury.

We find *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996), a case arising under the comparative negligence statute, Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995), to be instructive. In that case, Kathy Jo Traphagan was traveling on a highway when her car collided with the right rear of a stopped truck which was in her range of vision and was owned and operated by Mid-America Traffic Marking (Mid-America). There was evidence that both parties had been negligent. The trial court found that Traphagan was negligent as a matter of law but allowed the jury to determine the percentage of Traphagan's negligence as compared to Mid-America's. On appeal, Mid-America argued that Nebraska's range of vision rule required the trial court to find as a matter of law that Traphagan's negligence equaled or exceeded Mid-America's negligence. In the majority opinion, the Nebraska Supreme Court stated:

> We now hold that where reasonable minds may draw different conclusions and inferences regarding the negligence of the plaintiff and the negligence of the defendant such that the plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom

> recovery is sought, the apportionment of fault must be submitted to the jury.

Traphagan v. Mid-America Traffic Marking, 251 Neb. at 149, 555 N.W.2d at 783. The court concluded that it could not say as a matter of law that Traphagan's negligence equaled or exceeded Mid-America's negligence and held that the trial court properly submitted the negligence issue to the jury in order to have it compare Traphagan's negligence to the negligence of Mid-America. However, a concurring opinion in *Traphagan* filed on behalf of four justices provides an alternative analysis which we find to be applicable to the case before us. The concurrence reasoned that the question of Traphagan's negligence should have been submitted to the jury rather than decided by the court. However, the concurrence concluded that because the jury was properly instructed to weigh the relative contributions of the parties' negligence under the comparative negligence statute, no prejudice resulted to Traphagan.

In the present case, there was evidence that both parties were negligent. Indeed, Howe does not assign or argue that the issue of her own negligence should not have been submitted to the jury. Rather, her contention is that the jury should have been instructed that Hinzman was negligent. This argument ignores the reality that the district court would still have been required to submit the apportionment of negligence to the jury.

[8,9] Error without prejudice provides no ground for appellate relief. *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). Even if we were to assume the district court erred in overruling Howe's motion for a directed verdict, Howe was not prejudiced by the ruling. Like the trial court in *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996), the district court in the instant case instructed the jury to weigh the relative contributions of the parties' negligence. The district court also instructed regarding Howe's claims that Hinzman had failed to keep a proper lookout, made an improper turn, failed to yield the right-of-way, and failed to maintain control of her vehicle. Because the district court could not have directed a verdict in favor of Howe on the issue of Howe's own negligence, the jury was required to evaluate the

negligence of both parties. While the jury could have declined under the instructions to apportion any fault to Hinzman, it instead apportioned 51 percent of the fault to her and, by its general verdict, determined that Hinzman had failed to keep a proper lookout. See *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997) (jury, by its general verdict, pronounces upon all or any issues in favor of prevailing party). Because the jury found that Hinzman was negligent, we cannot say that Howe suffered prejudice from the district court's refusal to determine as a matter of law that Hinzman was negligent. See *Traphagan v. Mid-America Traffic Marking, supra* (Gerrard, J., concurring). Howe's assignment of error on this matter lacks merit.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in overruling Howe's motion to strike a juror and in overruling Howe's motion for a directed verdict, and we affirm.

AFFIRMED.

AGNES M. ROUBAL, BY AND THROUGH KATHLEEN A. HOLM, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE.

710 N.W.2d 359

Filed March 7, 2006. No. A-05-875.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. ____: ____. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
4. ____: ____: ____. The filing of the petition and the service of summons are the two actions necessary to establish the jurisdiction of the district court to review the final decision of an administrative agency under the Administrative Procedure Act.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Appeal dismissed.

Thomas A. Gleason, of Pickens, Daubman, Green & Gleason, L.L.P., for appellant.

Jon Bruning, Attorney General, and Douglas D. Dexter for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2005), this case was ordered submitted without oral argument. Agnes M. Roubal, by and through Kathleen A. Holm, pursuant to her power of attorney, filed a petition for review in the district court for Douglas County pursuant to the Administrative Procedure Act, seeking review of a final decision of the Nebraska Department of Health and Human Services (the Department), which decision denied Roubal certain medical benefits. The district court dismissed Roubal's petition because it was not timely filed. We agree that Roubal did not file her petition in a timely manner. Because Roubal's petition was not timely, the district court did not have jurisdiction to consider the merits of her claim. Likewise, this court lacks jurisdiction to consider the merits of Roubal's appeal. Accordingly, we dismiss Roubal's appeal for lack of jurisdiction.

BACKGROUND

The director of the Department signed an order on March 16, 2005, denying certain medical benefits to Roubal. The order was sent to Roubal's attorney by mail. The parties at trial, and in their appellate briefing, tried and argued the case as though the date of mailing was March 16; therefore, we use that date in our conclusions which follow. The parties do not dispute that the order was received by Roubal's attorney on March 21. Roubal filed a petition for review on April 20, seeking judicial review of the decision pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1999). The Department filed a motion to dismiss pursuant to Neb. Ct.

R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003). At the hearing on the Department's motion, the Department argued that Roubal's petition was not timely in that it was not filed within 30 days after service of the final decision as required by statute. Roubal argued that her petition was timely because it was filed within 30 days of her attorney's receipt of the Department's final decision.

After examining the relevant statutory provisions, the district court concluded that the filing of Roubal's petition on April 20, 2005, was untimely. The court consequently entered an order on June 22 granting the Department's motion to dismiss. Roubal subsequently perfected her appeal to this court.

ASSIGNMENT OF ERROR

Roubal asserts that the district court erred in determining that she did not file her petition for review in a timely manner.

STANDARD OF REVIEW

[1,2] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Id.*

ANALYSIS

[3,4] We first examine § 84-917, which provides in relevant part:

> (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.
>
> (2)(a) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken *within thirty days after the service of the final decision by the agency.*

(Emphasis supplied.) We also note that where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute. *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997). The filing of the petition and the service of summons are the two actions necessary to establish the jurisdiction of the district court to review the final decision of an administrative agency under the Administrative Procedure Act. *Id.*

Relevant to our decision is Neb. Rev. Stat. § 25-534 (Reissue 1995), which provides:

> Whenever in any action or proceeding, any order, motion, notice, or other document, except a summons, is required by statute or rule of the Supreme Court to be served upon or given to any party represented by an attorney whose appearance has been noted on the record, or is thus required to be served upon or given to the attorney for any party, such service or notice may be made upon or given to such attorney, unless service upon the party himself or herself is ordered by the court. Service upon such attorney or upon a party shall be made by delivering a copy to him or her or by mailing it to him or her.
>
> Delivery of a copy shall mean handing it to the attorney or to the party; or leaving it at his or her office with his or her clerk or other person in charge thereof; or, if the office is closed or the person to be served has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
>
> Every party appearing in an action without an attorney, and every attorney appearing in an action, shall designate on the record an address to which mail addressed to such party or attorney may be sent. Service by mail shall be by ordinary first-class mail addressed to such designated address, or if none is so designated, to the last-known address of such party or attorney. *Service by mail is complete upon mailing.*

> Proof of service may be made by certificate of the attorney causing the service to be made. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon him or her by mail, *three days shall be added to the prescribed period.*

(Emphasis supplied.)

Also relevant is Neb. Rev. Stat. § 25-2221 (Cum. Supp. 2004), which provides in relevant part that "[e]xcept as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run."

In addition to the above statutory provisions, the district court in this case relied on *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000). In *Schwarz*, the issue was the calculation of the 30-day period for responding to requests for admissions under Neb. Ct. R. of Discovery 36 (rev. 1996). Rule 36, which has not been amended since *Schwarz*, provides in relevant part: "The matter is admitted unless, *within thirty days after service* of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . ." (Emphasis supplied.) Neb. Ct. R. of Discovery 36 (rev. 2000). Regarding computation of the time period at issue in *Schwarz*, the Nebraska Supreme Court stated:

> The record reflects that the requests for admission were served on September 12, 1997, and that the expiration of the 30-day period specified in rule 36, computed as required by Neb. Rev. Stat. § 25-2221 (Reissue 1995), expired on October 13. However, because service was by mail upon opposing counsel, an additional 3 days [are] added to the prescribed period pursuant to Neb. Rev. Stat. § 25-534 (Reissue 1995), so that the responses were due on October 16.

258 Neb. at 848, 606 N.W.2d at 91.

In the present case, the Department entered its final decision and served a copy of that decision by mail on Roubal's attorney on March 16, 2005. Roubal argues that service was not completed until March 21, when the order was received by her attorney. However, § 25-534 provides that service by mail is complete upon mailing. Thus, service was completed on March 16 and the 30-day period specified in § 84-917, computed as required by § 25-2221 (i.e., excluding the day of the act, event, or default), would have expired on April 15. Because service was by mail, however, an additional 3 days are added to the prescribed period pursuant to § 25-534. Thus, Roubal would have had until April 18 to file a petition for review, making her petition filed on April 20 untimely.

Because Roubal's petition for review was not timely, the district court did not have jurisdiction to consider the merits and properly dismissed Roubal's petition. Likewise, this court does not have jurisdiction to consider the merits of Roubal's appeal, which must be dismissed.

CONCLUSION

The district court did not err in dismissing Roubal's petition for lack of jurisdiction.

APPEAL DISMISSED.

IN RE INTEREST OF DAKOTA L. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CHRISTINE T., APPELLANT.

712 N.W.2d 583

Filed March 14, 2006. No. A-05-385.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **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.

3. **Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **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.
5. **Indian Child Welfare Act: Child Custody: Jurisdiction: Domicile.** An Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. When an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
6. **Indian Child Welfare Act: Parental Rights: Jurisdiction: Domicile.** 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.
7. **Indian Child Welfare Act: Proof.** Any party seeking to effect a foster care placement of 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.
8. **Indian Child Welfare Act: Evidence: Expert Witnesses.** No foster care placement may be ordered in an involuntary proceeding in state court involving an Indian child 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.
9. **Pleadings.** An amended pleading supersedes the original pleading, whereupon the original pleading ceases to perform any office as a pleading.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Reversed and remanded with directions.

Craig H. Borlin for appellant.

Stuart J. Dornan, Douglas County Attorney, and Renee L. Mathias for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Christine T. appeals the order by the separate juvenile court of Douglas County adjudicating her five minor children under Neb.

Rev. Stat. § 43-247(3)(a) (Reissue 2004). Christine claims five separate errors with respect to the adjudication order; specifically, that (1) the court erred in assuming concurrent jurisdiction with the tribal court of the Omaha Tribe of Nebraska (Omaha Tribe); (2) the State's petition failed to meet the pleading requirements of the Indian Child Welfare Act (ICWA), thus infringing on Christine's due process rights; (3) insufficient notice was sent to the tribal court that the children had been removed from the family residence by the Nebraska Department of Health and Human Services (DHHS); (4) the court erred in finding the children to be within the meaning of § 43-247(3)(a); and (5) the court erred in finding that it was in the children's best interests to remain placed outside the home. For the reasons set forth herein, we find that jurisdiction was proper, but that the court erred when it proceeded under a petition which lacked ICWA pleading requirements. In addition, there is insufficient evidence that notice to the tribe was proper. Thus, the order of adjudication is reversed and the cause is remanded to the juvenile court, which we direct to proceed under an appropriate ICWA petition and to properly serve notice to the tribe.

BACKGROUND

This case involves five children born to Christine: Chastidy T. (born January 18, 1994), Dakota L. (born July 23, 1995), Darius L. (born December 10, 1996), Corice L. (born January 12, 1999), and Mary L. (born October 26, 2002). All five children are enrolled members of the Omaha Tribe in Macy, Nebraska. The family has had numerous contacts with DHHS and apparently has had some contact with Child Protective Services (CPS) in Macy as well, though the extent of the family's involvement with CPS and the tribal court was not clear from the record.

The family's involvement with DHHS with respect to this case began in December 2004. Specifically, on December 17, 2004, the State filed a petition in the separate juvenile court of Douglas County, alleging that the five 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 Christine. The petition included the following allegations: (1) that on or about December 15, 2004, the family home was without necessary

food, bedding, or pillows for the children; (2) that Christine had failed to provide the necessary financial or emotional support for the children's well-being; (3) that Christine had failed to assist the children in obtaining an education as required by law; (4) that Christine had failed to take advantage of services offered by DHHS and other providers to assist her children; and (5) that because of the truth of these allegations, the children were at risk for harm.

In addition to the petition alleging that the children were within the meaning of § 43-247(3)(a), the State also filed a motion for temporary custody on December 17, 2004, requesting that immediate temporary custody of all five children be placed with DHHS. The motion for temporary custody was based on an "Affidavit for Removal From Parental Home" by Jessyca Vandercoy, an initial assessment worker with DHHS. Because it is not necessary to our resolution of this case, we do not include the detailed information concerning the alleged need for removal of the children at this juncture. The affidavit indicated that according to DHHS documentation, all five children had been in numerous placements and had been removed from Christine's care several times.

Vandercoy's affidavit also included information on the family's involvement with the Omaha Tribe. Vandercoy stated:

> All five children are under the care and custody of the Tribal Court in Macy, Nebraska. The Tribal Court has been involved with this family since October 1998. The family has not been provided support services since 2003. On December 15, 2004 this worker spoke with [a] CPS [worker] in Macy. [The worker] stated that [CPS was] unable to provide services to this family because of the distance. She stated that she believes [the] Douglas County Court should have jurisdiction as the services have not [been] and are no[t] being provided to this family.

Vandercoy concluded that "[t]he Tribal Court and CPS in Macy have been unable to provide services to this family, despite removing the children over and over again," and that for this and several other reasons, the children continued to be at risk for harm and should be placed in protective custody.

On December 17, 2004, the court ordered that temporary custody of the five children be given to DHHS, with placement to exclude the home of Christine.

On December 22, 2004, a first appearance and detention/protective custody hearing was held before the court. At the start of the hearing, the court was informed by the State that "the [ICWA] will apply to this matter based on previous court intervention with this family." The court asked whether the children were actually enrolled in a tribe or eligible for enrollment, and Christine responded that the children were enrolled in the Omaha Tribe. Christine did not resist the continued detention of her children, and Christine's attorney noted that the State had agreed to provide some services to Christine, including assistance to complete a GED program, parenting classes, and the help of a family support worker. Christine entered a denial of the allegations in the petition and was told the possible consequences of her involvement with the juvenile court and informed of her rights, including the enhanced evidentiary standard of the ICWA. In its verbal findings at the conclusion of the hearing, the court stated, among other things, that the ICWA applied, that the children were enrolled members of the Omaha Tribe, and that notice of the proceedings was to be given to the Omaha Tribe. In its written detention hearing order, the court stated that it had been advised that the ICWA applied in that the children were enrolled members of the Omaha Tribe. The court ordered the continued detention of the children by DHHS.

On February 4, 2005, the State sent an "ICWA Notice" to an ICWA specialist with the Omaha Tribe. The notice indicated that a petition had been filed under § 43-247(3)(a) for the five children, alleging that they were within the jurisdiction of the separate juvenile court, and further stated that the children might be enrolled in the tribe, "thus invoking the [ICWA]." The notice included several other rights of the tribe, such as the right to intervene and the right to petition the court to transfer the proceeding to the tribal court. The next hearing date was also provided in the notice.

On February 7, 2005, the State filed an amended petition with the court. The amended petition was similar to the first petition in

its allegations, but added ICWA pleading language. Specifically, the amended petition alleged that the five children were enrolled or were eligible for enrollment in the Omaha Tribe and that pursuant to Neb. Rev. Stat. § 43-1505(4) (Reissue 2004), active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, but that those efforts had been unsuccessful.

The adjudication hearing was held on February 28 and March 1, 2005. Christine was not present when court began, and the court denied her attorney's motion to continue. The court decided to proceed on the original petition, noting that while the amended petition included language about the applicability of the ICWA, the court at the detention hearing had advised Christine that both the ICWA and its enhanced standard of proof applied, so that Christine had full notice that the ICWA was applicable. Christine's attorney noted that Christine had not been served with the State's February 4, 2005, ICWA notice. The attorney for the children's father, present for a first appearance of the father in these proceedings, stated that Christine and the father would like the case transferred to the Omaha Tribe "as has been done before" and that both parents must receive formal notice that the ICWA is applicable, even though the court had made a finding that the ICWA applied. The court responded that notice had been served on the tribe and that the court had discussed the matter with a prosecutor for the tribe, who said that he was aware of the hearing but would not be able to attend due to his involvement with another adjudication. The court noted the father's attorney's comments and stated that they were probably well placed, but that the father was not affected at that point by any lack of formal notice. The father was excused for an ongoing trial proceeding in a different case, and the hearing began on adjudication under the original petition.

During testimony of the first witness, Christine appeared in court. The court asked the State whether it wanted to proceed on the amended petition, and the State responded in the affirmative. Christine's attorney objected, stating that if the case proceeded on the amended petition, he would ask that Christine be arraigned that day on the amended petition and that he be

allowed time to meet with Christine to discuss the amended petition. The court stated that operating under the amended petition would not really change anything, because Christine had been served with a copy of the amended petition, to which statement Christine's attorney responded that he had not had time to discuss the amended petition with Christine to see whether she had any questions. The court then proceeded with the adjudication hearing on the original petition, and the testimony of the first witness continued.

That first witness, called by the State, was Vandercoy, the DHHS initial assessment worker who had written the affidavit supporting the motion for temporary custody. Vandercoy's verbal testimony was similar to the facts provided in her affidavit, albeit with more elaboration. Vandercoy also testified to the family's involvement with the Omaha Tribe. Vandercoy stated that as of December 16, 2004, the children were "in the custody of the Tribe, so they were State wards at the time." Upon cross-examination of Vandercoy by Christine's attorney, a discussion of the tribe's involvement with the family occurred, apparently for the purpose of demonstrating that in fact the tribe, not Christine, was primarily responsible for the children's well-being and that thus, Christine was not at fault if she had failed to provide for the children. Vandercoy stated that the Omaha Tribe originally became involved with the family in 1998. She was then asked when the tribe became involved in 2004, and she replied that the documentation from the tribe was confusing, but that Chastidy had been in the custody of the tribe continuously since 1998 and the other children also had been in the care and custody of the tribe continuously, though it was unclear whether the tribe had closed their case and then reopened it.

Vandercoy was then asked a series of specific questions relating to the family's involvement with the tribe. Vandercoy was asked whether the tribe had actually assumed jurisdiction of the children, and she responded yes. Vandercoy was asked whether the children were under the care and custody of the tribe at some point between her receipt of an initial report regarding the children in September 2004 and the time of the hearing, and she again responded yes. Later in her testimony, Vandercoy was

asked whether, "as far as legal jurisdiction goes, the children were in the care and control of the Omaha Tribe" on December 15 and 16, 2004, and she responded yes. Asked to elaborate with respect to the tribe's providing services to the family, Vandercoy responded that the tribe had recently provided the family a food voucher and a rent voucher, but that there were no family support services involved. She stated that no worker associated with the tribe had been out to visit the family since September, but that the tribe had had plans for a worker to come out to visit the family on December 21.

Christine's attorney continued to ask questions on the issue of Christine's responsibility for the care of her children in light of the tribe's involvement. Vandercoy responded, "The tribe had been involved and didn't — and stayed involved, so there was an assessment made by someone there that there was continued concern for these children; otherwise, they would have closed the case."

During cross-examination by the guardian ad litem, Vandercoy stated that she had tried to make contact with the tribe around the time of DHHS' December 2004 removal of the children from the family home. Vandercoy said that she left messages for a CPS worker in Macy on December 13, 14, and 15 because "we had had concerns, and the children were in the jurisdiction of the Tribe," but that she did not receive a callback until the children had already been placed into protective custody, on December 17. Vandercoy testified that she spoke with the family's tribal case manager on December 17. Vandercoy further stated that workers for the tribe had explained that the distance was too great for them to be able to provide supervision of the situation or provide services to the family.

Tayla Dickey, a DHHS protection and safety worker assigned to the case, also testified as to the family's involvement with the tribe. On cross-examination by the guardian ad litem, Dickey was asked whether the children had been in the custody of DHHS or in the custody of the Omaha Tribe in September 2004, when Vandercoy received the above-mentioned initial report of concern. Dickey responded that it was her understanding that they had been under the custody of the Omaha Tribe during that time. On recross-examination by Christine's attorney, Dickey

was asked whether she knew of any "court order from the Omaha Tribe . . . giving Christin[e] any direction as to what she's supposed to do." Dickey responded that she did not and that she did not have any order from the Omaha Tribe in the family's case file.

Christine testified about her involvement with the Omaha Tribe as well. Her attorney initiated the following line of questioning:

> Q. And have you had an action or a matter in the Omaha Tribal Court since October 1st of 2004?
>
> A. Have I had — excuse me?
>
> Q. Has there been a matter concerning the children in the Omaha Tribal Court since October of 2004?
>
> A. No. Like explain it to me.
>
> Q. When you were in this court previously in September —
>
> A. Uh-huh.
>
> Q. — was the matter transferred to the Omaha Tribal Court —
>
> A. Yes.
>
> Q. — at that time?
>
> A. Yes.
>
> Q. And was that approximately October 1st of 2004?
>
> A. That was back in January of 2004.
>
> Q. Have you been continuously under the jurisdiction of the Omaha Tribal Court during the year of 2004, then?
>
> A. Yes.
>
> Q. Have you appeared before the Omaha Tribal Court during 2004?
>
> A. No, I have not.
>
> Q. Have you been issued any orders concerning the children out of the Omaha Tribal Court during 2004?
>
> A. No, just find [sic] housing.
>
> Q. Do you have a caseworker through the Omaha Tribal Court?
>
> A. [Yes].
>
> Q. And when was the last time that you met with [her]?
>
> A. Back in November.

> Q. In the time prior to November of 2004, when did you meet with [her]?
>
> A. Other than that, I haven't met with her, but I've talked to her.

Christine gave further confirmation that the tribe had intervened in a proceeding in January 2004, and she testified that the children had been taken to Macy in February and returned to her in May. Chastidy was later placed in a shelter in Macy and returned to live with Christine on November 29. Christine stated that she had not received services from the tribe since August.

Additional evidence was presented regarding the allegations in the petition concerning Christine's care of the children, which evidence we need not detail here. At the conclusion of the hearing, the court made the following observation:

> First of all, [I] remind everyone that we are working off the original petition which was filed on December 17, 2004 and that the Court has made a finding that due to the application of the [ICWA], even to this original petition, that enhanced standards of proof do apply to the Court's findings which will be made in just a minute or two.

The court then adjudicated the children under § 43-247(3)(a). In its written adjudication order, the court found that the ICWA applied to these proceedings with the "corresponding enhanced burdens of proof." The court found the following allegations of the petition to be true, by clear and convincing evidence: (1) that on or about December 15, 2004, the family home was without necessary food, bedding, or pillows for the children; (2) that Christine had failed to provide the necessary financial or emotional support for the children's well-being; and (3) that because of the truth of these allegations, the children were at risk for harm. The court dismissed two remaining allegations due to a lack of proof by clear and convincing evidence, namely that Christine had failed to assist the children in obtaining an education as required by law and that she had failed to take advantage of services offered by DHHS and other providers to assist the children. The court also found that it would be contrary to the health and safety of the children for them to be returned home and that it was in the best interests of the children to remain in the temporary custody of DHHS for appropriate care

and placement. No specific findings under the ICWA were made. Christine appeals from this adjudication order.

ASSIGNMENTS OF ERROR

On appeal, Christine assigns the following errors: (1) that the juvenile court assumed concurrent jurisdiction of the case with the tribal court when it had no right to do so; (2) that the State's petition failed to meet the pleading requirements of the ICWA, infringing on Christine's due process rights; (3) that insufficient notice was sent to the tribal court that the children had been removed from the family residence by DHHS; (4) that the juvenile court found the children to be within the meaning of § 43-247(3)(a); and (5) that the juvenile court found that it was in the children's best interests to remain placed outside the home.

STANDARD OF REVIEW

[1,2] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.* A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Id.*

ANALYSIS

JURISDICTION

[3,4] Christine's first assignment of error is that the separate juvenile court erred when it assumed concurrent jurisdiction over the children with the tribal court. Although the issue of whether the tribal court had exclusive jurisdiction was not raised at any point in the trial proceedings, the issue of subject matter jurisdiction can be raised at any time. See *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002) (lack of subject matter jurisdiction may be raised at any time by any party or by court sua sponte). 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., supra.*

[5,6] Christine claims that the tribal court had exclusive jurisdiction of the children under 25 U.S.C. § 1911(a) (2000) of the federal ICWA and under Neb. Rev. Stat. § 43-1504(1) (Reissue 2004) of the Nebraska ICWA. Section 43-1504(1) of the Nebraska ICWA provides as follows:

> An Indian tribe shall have jurisdiction exclusive as to this state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. When an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Concurrent jurisdiction is addressed in the federal ICWA at § 1911(b) and in the Nebraska ICWA at § 43-1504(2), the latter of which reads as follows:

> 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.

From the language of § 43-1504(1), it is clear that in a child custody proceeding involving an Indian child, the tribe has exclusive jurisdiction in two instances: (1) when the Indian child resides or is domiciled within the reservation, except where jurisdiction is otherwise vested in the state by existing federal law, and (2) when the Indian child is a ward of a tribal court, notwithstanding the residence or domicile of the child.

At the time of removal, Christine's children were neither residing nor domiciled on the reservation, making the first instance enumerated above inapplicable to the present case. However, Christine argues that the second instance is applicable because the children were in fact "wards" of the tribal court. While jurisdictional issues under other § 43-1504 subsections have been discussed by Nebraska courts (see, e.g., *In re Interest of Brittany C.*

et al., 13 Neb. App. 411, 693 N.W.2d 592 (2005), and *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992) (involving tribe's motion to transfer jurisdiction to tribal court under § 43-1504(2))), exclusive jurisdiction under § 43-1504(1) appears to be an issue of first impression in Nebraska.

Other state courts have addressed a tribal court's exclusive jurisdiction under the federal ICWA statute § 1911(a), although in different factual situations. The Supreme Court of Indiana addressed the issue in *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988). At issue in that case was the validity of an adoption decree granted in a state trial court. Before the adoption decree was granted, a tribal court had filed a motion to transfer the case, attaching a copy of an order of wardship of the child which had been entered 1 day before the adoptive parents filed their petition for adoption. The state trial court denied the tribal court's motion to transfer and granted the adoption. On appeal, the Indiana Supreme Court first found that the ICWA was inapplicable, for reasons unrelated to those at issue in the present case; but the court went on to state that even if the ICWA was applicable, the tribal court had not enacted a valid wardship of the child, and therefore, exclusive jurisdiction could not exist under § 1911(a) by reason of the child's being a ward of the tribal court.

Exclusive jurisdiction under § 1911(a) was also addressed by the Supreme Court of Montana, in *Matter of M.R.D.B.*, 241 Mont. 455, 787 P.2d 1219 (1990). In that case, an Indian mother put her child up for adoption and an adoption petition was filed in a state trial court. The tribal court was given notice of the adoption proceedings and filed a motion to dismiss the petition for lack of jurisdiction. The state trial court found that the child was not a ward of the tribal court and that concurrent jurisdiction existed under § 1911(b). On appeal, the Supreme Court of Montana found that the child was in fact a ward of the tribal court because the child's mother had previously submitted herself to the jurisdiction of the tribal court by petitioning the court to take over the care and custody of her child, insofar as an infant becomes such a ward when its parents submit themselves to the jurisdiction of a tribal court. In addition, the supreme court noted that after granting the mother's petition and taking jurisdiction over the child, the tribal court had repeatedly referred to the child as a "ward" in its

orders. Therefore, the supreme court reasoned, because the child was a ward of the tribal court, the tribal court had exclusive jurisdiction under § 1911(a) and it was error on the part of the state trial court to determine that the state had concurrent jurisdiction over the child.

Even though these cases involved adoption proceedings rather than a juvenile adjudication, which is the issue in the present case, the jurisdictional question is the same. The tribal court in this case would have had exclusive jurisdiction over the children if they were in fact wards of the tribal court. In the two cases discussed above, the issue of exclusive jurisdiction was raised by the tribal court, by the motions to transfer or to dismiss. Those cases were resolved by virtue of the existence (or lack) of evidence concerning a valid wardship.

In this case, no direct evidence of wardship exists. Neither the tribe nor the tribal court attempted to intervene in the proceedings. Christine did not petition the juvenile court to transfer the proceeding to the tribe pursuant to § 43-1504(2). The testimonial evidence given at trial was inconclusive as to whether the children were currently wards of the tribal court. There was no documentary evidence provided which demonstrated that the children were wards of the tribal court. Because the record does not conclusively establish that the children were currently wards of a tribal court and because the children were not residing within the reservation of the tribe, we find no error in the juvenile court's exercise of jurisdiction over the children. This conclusion does not preclude intervention by the tribe at subsequent proceedings or presentation of further proof of the status of tribal court proceedings; nor do we intend by this conclusion to suggest how any subsequent motion to transfer jurisdiction should be determined.

Failure to Meet ICWA Pleading Requirements

[7,8] Christine next contends that the State's petition failed to meet the pleading requirements of the ICWA and that such failure infringed on her due process rights. Two petitions for adjudication were filed in this case: an "original" petition and then, later, an "amended" petition. The original petition did not include any language concerning the ICWA, while the amended petition

included ICWA pleading language, specifically the language of § 43-1505(4). Section 43-1505(4) states that "active efforts" to prevent the breakup of the Indian family must be made when a "foster care placement" of an Indian child is involved. The exact text of § 43-1505(4) is as follows:

> 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.

Christine claims that the juvenile court erred when it proceeded under the original petition, which had no ICWA language, instead of the amended petition, which included the § 43-1505(4) language. Although Christine references only § 43-1505(4), we note that neither the original petition nor the amended petition alleges facts with regard to § 43-1505(5), which provides:

> 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.

This court has addressed the issue of proper pleading under the ICWA once before in *In re Interest of Sabrienia B.*, 9 Neb. App. 888, 621 N.W.2d 836 (2001). In that termination of parental rights case, the State failed to include ICWA language in its motion for termination, even though all parties had stipulated previously that the child was Indian and that the ICWA would apply to any termination proceedings. The termination motion included general termination language under Neb. Rev. Stat. § 43-292 (Reissue 1998), but omitted specific ICWA language under § 43-1505(4) and (6). Again, § 43-1505(4) requires that "active efforts" be made to prevent the breakup of the Indian family, and § 43-1505(6) is similar to § 43-1505(5) above, requiring a demonstration that the continued custody of the child by the parent is likely to result in "serious emotional or physical damage" to the child in a termination of parental rights case. See *id.*

The mother in *In re Interest of Sabrienia B.* filed a demurrer to the termination motion, claiming that because ICWA language was not included in the State's motion, the allegations in the motion failed to " 'articulate an essential element to sustain a finding and Order of termination.' " 9 Neb. App. at 890, 621 N.W.2d at 839. The demurrer was denied, and the mother's parental rights were terminated. In its termination order, the juvenile court concluded that the State had proved the requirements of the Nebraska ICWA's § 43-1505(4) and (6), even though the ICWA language did not appear in the motion. The mother appealed from the termination order, claiming that the court erred in overruling her demurrer and in finding that the State's motion stated a cause of action.

On appeal, the State argued that by pleading general termination grounds in its motion, it had satisfactorily pled the ICWA requirements as well. Specifically, the State argued that it had addressed the ICWA's "active efforts" requirement in § 43-1505(4) when it pled in its motion that "reasonable efforts" to preserve and reunify the family pursuant to § 43-292(6) had failed to correct the conditions leading to the determination that the child lacked proper parental care. In addition, the State argued that the ICWA's requirement of demonstrating that continued custody by the parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child, found in § 43-1505(6), was adequately pled when the State pled under § 43-292 that termination was in the "best interests of the child."

On appeal, this court held that the " 'active efforts' " requirement of the Nebraska ICWA's § 43-1505(4) is "*separate and distinct from* the 'reasonable efforts' provision of § 43-292(6)," and thus upheld the mother's contention that the State must plead sufficiently to put the ICWA and § 43-1505 in issue. (Emphasis supplied.) *In re Interest of Sabrienia B.*, 9 Neb. App. at 895, 621 N.W.2d at 842. We found that the State's motion failed to allege facts sufficient to constitute an action for termination of parental rights under the Nebraska ICWA. The facts that the applicability of the ICWA had been discussed verbally in court and that the court specifically found in its order that the State had adequately proved the relevant ICWA requirements did not rectify the failure of the motion to include the relevant

ICWA language. We reversed the order of termination, and on remand, we granted the State leave to amend the motion.

Applying the rationale of *In re Interest of Sabrienia B.*, we conclude that in an action for adjudication of Indian children, it is necessary to plead facts under the ICWA. In this case, while the State did file an amended petition including allegations required under the ICWA, the court did not adjudicate the children under the amended petition. It was error for the court to proceed on the adjudication under the original petition, which did not allege facts under the ICWA. This is so despite the fact that Christine had been served with the amended petition and had been notified in court that the ICWA was applicable.

[9] Further, upon the filing of the amended petition, the preceding petition ceased to have any function. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996) (amended pleading supersedes original pleading; after amendment, original pleading ceases to perform any office as pleading). We conclude that it was also error for the juvenile court to proceed under the original petition because that pleading ceased to function upon the filing of the amended petition.

Accordingly, we reverse the order of adjudication and remand the cause to the juvenile court for an adjudication under an appropriate amended petition, with directions to the court to make specific findings as required by § 43-1505.

NOTICE TO TRIBE

Christine also claims that insufficient notice was given to the tribal court that the children had been removed from the family residence by DHHS, resulting in the tribal court's having insufficient notice to exercise its exclusive jurisdiction over its wards.

Notice requirements in a case involving the ICWA can be found at § 43-1505(1), which states as follows:

> In any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by certified or registered mail with return receipt requested, of the pending proceedings and of their right of

> intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the secretary in like manner, who may provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the secretary. The parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

This is an involuntary proceeding in a state court involving the foster care placement of Indian children. Therefore, § 43-1505(1) is applicable, and to be proper, the notice given to the tribe must have followed the specific requirements of that subsection. Restated, the subsection requires that notice be sent (1) to the "Indian child's tribe," *id.*; (2) by certified or registered mail with return receipt requested; (3) with notice of the pending proceedings; and (4) with notice of the tribe's right of intervention. In addition, the subsection states (5) that no foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the tribe and (6) that the tribe may have an additional 20 days to prepare for the proceeding, if requested.

Correspondingly in part, the ICWA notice in the instant case (1) was sent to the tribe on February 4, 2005, (2) was sent by certified mail with return receipt requested, (3) declared that a petition had been filed under § 43-247(3)(a) concerning the children, (4) stated the tribe's right of intervention, (5) stated that no foster care or termination proceeding shall take place until at least 10 days after receipt of the notice, and (6) added that the tribe could have an additional 20 days to prepare, if requested. Although Christine has not stated on appeal the specific requirements in § 43-1505(1) with respect to which she found error, it appears that she is asserting error regarding the person to whom the notice was sent (requirement (1)) and regarding the tribe's not specifically being made aware that the children were already in a state foster care placement when the notice was sent (perhaps falling under requirement (3)).

First, Christine claims that the ICWA notice should have been sent to the tribal court of, rather than an "ICWA specialist" with, the Omaha Tribe. However, Christine cites no authority for this. The plain language of § 43-1505(1) provides that notice must be sent to the "Indian child's tribe." The statute makes no mention of sending notice to the "tribal court."

Nebraska courts have not addressed the issue of to whom specifically the notice should be sent when the statute directs that it be sent to the "Indian Child's tribe." The Supreme Court of Indiana, however, addressed this issue in a termination of parental rights case, when tribal notification was given via subpoenas served on two representatives of the Potawatomi Indian Nation. See *Matter of D.S.*, 577 N.E.2d 572 (Ind. 1991). In that case, the supreme court found that the record was not clear as to whether the notification directed to those two individuals complied with the notice requirements in a federal ICWA statute, 25 U.S.C. § 1912(a) (1988). That federal ICWA subsection, pertaining to notice, is similar to the Nebraska ICWA's corresponding notice subsection in that it states that notice should be served on the "Indian child's tribe." See, § 1912 (2000); § 43-1505(1).

The supreme court noted that the Bureau of Indian Affairs has published guidelines, regarding the notice requirements, which correspond to and supplement the requirements in § 1912(a). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (not codified). It further noted that the Bureau of Indian Affairs authorizes tribes to designate an agent for service of notice of child custody proceedings. See 25 C.F.R. § 23.12 (2005). The names and addresses of the designated agents are published in the Federal Register. The supreme court held that the record did not show that these two persons were the tribal agents designated and entitled to receive service of notice, so the case was remanded to the trial court to serve notice to the tribe in a manner which conformed with the ICWA.

In this case, notice was given by a letter mailed to a named "ICWA specialist" with the Omaha Tribe. From the record in this case, it is not clear whether notification directed to the ICWA specialist complied with the ICWA's notice requirements. Because we are remanding this matter for a new adjudication

hearing, we direct that notice be given to the tribe as required by the ICWA.

Second, Christine appears to argue that the notice sent to the tribe was insufficient because it failed to notify the tribe that the children were in a state foster care placement at the time the notice was sent. However, Christine points to no specific language in § 43-1505(1) that requires this kind of information to be included in the notice. In fact, the plain language of § 43-1505(1) does not require the child's current placement to be included in the notice. The only part of § 43-1505(1) which even remotely addresses this information is the requirement that the tribe be notified of the "pending proceedings." In this case, the ICWA notice stated that the addressee was "hereby notified that there has been filed in the Separate Juvenile Court for Douglas County, Nebraska, a Petition and Order alleging that [the children] are [children] as defined in Neb.Rev.Stat. §43-247(3)(a) and alleging they are within the jurisdiction of the Court." This satisfied the requirement that the tribe be given notice of the "pending proceedings." Furthermore, an inspection of the ICWA notice in this case shows that the tribe was provided some information regarding the children's state foster care placement, as the notice stated that several documents were attached, including the "Affidavit for Removal From Parental Home," motion for temporary custody, and order for immediate custody. Thus, even though explicit notice that the children may have been in a state foster care placement at the time the ICWA notice was sent was not required, the tribe should have been on notice as to that fact.

CONCLUSION

We find that jurisdiction in this case was proper. However, it was error for the juvenile court to adjudicate the children under the original petition, as opposed to the amended petition. In addition, there is insufficient evidence that notice to the tribe was proper. Accordingly, we reverse the order of adjudication and remand the cause to the juvenile court for an adjudication under an appropriate ICWA petition, with notice to be served to the Omaha Tribe which conforms to the ICWA. Because we remand the cause to the juvenile court for the foregoing reasons, we decline to address Christine's additional assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS.

LOREE ZACH ET AL., APPELLEES, V. NEBRASKA STATE PATROL, APPELLANT.

710 N.W.2d 877

Filed March 21, 2006. No. A-05-449.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A trial court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) 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: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief.
3. **Pleadings.** 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.
4. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) 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.
5. **Workers' Compensation.** The Nebraska Workers' Compensation Act is to be given a liberal interpretation for the benefit of the claimant.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jon Bruning, Attorney General, and Lisa D. Martin-Price for appellant.

Terry M. Anderson and Steven M. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellees.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

The Nebraska State Patrol appeals from an order of the Nebraska Workers' Compensation Court review panel reversing the trial court's determination that the third amended petition filed by Loree Zach, Andrew Zach, Preston Zach, Jordan Zach, Cody Zach, Siera Zach, Ariel Zach, and Parker Zach (appellees) failed to state a claim upon which relief could be granted pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003).

BACKGROUND

On May 28, 2004, appellees filed a third amended petition in the Workers' Compensation Court requesting that they be awarded benefits under the Nebraska Workers' Compensation Act. The third amended petition alleges that on September 27, 2002, decedent Mark Zach, who had been a trooper with the Nebraska State Patrol, was killed as a result of "a self-inflicted gun shot wound in an accident, or as a result of an occupational disease, arising out of and in the scope and course of [his] employment with [the Nebraska State Patrol,] which accident and/or occupational disease occurred/developed in Madison County, Nebraska."

Pertinent portions of the factual background section of the third amended petition are as follows:

> 5. That the events and facts relating to the accident/occupational disease are as follows: Mark Zach was employed as a State Trooper and generally patrolled in an area including Madison County, Nebraska. On a date approximately two weeks prior to Zach's death, he stopped multiple suspects in Norfolk, Nebraska. In the course of investigating the activities of the suspects Zach found one of them to be armed with a pistol. Zach communicated the serial numbers from the handgun to a dispatcher. There was a miscommunication in the exchange between Zach and the dispatcher or an error on the part of one or the other of them the result of which was the failure to identify the handgun as stolen generally and specifically stolen from a sports store known as "Outdoors Unlimited". The consequence of failing to identify the handgun as stolen was that the suspects were not properly charged with possession of a stolen firearm and law enforcement was unable to take what would have been a lead in the "Outdoors Unlimited burglary" case and investigate whether the suspects were involved in that burglary or in possession of additional firearms which were stolen in the "Outdoors Unlimited burglary." These suspects were among those participants in a bank robbery in Norfolk, Nebraska (hereinafter "Norfolk bank robbery") during which several persons were murdered. The perpetrators of the "Norfolk

bank robbery" included two of the individuals stopped by Zach and involved weapons which had been stolen in the "Outdoors Unlimited burglary". The deaths which took place in the "Norfolk bank robbery" devastated the community of Norfolk where Zach resided. On the day following the "Norfolk bank robbery", Zach was summoned to the State Patrol offices where he was advised that the suspects in the "Norfolk bank robbery" included two of the individuals he had stopped two weeks earlier. He was further advised that the murders in the bank robberies were accomplished with guns stolen in the "Outdoors Unlimited burglary" and that there had been a miscommunication between himself and the dispatcher, the result of which was the failure to identify the handgun found on the suspects during the stop as a gun stolen from the "Outdoors Unlimited burglary". Upon being advised of the circumstances, Zach felt responsible for the murders in the "Norfolk bank robbery" and became very distraught.

6. [Appellees'] decedent suffered an "accident" resulting in a "personal injury" inasmuch as the sudden stimulus (i.e., being advised of the consequences of an error) caused Zach's brain to undergo physical changes which, in turn, led Zach to a state of mind which overroad [sic] his will to the extent that even knowledge of the consequences of the act of suicide did not prevent Zach from taking his own life.

7. That [appellees'] decedent suffered an "occupational disease" inasmuch as the exposure to the stress of his employment resulted in an identifiable mental disease which disease, in turn, led Zach to a state of mind which overrode his will to the extent that even knowledge of the consequences of the act of suicide did not prevent Zach from taking his own life; that the stress put upon Zach which led to his mental disease is due to causes and conditions which are characteristic of and peculiar to law enforcement inasmuch as law enforcement officers are repeatedly charged with the community's safety, repeatedly exposed to stressful situations and suffer a peculiar and extreme degree of stress when faced with the fatal consequences of their law enforcement activities.

On June 4, 2004, the Nebraska State Patrol (hereinafter appellant) filed a motion to dismiss appellees' third amended petition for failure to state a claim upon which relief can be granted under rule 12(b)(6). The pertinent portion of appellant's motion to dismiss is as follows:

> Specifically, [appellant] avers that [appellees'] claims against it are barred because [appellees] have not stated that decedent, Mark Zach, suffered a physical injury in an accident arising out of and in the course of his employment with [appellant]. The act of suicide, without an underlying injury to the employee's person, which injury, and the pain and/or depression resulting therefrom, later caused the injured worker to take his or her own life, is not an "accident" arising out of and in the course of employment as defined by the Nebraska Workers' Compensation Act. *See* [appellees'] Third Amended Petition, paragraphs 5-7.

On August 27, 2004, the trial court entered an order finding that appellees' third amended petition failed to state a claim upon which relief could be granted against appellant, and the trial court dismissed appellees' petition with prejudice. On September 8, appellees filed an application for review, asking the compensation court review panel to reverse the trial court's decision and reinstate the third amended petition. On February 28, 2005, the review panel entered an order reversing the trial court's decision and remanding the cause for trial on appellees' claim that decedent Zach suffered an injury from an accident and/or an occupational disease on September 27, 2002. Appellant now appeals the review panel's decision.

ASSIGNMENTS OF ERROR

Appellant assigns, restated, that the review panel erred in (1) reversing the trial court's decision that appellees failed to state a claim upon which relief could be granted and (2) relying on *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991), as the basis for its decision.

STANDARD OF REVIEW

[1] This action involves a rule 12 motion to dismiss for failure to state a claim. A trial court's grant of a motion to dismiss

for failure to state a claim under rule 12(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. *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

ANALYSIS

An employee is entitled to benefits under the Nebraska Workers' Compensation Act if personal injury is caused to an employee by accident or occupational disease arising out of and in the course of his or her employment. See Neb. Rev. Stat. § 48-101 (Reissue 2004). The term "accident" is defined in Neb. Rev. Stat. § 48-151(2) (Reissue 2004) as follows:

> Accident means an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant has the burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment.

The term "occupational disease" is defined in § 48-151(3) as follows: "Occupational disease means only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed." "Injury" is defined in § 48-151(4) as follows:

> Injury and personal injuries mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment. The terms include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms do not include disability or death due to natural causes but occurring while the employee is at work and do not include an injury, disability, or death that is the result of a natural progression of any preexisting condition.

Appellant argues that the trial court appropriately found that "violence to the physical structure of the body" is a necessary element for either an "accident" or an "occupational disease" and that physical changes in decedent's brain do not constitute "violence to the physical structure of the body." The trial court noted that appellees pled alternative theories of recovery, to wit: an accident and an occupational disease. In its order of dismissal, the trial court found:

> [W]hether the [decedent's] suicide is deemed an "accident" or an "occupational disease" the underlying condition that resulted in the [decedent's] suicide as alleged in the petition was mental stress. Mental stress whether it be deemed from an "accident" or an "occupational disease" must be accompanied by a prior physical insult to the physical structure of the body as required in Bekelski v. O.F. Neal Company, 141 Neb 657, 4 N.W.2d 741 (1942) where at page 290 the plaintiff is required to at least show that, "The appellant in this case had to produce at least some minimal evidence of actual physical injury."

The trial court also noted that appellees' petition alleges that when decedent was notified of the mistake in the gun serial numbers, this led decedent's " 'brain to undergo physical changes.' " The trial court held:

> To the extent that the [appellees'] decedent's brain did undergo "physical changes" the changes must be proceeded [sic] by violence to the physical structure of the body. As a matter of law, the mere talking or being informed of a problem does not rise to the level of violence to the physical structure of the body as contemplated by the Nebraska Supreme Court in *Bekelski, supra.*

In *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942), the Nebraska Supreme Court reversed an award in favor of the employee, noting that the terms "injury" and "personal injuries" mean only violence to the physical structure of the body. The Supreme Court went on to state:

> It seems to us that the legislature required, not only that there should be an accident attended by objective symptoms arising out of and in the course of the employment, but that the accident must be accompanied by violence to

> the physical structure of the body. The language indicates a clear distinction between physical and bodily injury on the one hand and mental, nervous and psychiatric injury unaccompanied by violence to the physical structure of the body on the other. The plain import of the words used eliminates from the operation of the law disabilities resulting from mental disturbances, nervousness and psychiatric ailments when violence to the physical structure of the body cannot be established.

Id. at 660, 4 N.W.2d at 743.

In reversing the trial court's decision in the instant case, the review panel relied on *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991). In *Tarvin*, the employee experienced excessive pressure and stress at work due to disciplinary actions against him. His work was regularly monitored by supervisors, and fellow workers excluded him from social events and coffeebreaks. Finally, while en route to work one day, the employee became so filled with anxiety that he was unable to enter an elevator at work, and he had been unable to work since that incident. The employee filed a claim for workers' compensation benefits based on his disabling depression and anxiety, which he claimed were aggravated by his job-related mental and/or physical stresses, pressures, and activities. The employee had preexisting depression due to a prior non-work-related leg injury. At trial, one psychiatrist testified that job-related stress caused a neurochemical level in the employee's brain to become imbalanced, which prevented normal transmission of messages from the employee's brain. Another psychiatrist testified at trial that the employee's brain chemistry had not been altered or changed by the stress experienced at work. This psychiatrist concluded that there was no causal relationship between any job-related stress and the employee's present mental condition. The Workers' Compensation Court found that the employee failed to prove compensability of his condition, and the court dismissed the action.

On appeal, the Nebraska Supreme Court noted that the employee claimed he "suffered 'violence to the physical structure of the body,' since he suffered a biochemical alteration of his brain and because 'a contributing factor [in the] exacerbation of

his pre-existing anxiety and depression was increased pain in his gunshot leg caused by walking and carrying documents at work.' " *Tarvin*, 238 Neb. at 856, 472 N.W.2d at 731. The Supreme Court noted the different opinions as to the cause of the employee's mental condition and held that the record presented nothing more than conflicting medical testimony and that it would not substitute its judgment for that of the compensation court in such cases. The court affirmed the order dismissing the petition.

In the present case, appellees allege that decedent's brain underwent physical changes from the sudden stimulus of being advised of the consequence of an error. The review panel noted that in *Tarvin, supra*, the Supreme Court affirmed the dismissal of a petition claiming benefits due to stress and changes in the employee's brain, not because the employee failed to show violence to the physical structure of the body, but because there was a conflict in the evidence as to whether there was violence to the physical structure of the body. The review panel determined that the holding in *Tarvin, supra*, indicates that a trial with receipt of evidence is necessary when there is a claim that the brain underwent physical changes. The review panel concluded that in the instant case, "[w]hether or not physical changes in the brain constitute an injury can only be decided after receipt of evidence as to what happened to [decedent's] brain."

[2-5] We agree with the review panel's conclusion that whether physical changes in decedent's brain constitute an injury, i.e., "violence to the physical structure of the body," is an issue to be determined after evidence is presented. Such a determination cannot and should not be made at this juncture. The only question before us is whether appellees' third amended petition states a claim upon which relief could be granted. Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005). See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). 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. *Spear T Ranch, supra*, citing *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999). As a practical matter, dismissal under rule 12(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. *Id.* Further, the Nebraska Workers' Compensation Act is to be given a liberal interpretation for the benefit of the claimant. See *Arbtin v. Puritan Mfg. Co.*, 13 Neb. App. 540, 696 N.W.2d 905 (2005). Accepting all of the allegations in the petition as true and drawing all reasonable inferences in favor of appellees, we determine that appellees' third amended petition does state a claim upon which relief could be granted such that it should not be dismissed pursuant to rule 12(b)(6). Appellees are entitled to an opportunity to produce evidence to show that the physical changes in decedent's brain constitute a compensable injury under the Nebraska Workers' Compensation Act. Accordingly, we determine that appellant's assignments of error are without merit, and we affirm the review panel's order of reversal.

CONCLUSION

We affirm the order of the Workers' Compensation Court review panel reversing the trial court's determination that the appellees' third amended petition failed to state a claim upon which relief could be granted pursuant to rule 12(b)(6) and remanding the cause for trial.

AFFIRMED.

CASSEL, Judge, dissenting.

The crux of the issue is whether an allegation of "physical changes" to the brain is sufficient to allege a compensable "injury," which in turn requires "violence to the physical structure of the body." I would hold that it is not sufficient.

Because the right of recovery of workers' compensation benefits is purely statutory, see *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986), I begin by quoting the language of Neb. Rev. Stat. § 48-151(4) (Reissue 2004) as follows:

> Injury and personal injuries mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms include disablement

> resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment. The terms include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms do not include disability or death due to natural causes but occurring while the employee is at work and do not include an injury, disability, or death that is the result of a natural progression of any preexisting condition.

The appellees' argument recognizes that the act of suicide cannot constitute the "violence to the physical structure of the body" necessary to establish an "injury" within the meaning of the statute. Once there has been a compensable "injury," i.e., once the "violence to the physical structure of the body" has occurred, then it becomes possible that the subsequent act of suicide is a consequence naturally flowing from the injury. To supply the required allegation of "injury," the appellees depend upon the allegation of "physical changes" to Zach's brain.

In *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988), the Nebraska Supreme Court, in interpreting the statutory definition of "injury," adhered to the meaning attributed in *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942), to that language. The Supreme Court stated that the statutory language

> "indicates a clear distinction between physical and bodily injury on the one hand and mental, nervous and psychiatric injury unaccompanied by violence to the physical structure of the body on the other. The plain import of the words used eliminates from the operation of the law disabilities resulting from mental disturbances, nervousness and psychiatric ailments when violence to the physical structure of the body cannot be established."

Sorensen v. City of Omaha, 230 Neb. at 289-90, 430 N.W.2d at 698 (quoting *Bekelski, supra*). See, also, 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §§ 56.04D and 56.06D[4] (2005) (stating that under § 48-151(2) and (4), claimant must suffer accident that causes violence to physical structure of body before mental impairment or disability may be compensable).

The *Sorensen* court also recognized that in *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985), the court implicitly reaffirmed the principles set out in *Bekelski*. In *Johnston*, the physical trauma and mental stimulus induced a physical injury, namely "minimal superficial erosions of the lower esophagus and minimal superficial erosion of the duodenal bulb." 219 Neb. at 459, 364 N.W.2d at 3.

I agree with the majority that we review de novo the trial court's grant of a motion to dismiss, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. See *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005). In the instant case, the appellees allege only "physical changes" to Zach's brain. Even where one draws all reasonable inferences in favor of the appellees and construes the language liberally in the appellees' favor, see *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005), I do not agree that this allegation asserts "violence to the physical structure of the body."

Both the majority of this court and the Workers' Compensation Court review panel seem to have principally relied upon *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991). There is, however, a critical difference between the procedural posture in *Tarvin* and the situation in the instant case. In *Tarvin*, upon rehearing, the Workers' Compensation Court found that the employee failed to prove compensability of his condition and dismissed the action. The Nebraska Supreme Court, citing the standard of review then applicable to findings of fact made by the Workers' Compensation Court after rehearing—giving such findings the same force and effect as a jury verdict in a civil case and not setting aside such findings unless they are clearly wrong—affirmed the dismissal. Although the employee in *Tarvin* argued that he had suffered a biochemical alteration of his brain, the Supreme Court noted medical evidence that the stress from the employment produced no chemical alteration and that the employee's mental condition and resultant disability were attributable solely to the employee's condition before employment. The Supreme Court simply held that the Workers' Compensation Court's factual findings were not clearly erroneous; the *Tarvin* court did not state or hold that a biochemical

alteration of the brain constitutes violence to the physical structure of the body. It was not necessary for the court to consider that proposition in order to resolve the case, and the decision in *Tarvin* is not binding precedent in that regard. See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004) (case is not authority for any point not necessary to be passed on to decide case).

The reasoning of the majority of this court, as well as the reasoning of the compensation court review panel, seems to me to ignore the significance of the word "violence" in the statutory definition of "injury." Since the decision of the Supreme Court in *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988), the Legislature has not substantively amended the definition of "injury" in the Nebraska Workers' Compensation Act. When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). The reasoning of the *Sorensen* court, reiterating and confirming the interpretation from *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942), requires more than "physical changes." The physical structure of every human body is constantly changing. By adopting the definition of injury requiring "violence to the physical structure of the body," the Legislature required more than mere physical change to establish a compensable injury.

Because I disagree that the bare allegation of "physical changes" to Zach's brain is sufficient to set forth a claim of a compensable "injury," I respectfully dissent.

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V.
PAUL K. RIVERA, APPELLEE AND CROSS-APPELLANT.

711 N.W.2d 573

Filed March 28, 2006. No. A-04-1142.

1. **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.

2. **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.
3. **Constitutional Law: Statutes: Jurisdiction: Time: Appeal and Error.** The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal.
5. **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.
6. **Prosecuting Attorneys.** An objection to the appearance of counsel appointed pursuant to Neb. Rev. Stat. § 23-1204.01 (Reissue 1997) must be supported by at least some showing that the county attorney did not request or require any assistance and that the court did not appoint counsel for such purpose.
7. ____. A prosecuting attorney, for purposes of Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2004), means a county attorney, city attorney, or designated attorney.
8. **Prosecuting Attorneys: Actions.** An assistant attorney general is the agent of the Attorney General and not an independent officer, and his official acts must be performed in the name of his principal.
9. **Rules of the Supreme Court: Time: Appeal and Error.** According to Neb. Ct. R. of Prac. 9A (rev. 2001), briefs must be filed within the times stated in the rules.
10. **Rules of the Supreme Court: Notice: Appeal and Error.** Failure to file a brief in response to a notice of default subjects the appeal to dismissal.
11. **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.
12. **Sentences: Appeal and Error.** In determining whether a sentence imposed is excessively lenient, Neb. Rev. Stat. § 29-2322 (Reissue 1995) requires that an appellate court consider (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct; (b) to protect the public from further crimes of the defendant; (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.
13. ____: ____. It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.
14. ____: ____. So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, an appellate court cannot say that a trial court has abused its discretion. Such a sentence is not untenable, does not unfairly deprive a litigant of a substantial right, and does not deny a just result.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Jon Bruning, Attorney General, and Corey M. O'Brien for appellant.

James H. Monahan and Maureen K. Monahan, of Monahan & Monahan, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

Paul K. Rivera pled no contest to child abuse, a Class IIIA felony, and the district court for Douglas County sentenced Rivera to 3 years' probation. The State of Nebraska, through a specially appointed deputy county attorney, appeals the sentence imposed on Rivera as excessively lenient. Rivera cross-appeals, alleging that (1) because the record fails to show that the Douglas County Attorney requested the appointment, the district court lacked the authority to appoint a special deputy county attorney; (2) the State failed to follow the proper procedure to appeal the sentencing; and (3) the State failed to timely file an appellate brief. For the reasons set forth below, we affirm.

II. BACKGROUND

The State originally charged Rivera with child abuse on December 1, 2003, in violation of Neb. Rev. Stat. § 28-707(5) (Cum. Supp. 2004), a Class III felony, based upon injuries sustained by his infant daughter. Rivera pled no contest to a reduced charge of child abuse, a Class IIIA felony in violation of § 28-707(4). The factual basis for the charge, provided by the prosecutor, is as follows:

> Your Honor, on the date or the time frame set forth in the information, for a period of that time and the last few days in that time frame, the defendant and his family were in Douglas County. During that period of time, the child . . . was taken to Children's Hospital and found to have . . . leg fractures, five to both legs. . . . [T]he child was very young. I believe her date of birth was 10/1 of '03. The opinions of the radiologist and treating physicians at Children's Hospital

> was that these were injuries caused by non-accidental trauma to the child.
>
> . . . Rivera did make a statement to the police indicating that he was responsible for mishandling the child to such a degree that these injuries and fractures were caused.

Rivera's counsel added, "It was a situation where . . . Rivera was doing what they called gas exercises, rotating his little girl's legs, and he snapped one of the legs." The court accepted Rivera's no contest plea.

On September 28, 2004, the matter came on for sentencing. During the sentencing hearing, the court stated:

> [T]he Court has reviewed your record, which basically up to this point is traffic misdemeanors. Why this happened, I think only you know. You flipped out supposedly. You've been doing everything that you're supposed to do, stayed in Nebraska. You've been working and continuing with your treatment. There's a good report from the treatment facility. They want you to continue. . . .
>
> . . . .
>
> . . . The Court's going to put you on probation. Probation will be for three years. Conditions of probation are that you stay out of trouble. . . . [T]he Court has no problem if you do wish to move to Colorado and join your family. This matter can be transferred there, but you have to get it all worked out with the probation office.

The transcript contains an "Order Appointing Special Deputy County Attorney" dated October 6, 2004, and file stamped on October 13. That order, signed by a district court judge other than the judge who took Rivera's plea and imposed sentence, states in part: "This matter comes [sic] the motion of the Court on this 6th day of October, 2004, seeking appointment of Corey M. O'Brien, . . . Assistant Attorney General, to act as Special Deputy County Attorneys [sic] in all matters related to the above-captioned matter." The order further stated that the court found the motion to be well taken and that the court appointed Corey M. O'Brien to serve as special deputy county attorney "pursuant to Neb. Rev. Stat. § 23-1204.01 ([Reissue] 1997)." The transcript does not contain any written motion requesting appointment of a special deputy county attorney. Also on October 6, the "Special Deputy

Douglas County Attorney, Corey M. O'Brien," requested permission from the Attorney General to appeal the sentence, and the chief deputy Attorney General, acting in the name of the Attorney General, consented. On behalf of the State and in his capacity as a special deputy county attorney, O'Brien timely appealed to this court pursuant to Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2004), claiming that Rivera's sentence was excessively lenient.

III. ASSIGNMENTS OF ERROR

The State alleges that the trial court abused its discretion in imposing an excessively lenient sentence.

On cross-appeal, Rivera alleges that the appeal should be dismissed because the assistant attorney general failed to (1) follow the proper procedure to be appointed a special deputy county attorney, (2) follow the proper procedure to appeal the sentence, and (3) timely file his brief on appeal.

IV. STANDARD OF REVIEW

[1] 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. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

V. ANALYSIS

1. Jurisdiction

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (2005). Thus, we begin by considering the assignments of error raised by Rivera's cross-appeal.

[3,4] The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal. *State v. Jones*, 264 Neb. 812, 652 N.W.2d 288 (2002).

Rivera alleges in his brief that this court does not have jurisdiction over the appeal because the State did not follow proper procedures pursuant to Neb. Rev. Stat. §§ 23-1204.01 (Reissue 1997) and 29-2320 and 29-2321 (Cum. Supp. 2004). We address each statute in turn.

(a) § 23-1204.01

Rivera argues both that § 23-1204.01 requires that a special deputy county attorney must be procured by the county attorney and that the record shows the absence of any motion or request made by or on behalf of the county attorney to procure such assistance. Section 23-1204.01 provides in relevant part: "The county attorney of any county may, under the direction of the district court, procure such assistance in any investigation or appearance or the trial of any person charged with a crime which is a felony, as he may deem necessary for the trial thereof . . . ."

[5] According to the language in the order appointing O'Brien as the special deputy county attorney, which order we have quoted above, the court itself initiated the appointment on the court's own motion. Section 23-1204.01 authorizes such an appointment "under the direction of the district court." 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. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992).

Rivera has failed to present proof to the contrary. While we agree with Rivera that the transcript before us contains no such motion or request by the county attorney, we observe that with one exception, all the praecipes for transcript requested specific documents and none of the praecipes requested any motion by the county attorney. Moreover, none of the praecipes for transcript requested the trial court clerk to certify to the absence of any such motion. The one exception is the request in one of the State's praecipes for "[a]ll entries contained on the [d]istrict [c]ourt docket sheet for this case." The trial docket entry for October 6, 2004, states: "On motion of County Attorney, signed Order releasing presentence investigation file. Signed Order appointing Special Deputy County Attorney." The record shows that the first motion referred to in the October 6 docket entry, the

motion to release the presentence investigation, was filed by O'Brien as the "Special Deputy Douglas County Attorney." The second order noted in the docket entry is the order we have already discussed and quoted above, and the language of the docket entry does not contradict the wording of the order of appointment. The docket entry is silent regarding whether the appointment was made on the court's own motion or initiated by the county attorney or any other person. Similarly, no praecipe directed the official court reporter to include any proceedings held on October 6 or requested the reporter to certify to the absence of any recorded proceedings on that date.

Rivera's brief speculates that because of some perceived need to meet the requirements of § 29-2321, which requirements we discuss below, the Attorney General himself instigated the appointment of his assistant as a special deputy county attorney. Such speculation, however, cannot constitute the proof necessary to defeat the presumption of absolute verity accorded to the court's order. Because the record contains no contrary showing, Rivera's argument constitutes pure speculation. In the absence of any contrary showing in the record, we accept the statements in the October 6, 2004, order as fact and determine that the district court appointed the special deputy county attorney on that court's own motion.

[6] Rivera's argument that the county attorney must request an appointment under § 23-1204.01 ignores the statutory language concerning the "direction" of the district court. The legislative history cited by Rivera does not state that such an appointment cannot be made on the district court's own motion and seems more likely to have been pertinent to Neb. Rev. Stat. § 23-1205 (Reissue 1997), which concerns appointments made "[i]n the absence, sickness or disability of the county attorney . . . or upon request of the county attorney for good cause." It has long been held that an objection to the appearance of counsel appointed pursuant to § 23-1204.01 must be supported by at least some showing that the county attorney did not request or require any assistance and that the court did not appoint counsel for such purpose. See *Blair v. State*, 72 Neb. 501, 101 N.W. 17 (1904). As we have already demonstrated, Rivera made no such showing. Indeed, there is nothing in the record to show

that Rivera ever asserted to the district court any objection concerning O'Brien's appointment.

(b) § 29-2320

[7] Rivera next argues that an appeal of "a sentence as too lenient" may be made only by a "prosecuting attorney" and that the Attorney General is not a "prosecuting attorney." Brief for appellee at 19. Section 29-2320 provides in pertinent part that "the prosecuting attorney charged with the prosecution" of the defendant convicted of a felony following a plea of nolo contendere "may appeal the sentence imposed if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient." A prosecuting attorney, for purposes of § 29-2320, means a county attorney, city attorney, or designated attorney. Neb. Rev. Stat. § 29-2315 (Cum. Supp. 2004).

[8] In the case before us, the special deputy county attorney appointed by the district court was also an assistant attorney general. That individual was not involved in the prosecution of the case until after sentencing, and his actions were all taken in the express assertion of his authority as a special deputy county attorney. None of his actions were taken in the name of the Attorney General. An assistant attorney general is the agent of the Attorney General and not an independent officer, and his official acts must be performed in the name of his principal. *Lower v. State*, 106 Neb. 666, 184 N.W. 174 (1921). Because the actions were taken in the name of the special deputy county attorney, the filing appears to be in literal compliance with that portion of § 29-2320 referring to a county attorney.

Further, the specially appointed officer may be a "designated attorney" within the meaning of § 29-2320. We are unable to find any Nebraska case or statute defining a "designated attorney." However, a dictionary definition of the term "designate" is as follows: "1. to mark or point out; indicate; show; specify. 2. to denote; indicate; signify. 3. to name; entitle; style. 4. to nominate or select for a duty, office, purpose, etc.; appoint, assign. . . . 5. named or selected for an office, position, etc., but not yet installed." Webster's Encyclopedic Unabridged Dictionary of the English Language 391 (1989). Because the district court, on

its own motion, appointed an assistant attorney general as a special deputy county attorney, such attorney could be considered a "designated attorney" and hence a "prosecuting attorney" for purposes of § 29-2320.

(c) § 29-2321

Finally, § 29-2321 provides:

> Appeals under section 29-2320 shall be taken as follows:
>
> (1) Within ten days of the imposition of sentence, the prosecuting attorney shall request the approval of the Attorney General to proceed with such appeal. A copy of such request for approval shall be sent to the defendant or counsel for the defendant;
>
> (2) If the Attorney General approves the request described in subdivision (1) of this section, the prosecuting attorney shall file a notice of appeal indicating such approval in the district court. Such notice of appeal must be filed within twenty days of the imposition of sentence. A copy of the notice of appeal shall be sent to the defendant or counsel for the defendant;
>
> (3) If the Attorney General does not approve the request described in subdivision (1) of this section, an appeal under sections 29-2320 to 29-2325 shall not be permitted; and
>
> . . . .
>
> Upon compliance with the requirements of this section, the appeal shall proceed as provided by law for appeals to the Court of Appeals.

The record shows that (1) the district court sentenced Rivera on September 28, 2004, (2) the same court appointed O'Brien on October 6 to serve as the special deputy county attorney, and (3) O'Brien, acting as the "Special Deputy Douglas County Attorney," requested and received consent from the Attorney General on October 6 to proceed with the appeal. Also on October 6, the special deputy county attorney filed a notice of intent to prosecute appeal and attached the letter from the Attorney General consenting to the appeal. The record shows literal compliance with § 29-2321.

Rivera maintains that the Legislature requires the consent of two separate prosecutorial offices and that the current appeal represents "a direct violation of the legislative intent of two separate

prosecutors agreeing the sentence should be appealed." Brief for appellee at 20. This argument presumes that O'Brien was not making an independent judgment as a special deputy county attorney. Once again, this argument is based upon pure speculation and is not supported by the record.

(d) § 84-204

One might wonder why we do not base our analysis upon Neb. Rev. Stat. § 84-204 (Reissue 1999), which states that "[t]he Attorney General and the Department of Justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties." Accord *State v. Hutter*, 145 Neb. 798, 18 N.W.2d 203 (1945). The record does not establish that the Attorney General ever invoked the authority granted by § 84-204. There is no written motion requesting the appointment of O'Brien, and as we have already pointed out, the district court's written order records that the action was taken on that court's own motion. All of O'Brien's subsequent actions were taken expressly invoking his authority as a special deputy county attorney. The State has not filed any answer brief responding to Rivera's cross-appeal, so we have not been favored with any responsive argument. While it is a curious circumstance that the person appointed by the district court as a special deputy county attorney also happens to be an assistant attorney general, we must decide the issues upon the record as presented. We therefore express no opinion whether the Attorney General could have brought the appeal based upon the authority of § 84-204.

2. Filing of Briefs

[9] Rivera argues that the State's appeal must be dismissed because it was filed late. According to Neb. Ct. R. of Prac. 9A (rev. 2001), "briefs . . . must be filed within the times stated in the rules." The State moved for an extension of time until January 28, 2005, to file its brief, and this court granted the request. Despite the extension of the expiration date to January 28, the State did not file its brief until February 8. However, as of that date, this court had not yet issued a notice of default.

[10] If the appellant fails to file its brief within the time allowed by the rules, the Supreme Court Clerk is directed to mail

a notice of default to the appellant or appellant's counsel of record. See Neb. Ct. R. of Prac. 10A (rev. 2000). Failure to file a brief in response to that notice subjects the appeal to dismissal. *Id.* Because the State filed its brief prior to issuance of any notice of default, rule 10A provides no support for dismissal of the State's appeal. See, also, *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001) (although failure to comply with Nebraska Supreme Court rules may in some instances result in its not considering issue raised on appeal, failure to comply with rule requiring jurisdictional statement is not jurisdictional and does not divest court of jurisdiction).

Although we expect the officers of the State to adhere to the highest professional standards and to timely comply with this court's rules, we find no merit in Rivera's argument.

3. Sentence

Rivera pled no contest to the Class IIIA felony charge of child abuse. Section 28-707 provides in relevant part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or physical or mental health;
>
> (b) Cruelly confined or cruelly punished;
>
> (c) Deprived of necessary food, clothing, shelter, or care;
>
> . . . .
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
>
> (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.
>
> (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.
>
> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

A Class IIIA felony is punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both; it has no minimum punishment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2004). On the

other hand, a Class III felony—with which Rivera was originally charged—is punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. See *id.*

The State argues that the district court abused its discretion in failing to consider "Rivera's initial lies to hospital staff and law enforcement[,] his continued denials of culpability despite his admission and the overwhelming medical evidence indicating this was not an accident[,] and the extent and severity of the injuries sustained by the 36 day old victim." Brief for appellant at 10.

[11,12] 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. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004). In determining whether a sentence imposed is excessively lenient, Neb. Rev. Stat. § 29-2322 (Reissue 1995) requires that we have regard for the following:

> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (4) Any other matters appearing in the record which the appellate court deems pertinent.

We next consider those factors.

The medical records contained in the presentence report reveal that on November 7, 2003, Rivera and his wife took their daughter to the hospital. Rivera told hospital staff that he had been sitting in a chair and holding the child and that when he went to get up, he dropped the child because his arm had fallen asleep. Initial radiographs disclosed three closed fractures of the right leg, two closed fractures of the left leg, and a closed fracture of

a rib. The "Impression" section of the radiology report contains the following statement: "Findings are suspicious for a corner fracture/classic metaphyseal lesion of the right distal femoral metaphysis. This raises concern for possible non-accidental trauma and consideration to a skeletal survey is suggested for further evaluation." Based on the child's metaphyseal fractures bilaterally, the doctor highly suspected child abuse. Another medical record contained in the presentence report states: "This is a 5-week-old female who was noted to have multiple fractures by radiology, old fractures. She had been seen by orthopedics on 11/07/2003 and was found to have a right femur fracture."

According to a supplementary police report contained in the presentence report, Rivera told police that after he had dropped his daughter, he compared her legs and twisted them to see if she had movement; that when he straightened out one of her legs, it "popped"; and that he felt the pop and then the leg went limp. Rivera told the police that he knew something was wrong but that he did not know if it was from the fall or if it was caused by him. According to another supplementary police report, a doctor stated that the right femur oblique displacement was from a direct trauma and a large force and that that doctor had seen such injuries caused by a motor vehicle accident or a significant trauma. At the time of the presentence investigation, Rivera's daughter was in a harness temporarily in order to promote healing, and she was healing well.

Rivera's presentence report reveals that he was born in 1964, graduated from high school, and attended some college. The report shows that Rivera was a resident of Colorado, that he was just visiting Nebraska at the time of the offense, and that he was gainfully employed with the U.S. Postal Service prior to the offense but had to resign because he had not been allowed to return to Colorado. Because of a protection order against Rivera filed by his wife and the conditions of Rivera's release of bond, Rivera was living in Lincoln with his brother-in-law and was working 40 hours per week at a convenience store. His wife and their children had returned to Colorado. According to Rivera, his wife was willing to consider reconciliation if Rivera continued with counseling, but her primary concern was for the safety of the children. The presentence report states that Rivera's wife was

setting up counseling for Rivera when he was able to return to Colorado, but she had informed Rivera that he would not be allowed to move back into the marital home and not be allowed to see the children unless it was supervised visitation.

The presentence report shows the following prior convictions of Rivera: driving under the influence in 1986, passing on the right in 1992, careless driving and speeding 20 or more miles per hour over the limit in 1994, and speeding 10 to 19 miles per hour over the limit and driving under the influence in 1995.

Rivera's statement contained in the report stated that he had been giving his daughter leg exercises, that he had done it in an extreme manner, that he had felt her leg pop, and that he had then stopped. The report states:

> When asked about the discrepancy between this written statement and the statements he made to the police, [Rivera] said "something happened inside" him at the time. He said he has learned that he was under a lot of stress at the time. He said he never felt rage before and couldn't explain it.

The report further stated that Rivera "gets vague when asked what exactly he did to cause the numerous fractures to his daughter's legs and to her rib."

Rivera's therapist stated that she believed Rivera would be safe both in his community and with his family and children, that it appeared the incident was a one-time event related to multiple stressors, and that Rivera had "tremendous" remorse and concern that a similar event should never recur. An assessment of behavioral risks administered as part of the presentence investigation showed that Rivera scored in the "low risk range" for violence; however, he scored in the "maximum risk range" for truthfulness. The probation officer stated that Rivera tested below the threshold for intensive supervision probation. The probation officer recommended that Rivera be placed on probation, that an interstate transfer to Colorado be requested, and that counseling be continued through his established treatment provider in Nebraska, with followup by an accredited agency in Colorado.

[13,14] We are cognizant of our decision in *State v. Charles*, 13 Neb. App. 305, 691 N.W.2d 567 (2005), which also involved

serious physical injuries to an infant. Before undertaking a comparison of *Charles* to the instant case, we recall that "[i]t is difficult to color-match cases when reviewing the terms of sentences." *State v. Haynie*, 239 Neb. 478, 491, 476 N.W.2d 905, 914 (1991). We also recognize that it is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, an appellate court cannot say that a trial court has abused its discretion. Such a sentence is not untenable, does not unfairly deprive a litigant of a substantial right, and does not deny a just result. *Id.* Nonetheless, a brief comparison reveals that *Charles* is distinguishable from the instant case in several key respects.

In *Charles*, pursuant to a plea agreement, the defendant was convicted of intentional child abuse in violation of § 28-707(5), which is classified as a Class III felony punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. In the instant case, Rivera was convicted of a Class IIIA felony, for which the statutory range of penalties is much less severe.

In *Charles*, the district court was operating under an incorrect premise—that the child was not a victim of shaken baby syndrome but instead had hit his head on the ceiling, the coffee table, and the floor when the defendant threw him in the air and failed to catch him. This court stated both that the fact the trial court "either mistakenly concluded that [the child] was not injured by shaking or simply ignored that fact" was an important consideration in the appeal and that the trial court "was clearly wrong in not regarding the nature and circumstances of the offense as a shaken baby case." *Charles*, 13 Neb. App. at 310, 691 N.W.2d at 571. We concluded that the trial court's misapprehension of the nature and circumstances of the crime had an effect on the sentence imposed and that such effect would likely have been to lessen the sentence.

Because of the injuries sustained by the child in *Charles*, the child was unable to crawl, had limited use of his right arm, suffered two or three seizures a day, and possibly did not have full

vision. The child's mother no longer worked in order to stay home with the child, to take him to therapy twice a week, and to be home when a therapist from the schools came to their home once a week to work with the child. As we have already noted above, the infant in the case before us is healing well, and no indication of any permanent injuries appears in the record.

In *State v. Charles*, 13 Neb. App. 305, 314, 691 N.W.2d 567, 574 (2005), on the assessment of behavioral risks, the defendant scored in the " 'problem risk range' " for truthfulness and in the " 'medium risk range' " on the violence scale. A family advocacy program counselor initiated contact with the defendant, and the defendant met twice with the counselor for approximately 30 minutes each time; there was no indication that the defendant made any further efforts toward rehabilitation. The probation office made no recommendation regarding the sentence, and the subsequently imposed terms of the 18-month probationary sentence required no counseling and no community service. We stated that the trial court's sentence allowed the defendant to "put this entire tragedy 'behind her' with little or no effort on her part and no punishment," and we believed that she should have to "directly confront the fact that she has been convicted of a major felony, intentional child abuse, and that she should think long and hard about why it happened and the potential lifelong consequences—physical, emotional, and financial—to [the child] and his family." *Id.* at 318, 691 N.W.2d at 576-77.

In the instant case, the court sentenced Rivera to 3 years' probation, which is nearly twice as long as the term of probation imposed in *Charles*. In the case before us, the county attorney amended the charge to an offense with no minimum punishment and the presentence report and remarks at the sentencing hearing show the absence of any request or argument for incarceration. Rivera's probation officer recommended that he be placed on probation and transferred to Colorado. Unlike the situation in *Charles*, in the instant case, there is no indication from the record before us that the trial court misapprehended the nature and circumstances of the offense.

Among Rivera's terms and conditions of probation are that he refrain from any unlawful conduct, work at gainful employment or otherwise keep productively busy during the term of probation,

and continue with therapy sessions either with his established treatment provider in Nebraska or with a similar treatment provider in Colorado should he request to transfer the probation to Colorado.

At the time of the presentence investigation, Rivera was 40 years old and had no history of violence. Rivera's psychiatrist and therapist believed that with continued counseling, he did not pose a risk to his wife or children. In contrast to the defendant in *Charles*, Rivera had taken, and was continuing to take, steps to address the consequences of his actions. The sentence in this case is supported by competent evidence and does not appear to be based on irrelevant considerations. We cannot say that such sentence is untenable.

VI. CONCLUSION

We find that the record fails to contradict the statement in the trial court's order that the special deputy county attorney was appointed on the court's own motion. We further find that the procedural requirements for appeal of the sentence by the State were satisfied and that we acquired jurisdiction of this appeal. Finding no abuse of discretion in the sentence of probation, we affirm the sentence of the trial court.

AFFIRMED.

DAVID J. MILLER, APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. COMMERCIAL CONTRACTORS EQUIPMENT, INC., AND ZURICH AMERICAN INSURANCE CO., ITS WORKERS' COMPENSATION INSURER, APPELLEES, CROSS-APPELLANTS, AND CROSS-APPELLEES, AND TRAVELERS INDEMNITY INSURANCE COMPANY, INTERVENOR-APPELLANT.

711 N.W.2d 893

Filed March 28, 2006. No. A-05-873.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Rules of Evidence.** The Nebraska Workers' Compensation Court shall not be bound by any technical or formal rules of procedure.
4. **Interventions.** Any person who has or claims to have an interest in a matter in litigation, in any action pending or to be brought in any of the courts of the State of Nebraska, may intervene, either before or after issue has been joined in the action, and before the trial commences.
5. **Judgments: Interventions.** Intervention after judgment cannot be obtained as a matter of right under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004).
6. **Interventions: Time.** Intervention should not be allowed where the party seeking to intervene had an opportunity to intervene at an earlier time, yet delayed in doing so.
7. **Equity: Judgments: Interventions.** In the exercise of its discretion and in furtherance of justice, a court of equity may allow intervention after judgment to protect the inherent rights of a party seeking intervention.
8. **Workers' Compensation: Equity: Judgments: Interventions.** The Nebraska Workers' Compensation Court does not have equitable jurisdiction and thus does not have equitable powers to allow intervention after judgment.
9. **Trial: Appeal and Error.** A party cannot complain of error which that party invited the court to commit; nor can a party silently tolerate error, gamble on a favorable result, and then complain of the tolerated error when the result is unfavorable.
10. **Workers' Compensation: Insurance: Parties.** An employer's workers' compensation insurer is clearly a proper party in workers' compensation litigation.
11. **Workers' Compensation: Insurance: Trial: Judgments.** A workers' compensation insurer is bound by the awards, judgments, or decrees rendered against the insured, regardless of the insured's participation at trial.
12. **Judgments: Interventions: Trial: Time.** A right to intervene should be asserted within a reasonable time. An intervenor may not unreasonably delay the original parties, unduly retard the trial of the case, or render nugatory a judgment without a compelling cause, particularly when it has been partially performed.
13. **Stipulations: Parties.** Parties are bound by stipulations voluntarily made.
14. **Stipulations: Public Policy.** In Nebraska, parties are free to make stipulations that govern their rights, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals.
15. **Appeal and Error.** 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.
16. ____. An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
17. **Appeal and Error: Words and Phrases.** 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.
18. **Workers' Compensation: Interventions: Appeal and Error.** It is plain error for the Nebraska Workers' Compensation Court to allow a party to intervene after the case is tried, a judgment is rendered, and an appeal is taken by another party.
19. **Stipulations.** The construction of a stipulation is a question of law.
20. **Estoppel.** Only reasonably justified reliance will create an estoppel.

21. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
22. **Workers' Compensation.** Permanent partial disability benefits pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 2004) are measured not by loss of bodily function, but by reduction in or loss of earning power or employability.
23. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.
24. **Workers' Compensation: Evidence: Testimony.** The Nebraska Workers' Compensation Court can rely on a claimant's testimony to determine the degree of permanent partial disability.
25. **Workers' Compensation.** If an employee receives the same or higher wages after an injury, it is indicative, although not conclusive, of the fact that his or her earning power has not been impaired.
26. **Workers' Compensation: Appeal and Error.** An appellate court will not substitute 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 compensation court.
27. **Workers' Compensation: Insurance: Liability: Time.** When a subsequent injury aggravates a prior injury, the insurer at risk at the time of the subsequent injury is liable. However, if the subsequent injury is a recurrence of the prior injury, the insurer at risk at the time of the prior injury is liable.
28. **Workers' Compensation: Appeal and Error.** A finding in regard to causation of an injury is one for determination by the Nebraska Workers' Compensation Court as the finder of fact.
29. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
30. **Workers' Compensation: Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even if the testimony is not live testimony.
31. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
32. **Trial: Expert Witnesses.** Where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact.
33. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits.
34. **Workers' Compensation: Penalties and Forfeitures: Words and Phrases.** A "reasonable controversy" regarding a workers' compensation claim may exist, so as to

preclude an award of waiting-time penalties to an employee, if there is a question of law previously unanswered by the appellate courts or if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part appeal dismissed.

Patrick B. Donahue and Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for intervenor-appellant.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellee David J. Miller.

Jerald L. Rauterkus and Jason R. Yungtum, of Erickson & Sederstrom, P.C., for appellees Commercial Contractors Equipment, Inc., and Zurich American Insurance Co.

SIEVERS, IRWIN, and MOORE, Judges.

SIEVERS, Judge.

I. INTRODUCTION

David J. Miller filed an action for workers' compensation benefits, alleging that he suffered compensable work accidents on April 9, 1999, and April 15, 2002, in the course of his employment with Commercial Contractors Equipment, Inc. (Commercial Contractors). On April 9, 1999, Zurich American Insurance Co. (Zurich) was Commercial Contractors' workers' compensation insurer, and on April 15, 2002, Travelers Indemnity Insurance Company (Travelers) was Commercial Contractors' workers' compensation insurer. Travelers was dismissed from the case before trial via a stipulation. The trial judge found that Miller had sustained an accident on April 15, 2002, thereby exposing Commercial Contractors to a claim for compensation under Travelers' coverage. Commercial Contractors and Zurich perfected an appeal to a three-judge review panel of the Workers' Compensation Court, and Travelers by motion sought leave to intervene in the appeal, which intervention the review panel allowed. After an unfavorable result from the review panel, Travelers has appealed to this court. We find that the review panel

committed plain error by allowing Travelers to intervene in the case after trial and during the appeal process.

II. FACTUAL BACKGROUND

On April 9, 1999, Miller suffered a back injury in an accident arising out of and in the course of his employment with Commercial Contractors. At the time of the accident, Miller was employed as a "master mechanic," which required him to "push around heavy stuff" and "carry heavy stuff," including tools weighing 100 pounds. He testified that the labor required of a master mechanic was very physical and that he did a lot of bending, twisting, stretching, and climbing. At the time of trial, Miller had been employed as a master mechanic with Commercial Contractors from 1993 until his second surgery in December 2002.

On September 21, 1999, Dr. Andrew Messer performed an interdiskal electrothermal (IDET) procedure on Miller at the L4-5 level of his spine and an anterior lumbar interbody fusion at the L5-S1 level. Dr. Messer stated in his followup evaluation of Miller that 6½ weeks after that surgery, Miller appeared "very comfortable" and was "essentially free of any back pain" and "doing very well." On January 24, 2000, Miller was allowed to return to work with restrictions of no lifting below knee level and a lifting limit of 35 pounds. On April 10, Dr. Messer released Miller with no restrictions and recommended a "final visit" in 6 months.

Miller testified that he returned to work with Commercial Contractors as a master mechanic in April 2000 and that he did all the same jobs he was required to do before the surgery, but that he had to figure out how to do some things differently, such as heavy lifting. In February 2002, Miller had an "onset of pain that [he] had experienced before." Miller testified that he did not have an accident that gave rise to this onset and that there was no incident that caused him to start having back pain at that time. On April 15, he saw Dr. Messer, complaining of low-back pain. Dr. Messer's notes state that a "provocative discogram" confirmed that the L4-5 level of Miller's spine had "re-torn." On December 20, Miller had a second back surgery, which consisted of an anterior lumbar interbody fusion at the L4-5 level and an anterior stabilization.

Miller was released to return to work on January 6, 2003, on "very light duty." At the time of trial, Miller had not yet returned to full duty as a master mechanic. Miller had a third surgery, on July 23, which is not at issue in the present case.

III. PROCEDURAL BACKGROUND

On January 2, 2003, Miller filed a petition in the Nebraska Workers' Compensation Court against Commercial Contractors and Zurich. We note that Commercial Contractors did not have independent counsel throughout the ensuing litigation and was represented by Zurich's counsel. Miller then filed an amended petition on June 20, naming Travelers and Phoenix Insurance Company (Phoenix) as additional defendants. The amended petition alleged that Miller had suffered an injury arising out of and in the course of his employment with Commercial Contractors on April 9, 1999. It further asserted that Miller returned to work without restrictions on April 10, 2000, and that on April 15, 2002, he stopped work and sought medical care for the "reappearance of lower back pain and disability symptoms." The amended petition alleged that "[i]n whole or in part, the cause of the reappearance of [Miller's] low back pain symptoms was the tasks of his employment with Commercial Contractors, specifically, frequent twisting, frequent bending, heavy physical exertion and heavy lifting." It also alleged that Miller's current low-back condition and any resulting disability were results of an aggravation of his 1999 back injury or a new injury condition of the same L4-5 disk injured in the 1999 workplace accident. Obviously, Miller, under the law to be discussed later, was seeking benefits from an "accident" in April 2002.

On August 14, 2003, nearly 2 months after the amended petition was filed, the parties, including Travelers, entered into a stipulation which we quote in its entirety because its exact language will later be crucial:

> COME NOW plaintiff and defendants, by and through their respective counsel of record, and hereby stipulate to the dismissal of Travelers Indemnity Company and Phoenix Insurance Company due to the lack of a present controversy and, in support thereof, state:
>
> 1. That plaintiff's Amended Petition alleges the reappearance of plaintiff's low back pain symptoms necessitated

> cessation of plaintiff's work activities on or about April 15, 2002, and performance of low back surgery on or about December 20, 2002.
>
> 2. That defendants, Commercial Contractors Equipment, Inc. and Zurich American Insurance Company, have admitted the December 20, 2002 surgery and associated temporary total disability are related to an incident occurring on or about April 9, 1999.
>
> 3. That Travelers Indemnity Company and Phoenix Insurance Company did not provide worker's [sic] compensation insurance coverage for Commercial Contractors Equipment, Inc. on April 9, 1999.

Pursuant to the stipulation, the trial court entered an order on August 14 dismissing Travelers and Phoenix without prejudice "for lack of a present controversy."

At trial on September 29, 2003, Miller moved to amend his operative petition, the amended petition, to remove the allegation that the cause of his condition was an occupational disease, a matter of no import in this appeal. Commercial Contractors and Zurich then orally moved to continue the case in order for Travelers or Phoenix to take part in the trial. Counsel for Commercial Contractors and Zurich argued:

> I guess based on the joint stipulation for dismissal . . . I would move that this matter be continued so that these entities, be it Travelers or Phoenix, be made a part of this and if there is a second injury in April of 2002, that . . . that be adjudged to be their responsibility. I mean, that is — the stipulation that we signed says that we accept. By "we," I mean Commercial Contractors and Zurich accept the 2002 December surgery, so that was the basis that these other individuals got out was that that surgery was accepted by us, so if there's some allegation there was another injury, I think they need to be in and I would move that we continue this case to allow those entities to be part of this trial or proceeding.

The trial court said that the joint stipulation appeared "to be more or less an agreement among the insurance companies for [Commercial Contractors]" and that Miller did not make "any express representations [in the stipulation] as to whether or not

. . . there was, in fact, a second accident." Thus, the trial court overruled the motion to continue and proceeded with the trial, at which Travelers was not present or represented.

IV. TRIAL COURT'S DECISION

On March 25, 2004, the trial court entered an award finding that Miller was entitled to temporary total disability benefits and medical expenses as a result of the April 9, 1999, injury. The trial court found that Miller suffered a 15-percent loss of earning capacity from the 1999 injury. The trial court also found that Miller suffered an accident on April 15, 2002, which was an aggravation of the 1999 injury, not a recurrence, thereby implicating the Travelers' coverage. The trial court accepted the opinion of Dr. Messer and awarded Miller temporary total disability benefits and present and future medical expenses for the 2002 accident. The trial court denied an award of attorney fees, penalties, and interest because it found that there was a reasonable controversy as to whether Miller suffered an accident on April 15, 2002, and as to whether such accident was a recurrence or an aggravation of the 1999 injury.

V. APPEAL PROCESS

On April 7, 2004, Commercial Contractors and Zurich appealed the March 25 award to the compensation court's three-judge review panel. On June 22, Travelers filed a "Petition in Intervention" alleging that Travelers was Commercial Contractors' workers' compensation insurer from June 11, 2001, to June 11, 2002, and that Travelers had an interest in the litigation because the trial court entered an award requiring Travelers, as Commercial Contractors' insurer, to pay workers' compensation benefits based upon Miller's accident of April 15, 2002. Travelers' petition also alleged that the trial court erred in (1) failing to adhere to its order dismissing Travelers and Phoenix based on the parties' stipulation, (2) interpreting the meaning of the stipulation, (3) failing to grant Commercial Contractors' motion to continue, (4) finding that Miller sustained an accident on April 15, 2002, and awarding benefits for such accident, and (5) failing to provide a reasoned decision. Travelers asked the review panel to reverse the trial court's March 25 award and find

that Miller was not entitled to any workers' compensation benefits for any accident falling within Travelers' coverage. Miller, Commercial Contractors, and Zurich filed a stipulation with the compensation court stating that they did not object to Travelers' petition in intervention.

On September 13, 2004, the review panel granted Travelers' petition in intervention, finding that Travelers should be allowed to intervene because it has a direct interest in the outcome of the litigation. The review panel issued its decision on June 24, 2005, finding in regard to Commercial Contractors' motion to continue that "[t]he insurance company which provided coverage for [the] defendant employer is not a necessary party," because under the Nebraska Workers' Compensation Act, "the employer is liable for the payment of indemnity, medical expenses, waiting time payments, and attorney's fees." As to the joint stipulation, the majority of the review panel concluded:

> The insurers, all of whom were represented by counsel, apparently made a calculated evaluation of the medical evidence and the law regarding aggravations versus recurrences [and] entered into the Joint Stipulation[,] and Travelers and Phoenix thereafter elected not to direct their counsel to be present for trial. Although the three insurers may have evaluated [Miller's] injury of April 15, 2002, as a recurrence rather than an aggravation, their collective evaluation was not binding on [Miller] or the trial court. [Miller] did <u>not</u> stipulate that his "December 20, 2002, surgery and associated temporary total disability are related to an accident occurring on or about April 9, 1999" . . . . [Miller] did stipulate that Zurich made that admission and that Travelers and Phoenix did not provide insurance coverage on April 9, 1999, but a careful reading of the Joint Stipulation demonstrates it really was among three insurance carriers contesting coverage. . . . Travelers and Phoenix cannot, by the Stipulation, invite dismissal as parties, elect not to participate at trial, and then complain about it later. . . .
>
> . . . .
>
> Likewise, [Miller] in the present case has no interest [in] which company insured [Commercial Contractors] on the

> date of accident. If one insurer believes the date of accident was within the coverage period of another, it is incumbent upon that insurer to remain engaged in the litigation to establish the date of accident.

As will be explained later, we find that the majority of the review panel was precisely on target in its analysis of the import of the stipulation. With respect to the merits of Miller's claim, the review panel agreed fully with the trial judge and affirmed.

The dissenting judge on the review panel opined that the trial court should have sustained the motion to continue because the stipulation sent a "message" to Commercial Contractors that Miller was withdrawing his claim for the April 15, 2002, injury and that it need not prepare a defense to such claim.

On July 22, 2005, Travelers filed its notice of appeal with this court, causing our clerk to designate Travelers as the appellant. Commercial Contractors and Zurich jointly filed their notice of appeal 3 days later on July 25, causing them to be designated as the appellees (and as cross-appellants, as they filed a cross-appeal). Miller has filed a cross-appeal claiming that the trial judge should have awarded him attorney fees, interest, and waiting-time penalties.

VI. ASSIGNMENTS OF ERROR

Travelers asserts, reassigned, that the trial court erred in (1) failing to grant the motion for continuance made at trial; (2) finding that Miller suffered a new injury on April 15, 2002, for the reason that such finding violated the stipulation for dismissal and order of dismissal and for the reason that such finding was contrary to the evidence and law; (3) finding that Miller was entitled to any workers' compensation benefits as a result of an injury on April 15, 2002; (4) finding that Miller "suffered an accident in 2002 and sustained disability as a result"; and (5) failing to provide a reasoned decision in that the trial court's award failed to explain the effect of the stipulation of the parties.

Commercial Contractors and Zurich (hereinafter collectively referred to as "Commercial Contractors") state in their brief that they join in Travelers' arguments for the above-named errors and that they also cross-appeal. However, notably, there are no specific assignments of error in Commercial Contractors' cross-appeal.

VII. STANDARD OF REVIEW

[1,2] 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. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002).

VIII. ANALYSIS

1. Travelers' Appeal

[3] We begin our analysis by determining whether Travelers was properly allowed to intervene in the appeal after trial, even though no party raises this issue. Travelers initially was a party to this case, but was dismissed pursuant to the parties' stipulation. Travelers then reentered the case after trial and decision when the compensation court review panel granted Travelers' petition in intervention. The Nebraska Workers' Compensation Act does not specifically address intervention, but we note that Neb. Rev. Stat. § 48-168(1) (Reissue 2004) provides that the Nebraska Workers' Compensation Court shall not be bound by any technical or formal rules of procedure, except as provided in that statute. Nonetheless, Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004) allows intervention to occur in "any of the courts of the State of Nebraska." Thus, we look to the general rules of procedure (specifically § 25-328 in this matter) for guidance, as Nebraska courts have done in various other workers' compensation cases involving procedural issues. See, *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995) (use of Neb. Rev. Stat. § 25-824(2) (Reissue 1989) in evaluating claim that attorney fees should be awarded as sanction for frivolous claim); *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992) (reference to Neb. Rev. Stat. § 25-1148 (Supp. 1991) in evaluating motion for continuance); *Bituminous Cas. Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990) (reference to Uniform Declaratory Judgments

Act in determining whether Workers' Compensation Court had authority to enter declaratory judgment); *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987) (reference to Neb. Rev. Stat. § 25-846 (Reissue 1985) in determining variance between pleading and proof), *disapproved on other grounds, Heiliger v. Walters & Heiliger*, 236 Neb. 459, 461 N.W.2d 565 (1990); *Armstrong v. Watkins Concrete Block*, 12 Neb. App. 729, 685 N.W.2d 495 (2004) (reference to Neb. Rev. Stat. § 25-852 (Reissue 1995) in analyzing procedure regarding amendment to pleadings); *Mabile v. Drivers Mgmt., Inc.*, 11 Neb. App. 765, 660 N.W.2d 537 (2003) (compliance with statutory requirements for summary judgment as set forth in Neb. Rev. Stat. § 25-1332 (Reissue 1995)).

[4] The intervention statute at issue, § 25-328, provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought *in any of the courts of the State of Nebraska*, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, *and before the trial commences*.

(Emphasis supplied.)

[5] Moreover, the Nebraska appellate courts have consistently held that intervention after judgment cannot be obtained as a matter of right under § 25-328, although none of the following cases are workers' compensation cases: See, *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962); *Department of Banking v. Stenger*, 132 Neb. 576, 272 N.W. 403 (1937); *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.*, 126 Neb. 744, 254 N.W. 507 (1934); *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993), citing *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 138 N.W.2d 462 (1965).

[6-8] In *Association of Commonwealth Claimants v. Hake, supra*, we held that the assignee of a receiver had no right to

intervene in the action while it was on appeal to this court. Intervention should not be allowed where the party seeking to intervene had an opportunity to intervene at an earlier time, yet delayed in doing so. *Id.* Clearly, this latter notion does little to aid Travelers' ability to intervene in the case at bar, as it began as a party to the case but then secured its own exit—for reasons which are not apparent to us. We also note that the only instance where we have found intervention to be allowed after judgment is in a court of equity. See *State ex rel. City of Grand Island v. Tillman, supra* (in exercise of its discretion and in furtherance of justice, court of equity may allow intervention after judgment to protect inherent rights of party seeking intervention). However, the Workers' Compensation Court does not have equitable jurisdiction, see *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); thus, such court does not have equitable powers to allow intervention after judgment. Using the above procedural framework, we analyze Travelers' petition in intervention and whether such intervention could appropriately be granted after trial while the trial judge's decision was on appeal to the review panel.

Travelers was initially a party to the case, but by stipulation and by order of the trial court, it was dismissed before trial. The trial court entered its award on March 25, 2004, for benefits resulting from two accidents occurring on April 9, 1999, and April 15, 2002. Commercial Contractors filed its application for review by the review panel on April 7, 2004. Over 2 months later on June 22, Travelers filed its petition in intervention, and such petition was granted by the review panel on September 13.

We are aware that the Nebraska Workers' Compensation Act allows the compensation court to "make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act." See § 48-168(1). The broad language of § 48-168(1) would certainly provide justification for timely intervention of insurers when there is a question of whether a worker has suffered a recurrence or aggravation of a previous work injury or an entirely new accident, particularly when the employer has changed insurers within the pertinent

timeframe. See *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987) (workers' compensation insurer allowed to intervene before trial). However, the procedural posture of this case raises not the simple issue of "Can Travelers intervene," but, rather, the issue of whether Travelers can intervene after trial and after Travelers voluntarily exited the case knowing that the amended petition obviously implicated its coverage. (The latter observation raises the issue of the meaning of the stipulation and the contents of the pleadings, which we shall get to shortly.) Therefore, at this point, it seems quite apparent that Travelers' intervention rests on a thin reed.

[9] Allowing an insurer to be dismissed from an action, sit by while the trial proceeds, and then file a petition in intervention after the case has been tried, a judgment has been issued, and the other parties have applied for review does not square with the analogous principle that a party cannot complain of error which that party invited the court to commit. See *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991). Nor can a party silently tolerate error, gamble on a favorable result, and then complain of the tolerated error when the result is unfavorable. See *id.* In this case, Travelers got itself out of the case, the case was tried without Travelers, the result exposed Travelers' coverage, and then, at the review panel level, Travelers sought reentry into the case. Obviously, Travelers used the stipulation to secure its exit from the case—which exit would not affect the underlying liability of Commercial Contractors which Travelers is contractually obligated to cover. Thus, Travelers gambled that an award could not or would not occur which would fall within its coverage of Commercial Contractors' workers' compensation liability.

[10-12] We recognize that the employer's compensation insurer is clearly a proper party in workers' compensation litigation because the insurer is bound by the " 'awards, judgments, or decrees rendered against such insured' " under Neb. Rev. Stat. § 48-146 (Reissue 2004) regardless of the insured's participation at trial. See *Ramsey v. Kramer Motors, Inc.*, 155 Neb. 584, 587, 52 N.W.2d 799, 800 (1952). However, as indicated above, allowing the insurer to sit idly by and gamble on a favorable result, and then intervene and assert error when the trial result is unfavorable as concerns its coverage, does not comport with the

policy and procedure for intervention under Nebraska law. In *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 371, 138 N.W.2d 462, 465 (1965), the court said:

> A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit. An intervener may not unreasonably delay the original parties, unduly retard the trial of the case, or render nugatory a judgment without a compelling cause, particularly when it has been partially performed. Consequently, persons who would otherwise be granted leave to intervene are denied consideration where they sit by and allow litigation to proceed without seasonably requesting leave to enter the case.

Here, Travelers exited voluntarily from the litigation when it knew or should have known of its potential exposure to a claim for benefits, given the allegations of the amended petition; gambled on a favorable result; and then reentered the litigation when the trial court's result indeed exposed it to such a claim.

[13,14] No one complains of the review panel's order granting intervention, simply, we suspect, because Miller does not care which insurer pays him and Zurich avoids paying benefits for the second surgery and resulting disability. And, Zurich and Travelers asserted at oral argument, in response to our questioning, that the best justification for permitting the intervention is that all parties agreed to it. In short, Travelers argues that because the parties in effect stipulated to Travelers' intervention at the appellate level, we should not concern ourselves with this issue. The general rule is that parties are bound by stipulations voluntarily made. See *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). In Nebraska, parties are free to make stipulations that govern their rights, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals. See *id.* While morals are not involved here, public policy is strongly implicated—particularly for future cases. In the present case, the parties have agreed to a procedure which is directly contrary to the intervention statute at issue, § 25-328, which provides that intervention cannot occur after trial. Thus, the parties' agreement that Travelers be allowed to intervene violates the public policy found in § 25-328.

[15-17] 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. *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994). An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *Russell v. State*, 247 Neb. 885, 531 N.W.2d 212 (1995) (Lanphier, J., dissenting). 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. *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995).

[18] The integrity and fairness of the judicial system require that the parties to a trial determine the issues, adduce the evidence, make the record, know who their adversaries are, and then, if they choose, pursue an appeal on the issues tried in the lower court by the parties to the trial. See *Zwygart v. State*, 270 Neb. 41, 699 N.W.2d 362 (2005). Obviously, these policy considerations for the orderly administration of justice underlie the requirement of § 25-328 that intervention occur before trial. To sanction the procedure used in this case flies in the face of § 25-328 and the policy considerations which require that intervention occur before trial. It was plain error for the review panel to allow Travelers to intervene after the case was tried, a judgment was rendered, and an appeal was taken by another party. Therefore, we dismiss Travelers' appeal and do not address its assignments of error.

2. Commercial Contractors' Cross-Appeal

We now turn to Commercial Contractors' arguments on cross-appeal. There is no specific section designating assignments of error in Commercial Contractors' brief on cross-appeal as required by Neb. Ct. R. of Prac. 9D(4) (rev. 2001). Instead, within its brief on appeal, and outside its brief on cross-appeal, Commercial Contractors "adopts and joins in" Travelers' first through fifth "argument[s]" located on pages 11 through 22 of Travelers' brief, although then making arguments rather similar to Travelers'. See brief for appellee Commercial Contractors at 5. Therefore, Commercial Contractors advances the same claims as Travelers. But, given our likely unanticipated dismissal of

Travelers, we determine that fairness demands that we address Commercial Contractors' claims.

(a) Stipulation

Commercial Contractors argues that "[a]s a matter of law, [Miller] is estopped from contradicting the stipulation he voluntarily executed with the other parties, especially because the other parties relied and acted upon the stipulation." Brief for appellee Commercial Contractors on cross-appeal at 6. In analyzing this argument, we recognize that the Workers' Compensation Court is not a court of equitable jurisdiction and that estoppel is an equitable remedy. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

Nonetheless, we address the meaning of the stipulation because Commercial Contractors also claims, "This case should be reversed and remanded for a new trial because the trial court committed plain error in its interpretation of the joint stipulation and its entry of the corresponding order." Brief for appellee Commercial Contractors on cross-appeal at 11.

[19] The construction of a stipulation is a question of law. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). The stipulation entered between Commercial Contractors, Zurich, Travelers, Phoenix, and Miller stated:

> COME NOW plaintiff and defendants, by and through their respective counsel of record, and hereby stipulate to the dismissal of Travelers Indemnity Company and Phoenix Insurance Company due to the lack of a present controversy and, in support thereof, state:
>
> 1. That plaintiff's Amended Petition alleges the reappearance of plaintiff's low back pain symptoms necessitated cessation of plaintiff's work activities on or about April 15, 2002, and performance of low back surgery on or about December 20, 2002.
>
> 2. That defendants, Commercial Contractors Equipment, Inc. and Zurich American Insurance Company, have admitted the December 20, 2002 surgery and associated temporary total disability are related to an incident occurring on or about April 9, 1999.

> 3. That Travelers Indemnity Company and Phoenix Insurance Company did not provide worker's [sic] compensation insurance coverage for Commercial Contractors Equipment, Inc. on April 9, 1999.

The clear language of the stipulation is that the parties stipulated only to what was going to happen—the dismissal of Travelers and Phoenix due to the lack of a present controversy. The parties did set forth the three enumerated paragraphs of "support" quoted above for the court's consideration to justify the stipulated action. Such justification included the fact stated in paragraph 2 that Commercial Contractors admitted that the 2002 injury was "related to" the 1999 accident. Brief for appellee Commercial Contractors on cross-appeal at 6. The first problem is that Zurich and Travelers' agreement that Miller's 2002 surgery and disability were "related to" the 1999 accident is really quite meaningless. Agreement on the nebulous phrase "related to" does not constitute agreement on the causation of Miller's present condition, because "related to" is likely insufficient to establish the fact that the 1999 accident caused Miller's 2002 problems. See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 715, 513 N.W.2d 361, 368 (1994) (doctor's opinion that noise exposure on job " 'may be related' " to hearing loss is insufficient proof of causation as matter of law).

[20] But, most significantly, Miller does not agree with the "related to" language in paragraph 2; he agrees only that Zurich and Travelers agreed to agree that the 2002 claim was "related to" the 1999 claim. By the plain language of the stipulation, Miller did not stipulate that the 2002 injury was a recurrence of the 1999 injury or even that it was "related to" the 1999 accident—only Zurich and Travelers did that. Because Commercial Contractors' construction of the stipulation is so tortured and strained, it cannot be said that Commercial Contractors reasonably relied upon the stipulation. See *Breslow v. City of Ralston*, 197 Neb. 346, 249 N.W.2d 205 (1977) (only reasonably justified reliance will create an estoppel). Additionally, Miller's amended petition clearly alleged that his "current lower back condition . . . is the result of an aggravation of his 1999 back injury and/or a new injury condition to the same L4/5 disc injured in [Miller's] 1999 workplace accident." As a result, Travelers was on notice

that Miller's claim included a claim for benefits within its coverage. A pretrial statement filed by Commercial Contractors on September 24, 2003, after the stipulation and the dismissal of Travelers, states that Miller's average weekly wage at the time of the 1999 accident was $1,100 and at the time of the 2002 accident was $1,500—providing further evidence that it was to Miller's benefit to focus on the April 2002 incident's being an aggravation or new accident, even somehow imagining that the amended petition was not enough to provide Travelers notice that its coverage was potentially exposed. Therefore, there is no evidence that Miller, by the stipulation or any other conduct, abandoned his claim of a new injury or aggravation in 2002. Estoppel (as argued by Commercial Contractors) is not applicable here.

Finally, the stipulation was not binding on Miller or the trial court in determining whether Miller's condition in 2002 was an aggravation, recurrence, or new injury because, as stated above, Miller agreed only that Zurich and Travelers had agreed to agree that his 2002 condition was "related to" his 1999 injury. At its most basic level, paragraph 2 of the stipulation is essentially a matter of "So what?" from Miller's viewpoint. If two insurers want to agree to something about his claim, it does not matter to Miller, because as long as Commercial Contractors is found liable, he cares little about which insurance company had the coverage at the time of his injury.

(b) Law of Case

[21] Commercial Contractors argues, "The August 14, 2003 order established the 'law-of-the-case' and should have precluded the trial court from reconsidering whether the December 20, 2002 surgery and associated temporary total disability were caused by the April 1999 incident." Brief for appellee Commercial Contractors on cross-appeal at 9. The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

Again, as we have previously stated, Miller did not stipulate that the 2002 injury was "caused by" the 1999 accident. He merely stipulated that Travelers and Phoenix could be dismissed

because there was no present controversy and, in support of such dismissal, that Zurich and Travelers agreed to agree about some degree of causation—albeit a likely insufficient level of causation. The order dismissing Travelers did not preclude the trial court from considering the issue of whether the 2002 injury was caused by an aggravation or a completely new injury, because the causation of Miller's condition in 2002 was not determined in the order dismissing Travelers and Phoenix. There simply was no reconsideration at trial of issues substantially similar to those resolved in the order dismissing Travelers—Travelers' liability is not a specific finding of the trial judge, but a matter of contractual insurance coverage as applied to the trial decision. Thus, the law-of-the-case doctrine does not apply here. Commercial Contractors' argument is without merit.

(c) Loss of Earning Capacity

[22,23] Commercial Contractors argues that the trial court erred in finding that Miller sustained a loss of earning capacity as a result of the April 9, 1999, injury. The trial court found that Miller suffered a 15-percent loss of earning capacity and awarded him permanent partial disability benefits resulting from the 1999 accident. Permanent partial disability benefits pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 2004) are measured not by loss of bodily function, but by reduction in or loss of earning power or employability. See *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005). Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Davis v. Goodyear Tire & Rubber Co., supra.*

The trial court considered Dr. Messer's 9-percent whole body impairment rating of Miller, as well as Miller's testimony, his educational background, his history of labor-intensive work, and his general medical condition, in determining whether Miller suffered a loss of earning capacity. The trial court stated that the record did not contain any medical opinion permanently restricting Miller's work activities as a result of the 1999 accident, and Dr. Messer released Miller thereafter without restrictions.

However, the trial court found that although Miller "testified that he did all of the same jobs that he did prior to the injury upon return to his work," Miller "approached his job in a different manner as he incorporated or utilized a 'better way' to perform the essential functions of his position." Consequently, the trial court found that Miller's "change in approach to his job" was necessitated by the 1999 accident, and assigned Miller a 15-percent loss of earning capacity.

[24] There is evidence in the record that when Miller returned to work after the 1999 accident, although he performed all the tasks of his employment that he did before the accident, he had to do some things differently, such as "us[ing] a crane for everything," because he could not carry things like he used to and he could not lift as much weight. Miller testified that he had to "think of a better way to do" some things "because [his] body wouldn't take [the heavy lifting and carrying] anymore." Miller imposed his own restriction not to lift more than 100 pounds after the 1999 accident (he lifted 150 to 200 pounds before the accident). He also testified that there were some things that he had to "get help with" after the accident which he used to do by himself before the accident. The trial judge took this evidence into account, properly viewing Miller's change in approach to his work as a factor in his capacity to perform the tasks of the work, and clearly, the court can rely on a claimant's testimony to determine the degree of disability. See *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

[25,26] Although Miller received a raise in June or July 2000, after the accident, such raise is not determinative of whether he sustained a loss of earning capacity. See *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005) (if employee receives same or higher wages after injury, it is indicative, although not conclusive, of fact that his or her earning power has not been impaired). Our standard of review for factual findings of the Workers' Compensation Court is "very deferential." *Id.* at 689, 696 N.W.2d at 148. We will not substitute our view of the facts for that of the compensation court if the record contains sufficient evidence to substantiate the factual conclusions reached by the compensation court. See *id.* Because there is sufficient evidence to support the trial court's findings,

the trial court was not clearly wrong in determining that Miller sustained a 15-percent loss of earning capacity because he was unable to perform his job in the same manner as he did before the 1999 accident. See *id.*

(d) Aggravation Versus Recurrence

[27-30] Commercial Contractors argues, "This case should be reversed and remanded for a new trial because the trial court erred in determining that an aggravation or a new injury occurred on April 15, 2002 as this finding is contrary to the evidence." Brief for appellee Commercial Contractors on cross-appeal at 13. When a subsequent injury aggravates a prior injury, the insurer at risk at the time of the subsequent injury is liable. *Miller v. Meister & Segrist*, 255 Neb. 805, 587 N.W.2d 399 (1998). But, if the subsequent injury is a recurrence of the prior injury, the insurer at risk at the time of the prior injury is liable. *Id.* A finding in regard to causation of an injury is one for determination by the compensation court as the finder of fact. *Id.* In testing the sufficiency of the evidence to support the findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party. *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005). As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even if the testimony is not live testimony. See, *id.*; *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

With regard to the 2002 injury, the trial court considered whether such injury was a recurrence or aggravation of the 1999 injury or an independent injury occurring "free of any employment influence whatsoever given the progressive traits of [Miller's] underlying degenerative disc disease." The trial court found that Miller suffered a second accident on or about April 15, 2002. The court summarized its reasoning as follows:

> [T]he demonstrated capacity of [Miller] to engage in heavy labor after reaching maximum medical improvement from the 1999 accident; the lack of a belief by his treating physician that future medical treatment would be necessary; the absence of any evidence suggesting that [Miller] remain[ed] symptomatic on any ongoing basis after his return

> to work; the passage of several years without [Miller's] apparently missing any work or feeling the need for treatment; all combine to effectively persuade the trier of fact that the April 15, 2002 incident was the product of an aggravation or independently contributing accident as defined under the Nebraska law.

The trial court also found that the opinion of Dr. Messer was "persuasive," and it accepted such opinion over the opinion of a medical expert for the defense. The court found that Dr. Messer had opined that the 2002 accident was causally related to Miller's work at Commercial Contractors.

[31] Commercial Contractors argues that the trial court's finding that there was an aggravation or new injury in 2002 was contrary to the evidence because there was medical evidence in the record showing that "in the middle of the 2-year period" referred to by the trial court as a timeframe after Miller's 1999 surgery during which he was asymptomatic, Miller sought medical treatment for " 'continued' " pain and exacerbation of his chronic lumbar pain. Brief for appellee Commercial Contractors on cross-appeal at 14. In looking at the evidence used by Commercial Contractors in its argument, we find that although treatment notes from Miller's visit to a physician on June 18, 2002, state that Miller reported having done well after his 1999 operation until "approximately 1½ years later in mid-2001, when he began noticing a gradual onset of worsening back pain," there is no evidence in the record that Miller saw a physician for that complaint at that time. His first such visit subsequent to being released for work without restrictions after the 1999 surgery was on April 15, 2002. Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). Despite the evidence that Miller had pain 1½ years after his 1999 surgery, the review panel did not err in determining that the trial court's finding of an aggravation was not clearly wrong.

[32] Commercial Contractors also argues that Dr. Messer offered conflicting opinions—one which stated that the 2002 injury was a recurrence and one that stated it was an aggravation or new injury. Where the testimony of the same expert is conflicting,

resolution of the conflict rests with the trier of fact, the single judge. See *id.* Here, the trial court accepted Dr. Messer's opinion which stated:

> Miller's low back condition on December 20, 2002, is fairly characterized as either a new injury to his L4/5 disc, or an aggravation of the 1999 L4/5 disc injury, but no matter how one chooses to characterize . . . Miller's low back condition, a cause of his condition is his performance of very labor intensive employment following his 1999 surgery.

The review panel did not err in finding that the trial court was not clearly wrong in accepting such opinion.

3. Miller's Cross-Appeal

[33,34] Miller asserts on cross-appeal that the trial court's findings of fact and conclusions of law do not support a denial of an award of interest, penalties, and attorney fees. Under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). A "reasonable controversy" regarding a workers' compensation claim may exist, so as to preclude an award of waiting-time penalties to an employee, if there is a question of law previously unanswered by the appellate courts or if the properly adduced evidence would support reasonable but opposite conclusions by the Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. See *Milliken v. Premier Indus.*, 13 Neb. App. 330, 691 N.W.2d 855 (2005). The trial court found that there was a reasonable controversy here, specifically whether Miller suffered an "accident" on April 15, 2002, whether Miller's 2002 injury was caused by Miller's work, and whether the injury was a result of an aggravation or a recurrence. We agree that there was a reasonable controversy as to such issues, and the review panel did not err in affirming the trial court's denial of penalties and fees.

IX. CONCLUSION

Because Travelers was erroneously permitted to intervene in the litigation after trial and judgment, it was not a proper party to this appeal. Commercial Contractors' arguments are all without merit, and Miller's argument as to fees and penalties is without merit. Therefore, although we affirm the order of the review panel, which affirmed the order of the trial court, we dismiss Travelers' appeal.

AFFIRMED IN PART, AND IN PART APPEAL DISMISSED.

LOUIS SCOTT, APPELLANT AND CROSS-APPELLEE, V. DRIVERS MANAGEMENT, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

714 N.W.2d 23

Filed April 4, 2006. No. A-05-011.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. ____: ____. 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.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation.** Pursuant to Neb. Rev. Stat. § 48-120(4) (Supp. 2005), all medical and hospital information relevant to the particular injury shall, on demand, be made available to the employer, the employee, the workers' compensation insurer, and the compensation court. The party requesting such medical and hospital information shall pay the cost thereof. No such relevant information developed in connection with treatment or examination for which compensation is sought shall be considered a privileged communication for purposes of a workers' compensation claim.
6. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellant.

Raymond P. Atwood, Jr., and Ricardo Enriquez, of Atwood, Holsten & Brown Law Firm, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

Louis Scott appeals from the order of the review panel of the Nebraska Workers' Compensation Court affirming in part and in part reversing and remanding the award of the trial court. Drivers Management, Inc. (DMI), cross-appeals. For the reasons set forth herein, we affirm in part, and in part reverse the judgment of the review panel and remand with directions consistent with this opinion.

STATEMENT OF FACTS

On November 7, 2001, Scott filed a petition in the Workers' Compensation Court alleging that he had "sustained severe personal injuries in an accident arising out of and in the course of his employment with [DMI]" and that "said accident occurred at East State Road and Madison in Princeton, Indiana, and for which injury [Scott] is entitled to workers' compensation benefits." Scott alleged that at the time of his injury, he was working as an over-the-road truckdriver for DMI, and that he was earning an average weekly wage of $605.66. Scott described the accident as follows: "On August 18, 1997, [Scott] was crossing the street at East State Road and Madison in Princeton, Indiana. [Scott] was walking from a restaurant back to his truck when he was violently and unexpectedly struck by a car." Scott alleged that as a result of the accident, he suffered "serious, painful, and permanent injuries," such as a dislocated shoulder, a torn rotator cuff, a "tibia/fibia fracture," and a "concussion which subsequently revealed overwhelming evidence of organic deterioration caused by his closed head injury." Scott further alleged that

he was totally disabled in the accident and that he was "entitled to benefits, past, present and future for temporary total disability, permanent disability and loss of earning capacity."

On November 16, 2001, DMI filed its answer to Scott's petition. DMI admitted that Scott was in its employ on the day of the accident, but DMI generally and specifically denied every other allegation in Scott's petition, except those constituting admissions against Scott's interests. DMI further alleged that "if [Scott] suffers from any injury, impairment or disability or need for medical care, which [DMI] specifically denies, that same resulted solely from sickness, infection, disease or other inherent condition within [Scott]," or that such an injury, impairment, disability, or need for medical care "resulted from the natural progression of a pre-existing condition, and/or is the result of an independent intervening cause, and is not attributable to any accident or occupational diseases arising out of and in the course of [Scott's] employment."

On May 9, 2003, Scott filed a "Motion to Strike the Opinions of [Scott's] Treating Psychologist, Richard Dowell, Jr., Which Were Obtained *Ex Parte*." In Scott's motion, he contended the following:

> 1. The work-related accident which is the subject of this litigation occurred on August 18, 1997. During the course of . . . Scott's recovery, he was referred to Richard E. Dowell, Jr., Ph.D., for evaluation and treatment due to difficulties he was experiencing with his memory. This referral to Dr. Dowell was made at the request of [Scott's] then treating physician, Dr. [Louis] Conway. Dr. Dowell provided treatment to [Scott] on April 1st and 6th, 1998.
>
> 2. After the filing of the Petition in this case, [DMI's] counsel contacted Dr. Dowell *ex parte* on several occasions to discuss the treatment provided to [Scott] by Dr. Dowell. Additionally, defense counsel provided Dr. Dowell with additional documentation prepared by [DMI's] retained expert and asked Dr. Dowell to formulate opinions based upon this information.
>
> 3. Dr. Dowell prepared his initial report dated February 21, 2003, wherein he expressed several opinions regarding [Scott] based upon the information which was provided to

> him *ex parte* by defense counsel. Dr. Dowell's deposition was taken by [Scott] on April 16, 2003. Thereafter Dr. Dowell provided a second report dated May 5, 2003 expressing additional opinions in this case.
>
> 4. At no time did [Scott] waive the physician/patient privilege, or provide Dr. Dowell with a release authorizing him to discuss his treatment with [DMI] or its counsel.
>
> . . . .
>
> 9. [Scott] has refused to waive his privilege with respect to *ex parte* communications between the defense counsel and his treating physicians.

Scott asked the court to strike the February 21 and May 5, 2003, reports prepared by Dr. Richard Dowell, Jr.

On May 14, 2003, proceedings were held on Scott's petition and motion to strike. After hearing arguments from both Scott and DMI, the compensation court overruled the motion to strike. The parties then entered into numerous stipulations, including that Scott was employed by DMI on the day of the accident, that the accident arose out of and in the course of such employment, that DMI received timely notice of the accident, that Scott sustained "some form of injury," and that the payment records offered into evidence accurately reflected payments which were made by DMI to Scott and were relative to the accident. The parties then entered numerous exhibits, including medical records, into evidence. That evidence will be discussed at more length, as necessary, in the analysis portion of this opinion.

Scott first called Veda Brown to testify on his behalf. Brown testified that she lived with Scott and that they had known each other since they were 16 years old. Brown said that she had corresponded with Scott while he was in Vietnam. Brown was not in contact again with Scott until the 1980's, and she has lived with Scott since 1995. Brown testified that prior to Scott's 1997 accident, he was "funny, [would] tell jokes, [and] took care of himself, his business, his apartment, shopping, all of those things, going out and stuff like that." Brown said that prior to the accident, Scott was employed, did not have any anger problems, was easy to get along with, was not paranoid, and had no problems sleeping. Brown testified that she saw Scott approximately 3 weeks after his 1997 accident, and she described his condition as follows: "He

couldn't move. He had a — like a cast on his right, all on this side, and bandages all on his leg. And the scar he had like — looked like they had done something right here. He had a tooth missing, scrapes and stuff on his elbow." Brown said that after the accident, Scott "wasn't the same person" and "seemed down."

Brown testified that after Scott was released from the hospital following the 1997 accident, he needed her assistance with getting around, bathing, using the bathroom, and changing his bandages. She said that his demeanor had changed and that he was angry and hard to be around after being released from the hospital. She also said that he was paranoid and argumentative and that he had not been this way prior to the accident. Brown testified that Scott began to feel as if someone were watching him and listening to him. She further testified that after the 1997 accident, Scott's memory had gotten worse. For example, after he ate, he did not remember what he had eaten. Additionally, Scott's sleep patterns changed in that after the accident, "he would get very warm, and [would be] jumping in his sleep, mumbling, restless, up in the nighttime smoking cigarettes." Brown testified that Scott would be unable to live on his own and that she handled his money, his clothing, and his paperwork.

On cross-examination, Brown testified that prior to 1995, she lived in New York and Scott lived in California. She said that she had not lived with Scott prior to 1995 but that she was "familiar with [Scott's] behavior from — on a day-to-day basis, a living-together basis from substantially September of 1995 to the [time of the hearing]." She said that she had attended approximately 20 of Scott's medical appointments since the time of the 1997 accident and that to her knowledge, Scott had been honest when explaining symptoms and problems to doctors. She said that prior to 1997, Scott had not complained to her about anger, sleep, or memory problems. Brown said that prior to the 1997 accident, she did not have to "take care of" Scott. Brown further stated that from July 1996 until June 1997, she had ridden along with Scott every day when he was driving his truck.

Brown testified that Scott was in another accident in 1998 but that his memory and behavior did not change as a result of that accident. She said that the 1998 accident mainly caused Scott to have pain in his shoulder. DMI's counsel asked Brown if Scott,

"in his medical reports or in his medical treatment[,] reported that he was having increased memory loss since the 1998 accident, and increased problems with concentration, neck pain, back pain, and bilateral knee pain, in addition to the shoulder, would that be different than your understanding." Brown replied that "[Scott's] memory, that's been like that since [19]97. That's an ongoing thing with him. . . . And him being paranoid and having a problem sleeping and all of that, that was before the [19]98 accident." On redirect examination, Brown clarified that Scott injured his left shoulder in the 1998 accident and that he injured his right rotator cuff in the 1997 accident.

Scott then testified in his own behalf. Scott testified that he was in the U.S. Army from 1968 until 1974 and that he was stationed in Vietnam during part of that time. While he was serving in the Army, he was awarded the Purple Heart, as well as other medals of commendation. He was honorably discharged from the Army, and he indicated that from the time of his discharge until the 1997 accident, he was "continually employed." Scott worked as a pipefitter before becoming an over-the-road truckdriver. Scott said that he was working for DMI when he was involved in the 1997 accident, which he described as follows:

> I arrived to my drop off point and the business was closed. So I locked up my truck, went about — I went down the road to get something to eat. Came out. I was walking back to my truck. And I saw headlights about five feet from me. I woke up. I was in the hospital.

He said that he lost consciousness for a short time and that he does not have a "real clear recollection of the events following the accident."

Scott said that as a result of the 1997 accident, he suffered a broken leg, a dislocated right shoulder, a torn rotator cuff, an injury to his right cheek requiring stitches, and a loud ringing in his right ear. Scott underwent numerous surgeries after the 1997 accident. When asked if he suffered any psychological injuries in the 1997 accident, Scott replied that he forgets things, has mood swings, and prefers not to be around people. He further testified that anymore, he does not trust people, does not like being in crowded stores, and does not have patience. He claimed that he did not have those problems prior to the 1997 accident. Scott

testified that he continues to have physical problems related to the 1997 accident, such as severe pain in his right knee and ankle. He said that when he sees the scars on his legs, it brings back memories of the accident and it "makes me agitated. . . . It makes me remember back, all the pain and treatments I had. And it makes me angry." He further testified that he still has problems with his right shoulder.

Scott testified that he was in another accident in 1998, when a car in which he was riding was struck by another vehicle. In the 1998 accident, he injured his left shoulder and his left knee and he banged his head. The accident also made his right leg, right shoulder, and neck sore. Scott said that in the 1998 accident, the most significant injury was to his left shoulder, and that his left shoulder was not injured in the 1997 accident. He said that it took about 1 year for him to recover from the injuries he sustained in the 1998 accident. Scott testified that after his recovery from the 1998 accident, his right leg and right shoulder "felt the same way it did before that [19]98 accident."

Scott then testified about his experiences in Vietnam. He said that it was difficult for him to discuss his time in Vietnam and that he sustained injuries while he was there. Scott had stepped on three landmines, thereby suffering cuts, a perforated eardrum, and injuries to his left knee. He also witnessed other soldiers being wounded or killed. When asked if he had been honest when giving the history of his Vietnam experiences to doctors, Scott replied: "If it didn't hurt me too much at that time to speak about it, I would talk. But if it really aggravated me, I wouldn't say [any]thing unless I was asked." He sought treatment at the Veterans' Administration (VA) hospital in Philadelphia, Pennsylvania, after he was discharged, and he was diagnosed with posttraumatic stress disorder (PTSD). Scott testified that in the mid-1980's, he was having problems with his PTSD but was able to work full time despite the problems. He testified that since the 1997 accident, his PTSD symptoms had worsened. Scott testified:

> I suffer mood swings. I wake up at night in a cold sweat. I wake up at night thinking I'm in the truck, standing on the running boards urinating. . . . I don't like to be around people.

. . . .

> I often have thoughts of people watching me. I don't like loud noises. Loud noises really startle me.

Scott testified that he is "not the same person [he] was before the accident at all, physically or mentally."

Scott said that he began to notice the worsening of his PTSD symptoms when he got out of the hospital following the 1997 accident. He testified that at such time, he became angry, distrusted people, and began to have nightmares. Scott said that he was taking thyroid medication, sleeping aids, and medication for his paranoia and mood swings, but that prior to his 1997 accident, he was not taking any medication. In addition, Scott testified that his memory has gotten worse since the 1997 accident and that he has trouble remembering things such as his telephone number or directions. Scott also testified that he has trouble concentrating and that this problem began after the 1997 accident as well. Scott said that although he would like to work, he has been unable to work since the 1997 accident. Scott testified that he had attempted to be truthful and honest with the doctors who had treated him since 1997 and that while he had never intentionally misled them, he might have forgotten to mention things.

On cross-examination, Scott testified that since 2000, he has sought treatment through the VA for his PTSD, and that his disability has been raised from 10 to 70 percent as a result of his PTSD symptoms. He denied that he had ever received treatment through the VA for injuries to his right leg. He also denied having nightly nightmares prior to the 1997 accident, although he conceded that he had received treatment through the VA as recently as 1995 for nightmares. Scott said that he could not remember if prior to the 1997 accident he received any treatment through the VA for problems with anger and distrust of people. Scott also conceded that he struck his head in the 1998 accident, but he stated that it did not render him unconscious. Scott conceded that prior to the 1997 accident, he did receive treatment through the VA for depression and PTSD. Scott further testified that he was not having memory problems prior to the 1997 accident.

On redirect examination, Scott reiterated that while he had suffered from PTSD for a long while, he had been able to work

through the symptoms until the 1997 accident. On recross-examination, Scott conceded that prior to the 1998 accident, he had hoped to one day return to work, and that while records showed he took a functional capacity examination prior to the 1998 accident, he did not recall taking the examination.

DMI first called James Rogers, a vocational counselor, to testify on its behalf. The parties stipulated that Rogers is an expert in the field of vocational rehabilitation. Rogers said that he interviewed Scott and examined medical reports and records in the instant case. Rogers testified that he had prior experience dealing with cases involving brain injuries. Rogers said that he prepared one loss of earning capacity analysis in which he found that Scott had a 60- to 65-percent loss of earning capacity, based on member impairments to his right arm and right leg. Rogers was asked if he "rendered an opinion as to what [Scott's] status was in the world at the time [Rogers] evaluated [Scott], but without regard to what put [Scott] there," and Rogers replied in the affirmative. Rogers also testified that he did not believe that he had examined medical records or reports regarding Scott's 1998 accident.

Rogers next testified that he had recently changed his opinion regarding Scott's employability and that he now believed Scott to be unemployable. Rogers said that this opinion was based partially on a 2003 functional capacity evaluation, and he conceded that he made no effort to "distinguish any permanent or any impairment or any restrictions that may — from that [functional capacity evaluation], that may have been attributable to . . . Scott's war injuries or from his 1998 accident." Rogers also said that in concluding Scott was unemployable, Rogers considered both Scott's physical capabilities and his psychological and psychiatric status. Finally, Rogers said that he was not able to establish a causative link between Scott's disability status and the 1997 accident; Rogers also agreed that no vocational counselor could render an opinion on causation.

On cross-examination, Rogers said that he had ample information available to him in the instant case and that he did not feel any additional information or documentation was necessary in order to assist him in formulating an opinion. Rogers testified he believes that the overwhelming evidence shows Scott is unemployable and that "[t]his is due to a combination of [Scott's]

PTSD, age, below average intellect, and physical problems." Rogers said that none of the testimony given at the hearing changed his opinion.

DMI next called Karen Stricklett to testify on its behalf. Stricklett said that she is a vocational rehabilitation counselor and that she had been asked to prepare a rebuttal report concerning Scott. Stricklett said that based on the records she reviewed, she was able to provide an opinion with a reasonable degree of vocational certainty. Stricklett's reviews of the medical records and her opinions are contained in her report and will be discussed as necessary in the analysis section of this opinion.

The court entered its award on August 29, 2003. The court found as follows with regard to the accident:

> Following [Scott's] accident, he was hospitalized in Deaconness Hospital in Evansville, Indiana, through September 12, 1997, with diagnoses of multiple trauma with multiple face injuries, traumatic dislocation of right shoulder with an associated rotator cuff tear, multiple contusions, abrasions and lacerations and a Grade III open tibia and fibula fracture with significant soft tissue loss . . . . [Scott] was then transferred to Williamsport Hospital, where he came under the care of Dr. Richard Straley, who has remained his treating physician. Prior to transfer from the Deaconness Hospital, [Scott] underwent surgical repair of his right leg including the application of an external fixator and internal rod along with skin grafts, a rotator cuff repair, and repair of facial abrasions . . . .
>
> Early in his treatment, first noted on November 14, 1997, [Scott] reported an increase in his memory loss and requested a referral to a psychiatrist . . . . [Scott] has consistently made such complaints throughout his treatment with Dr. Straley.
>
> It is uncontested that [Scott] suffered from pre-existing [PTSD]. He served four years in Vietnam in the army and was wounded on several occasions. He also witnessed a number of his unit members fall victim to land mines. However, [Scott] was able to work consistently since his discharge from the service, and had not sought treatment from the [VA] for his [PTSD] since the late 1980's.

[Scott] has presented ample evidence, which the court finds to be persuasive, that he suffered an aggravation of his [PTSD] as a result of the accident and injury on August 18, 1997. In making this finding, the court relies upon the reports of Dr. Terri L. Calvert . . . , Dr. Jack Stark . . . , and Dr. [LaRue] Montanye . . . . It is the consensus of these professionals that [Scott] has not only suffered an aggravation of the PTSD, but that as a result, he has been rendered virtually unemployable.

[Scott] has been also evaluated by experts retained by [DMI], and the court has considered the opinions offered by Drs. [Jerry] Sweet and Dowell, as well as the balance of the medical evidence. However, as stated above, the court finds the opinions of the experts presented by [Scott] to be persuasive.

[Scott] has also offered the opinion of . . . Rogers, a vocational expert, who conducted a review of all the medical records presented to him by the parties. . . . It is apparent that . . . Rogers has considered the reports of the medical and psychological professionals, as well as the functional capacity evaluations, which [Scott] has undergone. As a result, . . . Rogers has offered the opinion that [Scott] is at best an odd-lot worker, perhaps capable of working in a sheltered environment.

[DMI] has presented the report of . . . Stricklett and as a presumable defense, her testimony that it is not possible for a vocational expert to attribute [Scott's] current employability status to the August 18, 1997, accident and injury. The court would suggest that such a determination is the province of the court, and the court is presented with ample evidence to make that causal connection.

The court has also considered the fact that [Scott] was involved in an additional motor vehicle accident in August, 1998. In that accident, he suffered an injury to his neck and left shoulder in particular. While representing an intervening event, certainly the court believes [Scott] has presented ample evidence from Dr. Straley that the August 1998 motor vehicle accident did not cause further injury to his right shoulder or worsen his right leg injury. Nor did [Scott]

> suffer any additional head injury above what had occurred in August 1997.
>
> The court relies upon the opinions of Dr. Montanye, in finding that [Scott] became permanently and totally disabled on August 9, 1999. On that date, it was Dr. Montanye's opinion that [Scott's] prognosis for employment was poor and that his prognosis for employment in a sheltered environment was fair to average. Dr. Straley offered the opinion . . . that [Scott] was at maximum medical improvement as of October 11, 1999.

DMI appealed to the review panel, which held a review hearing on May 13, 2004. In its "Order of Remand and Reversal in Part on Review," the review panel concluded, "The degree of incapacitation and whether such was due to [Scott's] Vietnam experience, the accident of August 18, 1997, or a subsequent automobile accident of August 1998, are central to the finding by the trial court that [Scott] is now permanently and totally disabled." The review panel found that "[t]he trial court believed, and made a finding of fact in the Award of August 29, 2003, that [Scott] 'had not sought treatment from the [VA] for his [PTSD] since the late 1980's.' " The review panel then stated, "However, the evidence established that in fact [Scott] was evaluated and treated at the VA Medical Centers in Compton, and Long Beach, California, from 1990 through 1995 regarding [PTSD] and additional medical issues." The review panel noted, "The degree of preexisting PTSD and [Scott's] history of treatment and its [e]ffect on [him] is so critical to a final determination regarding [his] status we believe the case should be remanded so the trial court may re-weigh the evidence, aware of [Scott's] history of treatment."

The review panel further found that the trial court did err when it calculated Scott's average weekly wage in that the trial court had improperly excluded 3 weeks' wages from the average weekly wage calculation, because "[n]o testimony in the present case offered a sufficient explanation regarding the weeks in question to cause exclusion." The review panel also concluded that the trial court used the wrong statutory maximum benefit, noting that "the statutory maximum weekly rate in 1997 was $427.00 rather than $444.00." Finally, the review panel affirmed the ruling of the trial court denying Scott's motion to strike portions of

Dr. Dowell's testimony due to a violation of the physician-patient privilege.

In a "Concurrence in Part and Dissent in Part," one member of the review panel found the following:

> In Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 461 N.W.2d 565 (1990) the Nebraska Supreme Court stated that an employee is entitled to an award when the injuries suffered in an accident combine with the pre-existing condition or disability and further that there is no allocation of disability attributable to a work-related injury and disability attributable to an antecedent or pre-existing condition. The plaintiff in this case had pre-existing [PTSD] which, when combined with the injuries he suffered in the accident, leaves him totally disabled. This is true even if the accident did not aggravate the pre-existing [PTSD]. This is what the trial judge found and there is substantial evidence in the record to support the trial judge. The trial judge should be affirmed on the issue of total permanent loss of earning power.

The concurrence in part further asserted that the trial court's determination of Scott's average weekly wage should be affirmed, although it agreed that the trial court's use of $444 as the statutory maximum was in error and stated that the matter should be remanded only on that issue. Scott has now appealed to this court, and DMI has cross-appealed.

ASSIGNMENTS OF ERROR

Scott alleges, restated, that the review panel erred when it reversed the trial court's award regarding both the aggravation of Scott's PTSD and his average weekly wage and when it failed to reverse the trial court's ruling regarding the portions of Dr. Dowell's testimony which were obtained ex parte. On cross-appeal, DMI contends that the review panel erred when it remanded the cause back to the trial court without ruling on all issues raised by DMI on appeal and when it failed to find that the trial court had not issued a reasoned decision.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the

compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Id.*

[3] 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.*

[4] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

Aggravation of PTSD.

Scott first alleges that the review panel erred when it reversed the trial court's determination regarding the aggravation of his PTSD. In its "Order of Remand and Reversal in Part on Review," the review panel found:

> The trial court believed, and made a finding of fact in the Award of August 29, 2003, that [Scott] "had not sought treatment from the [VA] for his [PTSD] since the late 1980's." . . . However, the evidence established that in fact [Scott] was evaluated and treated at the VA Medical Centers in Compton, and Long Beach, California, from 1990 through 1995 regarding [PTSD] and additional medical issues. . . . The degree of preexisting PTSD and [Scott's] history of treatment and its [e]ffect on [him] is so critical to a final determination regarding [his] status we believe the case should be remanded so the trial court may re-weigh the evidence, aware of [Scott's] history of treatment.

Scott alleges that "there is ample evidence in the record to support the findings made by [the trial judge]" and that the review panel should have affirmed the trial court's findings. Brief for appellant at 19.

The trial court, in its award, made the following findings with regard to Scott's PTSD:

> It is uncontested that [Scott] suffered from pre-existing [PTSD]. He served four years in Vietnam in the army and was wounded on several occasions. He also witnessed a number of his unit members fall victim to land mines. However, [Scott] was able to work consistently since his discharge from the service, and had not sought treatment from the [VA] for his [PTSD] since the late 1980's.
>
> [Scott] has presented ample evidence, which the court finds to be persuasive, that he suffered an aggravation of his [PTSD] as a result of the accident and injury on August 18, 1997. In making this finding, the court relies upon the reports of Dr. Terri L. Calvert . . . , Dr. Jack Stark . . . , and Dr. [LaRue] Montanye . . . . It is the consensus of these professionals that [Scott] has not only suffered an aggravation of the PTSD, but that as a result, he has been rendered virtually unemployable.

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004). 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.*

The record is clear that Scott did in fact receive some treatment for his preexisting PTSD during the early- to mid-1990's. The trial court erroneously noted that he had not been treated for his preexisting PTSD since the late 1980's. We agree with the review panel that "[t]he degree of preexisting PTSD and [Scott's] history of treatment and its [e]ffect on [him] is . . . critical to a final determination regarding [his] status." Thus, we affirm the review panel's determination that the matter should be remanded to the trial court "so the trial court may re-weigh the evidence, aware of [Scott's] history of treatment."

Average Weekly Wage.

Scott next alleges that the review panel erred when it found that "the trial court erred regarding the calculation of the average

weekly wage and [Scott's] temporary and permanent indemnity rates." In its award, the trial court found as follows:

> At the time of said accident and injury, [Scott] was receiving an average weekly wage of $672.98 being sufficient to entitle him to benefits of $444.00 (the statutory maximum) per week for 103 weeks of temporary total disability, and thereafter, and in addition thereto a like sum each week from August 10, 1999, through the date of the hearing herein, and for so long in the future as [Scott] remains permanently and totally disabled. [Scott] is also entitled to $444.00 per week for 6.75 weeks for a 3 percent permanent partial disability to his right arm, and a like sum each week for 68.8 weeks for a 32 percent permanent partial disability to his right leg. The court relies upon the calculation presented by [Scott] to ascertain [his] average weekly wage.

The review panel found that under *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990), the trial court should "exclude 'abnormally low work weeks'" from the calculation of a worker's average weekly wage but that "[n]o testimony in the present case offered a sufficient explanation regarding the weeks in question to cause exclusion." The review panel then stated: "[T]he finding regarding average weekly wage [should be] reversed and remanded for re-calculation. Further, the statutory maximum weekly rate in 1997 was $427.00 rather than $444.00."

In *Canas, supra*, the Nebraska Supreme Court found that "the Legislature sought to exclude those abnormally low workweeks from the 26-week period used for the calculation." *Id.* at 168, 459 N.W.2d at 537. Nowhere in *Canas* does the Nebraska Supreme Court suggest that a trial court cannot examine a worker's wage statement and exclude abnormally low workweeks without testimony regarding why the workweeks were abnormally low. In the instant case, although there was no testimony explaining abnormally low workweeks, Scott's wage statement for the previous 6 months was introduced into evidence. The trial court examined Scott's wages for the 6 months preceding his work-related accident, excluded those weeks that it found to be abnormally low, and calculated Scott's average weekly wage. This was a finding

of fact made by the trial court, and it was not clearly erroneous. Therefore, we reverse the finding of the review panel and instead hold that the trial court's finding regarding the calculation of Scott's average weekly wage should be affirmed.

Additionally, both parties agree that the statutory maximum weekly rate in 1997 was $427 rather than $444. Accordingly, the matter must be remanded to the review panel for remand to the trial court, with directions to amend its award to show that Scott is entitled to benefits of $427 per week rather than $444 per week, should the trial court determine that Scott is entitled to benefits.

Information Obtained Ex Parte.

Scott next alleges that the review panel erred when it failed to reverse the trial court's ruling regarding the portions of Dr. Dowell's testimony which were obtained ex parte. Scott contends that the "physician/patient privilege precludes an employer or its legal representative from contacting [a] plaintiff's treating health care provider *ex parte*." Brief for appellant at 29.

[5,6] Scott's argument is misplaced. Neb. Rev. Stat. § 48-120(4) (Supp. 2005) provides, in relevant part:

> All medical and hospital information relevant to the particular injury shall, on demand, be made available to the employer, the employee, the workers' compensation insurer, and the compensation court. The party requesting such medical and hospital information shall pay the cost thereof. No such relevant information developed in connection with treatment or examination for which compensation is sought shall be considered a privileged communication for purposes of a workers' compensation claim.

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

The meaning of § 48-120(4) is plain and unambiguous. When an injured worker is seeking compensation for an injury from his employer and the employer seeks relevant information from the injured worker's treating physician regarding that injury, that information is not privileged. This assignment of error is without merit.

DMI's Cross-Appeal.

On cross-appeal, DMI alleges that "[t]he review panel erred in remanding rather than ruling on all issues raised on appeal from the trial court by [DMI]." Brief for appellee on cross-appeal at 44. The review panel, in its order, held that "[m]ost of [DMI's] other assignments of error are related to the PTSD issue and it is premature to address those allegations of error pending the trial court's redetermination regarding aggravation of that preexisting condition." DMI's allegations of error revolve around the trial court's factual findings, and we determine that the review panel was correct when it found that it would be premature to address DMI's additional allegations of error prior to the trial court's reweighing of the evidence presented to it on remand. This assignment of error is therefore without merit.

CONCLUSION

The trial court's factual finding that Scott had not been treated for his PTSD since the late 1980's was clearly erroneous. We find that the review panel properly reversed this finding and remanded the cause for the trial court to reweigh the evidence in light of Scott's history of treatment. We further find that the trial court properly calculated Scott's average weekly wage, but we find that the trial court used the incorrect statutory maximum wage rate. Additionally, the review panel correctly held that Scott's medical information received by DMI from Dr. Dowell was not protected by physician-patient privilege. Finally, we hold that the review panel correctly determined that it was premature to address the issues presented by DMI on cross-appeal, because the matter needed to be remanded to the trial court for a reweighing of the evidence presented. Therefore, the matter is remanded to the review panel for remand to the trial court with directions consistent with this opinion.

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

IRWIN, Judge, dissenting in part.

Although I agree with the majority's conclusions in most respects, I respectfully dissent from that portion of the majority opinion which reverses the review panel's holding concerning Scott's average weekly wage. I agree with the review panel that

"'abnormally low work weeks'" may be excluded from the compensation court's calculation of the average weekly wage only when the record presents a sufficient explanation regarding the weeks in question. I respectfully disagree from the majority's conclusion that "[n]owhere in *Canas* [*v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990),] does the Nebraska Supreme Court suggest that a trial court cannot examine a worker's wage statement and exclude abnormally low workweeks without testimony regarding why the workweeks were abnormally low."

In *Canas*, the issue specifically presented to the Nebraska Supreme Court was not whether certain weeks should be excluded from the average weekly wage calculation, but, rather, how the compensation court should "average" the employee's weekly wage during the relevant weeks. Nonetheless, in recognizing that certain weeks in that case should be excluded, the court stated:

> In the 26 weeks preceding the accident, each of [the employee's] workweeks was not less than 44.03 hours or more than 50.87 hours, with seven exceptions. *In those 7 weeks, [the employee] worked 20.77, 37.43, 34.75, 14.35, 36.63, 7.78, and 36.75 hours, respectively. It is uncontroverted that [the employee's] shortened workweeks were due to vacation time incurred in moving his family from Texas to Nebraska, sick leave, and holidays.*

(Emphasis supplied.) *Id.* at 167, 459 N.W.2d at 536-37. Although not essential to the holding in *Canas*, the court specifically recited evidence in the record which explained why those specific workweeks were abnormally low.

Similarly, in *Clifford v. Harchelroad Chevrolet*, 229 Neb. 78, 425 N.W.2d 331 (1988), the Nebraska Supreme Court affirmed the review panel's holding in which it excluded from the average weekly wage calculation certain weeks as abnormally low workweeks. A review of the opinion in *Clifford*, however, indicates that the court recognized that most of the excluded weeks were during a time period when the employee's illness prevented him from working. After examining two specific exhibits, the court noted that the specific weeks should be excluded. Again, the court's discussion suggests that the exhibits demonstrated a reason for the abnormally low workweeks and recognizes that the bulk of them

were due to illness. Although the suggestion was, again, not central to the court's holding, the court's discussion in *Clifford* further suggests that the record should include some explanation for an abnormally low workweek before the week should be excluded from the average weekly wage calculation.

Although I recognize that no opinion of the Nebraska Supreme Court specifically holds that the record must contain an explanation for an abnormally low workweek before that week may be excluded from the average weekly wage calculation, I also note that the majority points to no authority specifically holding that such is not required. Inasmuch as there is no specific holding of the Nebraska Supreme Court on this matter, I look to the discussion in both *Canas* and *Clifford* and see, at the very least, a suggestion that such is required. Accordingly, I would affirm the review panel's holding on this issue.

ERNEST C. HARPER, APPELLANT, V.
HAROLD W. CLARKE ET AL., APPELLEES.

713 N.W.2d 502

Filed April 11, 2006. No. A-04-461.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Pleadings: Proof: Dismissal and Nonsuit.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.
3. **Pleadings: Dismissal and Nonsuit: Rules of the Supreme Court: Notice: Appeal and Error.** A court's failure to give notice before a sua sponte dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is not per se reversible error when it is patently obvious that the plaintiff could not prevail based on the facts alleged in the complaint.
4. **Civil Rights: Prisoners: Collateral Attack.** A Nebraska State Penitentiary inmate's civil rights claim filed under 42 U.S.C. § 1983 (2000) which is a collateral challenge to an underlying disciplinary action is not cognizable under § 1983 unless the prisoner can demonstrate that the disciplinary conviction has previously been invalidated.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Affirmed.

Ernest C. Harper, pro se.

Jon Bruning, Attorney General, and Stephanie A. Zeeb for appellees.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Ernest C. Harper appeals from the order of the district court for Johnson County dismissing Harper's complaint filed under 42 U.S.C. § 1983 (2000). Because we conclude that Harper's § 1983 claim is not cognizable and that the district court's failure to give Harper notice of its sua sponte dismissal of the complaint as to all but one of the defendants was not reversible error, we affirm.

BACKGROUND

At the time of the actions leading to this appeal, Harper was committed to the Nebraska Department of Correctional Services (DCS) and incarcerated at the Tecumseh State Correctional Institution. On January 31, 2003, Harper allegedly engaged in "inappropriate physical contact" with a female staff member, as reported by that staff member, and was placed on immediate segregation. The situation apparently involved Harper's contact with Pam Cooper, an employee of a food service company which had contracted with DCS to provide such service for the prison institution.

On February 20, 2003, a hearing was held by the Institutional Disciplinary Committee. Harper was found guilty of "Sexual Activities" and was given 45 days' disciplinary segregation, with credit for 21 days served. Harper also lost one-half month of good time. It appears that sometime thereafter, Harper was placed on administrative confinement status, having been deemed a threat to the safety, security, and good running order of the prison institution as a result of his inappropriate behavior with Cooper.

On June 18, 2003, a "Director's Subcommittee" hearing was held, and Harper's administrative confinement status was maintained. Harper appealed this decision to the director of DCS, Harold W. Clarke, who denied the appeal.

On December 29, 2003, Harper filed a complaint in the district court for Johnson County against the following persons, individually and in their official capacities: Clarke; Ken Quinn, a deputy warden; Cooper; Cpl. Lee Tinkler, a prison guard; and an "Unnamed/Unknown individual." The trial court treated Harper's claim as alleging a violation of the above-mentioned federal civil rights statute, § 1983. In his complaint, Harper essentially alleged that he was denied due process in connection with the events leading to his segregation, in that he was not provided with copies of the reports or statements made by Cooper and Tinkler which Harper alleged were used against him by the defendants. Harper also claimed that he was not afforded an opportunity to refute the reports or statements or use them to disprove a material fact. Harper further alleged that he had been charged with action against a "staff" member, but that the food service company's employees (i.e., Cooper) are not "staff," thereby rendering the reports false and misleading. Harper claimed that he should therefore not be punished for inappropriate contact with " 'staff.' " Harper sought both compensatory and punitive damages in his complaint.

Although the motion is not included in the record, Cooper apparently filed a motion to dismiss Harper's complaint under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) for failure to state a claim upon which relief could be granted. A hearing was held on this motion on February 23, 2004, in the district court. Harper appeared pro se via telephone, and Cooper and her attorney appeared in person. Cooper asserted that she should not be a defendant in the action because she was not an employee of DCS, but, rather, was an employee of the food service company, an entity that contracted with DCS to provide such service for the prison institution. Cooper claimed that as such, she had no decisionmaking authority in the matter and thus should be dismissed from the proceeding. On February 25, the district court entered an order that dismissed the complaint not only as to Cooper upon her motion, but as to all the other defendants upon the court's own motion.

Specifically, in response to Cooper's claim that she could not be sued based on the allegations in Harper's complaint, the court noted in its order that a private individual can be sued under

§ 1983. However, the court then noted that Harper had previously appealed the decision of DCS in his disciplinary case to the district court for Johnson County, which had affirmed the decision. The court also noted that on further appeal, this court had, pursuant to Neb. Ct. R. of Prac. 7A(1) (rev. 2000), summarily affirmed DCS' imposition of discipline. See *Harper v. Department of Corr. Servs.*, 12 Neb. App. xlvii (No. A-03-770, Nov. 17, 2003). The district court found that pursuant to *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), Harper was precluded from bringing a claim for damages under § 1983 because Harper had failed to have his disciplinary conviction or sentence overturned. Therefore, after taking judicial notice of "Harper[']s files," the district court held that Harper had failed to state a claim for damages that was cognizable under § 1983. The district court further found that Harper had not alleged that he had suffered actual injury as a result of the alleged conduct of the prison officials and that inmates have no liberty interest in their placement in administrative confinement. As noted above, the court granted Cooper's motion to dismiss and then, on its own motion, dismissed the case as to all the other defendants. The court concluded that Harper did not have the ability to amend his complaint.

On March 1, 2004, Harper filed a "Motion to Alter or Amend a Judgment" with the district court. The motion was heard on March 29, and Harper again appeared pro se via telephone. The court denied the motion in an order filed on March 30. Harper now appeals.

ASSIGNMENTS OF ERROR

Harper assigns the following errors: (1) The district court erred when dismissing his complaint for failure to state a claim upon which relief could be granted, on its own motion, without notice; (2) the district court erred and abused its discretion in finding that he did not have a liberty interest when placed in administrative confinement; (3) the district court erred and abused its discretion by failing to sustain his motion to alter or amend the judgment.

STANDARD OF REVIEW

[1,2] An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the

complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief. *Id.*

ANALYSIS

Harper asserts that the district court erred in dismissing his complaint for failure to state a claim upon which relief could be granted on its own motion and without notice. In other words, Harper claims that the district court erred when it dismissed his claim sua sponte as to all defendants other than Cooper on its own motion and without first providing Harper adequate notice of the dismissal. The relevant question thus becomes the appropriateness of a sua sponte dismissal under rule 12(b)(6) without notice's first being provided to the plaintiff. Because this action was filed after January 1, 2003, it is governed by the new rules for notice pleading, which apply to all "civil actions filed on or after January 1, 2003." See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). Nebraska courts have not addressed sua sponte dismissals under rule 12(b)(6). Because the new rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. See, similarly, *Kellogg v. Nebraska Dept. of Corr. Servs., supra*; *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

The Eighth Circuit addressed sua sponte dismissals under the federal equivalent of rule 12(b)(6) and the issue of notice in *Smith v. Boyd*, 945 F.2d 1041 (8th Cir. 1991). In *Smith*, a pretrial detainee filed a pro se complaint alleging that jail officials had violated his civil rights by tampering with his mail, harassing him in retaliation for his complaints about jail conditions, denying him meaningful access to the courts, and denying him social services afforded other prisoners. Prior to trial, the court dismissed the detainee's complaint sua sponte for failure to state a claim. He appealed, claiming, among other things, that the district court erred by dismissing his complaint without first providing him notice and an opportunity to respond.

The Eighth Circuit held that the failure to give such notice is not per se reversible error when it is "patently obvious the plaintiff could not prevail based on the facts alleged in the complaint." *Id.* at 1043. The court further stated that although district courts should provide predismissal notice, the failure to give such notice does not mandate reversal. Rather, the court held that it would "review the allegations of the compliant de novo, accept as true all well-pleaded allegations, and construe the complaint in the light most favorable to the plaintiff to determine whether it states a claim." *Id.* After its de novo review of the allegations in the complaint, the *Smith* court concluded that the district court had properly found that the detainee's complaint failed to state a claim.

The *Smith* court noted that there was a split among the circuits as to whether the failure to provide predismissal notice mandates reversal, but the court declined to follow a rule mandating reversal, finding it "too inflexible." *Id.* at 1043 n.2. The Eighth Circuit has not revisited the issue of notice and a sua sponte dismissal under the federal equivalent of rule 12(b)(6) since *Smith*, and a review of relevant federal cases indicates that the circuits remain divided on whether notice is required before a court may dismiss a claim sua sponte under rules equivalent to rule 12(b)(6). A number of circuits have held that sua sponte dismissal under a rule equivalent to rule 12(b)(6) of a meritless claim without notice does not require reversal. See, *Baker v. Director, U.S. Parole Com'n*, 916 F.2d 725 (D.C. Cir. 1990) (per curiam); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986 (9th Cir. 1987). See, also, *McKinney v. Okl., Dept. of Human Services*, 925 F.2d 363 (10th Cir. 1991) (allowing dismissal without notice where plaintiff cannot prevail on facts alleged and amendment would be futile). Other circuits have held that the failure to provide predismissal notice mandates reversal. See, *Street v. Fair*, 918 F.2d 269 (1st Cir. 1990) (per curiam); *Ricketts v. Midwest Nat. Bank*, 874 F.2d 1177 (7th Cir. 1989); *Perez v. Ortiz*, 849 F.2d 793 (2d Cir. 1988); *Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico*, 695 F.2d 524 (11th Cir. 1983).

[3] We find the Eighth Circuit's decision in *Smith v. Boyd*, 945 F.2d 1041 (8th Cir. 1991), to be persuasive. Accordingly, we hold that a court's failure to give notice before a sua sponte dismissal

under rule 12(b)(6) is not per se reversible error when it is patently obvious that the plaintiff could not prevail based on the facts alleged in the complaint. Applying this holding to the instant case, we will review the allegations of Harper's complaint de novo, accept as true all well-pled allegations, and construe the complaint in the light most favorable to Harper to determine whether it states a claim. We turn now to the allegations of Harper's complaint.

[4] Upon de novo review, we conclude that the district court properly found that the complaint failed to state a claim. The essence of Harper's complaint was that his due process rights were violated under § 1983 because he was not provided with copies of the reports or statements made by Cooper and Tinkler in the disciplinary proceedings against him. As noted by the district court with regard to Harper, a Tecumseh State Correctional Institution inmate, we note that a Nebraska State Penitentiary inmate's civil rights claim filed under § 1983 which is a collateral challenge to an underlying disciplinary action is not cognizable under § 1983 unless the prisoner can demonstrate that the disciplinary conviction has previously been invalidated. See, *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997); *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000). We hold that this rule applies to Harper and to inmates of any DCS penitentiary. Harper has not demonstrated that his previous disciplinary conviction has been invalidated; in fact, Harper had appealed his conviction to the district court and to this court, both of which affirmed his conviction. Thus, Harper's § 1983 claim is not cognizable, and the failure of the district court to give Harper notice of the sua sponte dismissal is not reversible error because it is patently obvious that Harper could not prevail based on the facts alleged in his complaint. Accordingly, we affirm the district court's dismissal of Harper's complaint. Having so concluded, we do not address Harper's 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. *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004).

CONCLUSION

The district court did not err when it dismissed Harper's claim sua sponte under rule 12(b)(6) without first providing Harper with

notice. Because Harper failed to demonstrate that his previous disciplinary conviction had been invalidated, his § 1983 claim was not cognizable.

AFFIRMED.

ALVIN H. GOESER, AS FATHER AND NEXT FRIEND OF EMMERY JADE ALLEN AND GALEN BROCK GOESER, APPELLANT AND CROSS-APPELLEE, V. TANYA C. ALLEN, NOW KNOWN AS TANYA C. MULLER, APPELLEE AND CROSS-APPELLANT.

714 N.W.2d 449

Filed April 11, 2006. No. A-05-658.

1. **Jurisdiction: Final Orders: Parties: Appeal and Error.** When no party has presented the issue of whether the record contains a final, appealable order, an appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as a result of a defect which prevents acquisition of appellate jurisdiction.
2. **Jurisdiction: Final Orders: Appeal and Error.** When an appellate court lacks appellate jurisdiction because a final, appealable order was not rendered by the lower court, it may not reach the merits of the appeal.
3. **Jurisdiction: Final Orders: Motions to Vacate: Appeal and Error.** There is only one exception to the rule that an appellate court may not reach the merits of the case when it lacks jurisdiction because a final, appealable order was not rendered by the lower court. The exception is that even though an appellate court may lack jurisdiction to hear the merits of the case, it does have authority to vacate a lower court's order and, if appropriate, remand the case for further proceedings, when such order was entered by a court lacking jurisdiction and was thus void.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Appeal dismissed.

John A. Kinney, of Govier, Milone & Kinney, L.L.P., for appellant.

Tanya C. Muller, pro se.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Alvin H. Goeser appeals from the order of the Douglas County District Court modifying an earlier paternity and support decree.

On appeal, Alvin alleges that the district court erred in modifying the decree. Because the parties have both waived oral argument, this case was submitted on the parties' briefs. See Neb. Ct. R. of Prac. 11E(6) (rev. 2001). We determine that the order modifying the decree was not a final, appealable order. Accordingly, we dismiss the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001).

II. BACKGROUND

Alvin and Tanya C. Allen, now known as Tanya C. Muller, are the parents of two children born out of wedlock: Emmery Jade Allen, born September 12, 1992, and Galen Brock Goeser, born January 7, 1995. In a March 13, 2000, decree, the district court made a finding of paternity and determined that Alvin is the father of the children and "owes a corresponding duty to provide support on behalf of said children." In the decree, the trial court awarded Tanya custody of the children, subject to Alvin's reasonable rights of visitation as set forth in a parenting plan. The trial court ordered Alvin to, inter alia, pay $180 per month in child support and 50 percent of all nonreimbursed health care costs for the children.

At the time of the decree, Tanya resided in Nebraska with the children. On June 1, 2001, Tanya filed an application for modification of the decree, requesting leave to remove the children from Nebraska. She alleged that a material change in circumstances warranted a modification of the decree in that she had obtained her bachelor of science degree in nursing and wished to obtain an advanced degree in midwifery offered through the University of Minnesota in Minneapolis, Minnesota. She asserted that it was in the children's best interests that they remain in her custody and that the court grant her leave to remove them from Nebraska, as an advanced degree would enhance her employment and income potential. Tanya asserted that the parties' financial conditions had changed since the time of the decree and that such change would result in a change to Alvin's child support obligation of at least 10 percent anticipated to exist for at least 6 months.

The record suggests that on August 27, 2001, the district court made a docket entry modifying the decree to allow Tanya to remove the children to Minnesota. On December 30, 2002, Alvin

filed an answer and cross-application requesting that the court deny Tanya's application and alleging a material change in circumstances in that Tanya had "interfered with [Alvin's] relationship with the parties' minor children in an attempt to alienate the minor children from [Alvin]"; Alvin claimed that this change warranted a modification of the decree to grant him custody of the children, subject to Tanya's right of reasonable visitation.

On January 8, 2003, Tanya filed a "Reply and Answer" to Alvin's pleading, alleging that the decree had already been modified by docket entry on August 27, 2001. A trial was held on January 16, 2003, and a modification order was filed on March 10. In the March 10 modification order, the trial court granted Tanya leave to temporarily remove the children to Minnesota for the purpose of completing her advanced degree. The trial court ordered that

> if upon completion of said program [Tanya] elects to remain in Minnesota, [she] shall file an Application for Permanent Removal; that the minor children shall remain in [Tanya's] custody during the pendency of such action; [and] that if said Application for Permanent removal is not filed within two (2) weeks of [Tanya's] completion of said program, [Tanya] is hereby ordered to return the minor children to Nebraska.

The trial court found that Alvin's and Tanya's "financial conditions have changed which would result in a change to [Alvin's] child support obligation of at least ten (10) percent and it is anticipated that said financial conditions shall exist for a period of at least six (6) months." As such, the trial court modified Alvin's child support obligation to $300 per month, commencing on September 1, 2001; $350 per month, commencing on April 1, 2002; and $377.69 per month, commencing on February 1, 2003. No appeal was filed.

On September 9, 2003, Tanya filed an application to modify the decree requesting permanent leave to remove the children from Nebraska. She alleged that there had been a material change in circumstances since the time of the decree and first modification order and that the change warranted such further modification of the decree. Namely, Tanya maintained that she had completed the advanced degree in midwifery in Minnesota, had

completed her "boards testing," and was licensed in Minnesota as a certified midwife. She alleged that she had secured permanent employment, had married, and was expecting a child with her husband. Also, she maintained that the children had resided in Minnesota for 2 years, had adjusted well to the area, and were actively involved in school, sports, church, and other organized activities. As such, Tanya alleged, it was in the children's best interests that she be granted permanent leave to remove the children from Nebraska. Tanya also asserted, "Based on the parties['] current financial condition and application of the Nebraska Child Support Guidelines, [Alvin's] child support obligation would adjust by at least ten percent and should be modified in accordance with the [Nebraska Child Support G]uidelines."

On September 16, 2003, Alvin filed an answer and cross-application to modify the decree. Alvin denied the portion of Tanya's application alleging material changes in circumstances warranting a modification, and his cross-application sought modification of the decree's provisions regarding, inter alia, visitation, travel expenses, child support, and nonreimbursed health care costs. The matter came before the court for trial on September 30, 2004.

At trial, Alvin testified that he is a full-time student seeking a degree in geography. He indicated that he works an average of 30 hours per week in the food service industry, earning an average gross monthly income of $1,700. Alvin provided suggestions to the court, requesting the court either to not modify his child support obligation or to modify that obligation to $0 per month due to the cost of his obligation to pay for travel expenses related to periods of visitation. Tanya testified at trial that she works 24 hours per week, earning a wage of $38 per hour for working on weekends and $37 per hour for working on weekdays.

At the end of the hearing, the court issued findings from the bench. With respect to child support, the trial court stated:

> The child support should be set as the earnings justify once they're plugged into the guideline situation. And I think in your case, [Alvin], your child support may go up a very small amount from what I'm looking — from listening to counsel, I'm not certain. Those numbers are easily

> transcribed into the calculation and computation and then that result needs to be had.

The trial court directed a question to Alvin and Tanya: "I assume — are both of you filing your tax returns married and joint?" Both parties answered affirmatively, and the court stated, "You should use that in the calculation because that will adjust the child support obligation. So you need to make sure that's done." Subsequently, counsel for Tanya asked the court:

> Judge, I would request since we have to do a child support calculation, what I would like to — if it's all right with the Court, commit to having a hearing for 20 minutes or 15 minutes 30 days from now so we have the final order on your desk. And if there's any problem regarding child support it's resolved and then we have a final order.
>
> Is that acceptable?

The trial court then directed questions to Alvin:

> THE COURT: You work off tips, don't you, sir?
>
> [Alvin]: Yes.
>
> THE COURT: So I suppose you filed a tax return for last year?
>
> [Alvin]: Uh-huh, yes.
>
> THE COURT: I don't know if you've passed those back and forth, but you ought to do that. That's a good starting point. Yeah.

In its findings issued from the bench, the trial court addressed the issue of nonreimbursed health care costs. The trial court stated to the parties:

> The law requires that each of you bear 50 percent of each [medical expense for the children] beyond [medical insurance] coverage, what's called unreimbursed medical. But [Tanya] is entitled to the first $480 per child before that 50 percent calculation goes into effect, so that you understand that. It's not just the opposite. In other words, [Tanya] doesn't pay for the insurance and then [Alvin] get[s] a $480 credit. It works the other way. That's just common sense. That is the law now.

On April 27, 2005, the trial court filed a modification order on Tanya's application to modify and Alvin's cross-application to modify. The order granted and denied various requests in 15

numbered sections, including a section modifying child support. The order states, in relevant part, "Pursuant to the Nebraska Child Support Guidelines, [Alvin] shall pay . . . monthly child support for the support and maintenance of the two (2) minor children, the sum of _____. . . . At such time as there is one (1) minor child, [Alvin's] monthly child support obligation shall be reduced to _____." Additionally, the trial court modified the decree with respect to nonreimbursed health care costs, ordering Alvin to pay the first $480 thereof per year per child and Alvin and Tanya to equally share the remaining portion. Thereafter, Alvin timely filed this appeal, and Tanya has cross-appealed.

III. ASSIGNMENTS OF ERROR

Alvin has assigned six errors that concern the district court's modification of the decree, and Tanya has assigned one. Given our conclusion below, that we do not possess jurisdiction, we do not address the assigned errors.

IV. ANALYSIS

1. Appellate Jurisdiction

It is the duty of an appellate court to settle jurisdictional issues presented by a case. *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703 N.W.2d 893 (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. *Morin v. Industrial Manpower*, 13 Neb. App. 1, 687 N.W.2d 704 (2004). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Id.* 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).

[1] Although neither party has presented the issue of whether the record contains a final, appealable order, 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. See *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

In Nebraska, a judgment is the final determination of the rights of the parties in an action. *Harvey v. Harvey*, 14 Neb. App. 380, 707 N.W.2d 444 (2005); Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2004). Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

The rights and liabilities of the parties to an action must be able to be determined, and the unsuccessful party must be able to readily understand and be capable of performing that which he is ordered to do, from the judgment itself. See *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986).

In the present case, the trial court ordered modification of the child support obligation, but it did not ascertain Alvin's monthly obligation. Instead, as shown above, the court left unfilled blanks in the order. Because no specific sums for child support were included in the trial court's order, and because the rights and liabilities of the parties could not be ascertained without going beyond the record, the order was not a final, appealable order. Accordingly, this court is without jurisdiction to consider Alvin's appeal, and it must be dismissed.

2. Reaching Merits

[2] We have determined that the described defect in the trial court's order prevents our acquiring jurisdiction. Because we do not have jurisdiction where a final, appealable order was not rendered by the lower court, we cannot reach the merits of Alvin's appeal. See *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004) (stating that when appellate court lacks jurisdiction, appellate court may not reach merits of case). There is a significant body of case law that reflects the prior statement.

[3] The above rule has only one exception. The exception is that even though an appellate court may lack jurisdiction to hear the merits of the case, the appellate court does have authority to vacate a lower court's order and, if appropriate, remand the case for further proceedings, when such order was entered by a court

lacking jurisdiction and was thus void. See, *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005); *In re Estate of Tizzard*, 14 Neb. App. 326, 708 N.W.2d 277 (2005). This exception is not applicable in the case before us.

We note that a panel of this court, in *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997), concluded that it lacked appellate jurisdiction where a final, appealable judgment was not rendered by the lower court. Notwithstanding the finding that it lacked appellate jurisdiction, the panel determined that it could reach the merits of the appeal and opined, "Although we are vacating [the appellant's] sentences and remanding the cause with directions, we discuss [an evidentiary] assignment of error, as it is likely to be raised again at the county court level." *Id.* at 492, 560 N.W.2d at 857. The discussion included, in part, resolving an assigned error dealing with the questions of the admissibility of the results of a breath test and a preliminary breath test and whether such tests were conducted according to invalid rules issued by a government agency. This action on the panel's part appears to have been incorrect, and we decline to follow *Engleman* in this regard.

V. CONCLUSION

The April 27, 2005, order of the district court did not dispose of all the issues and is, therefore, not a final, appealable order. Accordingly, we dismiss Alvin's appeal and Tanya's cross-appeal.

APPEAL DISMISSED.

IN RE INTEREST OF CHLOE L. AND ETHAN L.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,
V. DEANNA J., APPELLANT, AND DANIEL L.,
APPELLEE AND CROSS-APPELLANT.

712 N.W.2d 289

Filed April 11, 2006. No. A-05-1072.

1. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court

must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence.

2. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **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.
4. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven.
5. **Parental Rights: Proof.** A finding of abuse or neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health has occurred which ordinarily would not occur in the absence of abuse or neglect.
6. **Parental Rights.** A court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child.
7. ____. A child 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 G. CRNKOVICH, Judge. Affirmed.

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellant

Stuart J. Dornan, Douglas County Attorney, and Kristin L. Huber for appellee State of Nebraska.

Regina T. Makaitis for appellee Daniel L.

SIEVERS, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Deanna J. appeals and Daniel L. cross-appeals from an order of the separate juvenile court of Douglas County terminating Deanna's and Daniel's parental rights to their two minor children. On appeal, Deanna and Daniel contend that the trial court erred in finding clear and convincing evidence to terminate their parental rights under Neb. Rev. Stat. § 43-292(2), (3), (8), (9), and (10)(d) (Reissue 2004) and in finding that termination of their rights is in their children's best interests. For the reasons set forth below, we affirm.

BACKGROUND

Deanna and Daniel are the parents of Chloe, born August 16, 2003, and Ethan, born August 9, 2004. On September 24, 2004, the State filed a petition in juvenile court alleging that Chloe and Ethan came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) by reason of the faults or habits of Deanna. On that same date, the juvenile court placed both children in foster care.

On December 1, 2004, the State filed a second amended petition alleging that pursuant to § 43-247(3)(a), Deanna and Daniel placed both children in a situation which was "dangerous to their life or limb, or injurious to the[ir] health or morals" in that on September 22, Ethan had been treated for a broken arm. The petition alleged that while treating Ethan, medical personnel discovered that Ethan had sustained multiple fractures throughout his body, which fractures were in various stages of healing. The petition stated that Ethan was in Deanna and Daniel's care at the time the injuries occurred and that neither parent had given a plausible explanation for Ethan's injuries.

The petition also alleged that Deanna's and Daniel's parental rights should be terminated. In that regard, the petition alleged Ethan came within the meaning of § 43-292(8) and (9) in that Deanna and Daniel had inflicted, by other than accidental means, serious bodily injury, and in that Deanna and Daniel had subjected Ethan to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. The petition also stated that Chloe and Ethan came within the meaning of § 43-292(2), (3), and (10)(d) in that: Deanna and Daniel had substantially and continuously neglected or refused to give their children necessary parental care and protection; Deanna and Daniel, being financially able, had willfully neglected to provide their children with the necessary subsistence, education, or other care necessary for their health, morals, or welfare; and Deanna and Daniel had committed a felony assault that resulted in serious bodily injury to Ethan. The petition also alleged that termination of Deanna's and Daniel's parental rights was in the best interests of both Chloe and Ethan.

On February 8 through 11, April 6, 8, and 21, and May 5, 2005, hearings were held on the State's second amended petition.

The record from those hearings shows that at all relevant times alleged in the petition, Deanna and Daniel resided with Daniel's father and younger brother in a three-bedroom apartment in Omaha. Daniel worked the night shift from 11 p.m. to 7 a.m., while Deanna stayed at home with the children.

The record shows that prior to Ethan's birth, Deanna and Daniel had agreed to place Ethan for adoption. After the adoptive parents decided not to adopt Ethan, Deanna and Daniel arranged for Ethan to stay at the home of various friends until Ethan was 2 to 4 weeks of age, when Ethan came to reside with Deanna and Daniel.

On September 22, 2004, Deanna noticed that Ethan was favoring one of his arms in that Ethan was not moving the arm much and had it pulled up near his body. Deanna did not notice any bruising or swelling on Ethan's arm. In the late afternoon, Deanna took Ethan to Children's Hospital in Omaha so that his arm could be checked out.

After examining Ethan's arm, doctors found that the arm was fractured and that Ethan had a total of 29 fractures throughout his body in various stages of healing. Tests showed that there was no organic cause for Ethan's injuries and that Ethan's bone density was normal. When asked by police officers what might have happened to Ethan, Deanna stated that at 5 p.m. on September 21, 2004, she had left Ethan in a "bouncy seat" while she went into the kitchen to fix Ethan's bottle. Deanna stated that when she returned, Ethan was lying face down on the floor with Chloe nearby. Deanna stated that she believed Chloe pulled Ethan out of his bouncy seat. Daniel told police officers that he did not witness this incident but that Deanna had told him about it after it happened. Daniel stated, though, that the incident occurred earlier on September 21, since Deanna told him about it when he got up at noon on that day to use the restroom. After discovering Ethan's fractures, doctors also examined Chloe and no injuries were found. Criminal charges were never brought against Deanna or Daniel.

At trial, the State called several witnesses to testify, including Dr. Sandra Allbery, a radiologist at Children's Hospital. Allbery testified that an infant's bones are generally strong and not easily broken in a normal child. Allbery compared an infant's bones

to green tree limbs, stating that although they bend, they rarely break. Allbery testified that upon examining the results of tests done on Ethan on September 22, 2004, she noted that Ethan had four acute fractures, consisting of two "corner fractures," a right collarbone fracture, and a fracture to Ethan's left humerus, or upper arm.

Allbery described the humerus fracture as a complex or spiral fracture in that this fracture was bidirectional, which implies increased force. Allbery stated that the amount of force necessary to break a humerus bone would be equal to the force necessary to break a bundle of pencils. Allbery defined an acute fracture as a fracture less than 10 days old and stated that Ethan's left arm fracture was probably less than 5 days old.

Allbery testified that the balance of Ethan's fractures were nonacute, or more than 10 days old, and consisted of 18 rib fractures in addition to multiple fractures of Ethan's femur and tibia bones in both his left and right legs and a fracture to Ethan's left collarbone. Allbery stated that the tests showed that Ethan did not have any head injuries.

Allbery further testified that Ethan had normal bone density with no evidence of bone disease. Allbery testified that if Ethan had an underlying bone condition, she would have expected to see more acute fractures. Allbery also testified that some of Ethan's fractures could date back to his birth but that Ethan's fractures would be highly unusual for anything related to birth trauma. Allbery testified that instead, Ethan's injuries were caused by nonaccidental trauma, and that Ethan's fractures were classic locations for injuries resulting from child abuse, because Ethan's injuries were not the type of fracture caused by any sort of accident.

Allbery testified that whoever inflicted Ethan's injuries used a large degree of force and that Ethan's fractures would not occur easily or with normal handling of an infant. Allbery testified that the injuries to Ethan's limbs were caused by someone shaking them and that Ethan's rib fractures were caused by someone squeezing Ethan's ribs. Allbery testified that Ethan's injuries were of the same type as those children diagnosed with shaken baby syndrome except that Ethan did not sustain a head injury. Allbery testified that Chloe was not capable of causing Ethan's injuries.

Allbery noted that a second set of x rays taken on January 18, 2005, showed both that Ethan's fractures to his limbs had healed and that no new fractures were present. Allbery testified that a second set of x rays of Ethan's ribs were not done and that those x rays were unnecessary, given the evidence that the other fractures were healing.

Dr. John Tubbs, a family practitioner, also testified at trial. Tubbs testified that he provided prenatal care for Deanna and that at the time of trial, he was providing medical care for both children. Tubbs testified that after Chloe's birth, Deanna and Daniel routinely brought Chloe in for visits, and that he never had any concerns about the care Chloe received from her parents.

Tubbs testified that he delivered Ethan and that Ethan did not suffer any fractures during his birth. On September 13, 2004, Tubbs saw Ethan for a well-baby check and Deanna and Daniel had yet to decide if Ethan would reside with them permanently. Tubbs testified that at the time of that checkup, he had concerns relating to both the failed adoption and Ethan's final disposition. Tubbs testified that despite this fact, Deanna appeared to be doing well and had a positive attitude.

Tubbs also testified that he examined Ethan at the September 13, 2004, appointment and saw no signs of fractures, even though Tubbs acknowledged that Ethan probably already had some fractures, given what the x rays showed on September 22. Tubbs testified that he did not see any bruising on Ethan but that bruising is not always present with a broken bone. Tubbs testified that he did not recall Ethan's crying much during the examination and that he did not recall Ethan's crying out in pain when Tubbs checked Ethan's hips for dislocation. Tubbs opined that Ethan's injuries were caused by physical abuse.

Dr. Jeffrey DeMare, an attending physician in the pediatric intensive care unit and the medical director of the Children's Advocacy Team at Children's Hospital, also testified. DeMare stated that he examined Ethan at Children's Hospital on September 23, 2004. DeMare testified that during the examination, Ethan was easily excitable and any manipulation of Ethan's body would cause him to cry. DeMare stated that fractures cause pain and that the more mobile a child is, the more pain he or she will feel. DeMare also stated that he did not observe any bruises

on Ethan and that Ethan's parents would not necessarily have known of Ethan's fractures if someone else was inflicting them.

DeMare also stated that Ethan's fractures were caused by nonaccidental trauma or child abuse. DeMare stated that the person inflicting Ethan's injuries used substantial force and that therefore, Chloe did not injure Ethan by pulling him out of his bouncy seat. DeMare also testified that tests showed that Ethan's injuries were not caused by any type of bone disease. DeMare testified that an additional test, called a "collagen test," could have been done but that it was not necessary, given the other tests which doctors had performed on Ethan.

Dr. Horacio Plotkin, an assistant professor of pediatrics and orthopedic surgery at the University of Nebraska Medical Center and the director of the Metabolic Bone Diseases Clinic at Children's Hospital, also gave testimony. Plotkin testified extensively regarding whether Ethan has a bone disease disposing him to fractures. Plotkin concluded that Ethan had no signs of any bone disease and stated that the tests used in that determination were the "gold standard" of testing procedures. Additionally, Plotkin agreed that although a collagen test could have been performed on Ethan, a collagen test is not standard practice, given that it does not rule out bone diseases if the results are negative. Specifically, a collagen test could tell absolutely that Ethan has a bone disease if the test was positive, but if the test was negative, it would not mean that Ethan does not have a bone disease.

Jackie Fink testified that she was a protection and safety worker with the Nebraska Department of Health and Human Services (DHHS). Fink testified that on September 27, 2004, Chloe and Ethan were assigned to her caseload. Fink testified that she observed Deanna and Daniel interact with both children on three occasions in October 2004 and possibly on another occasion prior to Christmas that year.

Fink testified that she did not come to a conclusion as to who harmed Ethan, but Fink opined that Deanna's and Daniel's parental rights should be terminated and that termination is in the children's best interests, based on the "whole case" and more specifically on the "amount of and severity of injuries that happened to Ethan, the lack of knowing who inflicted the injuries . . . and the safety of the children in general."

Fink testified that she was unable to come up with a rehabilitation plan for Deanna and Daniel "[d]ue to the safety and risk to the children and not knowing for sure what happened or who inflicted the injuries to Ethan." Fink testified that she did not think it was safe for Chloe and Ethan to be returned home regardless of whether the parents or someone else harmed Ethan. Fink further testified that even if neither parent injured Ethan, there were no services that the State could offer Deanna and Daniel in order to reunite them with their children. On cross-examination, Fink testified that psychological evaluations of the parents, parenting classes, chemical dependency evaluations, and psychiatric evaluations could "[p]ossibly" have been helpful in reuniting Deanna and Daniel with Chloe and Ethan.

The State also called several police officers to testify. Sgt. Alan Reyes, a police officer with the city of Omaha, testified that he investigated Ethan's injuries. Reyes testified that Deanna told him that Ethan had been injured by Chloe's act of pulling Ethan from his bouncy seat. Reyes testified that Deanna gave him permission to search the family's apartment. Reyes testified that the apartment was clean and stockpiled with supplies. Reyes stated that the bouncy seat was on a carpeted floor in the living room and that according to his training, falling out of the bouncy seat onto the carpet could not have caused Ethan's injuries.

Det. Jerald Swanson, another police officer with the city of Omaha, also investigated Ethan's injuries. Swanson testified that he examined Ethan on September 22, 2004, and that he noticed eight "marks" on Ethan that appeared to be bruises—three on his back, one on his left elbow, one on his left hip, two on his left knee, and one behind his left ear.

Swanson testified that after observing the "marks," he spoke to a radiologist at Children's Hospital who told him Ethan's acute fractures had occurred within the last 3 days and Ethan's older fractures, especially those to his ribs, were approximately 2 weeks old. Swanson testified that during his interview with Deanna, she indicated that she and Daniel had intended to offer Ethan for adoption but that the adoptive family had backed out for undisclosed reasons. Deanna indicated to Swanson that Ethan had been living with Deanna and Daniel for 2 to 4 weeks prior to September 22, 2004, given that Ethan had stayed with

various friends and family after he was released from the hospital. Deanna also stated that Ethan was a good child but that he was somewhat colicky, which she attributed to having been given a certain formula.

Swanson testified Deanna indicated that she was Ethan's primary caregiver during the day but that Daniel provided care for the children if she slept in. Swanson also testified that Deanna gave him a timeline in regard to who may have had contact with Ethan from September 17 to 22, 2004. Swanson stated that on September 18, Deanna and her cousin had taken the children to a football game, but Deanna did not relay that anything had happened to Ethan while they were at the game. Deanna also indicated to Swanson that on September 20, she had left the children with Daniel's brother for 1½ hours while she ran errands, but she did not mention whether she observed any injuries to Ethan upon her return. Deanna did not indicate to Swanson that there were any other occasions from September 17 to 22 where someone other than herself or Daniel cared for the children.

The trial court held that Deanna's statements to Swanson were admissible against Deanna but could not be used in the case against Daniel. Two other police officers also testified, but given that these officers did not provide any new information, we do not detail their testimony here.

After the State presented its case, Deanna and Daniel separately moved to dismiss the State's second amended petition, for failure to meet its burden. The trial court overruled both motions. Both parents then rested without presenting any evidence.

In an order filed August 11, 2005, the trial court terminated Deanna's and Daniel's rights to Chloe and Ethan, finding that termination of their rights in regard to Ethan was justified by clear and convincing evidence under § 43-292(8) and (9), while clear and convincing evidence supported the termination of their rights to both children under § 43-292(2), (3), and (10)(d). The trial court also stated that termination of Deanna's and Daniel's rights was in the children's best interests. Deanna appeals, and Daniel cross-appeals.

ASSIGNMENTS OF ERROR

Given that Deanna and Daniel present the same assignments of error, we set out the assignments of error as follows: Deanna

and Daniel contend that the trial court erred in finding that (1) clear and convincing evidence supports the termination of their parental rights under § 43-292(2), (3), (8), (9), and (10)(d) and (2) clear and convincing evidence shows that termination of their parental rights is in the children's best interests.

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence. *In re Interest of Kindra S., ante* p. 202, 705 N.W.2d 792 (2005). See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[2] The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

ANALYSIS

[3,4] On appeal, both Deanna and Daniel contend that the trial court erred in finding that clear and convincing evidence supports the termination of their parental rights to both Chloe and Ethan. 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 Skye W. & McKenzie W., ante* p. 74, 704 N.W.2d 1 (2005). The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. *Id.*

Section 43-292(2) states that a parent's rights may be terminated if a 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."

[5] In regard to that question, we note that this court has held that a finding of abuse or neglect may be supported where the

record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health has occurred which ordinarily would not occur in the absence of abuse or neglect. *In re Interest of McCauley H.*, 3 Neb. App. 474, 529 N.W.2d 77 (1995). Although *In re Interest of McCauley H.* was an appeal from an adjudication, we extend its holding to the instant case.

The record shows that on September 22, 2004, Ethan was approximately 6 weeks old and had been in his parents' care for at least 2, if not 4, weeks. The record also establishes that Ethan had sustained both acute and nonacute fractures and that the acute fractures were 5 to 10 days old, while the nonacute fractures were over 10 days old. The record also contains evidence that from September 17 to 22, Ethan was in the sole care of Deanna and Daniel except for 1½ hours on September 20 when Daniel's brother watched the children while Deanna ran errands. No evidence was presented that Ethan sustained his injuries while in Daniel's brother's care. Rather, Deanna and Daniel presented evidence that Ethan was injured when Chloe pulled him out of his bouncy seat on September 21. The State presented numerous witnesses who disputed that event as the cause of Ethan's injuries.

Additionally, the evidence establishes that Ethan suffered multiple injuries which would not have occurred in the absence of abuse or neglect. Three doctors testified that the person who inflicted Ethan's injuries used a great deal of force to cause Ethan's 29 fractures and that such injuries were caused by the violent shaking of Ethan's limbs and the squeezing of his ribs from both the front and the back. All three doctors also testified that there was no way Ethan's injuries could have been accidental and that his injuries were caused by child abuse.

After a de novo review, we find that the State proved by clear and convincing evidence that Deanna's and Daniel's parental rights should be terminated to both Chloe and Ethan under § 43-292(2), given that Deanna and Daniel substantially and continuously or repeatedly neglected and refused to give Ethan necessary care and protection. Under § 43-292(2), the proof of the neglect and failure to protect Ethan provided grounds for

termination of both parents' rights to Ethan's sibling, Chloe. Because the State need show by clear and convincing evidence the presence of only one of the grounds for termination of parental rights in § 43-292, we need not address whether the children come within the meaning of § 43-292(3), (8), (9), or (10)(d). See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issue not necessary to decision).

Deanna and Daniel argue that the trial court erred in finding that the termination of their rights is in Chloe's and Ethan's best interests.

Fink, the family's caseworker with DHHS, testified that Deanna's and Daniel's parental rights should be terminated and that termination is in the children's best interests, based on the "whole case," and more specifically on the "amount of and severity of [Ethan's] injuries . . . and the safety of the children in general." Fink testified she did not think that it was safe for Chloe and Ethan to be returned home, given Ethan's injuries.

[6,7] We note that although Chloe has not yet experienced actual injury or physical harm, a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child. See *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004). A child cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*

Given the severity of Ethan's injuries, as noted above, and the fact that Deanna and Daniel failed to protect Ethan from those injuries, clear and convincing evidence shows that termination is in both Chloe's and Ethan's best interests.

CONCLUSION

After reviewing the record de novo, we conclude that the trial court did not err in finding that clear and convincing evidence supports the termination of Deanna's and Daniel's parental rights to Chloe and Ethan under § 43-292(2) or in finding that clear and convincing evidence shows that termination of Deanna's and Daniel's parental rights is in the children's best interests. For those reasons, we affirm the court's order terminating Deanna's and Daniel's parental rights to both Chloe and Ethan.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT CLAYCAMP, APPELLANT.

714 N.W.2d 455

Filed April 18, 2006. No. A-05-592.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
3. **Trial: Jury Instructions: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1115 (Reissue 1995), no oral explanation of any instruction authorized by law shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.
4. **Trial: Jury Instructions.** Neb. Rev. Stat. § 25-1115 (Reissue 1995) has not been construed so as to require a trial court to reduce to writing all the admonitions which it may be proper to give the jury while the trial is in progress.
5. **Juries: Jury Instructions.** The sole source of law to be considered by the jury comes from the instructions given by the judge.
6. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
7. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Clay County: VICKY L. JOHNSON, Judge. Reversed and remanded for a new trial.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Scott Claycamp appeals from his convictions following a jury trial for first degree assault and use of a deadly weapon to commit a felony. The trial court read its final written jury instructions, including one on self-defense but excluding its final "submission" instruction, and then permitted the parties to present closing arguments. During closing arguments, the court orally instructed the jury "not to consider any sort of [the victim's] conduct or the consequences of his conduct." We conclude that the court's oral instruction conflicted with the earlier written instruction concerning self-defense and thus constituted reversible error. We therefore reverse the judgment of the district court and remand the cause for a new trial.

BACKGROUND

Claycamp and the victim were neighbors in Edgar, Nebraska, and the victim had formerly been married to Claycamp's sister. Claycamp and the victim had a history of confrontations. On June 13, 2004, the victim, from his own property, began yelling and screaming at Claycamp. Claycamp grabbed an ax handle, claiming that he intended to defend himself because of previous threats and assaults. A confrontation ensued on the edge of Claycamp's property where it abutted a public street in Edgar. The victim sustained multiple lacerations and fractures to his face and skull. Based on the above events, the State charged Claycamp with first degree assault and use of a deadly weapon to commit a felony.

Prior to trial, the trial court partially sustained the State's motion in limine, precluding evidence "regarding actions by law enforcement, the County Attorney's Office, or any Judge as they relate to other investigations, arrests, prosecutions, or the issuance of orders related to the victim [and] regarding any failure on the part of the State to arrest, prosecute, or incarcerate the victim."

At trial, Claycamp testified that in May 1995, he put a "no trespassing" sign on his property to keep the victim away from

Claycamp. In May 2003, Claycamp and the victim had an argument about the victim's walking across Claycamp's property. Claycamp testified that he "went down" when the victim kicked Claycamp in the crotch and that the victim then grabbed Claycamp's crotch, picked Claycamp up, and squeezed. In July 2003, Claycamp acquired a protection order against the victim. Claycamp testified that even after the protection order was granted, the victim constantly yelled at and harassed Claycamp and wanted Claycamp to fight. According to Claycamp, on some occasions the victim did so while he was on Claycamp's property.

On May 5, 2004, a deputy from the sheriff's office investigated a disturbance reported by Claycamp where the victim yelled that he was going to burn down Claycamp's house with Claycamp in it. Claycamp testified that it took the deputy approximately 1½ hours to arrive following the first telephone call to the police. After entering the victim's house, the deputy then spoke with Claycamp and told Claycamp that a fire bomb was in the victim's sink. The sheriff's office responded to another disturbance call on June 2 because the victim was yelling that he was going to "kick [Claycamp's] ass." Claycamp testified that he was afraid of the victim and did not feel safe in his home.

Claycamp testified that on the evening of June 13, 2004, the victim repeatedly yelled that he was going to "kick [Claycamp's] ass." Claycamp testified that he carried the ax handle with him to another neighbor's house to defend himself, because the victim had "beat [Claycamp] up" before and because Claycamp figured the victim would do it again. Claycamp testified that when he left the neighbor's house and was a couple of feet onto his property, the victim, while standing at the street's edge closest to Claycamp's house, stated, "come on, [expletive], cross the line." Claycamp held the ax handle up and told the victim to go home. As Claycamp turned and started to walk toward his camper, he watched the victim out of the corner of his eye and saw the victim "coming at [Claycamp]" as if the victim were going to grab him. Claycamp turned and hit the victim with the ax handle "until he stopped coming at [Claycamp]." The victim stumbled backward and fell to the ground in the street. Claycamp testified that the victim did not touch him on June 13, and Claycamp had no bruises or injuries.

The victim was taken to a hospital by "life flight" and was admitted as a category one trauma, the "highest activation level" the hospital has, due to the amount of maxillofacial injuries. The injuries were so severe that hospital staff performed a surgical procedure where a tube was inserted into the victim's trachea. The victim subsequently underwent approximately 10 hours of reconstructive surgery to his head and face. Based on the injuries, a doctor opined that the victim suffered a minimum of five blows to the head. The doctor observed no "defensive wounds" on the victim.

At the conclusion of the evidence, the trial court advised the jury that there would be a short break and that "[t]hen we're going to bring you in here, do instructions. And do the closing arguments." The bill of exceptions shows that after the break, the court told the jury:

> What's going to happen now is I'm going to read to you all of the jury instructions except for the last one. When we get done with closing arguments and you get ready to go in the jury room you will each receive a copy of it. But I'm going to ask you to pay attention as I read you the first several instructions.

A parenthetical comment follows, stating, "Instructions read to the jury at this time." The trial court's interlineations of the instructions reword instruction No. 1, "Function of Judge, Jury, and Counsel," to read in part: "[N]ow that you have heard all of the evidence and the arguments of ~~*will be given*~~ counsel, *which we* [*sic*] *be shortly*, it is my duty to instruct you in the law." (Emphasis depicts interlineations.) Although it is not entirely clear from the record, it appears that the instructions concerning the elements of the offenses and the instruction concerning self-defense were given at this time. The transcript contains the instruction on self-defense, instruction No. 4, which states:

> [Claycamp] acted in self[-]defense if:
>
> (1) [The victim] threatened or attempted force that would cause death or serious bodily injury to [Claycamp]; and
>
> (2) [Claycamp] did not provoke any such use of force against him with the intent of using deadly force in response; and,

> (3) Under the circumstances as they existed at the time, [Claycamp] reasonably believed that his use of deadly force was immediately necessary to protect himself against death or serious bodily harm; and,
>
> (4) Before using deadly force [Claycamp] either tried to get away or did not try because he did not believe he could do so in complete safety.
>
> The fact that [Claycamp] may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably in response to that belief. [Claycamp] is not required to prove that he acted in self[-]defense. It is up to the State to prove that he did not.

During the State's closing argument, the special deputy county attorney contended in part:

> Now, should a person have to be sitting in his house in fear? No. No. [The victim] deserved, he deserves to be punished for what he does. But it's not his trial today. The question is, the question is, did . . . Claycamp do what he could do to avoid this situation from happening?

At this point, Claycamp's counsel objected to the argument and, outside the jury's presence, made a motion for mistrial, noting:

> Your ruling on the motion in limine in regard to our offer in proof and our offer in proof have been scrupulously honored by the defense. The State now has injected this issue into its closing argument, they have implied to the jury that [the victim] will have a day in court. And will be prosecuted. When the fact of the matter is known that he isn't going to be prosecuted. So the statute of limitation on some of these things has run.

The trial court, after having the official court reporter read back the pertinent argument, heard arguments of counsel, during which time the State's counsel suggested that if the court believed that there had been an improper argument, the court could admonish the jury not to consider that part of the argument. The trial court stated, "I think you skirted awfully close." The court then overruled the motion for mistrial, advising counsel that the court intended both to admonish the jury and to tell the jury "you're not to consider what, if anything, is going to happen to [the victim] as

a result of his conduct." Claycamp's counsel objected to the proposed admonishment, asserting that it compounded the error. The trial court inquired as to how defense counsel would suggest that the jury be admonished, and Claycamp's counsel responded that he did not have an admonishment and that he thought the only proper remedy would be a mistrial.

Upon returning to open court, the trial court admonished the jury as follows:

> Ladies and gentlemen, I'm going to instruct you that you're not to consider any sort of [the victim's] conduct or the consequences of his conduct. This is about the defendant . . . Claycamp. So any remarks about punishment that may have been made are not proper for you to consider. You may continue, [special deputy county attorney].

Claycamp's counsel then stated, "Judge, I'd like an exception noted to the admonishment," and the trial court so noted.

Thereafter, closing arguments resumed and both parties presented arguments to the jury as to whether Claycamp was acting in self-defense at the relevant time. At the end of the rebuttal argument, the record contains a parenthetical comment stating, "Final instruction read to the jury at this time." We assume this final instruction was instruction No. 12, entitled "Submission to the Jury."

A jury found Claycamp guilty of both counts. Prior to imposing sentence, the trial court overruled Claycamp's motion for new trial based on the motions for mistrial made during the course of the trial. The court sentenced Claycamp to 15 to 20 years' imprisonment on the first degree assault conviction and 5 to 10 years' imprisonment on the use of a deadly weapon to commit a felony conviction, said sentences to run consecutively.

Claycamp timely appeals.

ASSIGNMENT OF ERROR

Claycamp alleges that the trial court erred in instructing the jury that it was not to consider either the victim's conduct or the consequences of his conduct.

STANDARD OF REVIEW

[1] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned

instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002).

ANALYSIS

We begin by observing that if the trial court had pronounced an admonishment in the same words suggested by the court in chambers, i.e., "I'm going to instruct [you] not to consider what, if anything, is going to happen to [the victim] as a result of his conduct," the sole issue presented by this appeal probably could have been avoided. Thus, the events of this case demonstrate that a trial court, in determining how to admonish a jury in response to an arguably improper argument, should first, outside the presence of the jury and in consultation with counsel, develop specific, clear language for the admonishment and then, upon delivering the admonishment, should utilize that precise language. In the instant case, the trial court developed such language, but then, when addressing the jury, pronounced different words as follows:

> Ladies and gentlemen, I'm going to instruct you that you're not to consider any sort of [the victim's] conduct or the consequences of his conduct. This is about the defendant . . . Claycamp. So any remarks about punishment that may have been made are not proper for you to consider. You may continue, [special deputy county attorney].

Claycamp asserts that the court's words following the overruling of his motion for mistrial amounted to a jury instruction inconsistent with its earlier instruction on self-defense and that the court thus erred in giving an erroneous jury instruction. Under the particular circumstances presented in this case, we agree that the first sentence of the court's pronouncement constituted an instruction to the jury which conflicted with the earlier written instruction on the issue of self-defense.

As the background set forth above demonstrates, we are presented with a factual scenario where the jury has been given all the formal jury instructions save the final one, and then in the midst of the State's closing argument, the court uses language "instruct[ing]" the jury "not to consider any sort of [the victim's] conduct or the consequences of his conduct."

[2] The State argues that Claycamp failed to "raise or specifically object to the *content* of the admonishment." Brief for appellee at 9. We agree that during the conference in chambers, Claycamp's trial counsel argued the matter solely as one involving prosecutorial misconduct and did not object to the content of the court's proposed admonishment. However, the court's instruction to the jury significantly differed in content from the admonishment proposed in chambers. We cannot expect trial counsel to anticipate such a difference. When confronted with the different language actually pronounced, Claycamp's trial counsel immediately preserved an exception. It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[3] In this appeal, Claycamp focuses on the first sentence of the oral instruction which he now contends eliminated his claim of self-defense. Although Claycamp does not cite or discuss Neb. Rev. Stat. § 25-1115 (Reissue 1995), we consider that statute as controlling in the instant case. Section 25-1115 states:

> No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.

One of those "preceding sections," Neb. Rev. Stat. § 25-1111 (Reissue 1995), imposes upon the trial judge the duty, in all cases, both civil and criminal, to reduce their charges or instructions to the jury to writing, before giving the same to the jury. Under the circumstances presented in the instant case, we consider the trial court's instruction "not to consider any sort of [the victim's] conduct or the consequences of his conduct" as a violation of § 25-1115. Under § 25-1115, the trial court's action

constitutes "error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein."

[4] We recognize that this statute has not been construed so as to require a trial court to reduce to writing all the admonitions which it may be proper to give the jury while the trial is in progress. See *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955). In the instant case, however, the instruction was delivered after the evidence was concluded and most of the written instructions had been read to the jury. We concede that most instances of prejudicial error under § 25-1115 have occurred after the jury had begun its deliberations, but § 25-1115 is not expressly limited to instructions given during deliberations. In the instant case, we believe the critical factors are that the instruction was given after the written jury instructions had already been read to the jury and that the language of the instruction could reasonably be understood by the average juror as modifying the court's earlier written instruction on the critical issue of self-defense. It naturally follows that the jury, when later instructed in a conflicting manner, could be confused. Obviously, the purpose of § 25-1115 is to avoid such confusion.

It may be that the instant case demonstrates the wisdom of the pattern jury instruction, including the optional language, which contemplates that the instructions will be read to the jury after the closing arguments of the parties or counsel. See NJI2d Crim. 9.1 ("[m]embers of the jury, now that you have heard all of the evidence [and the arguments of counsel] it is my duty to instruct you in the law").

[5] The subsequent arguments of counsel for the State and for Claycamp cannot be viewed as dissolving the prejudice contemplated by § 25-1115. Such an argument would suggest that the jury should equate arguments of counsel with the trial court's instructions on the law. The sole source of law to be considered by the jury comes from the instructions given by the judge. See *State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969). We conclude that the subsequent arguments of the prosecutor and of defense counsel cannot be viewed as having cured the obvious prejudice flowing from the oral instruction not to consider the victim's conduct, which was the heart of Claycamp's defense.

[6,7] Having concluded that the district court erred in its instruction to the jury, we must now determine whether such error was harmless. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id.* Though there was evidence at trial which would support the jury's verdict, we cannot conclude that the jury's verdict was unattributable to the erroneous instruction. We further conclude that there is sufficient evidence upon which a jury could find Claycamp guilty of the charged offenses, and we therefore remand the cause for a new trial. See *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003).

CONCLUSION

We conclude that the district court erred in giving an oral instruction in direct conflict with the court's earlier written instruction concerning self-defense and that the prejudice flowing from the erroneous instruction requires that the judgment be reversed and the cause be remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLANT, V.
WILLOW T. HEAD, APPELLEE.

712 N.W.2d 822

Filed April 18, 2006. No. A-05-745.

1. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** The appellate court has 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, and to vacate an order of the lower court entered without jurisdiction.
2. **Criminal Law: Drunk Driving: Prior Convictions: Sentences.** Neb. Rev. Stat. § 60-6,196 (Reissue 2004) criminalizes the act of driving under the influence of

alcoholic liquor or drugs, and the fact that the defendant has previously been convicted of such crime is irrelevant to the guilt or innocence of the defendant and is only relevant to the defendant's sentence.

3. ____: ____: ____: ____. A motion to quash which raises the issue of the admissibility of a defendant's prior driving under the influence convictions, for enhancement purposes, should not be filed until after a determination of the defendant's guilt on the underlying offense.
4. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
5. **Criminal Law: Drunk Driving: Prior Convictions: Sentences.** The proper procedure for determining the admissibility of prior driving under the influence convictions as prior convictions for the purposes of enhancement is to file a motion to quash on the enhancement issues after a determination of guilt on the underlying offense.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Order vacated, appeal dismissed, and cause remanded for further proceedings.

Stuart J. Dornan, Douglas County Attorney, and James M. Masteller for appellant.

James E. Schaefer and Jill A. Daley, of Gallup & Schaefer, for appellee.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Willow T. Head was charged in Douglas County District Court with driving under the influence (DUI), fourth offense. Head filed a motion to quash her previous convictions for DUI, which motion was granted by the district court. We granted the State's application to docket error proceedings, which application alleged that the Douglas County District Court erred in granting Head's motion to quash because the district court erred (1) in concluding that Head's April 29, 2002, Douglas County Court first-offense DUI conviction in violation of Omaha Mun. Code, ch. 36, art. III, § 36-115 (2001), did not constitute a "'prior conviction'" as defined in Neb. Rev. Stat. § 60-6,197.02 (Reissue 2004) and (2) in concluding that the doctrine of collateral estoppel or issue preclusion applied to prevent the court from finding that Head's December 6, 1993, Lancaster County Court DUI conviction in

violation of Lincoln Mun. Code § 10.16.030 (1992) constituted a " 'prior conviction' " as defined in § 60-6,197.02.

STATEMENT OF FACTS

On November 18, 2004, an information was filed in the Douglas County District Court charging Head with DUI, in violation of Neb. Rev. Stat. § 60-6,196(2) (Reissue 2004). The State alleged that the charged offense was a fourth offense, based upon Head's prior convictions for DUI (1) in Lancaster County Court on December 6, 1993, (2) in Douglas County Court on April 29, 2002, and (3) in Douglas County Court on August 14, 2003. The information was amended by interlineation on March 2, 2005, to correct one of the dates of Head's alleged prior convictions.

On February 24, 2005, Head filed a motion to quash the information for the reasons that (1) "as a matter of law the prior convictions listed in the information are defective, unconstitutional and may not be utilized as prior convictions to enhance this felony prosecution," and (2) "the State can only utilize convictions for a city ordinance enacted in conformity with §60-6,196." Hearings on the motion to quash were held on March 2 and 10.

During the evidentiary hearings, the district court received seven exhibits into evidence. Exhibit 1 reflects that on April 29, 2002, in Douglas County Court, Head pled no contest to first-offense DUI, was found guilty of that offense, and was sentenced to probation, which she satisfactorily completed. Exhibit 1 is an eight-page exhibit consisting of certified copies of the complaint initially charging Head with second-offense DUI in violation of Omaha Municipal Code § 36-115, the Douglas County Court's journal entries and orders, an order of probation, a "Satisfaction of Judgement and Sentence," and an order setting aside Head's conviction. Defense counsel offered exhibit 5, which duplicates exhibit 1 but also contains certified copies of two pages of the county court's journal entry and order which are not contained in exhibit 1.

Exhibit 2 reflects that on August 14, 2003, in Douglas County Court, Head pled guilty to second-offense DUI in violation of Omaha Municipal Code § 36-115. Exhibit 2 is a six-page exhibit consisting of certified copies of a complaint, a journal entry and order, an order of probation, and a satisfaction of judgment

and sentence. Exhibit 3 reflects that on December 6, 1993, in Lancaster County Court, Head pled guilty to and was convicted of DUI in violation of Lincoln Municipal Code § 10.16.030. Exhibit 3 consists of a certified copy of the complaint, a case action summary, a prearraignment information, a waiver of rights, and an order of probation, which probation was revoked. Exhibit 4 is related to exhibit 3 and is a certified copy of the complete transcript of the proceedings that were held on December 6, 1993, March 11, 1994, and August 9, 1995, before the Lancaster County Court. Exhibits 6 and 7 are certified copies of court records relating to Head's February 17, 1995, DUI conviction in Johnson County, Iowa. This conviction is not at issue in this appeal.

On April 28, 2005, the district court sustained the motion to quash. Specifically, the district court held that Head's April 29, 2002, DUI conviction in Douglas County Court was not a valid prior conviction because the city ordinance upon which the conviction was based was not in conformity with the state statute as reflected by *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003). The district court further held that it was prevented by the doctrine of issue preclusion or collateral estoppel from determining whether Head's December 6, 1993, DUI conviction in Lancaster County Court was a valid prior conviction. The court went on to hold that Head's August 14, 2003, Douglas County Court conviction for second-offense DUI constituted a valid prior conviction. The court reserved ruling on the validity of an alleged fourth prior DUI conviction of Head on February 17, 1995, in the district court for Johnson County, Iowa.

The State filed an application to docket error proceedings alleging that the Douglas County District Court erred in granting Head's motion to quash, which application was granted by this court.

ASSIGNMENTS OF ERROR

On appeal, the State contends that the district court erred (1) in concluding that Head's April 29, 2002, Douglas County Court first-offense DUI conviction in violation of Omaha Municipal Code § 36-115 did not constitute a "'prior conviction'" as defined in § 60-6,197.02 and (2) in concluding that the doctrine of collateral estoppel or issue preclusion applied to prevent the

court from finding that Head's December 6, 1993, Lancaster County Court DUI conviction in violation of Lincoln Municipal Code § 10.16.030 constituted a " 'prior conviction' " as defined in § 60-6,197.02.

STANDARD OF REVIEW

[1] The appellate court has 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, and to vacate an order of the lower court entered without jurisdiction. *In re Estate of Tizzard, ante* p. 326, 708 N.W.2d 277 (2005). See *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

ANALYSIS

The State contends that the district court erred in concluding that Head's April 29, 2002, DUI conviction in Douglas County Court in violation of Omaha Municipal Code § 36-115 was not a prior conviction under § 60-6,197.02 because the city ordinance upon which the conviction was based was not in conformity with the state statute as reflected by *State v. Loyd, supra*. The State also contends that the district court erred in concluding that the doctrine of collateral estoppel or issue preclusion applied to prevent the court from finding that Head's December 6, 1993, Lancaster County Court DUI conviction in violation of Lincoln Municipal Code § 10.16.030 constituted a prior conviction as defined in § 60-6,197.02.

Neb. Rev. Stat. § 29-1808 (Reissue 1995) provides: "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged."

In *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003), the defendant was charged in county court with second-offense DUI under Omaha Municipal Code § 36-115. The defendant filed a motion to quash, alleging that § 36-115 was inconsistent with § 60-6,196. The county court determined that the ordinance was not in conformity with the statute and granted the defendant's motion to quash, and the district court affirmed. The State took exception to the district court's order.

In considering whether the district court erred by affirming the county court's grant of the defendant's motion to quash, the Nebraska Supreme Court stated:

> The power of a municipality to enact and enforce any ordinance must be authorized by state statute. . . . Thus, a city may not pass legislation which conflicts, or is inconsistent, with state law. . . . An ordinance may not permit or license that which a statute forbids or prohibits, and vice versa. . . . Where there is a direct conflict between an ordinance and a state statute, the statute is superior law. . . . A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist. . . . When an ordinance is inconsistent with statutory law, it is unenforceable.

(Citations omitted.) *State v. Loyd*, 265 Neb. at 235, 655 N.W.2d at 705-06. The court held that a conviction under § 36-115 of the Omaha Municipal Code is inconsistent with § 60-6,196 because it requires a different punishment for a defendant charged with second-offense DUI who is placed on probation. Consequently, the Supreme Court ruled that since the provisions of § 60-6,196 and Omaha Municipal Code § 36-115, as they apply to charges of second-offense DUI, are inconsistent, they cannot coexist and § 36-115 of the Omaha Municipal Code was unenforceable. However, the Supreme Court did not consider the issue of whether the motion to quash should have been granted in the first place.

[2,3] In *State v. Neiss*, 260 Neb. 691, 700, 619 N.W.2d 222, 229 (2000), the Nebraska Supreme Court noted that the DUI statute criminalizes the act of DUI and that "the fact of prior offenses is irrelevant to the guilt or innocence of the defendant and is only relevant to the defendant's sentence." Thus, it appears that until a defendant's guilt or innocence of the underlying DUI has been determined, the admissibility of prior DUI convictions for enhancement purposes is not yet ripe for determination by the court. Consequently, a motion to quash which raises the issue of the admissibility of a defendant's prior DUI convictions, for enhancement purposes, should not be filed until after a determination of the defendant's guilt on the underlying offense.

[4,5] In the instant case, because Head's motion to quash did not present an issue ripe for determination by the district court,

the court should not have attempted to exercise its judicial power by issuing an advisory opinion concerning the admissibility of Head's prior DUI convictions as prior convictions for the purposes of enhancement when her guilt regarding the underlying DUI offense had not yet been determined. An order purporting to make such a determination is merely an advisory opinion by the court. " 'In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.' " *Wilcox v. City of McCook*, 262 Neb. 696, 700, 634 N.W.2d 486, 489 (2001) (quoting *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999)). The proper procedure for determining the admissibility of prior DUI convictions as prior convictions for the purposes of enhancement is to file a motion to quash on the enhancement issues after a determination of guilt on the underlying offense. See *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003) (after pleading guilty to attempted escape, defendant filed motion to quash amended information as it pertained to his habitual criminal status; district court overruled motion to quash and found defendant to be habitual criminal).

In the instant case, Head's motion to quash regarding the admissibility of her prior DUI convictions as prior convictions for the purposes of enhancement was both filed and decided prior to a determination of her guilt or innocence on the underlying DUI charge. Thus, the district court's April 28, 2005, ruling was merely an advisory opinion by the court.

CONCLUSION

Because Head's motion to quash did not present an issue ripe for determination by the district court, the court should not have attempted to exercise its judicial power by issuing an advisory opinion concerning the admissibility of Head's prior DUI convictions as prior convictions for the purposes of enhancement when her guilt regarding the underlying DUI offense had not yet been determined. Consequently, the district court's April 28, 2005, ruling on Head's motion to quash is vacated, this appeal is dismissed, and the cause is remanded for further proceedings.

ORDER VACATED, APPEAL DISMISSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

DAN J. KRAMER, APPELLANT, V. EAGLE EYE HOME INSPECTIONS, INC., ET AL., APPELLEES.

716 N.W.2d 749

Filed April 25, 2006. No. A-04-1253.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the 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 the 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. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
4. ____: ____. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion.
5. **Actions: Fraud: Proof.** To recover on a fraudulent misrepresentation claim, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result.
6. **Negligence: Fraud: Liability.** Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information.
7. **Actions: Negligence: Proof.** To recover on a negligent misrepresentation claim, one must demonstrate, inter alia, that one who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
8. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.

9. **Real Estate: Sales.** Neb. Rev. Stat. § 76-2,120 (Reissue 2003) provides that each seller of residential real property located in Nebraska shall provide the purchaser with a written disclosure statement of the real property's condition.
10. **Contracts: Arbitration and Award.** Arbitration is purely a matter of contract.
11. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
12. **Contracts: Arbitration and Award.** Under Neb. Rev. Stat. § 25-2602.01 (Cum. Supp. 2004), a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.
13. **Contracts: Estoppel.** As a general rule, every person of mature age able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of the instrument signed and is estopped from denying the contents thereof.
14. **Contracts: Arbitration and Award.** As required by Neb. Rev. Stat. § 25-2602.02 (Cum. Supp. 2004), the following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: "THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."
15. **Statutes.** Statutes which change or take away a common-law right are to be strictly construed.
16. **Contracts: Arbitration and Award.** When a contract which attempts to establish binding arbitration as the sole remedy fails to strictly comply with Neb. Rev. Stat. § 25-2602.02 (Cum. Supp. 2004), the arbitration clause is voidable and unenforceable.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Douglas W. Ruge II for appellant.

John S. Lingo, P.C., L.L.O., for appellee Eagle Eye Home Inspections, Inc.

Brandie M. Fowler for appellee Daniel Surdell.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Dan J. Kramer appeals the decision of the district court for Douglas County granting the appellees' motions for summary judgment and dismissing the action.

I. FACTUAL BACKGROUND

Kramer purchased a home from Edward J. Surdell and Ann M. Surdell in May 2003. The home was found to have termite damage. The key components in this case are when the termite damage was discovered and Kramer's knowledge of the problem.

On May 12, 2004, Kramer filed a complaint against Eagle Eye Home Inspections, Inc. (Eagle Eye); Daniel Surdell, the personal representative of the estate of Edward J. Surdell; and Ann M. Surdell. (For simplicity, we will refer to the Surdells and the personal representative alike as "the Sellers.") Kramer alleged four causes of action against the Sellers: (1) violation of Neb. Rev. Stat. § 76-2,120 (Reissue 2003), (2) common-law fraudulent misrepresentation, (3) negligent misrepresentation, and (4) fraudulent concealment. Kramer also alleged one cause of action, negligence and breach of contract, against Eagle Eye. Kramer alleged damages of $14,641.15. Attached to his complaint as exhibits were a home purchase agreement dated May 6, 2003, and a "Seller Property Condition Disclosure Statement."

Eagle Eye filed an "Answer, Affirmative Defenses and Cross-Claim" alleging the following affirmative defenses: (1) "[A]ny problems or defects concerning the property in question were disclosed to [Kramer] either in writing or orally by the Sellers"; (2) "[Kramer], upon reasonable examination or inspection as a lay person buyer and/or upon additional destructive testing, removal or probing after receipt of the Seller's Disclosure Statement and [Eagle Eye's] Inspection Report[,] should have noticed and discovered any damage caused by termites or any other wood-destroying insects"; (3) "any of the damages complained of in [Kramer's] Complaint were located in areas [of] which [Eagle Eye's] Inspection Report made mention [as] problem areas to the extent that they were discoverable without destructive testing, removal or probing per the contract between [Eagle Eye] and [Kramer]"; (4) "any damage suffered by [Kramer] was solely caused by [the Sellers]"; (5) "pursuant to the written [inspection agreement] between [Eagle Eye] and [Kramer] dated May 12, 2003, any damages suffered by [Kramer] are limited to the amount paid for the home inspection, $265.00"; and (6) "this matter is (pursuant to the written [inspection agreement] between [Eagle Eye] and [Kramer] dated May 12, 2003) governed by a

mandatory arbitration clause and . . . written demand for such arbitration was not made within one year of the date of the agreement." Eagle Eye therefore requested that the court enter an order dismissing the suit against it with prejudice. In its cross-claim against the Sellers, Eagle Eye alleged that

> should any damages be awarded in favor of [Kramer] against [Eagle Eye], . . . any such damages were caused by the negligent failure to disclose or intentional misrepresentation by one or both of the [Sellers] and that any judgment so rendered should be entered in favor of Eagle Eye and against the [Sellers].

On July 23, 2004, the Sellers filed a motion for summary judgment claiming that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. In support of their motion, the Sellers stated:

> 1. . . . Kramer elected to have a whole house inspection and termite inspection prior to purchasing the Surdell residence.
>
> 2. Both inspections revealed damage due to termites, putting [Kramer] on notice of said damage and allowing him to rescind the purchase agreement if he so chose.
>
> 3. [Kramer] elected to have the damage treated rather than rescind the agreement.
>
> 4. Due to the fact that the damage was disclosed to [Kramer], and [Kramer] elected to close on the purchase of the home nonetheless, [Kramer] has waived his right to now claim damages against the Seller[s].
>
> 5. [Kramer] acknowledged upon receipt of the Seller's Property Disclosure Statement that said statement contained no warranties of any kind and was not a substitute for home inspections and/or termite inspections. These later inspections revealed the damage that [Kramer] now complains of, in an amount of time that would have allowed [Kramer] to rescind or renegotiate his agreement with the Sellers. [Kramer] has failed to mitigate his damages in this regard and now should be estopped from attempting to do so.

On July 27, 2004, Eagle Eye filed a motion for summary judgment claiming that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of

law. In its motion, Eagle Eye stated that it "relie[d] upon each of the denials and affirmative defenses raised in its Answer, Affirmative Defenses and Cross-Claim filed herein."

A hearing on the motions for summary judgment was held on September 8, 2004. At the hearing on the motions for summary judgment, the Sellers offered into evidence a "Settlement Statement" dated May 23, 2003, and signed by Kramer; an unsigned "Wood Destroying Insect Infestation Inspection Report" issued by "TNT Termite Inspections, Inc." (TNT); the above-mentioned property condition disclosure statement, signed by the Sellers on April 1, 2003, and by Kramer on May 6; and TNT's "Termite Service Plan" dated May 20, 2003, signed by a TNT representative and listing Kramer as the "purchaser," but not signed by Kramer. The settlement statement and disclosure statement were received into evidence. TNT's inspection report and termite service plan were conditionally received into evidence—pending Kramer's acknowledgment that he had received them prior to the hearing (Kramer was not present at the hearing, and his counsel was unable to reach him). We note that the record does not reflect whether such acknowledgment was received, but the court's order seems to rely on these exhibits, about which no complaint is made. We also observe that Kramer's affidavit does acknowledge his receiving an inspection report from TNT, and the above-mentioned settlement statement signed by Kramer (and by an agent of "Security Land Title & Escrow") on May 23, 2003, shows that Kramer received a reduction of $1,348.20 in the sale price of the home as a result of "Termite Treatment" by TNT.

Eagle Eye offered into evidence an affidavit of Eagle Eye's owner/inspector, with an inspection agreement between Eagle Eye and Kramer and an Eagle Eye inspection report attached as exhibits. These documents were received into evidence, with the exception of the affidavit's paragraph 5, which was not received. In the affidavit, the affiant stated: (1) He is the owner of and sole shareholder in Eagle Eye; (2) he personally inspected the home at issue on May 12, 2003; (3) Kramer personally signed page 2 of the inspection agreement on that same date in the owner/inspector's presence; (4) the inspection agreement specifically excludes any inspection for termite infestation but does state that

if any termite damage is observed, it will be noted in the inspection report; and (5) several abnormal items both inside and outside of the home are noted on the inspection report, and each item was brought to Kramer's attention at a postinspection walkthrough on May 12, 2003.

Kramer offered into evidence the complaint and attachments he had filed on May 12, 2004 (the attachments being the home purchase agreement and property condition disclosure statement), along with his affidavit. The complaint and attachments were received into evidence, and the affidavit was also received, with the exception of its paragraph 13. In the affidavit, Kramer stated: (1) In connection with entering into the purchase agreement, he did review and rely upon the property condition disclosure statement; (2) the disclosure statement indicated that there was no damage to the real property or structures due to wind, fire, wood-destroying insects, or rodents; (3) he is not a property inspector and, prior to closing on the purchase of the property, did not have any special knowledge of termites which would make him aware that termites were on the property; (4) after closing on the property, he discovered material damage to the property including walls and siding which were so damaged that "you could put your finger through" them; (5) Eagle Eye did a "whole-house inspection" on the property prior to closing, and Kramer relied on the inspection; (6) Eagle Eye inspected the interior walls of the property and failed to notice or inform Kramer of extensive termite damage or any termite damage to those walls, noting simply some areas of waterstains and paint peeling which "appeared serviceable"; (7) after the discovery of extensive termite damage on the property, Eagle Eye came back to the property, and when Kramer pointed out the areas of termite damage, the inspector admitted that he had " 'missed' " the termite damage, stated that "it was his 'fault,' " and encouraged Kramer to sue (to recover from Eagle Eye's insurance); (8) "[t]he inspection report I received from TNT did not disclose any damage from wood destroying insects"; and (9) "I had no idea of termite damage or any significant damage to the Property until after closing on the purchase of the Property."

The court then entered an order on October 6, 2004, granting both Eagle Eye's and the Sellers' motions for summary judgment.

In granting Eagle Eye's motion, the district court found: (1) Eagle Eye inspected the home on May 12, 2003, and the results of this inspection were provided to Kramer; (2) the first paragraph of the inspection agreement specifically excludes inspection for termite infestation—Eagle Eye was to note any termite damage observed during the inspection, and none was noted; (3) the inspection agreement entered into by Kramer and Eagle Eye is " 'essentially visual,' " specifically excluding latent and concealed defects; (4) Eagle Eye performed as it was required to under the inspection agreement; (5) Kramer and Eagle Eye were subject to a mandatory arbitration clause requiring that written demand for arbitration be made within 1 year from the date of the inspection agreement, that is, by May 12, 2004; and (5) Kramer failed to make timely written demand for arbitration, thereby waiving his claims against Eagle Eye.

In granting the Sellers' motion, the district court found: (1) the Sellers certified completion of the property condition disclosure statement on April 1, 2003; (2) Kramer acknowledged receipt of the disclosure statement on the following May 6; (3) the disclosure statement indicates that the home had previously been treated for wood-destroying insects or rodents; (4) Kramer, pursuant to the purchase agreement, hired TNT to perform a wood-destroying insect infestation inspection of the property, and the inspection occurred on May 20; (5) pursuant to the inspection, TNT reported to Kramer that it had observed visual evidence of active wood-destroying insect infestation on the premises and recommended treatment " 'at this time' "; (6) Kramer then agreed to TNT's providing "full termite treatment" on May 20; (7) the Sellers, pursuant to the purchase agreement, had $1,348.20 deducted from the proceeds at settlement on May 23 to pay for said termite treatment; (8) Kramer closed on the sale of the home on May 23 with specific knowledge that the premises had an active wood-destroying insect infestation, having been clearly put on notice of the infestation prior to the date of closing; and (9) the exhibits received by the court on the Sellers' motion for summary judgment did not in any way support Kramer's claims of fraudulent misrepresentation, negligent misrepresentation, statutory violations, or fraudulent concealment. Kramer timely appeals the order of the district court.

II. ASSIGNMENTS OF ERROR

Kramer asserts that the district court erred in (1) finding that there was no evidence to support his position; (2) awarding summary judgment in favor of the Sellers by finding that Kramer had knowledge that the property had been treated for termites; (3) considering the oral arguments of Eagle Eye at the hearing for summary judgment, as the motion and supporting documentation prior to the hearing were insufficient to put Kramer on notice that the inspection agreement's arbitration clause would be an issue in the motion's resolution; (4) ruling that he waived his right to arbitration by allegedly failing to make written demand for arbitration; and (5) ruling that the arbitration clause was enforceable.

In addition, Kramer argues, but does not specifically assign as error, that (1) the court committed error in finding that Eagle Eye performed as it was required under the inspection agreement and (2) Eagle Eye waived its right to assert arbitration because it answered the merits of the case and filed a third-party complaint against the Sellers. However, we do not address the merits of these arguments. "To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error." *Brunk v. Nebraska State Racing Comm.*, 270 Neb. 186, 197, 700 N.W.2d 594, 604 (2005).

III. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the 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. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

[2] In reviewing a summary judgment, an appellate court views the evidence in the 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.*

IV. ANALYSIS

[3,4] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to

judgment as a matter of law. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Id.* Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion. *Id.*

1. SELLERS

At the hearing on the motion for summary judgment, the Sellers offered into evidence, as noted above, the settlement statement (signed by Kramer), TNT's inspection report (not signed), the property condition disclosure statement (signed by the Sellers and by Kramer), and TNT's termite service plan (signed by TNT and listing Kramer as the "purchaser," but not signed by Kramer). The property condition disclosure statement indicates that the Sellers were not occupying the real property, that there had not been damage due to wood-destroying insects, and that there had been treatment for wood-destroying insects. Furthermore, the disclaimer on the disclosure statement says that the statement was a disclosure of the home's condition as known by the Sellers, was not a warranty of any kind by the Sellers, and should not be accepted as a substitute for any inspection that the Sellers may have wished to obtain. TNT's inspection report and termite service plan, together with the settlement statement, show that (1) Kramer hired TNT to do a termite inspection of the home, (2) TNT found visible evidence of termites, (3) TNT performed a full termite treatment on the home, and (4) Kramer received a credit against the sale price of the home to pay for the termite treatment by TNT.

The Sellers produced a prima facie case demonstrating that they were entitled to judgment if the evidence were uncontroverted at trial. Because the Sellers made a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifted to Kramer. See *New Tek Mfg. v. Beehner, supra*. Kramer offered into evidence a copy of his complaint, with the purchase agreement and the property condition disclosure statement attached, and his

affidavit. The contents of the property condition disclosure statement were discussed above. The purchase agreement shows that Kramer agreed to pay the cost of a wood-destroying insect inspection of the property, that the Sellers agreed to pay for any treatment or repair work found necessary because of any wood-destroying insects, and that Kramer agreed to accept the treated property upon completion of any such repairs. Kramer's affidavit states in relevant part that he relied on the property condition disclosure statement, which said there was no damage to the real property due to wood-destroying insects, and that after closing on the property, he discovered such damage to the property.

(a) No Evidence to Support Kramer's Position

Kramer argues that the court committed error in ruling that the exhibits received on the Sellers' motion for summary judgment do not in any way support Kramer's claims for fraudulent misrepresentation, negligent misrepresentation, statutory violation, or fraudulent concealment. However, Kramer does not specifically argue with respect to "statutory violation," and therefore, we do not address such claim. See *Brunk v. Nebraska State Racing Comm.*, 270 Neb. 186, 700 N.W.2d 594 (2005).

(i) Fraudulent Misrepresentation

[5] In order to recover on an action for fraudulent misrepresentation, Kramer must show

> (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that [he] reasonably did so rely; and (6) that he . . . suffered damage as a result.

See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 378, 702 N.W.2d 792, 803 (2005). See, also, *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000). The Sellers did indicate on the property condition disclosure statement that there had not been damage due to wood-destroying insects, but that there had been treatment for wood-destroying insects. The problem for Kramer is that he cannot show that he reasonably relied on the disclosure statement and that he suffered damage as a result, because Kramer

had a termite inspection and treatment done on the home prior to closing and received a credit on the sale price for such treatment. Therefore, Kramer cannot meet the requirement of reasonable reliance on the Sellers' representation because of the action he indisputably took, which action conclusively negates any claim of reasonable reliance on the seller's representations. Thus, this theory of recovery is proper for summary judgment.

(ii) Negligent Misrepresentation

[6,7] "Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information." *Washington Mut. Bank v. Advanced Clearing, Inc.*, 267 Neb. 951, 954, 679 N.W.2d 207, 210 (2004).

> To recover on a negligent misrepresentation claim, one must demonstrate, inter alia, that " '[o]ne who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information* for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.' "

(Emphasis supplied.) (Emphasis in original.) *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 805, 660 N.W.2d 168, 175 (2003), quoting *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

Again, Kramer did not incur an actionable loss caused by justifiable reliance on the Sellers' disclosure statement, because he had a termite inspection and treatment done on the home prior to closing and received a credit on the sale price for such treatment. Therefore, Kramer, as a matter of law, cannot prove all of the elements necessary for negligent misrepresentation. Thus, this theory is properly dismissed on the Sellers' motion for summary judgment.

(iii) Fraudulent Concealment

[8] To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact,

> concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.

Ord v. AmFirst Invest. Servs., 14 Neb. App. 97, 107, 704 N.W.2d 796, 804 (2005). In *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990), the Nebraska Supreme Court found that the buyers had proved their case of fraud against the sellers when they showed that the sellers made it impossible to detect termite damage and weakened floor joists when they fully covered the basement ceiling with Sheetrock, leaving no exposed wood. No such obvious concealment occurred in the instant case.

[9] Section 76-2,120(2) provides that "[e]ach seller of residential real property located in Nebraska shall provide the purchaser with a written disclosure statement of the real property's condition." In the instant case, the Sellers did complete the property condition disclosure statement (specifically a "Nebraska Real Estate Commission Seller Property Condition Disclosure Statement [for] Residential Real Property"), checked the box on it indicating that there had not been damage to the property due to wood-destroying insects, and also checked the box on it indicating that there had been treatment for wood-destroying insects or rodents. Kramer signed the disclosure statement, acknowledging receipt of the same. The purchase agreement between Kramer and the Sellers states:

> **20. Wood Infestation:** Purchaser (Seller, in the case of a new V.A. loan) agrees to pay the cost of a wood destroying insect inspection of the building, attached and detached structures, and Seller agrees to pay for any treatment or repair work found necessary for issuance of a termite warranty and/or treatment of any wood destroying insects. Purchaser agrees to accept the treated Property upon completion of repairs for material damages from wood destroying insects.

Furthermore, the evidence shows that prior to signing the settlement statement on May 23, 2003, Kramer had a termite inspection and treatment done on the residence by TNT and received a $1,348.20 reduction in the property's purchase price to cover the costs of said inspection and treatment. Even viewing the evidence in the light most favorable to Kramer, there is no evidence that the Sellers knew of termite damage and concealed the presence of such damage, and as discussed above, the element of Kramer's lack of knowledge is absent as well. Summary judgment was properly granted on this theory also.

(b) Kramer's Knowledge of Termite Treatment

Kramer argues that the district court erred in awarding summary judgment to the Sellers by finding that Kramer had knowledge that the property was treated for termites. The property condition disclosure statement did indicate that the property was treated for termites, and again, we point to the facts that Kramer hired TNT to inspect the home for termite infestation or damage and that TNT was also hired to treat the home for termites—as evidenced by the line on the settlement statement showing the reduction in sale price to cover the costs of such treatment, as well as by TNT's inspection report and termite service plan. This seems an appropriate juncture to point out that if Kramer was damaged, it was when he closed on the sale and became the owner of the home. Indeed, before Kramer closed on the purchase, the Sellers told him of prior termite treatment; he arranged his own termite inspection, which found termites; and he had the home treated at the Sellers' cost—facts which all necessarily preclude the viability of the various theories advanced against the Sellers. Therefore, Kramer has not shown the existence of a material fact which would prevent summary judgment. Thus, summary judgment in favor of the Sellers was proper.

2. Eagle Eye

At the hearing on the motion for summary judgment, Eagle Eye offered into evidence the affidavit of Eagle Eye's owner/inspector, with the inspection agreement and inspection report attached. The inspection agreement specifically excludes any inspection for termite infestation and includes an arbitration clause providing that Kramer had 1 year from the date of the agreement

to make written demand for arbitration before any claims stood waived.

Eagle Eye clearly produced enough evidence to demonstrate that it was entitled to judgment as a matter of law if the evidence were uncontroverted at trial. Because Eagle Eye made a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifted to Kramer. See *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). Kramer offered into evidence a copy of his complaint and his affidavit. Kramer's affidavit states in relevant part that Eagle Eye did a "whole-house inspection" on the property prior to closing, that Kramer relied on the inspection, and that Eagle Eye had inspected the interior walls of the property but had failed to notice or inform Kramer of extensive termite damage. It further states that after the discovery of extensive termite damage on the property, the inspector came back to the property, and that when Kramer pointed out the areas of termite damage, the inspector admitted that he had "missed" the termite damage, stated that "it was his 'fault,' " and encouraged Kramer to sue (to recover from Eagle Eye's insurance).

(a) Notice That Arbitration Clause Was at Issue

Kramer argues that the district court erred in considering the oral arguments of Eagle Eye at the hearing for summary judgment, as the motion and supporting documentation prior to the hearing were insufficient to put Kramer on notice that the inspection agreement's arbitration clause would be an issue in the resolution of Eagle Eye's motion for summary judgment. In its motion for summary judgment—filed on July 27, 2004—Eagle Eye stated that it "relie[d] upon each of the denials and affirmative defenses raised in its Answer, Affirmative Defenses and Cross-Claim filed [on June 11] herein." And, in its affirmative defenses, Eagle Eye stated, "[t]his matter is (pursuant to the written [inspection agreement] between [Eagle Eye] and [Kramer] dated May 12, 2003) governed by a mandatory arbitration clause and . . . written demand for such arbitration was not made within one year of the date of the agreement." Therefore, Eagle Eye's motion for summary judgment specifically referenced and relied upon Eagle Eye's affirmative defense regarding the arbitration

clause, which defense was filed the previous month. Thus, the pleadings were clearly sufficient to put Kramer on notice that the arbitration clause was an issue in the case, as well as in the resolution of Eagle Eye's motion for summary judgment—assuming, without deciding, that notice of specific issues is required in advance in a summary judgment proceeding. This assignment of error is without merit.

(b) Enforceability of Arbitration Clause

Kramer argues that the district court erred in ruling that the arbitration clause was enforceable.

(i) Federal Arbitration Act

[10,11] Arbitration is purely a matter of contract, *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002), and "[t]he construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below," *id.* at 11, 637 N.W.2d at 878.

Kramer argues that Eagle Eye failed to make a prima facie case showing that the transaction at issue involved interstate commerce for the purpose of the federal Arbitration Act. Eagle Eye argues that Kramer misstated that "interstate" commerce must be affected. (Emphasis omitted.) Brief for appellee Eagle Eye at 6. Eagle Eye, citing *Cornhusker Internat. Trucks v. Thomas Built Buses, supra*, argues that "[a] binding arbitration clause in a standardized contract is valid in Nebraska so long as it affects commerce." Brief for appellee Eagle Eye at 6. However, Nebraska's Uniform Arbitration Act, discussed below, does not mention "commerce" at all. Additionally, there is no authority cited that the Uniform Arbitration Act is somehow preempted by the federal Arbitration Act, necessitating a showing of an effect on interstate commerce.

[12,13] In 1987, Nebraska enacted the Uniform Arbitration Act. See Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 1995 & Cum. Supp. 2004). See, also, *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). Section 25-2602.01 states in part:

> (b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.

As a general rule, every person of mature age able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of the instrument signed and is estopped from denying the contents thereof. See, *Prudential Ins. Co. v. Holliday*, 191 Neb. 144, 214 N.W.2d 273 (1974); *Shanle v. Busch*, 134 Neb. 903, 280 N.W. 174 (1938); 28 Am. Jur. 2d *Estoppel and Waiver* § 66 (2000); 17A Am. Jur. 2d *Contracts* § 149 (2004). There was no evidence to warrant taking the instant factual situation as falling outside the scope of this rule. In short, there is no evidence that Kramer and Eagle Eye did not voluntarily and willingly enter into the arbitration clause of the inspection agreement. Kramer did not comply with the arbitration provisions of the contract, and thus, the trial court did not err in granting summary judgment to Eagle Eye on this basis; however, as explained below, the arbitration clause is not enforceable.

(ii) Violation of Nebraska Statutory Law

[14] Section 25-2602.02 states, "The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." Nonetheless, the inspection agreement at issue reads:

> *In the event a dispute or claim should arise from the inspection or inspection report, it is agreed that this dispute or claim shall be resolved informally between the parties or by binding Arbitration under the* ***"Construction Industry Arbitration Rules"*** *of the* ***American Arbitration Association,*** *and use as a gauge of performance the* ***"Standards-of-Practice"*** *of the* ***American Society of Home Inspectors (ASHI®)****.*

Therefore, on its face, the agreement does not comply with § 25-2602.02.

[15,16] There is no previously decided case addressing the effect of such noncompliance, and Nebraska's Uniform Arbitration Act does not provide a remedy for such violation. It is well known that statutes which change or take away a common-law right are to be strictly construed. *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005). The arbitration clause results in Kramer's giving up his common-law right to trial by a court or jury with the attendant evidentiary and procedural safeguards. And, while it is obviously the public policy of this state, via the Legislature's enactment of the Uniform Arbitration Act, that such rights can be surrendered in exchange for binding arbitration, we must construe such statutes strictly. In this instance, that necessarily means that the notice of the arbitration requirement must be in the words and style provided by the Legislature in § 25-2602.02—especially in light of the fact that the Legislature used the term "shall" in reference to such language in § 25-2602.02. Therefore, when a contract which attempts to establish binding arbitration as the sole remedy fails to strictly comply with § 25-2602.02, the arbitration clause is voidable and unenforceable. The inspection agreement's arbitration clause did not strictly comply with § 25-2602.02, and therefore, such clause is void and unenforceable. As a result, the arbitration clause is not a complete defense to this action against Eagle Eye.

Therefore, we turn to the merits of the grant of summary judgment to Eagle Eye. The inspection agreement clearly states:

> The inspection is essentially visual; it is based upon the experience and opinion of the inspector, and it is not meant to be technically exhaustive. Latent and concealed defects and deficiencies are excluded from this inspection. The home is not specifically inspected for termite infestation. However, if any termite damage is observed, it will be noted in the report.

Thus, Eagle Eye clearly produced enough evidence to demonstrate that it is entitled to judgment if the evidence were uncontroverted at trial. Because Eagle Eye made a prima facie case, the burden to produce evidence, showing the existence of a material

issue of fact that prevents judgment as a matter of law, shifted to Kramer. See *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

Kramer offered into evidence a copy of his complaint and his affidavit. Kramer's complaint alleged negligence and breach of contract as to Eagle Eye, and Kramer's affidavit states in relevant part:

> Subsequent to the discovery of extensive termite damage on the Property, the inspector came back to the Property. I pointed out the areas of termite damage. The inspector admitted that he had "missed" the termite damage [and] that it was his "fault" and informed me that I would have to sue him to get recovery. He encouraged me to sue him, and said that is what insurance is for.

This alleged statement by Eagle Eye's inspector—that he "missed" the damage and that "it was his 'fault' "—is an admission which we must view most favorably to Kramer, and when we do so, it is clear that there is sufficient evidence to show the existence of a material issue of fact that prevents judgment as a matter of law. See *New Tek Mfg. v. Beehner, supra*. Therefore, the award of summary judgment in favor of Eagle Eye was improper and is hereby reversed, and the cause as to Eagle Eye is remanded for further proceedings.

V. CONCLUSION

For the reasons stated above, we find that Kramer did not produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law with respect to the Sellers, and therefore, the grant of summary judgment in favor of the Sellers is affirmed. The grant of summary judgment in favor of Eagle Eye is reversed, because the arbitration clause of the inspection agreement is unenforceable due to the absence of the statutorily required notice language and because there is evidence that Eagle Eye has admitted that it should have found the termite damage during its inspection. Accordingly, there are genuine issues of material fact for trial; the judgment in favor of Eagle Eye is hereby reversed, and the cause as to Eagle Eye is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ZACHARY P. O'HARA, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEBRASKA, APPELLEE.

713 N.W.2d 508

Filed May 2, 2006. No. A-04-1128.

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. ____: ____. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Judgments.** The signature of the director of the Nebraska Department of Motor Vehicles is required for an order of revocation to be effectively rendered.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Appeal dismissed, and cause remanded with directions.

Phillip G. Wright and Casey J. Symonds, of Wright & Associates, for appellant.

Jon Bruning, Attorney General, and Edward G. Vierk for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Zachary P. O'Hara appeals from the judgment of the district court for Douglas County affirming the revocation of his driver's license by the Nebraska Department of Motor Vehicles (Department). Based on the reasons that follow, the appeal is dismissed and the cause is remanded to the district court with directions to vacate its judgment.

BACKGROUND

On February 27, 2004, at approximately 1 a.m., Omaha police officer Scott Buresh was on duty and observed in a parking lot a vehicle that appeared to have been involved in an accident. The vehicle had significant lower front-end damage, and both of its front tires were flat. Buresh testified that he did not recall seeing the vehicle in the parking lot when he had driven by the same

location earlier that evening. Buresh approached the vehicle and found O'Hara sitting in the driver's seat listening to the radio. The keys were in the ignition, but the vehicle was not running. During contact with O'Hara, Buresh detected an odor of an alcoholic beverage. Buresh also testified that O'Hara had difficulty standing and walking without assistance. Buresh administered field sobriety tests to O'Hara, and O'Hara demonstrated impairment during the tests.

During Buresh's contact with O'Hara, Omaha police officer Jon Martin arrived at the location. Martin administered a preliminary breath test, and upon completion of such test, O'Hara was arrested for driving under the influence of alcohol and was taken to police headquarters. A chemical test performed at police headquarters indicated that O'Hara had an alcohol concentration of his breath that exceeded the legal limit set forth in Neb. Rev. Stat. § 60-6,196(1) (Supp. 2003). Buresh testified that he recorded the test result on a "Sworn Report" form, completed the form, and signed it in the presence of a notary. The Department received the sworn report on March 5, 2004.

On March 4, 2004, O'Hara filed a petition for administrative hearing with the Department, requesting a hearing to contest the revocation of his driver's license. On April 12, an administrative license revocation (ALR) hearing was held before a hearing officer for the Department to determine whether O'Hara was operating or in the actual physical control of a motor vehicle while under the influence of alcohol, in violation of § 60-6,196(1). Buresh and Martin both testified for the Department, describing the events that led to O'Hara's arrest, as previously set forth. The Department also offered the sworn report prepared by Buresh, and it was received into evidence over O'Hara's objection.

On April 16, 2004, the hearing officer entered a document titled "Proposed Findings of Facts, Proposed Conclusions of Law and Recommended Order of Revocation." The hearing officer found that the evidence established that O'Hara was operating and in actual physical control of a motor vehicle while having a breath-alcohol content that exceeded the legal limit in violation of § 60-6,196(1). The hearing officer recommended revocation of O'Hara's driver's license for the statutory period. Directly below the hearing officer's signature on the "Proposed Findings

of Fact, Proposed Conclusions of Law and Recommended Order of Revocation" is a section titled "Certificate of Adoption and Order," which purports to be the order of the director of the Department adopting the hearing officer's recommended order. The section specifically states that the director is adopting the hearing officer's recommended order as the official and final order of the director. It further states that O'Hara's driver's license is revoked for 90 days, effective April 27, 2004. The "Certificate of Adoption and Order" is dated April 19, 2004, but it is not signed by the director. O'Hara nonetheless appealed to the district court for Douglas County the Department's order of revocation. On September 22, 2004, the district court entered an order affirming the Department's order of revocation. O'Hara now appeals to this court.

ASSIGNMENTS OF ERROR

O'Hara assigns that the district court erred in (1) failing to find that his due process rights were violated at the ALR hearing, (2) failing to find that his arrest and resultant driver's license revocation were invalid because his vehicle was located on private property, and (3) affirming the Department's order of revocation when on its face it contains no findings of fact, conclusions of law, or order affirming the hearing officer's determination, because it was not signed by the director as required.

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. *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

ANALYSIS

[2] We first consider whether the district court had jurisdiction over this matter and, consequently, whether we have jurisdiction. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Malolepszy v. State, supra*; *Smith*

v. Lincoln Meadows Homeowners Assn., 267 Neb. 849, 678 N.W.2d 726 (2004).

The jurisdictional question in this case stems from the failure of the director of the Department to sign the order of revocation. As previously stated, the "Proposed Findings of Facts, Proposed Conclusions of Law and Recommended Order of Revocation" was signed by the hearing officer on April 16, 2004. Directly below that signature is the "Certificate of Adoption and Order" section, which purports to be the director's order adopting the hearing officer's recommended order of revocation. However, there is no signature in the space provided above the block containing the director's name and title. The director did sign the "Certificate of Service," which appears on the same page just below the "Certificate of Adoption and Order" section.

Interestingly, O'Hara is the one who raises issue with the missing signature. However, O'Hara does not make a jurisdictional argument, but, rather, argues that the Department's order of revocation is void and cannot be enforced due to the director's failure to sign the "Certificate of Adoption and Order."

[3] The Nebraska Administrative Code requires that "[e]very decision and order rendered by the Director adverse to a party shall be in writing and shall be accompanied by findings of fact and conclusions of law reached by the Director." 247 Neb. Admin. Code, ch. 1, § 021.01 (2001). The question we must address is whether the signature of the director of the Department is required for an order of revocation to be considered rendered by the director. Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004) defines "rendition of a judgment" as "the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action." Under § 25-1301, "rendition of a judgment," i.e., the judge's signature, is a requirement for a final order. Although § 25-1301(2) applies specifically to courts, we cannot discern any reason why a final decision and order by the Department in an ALR proceeding would not require the director's signature in order to be considered "rendered" under § 021.01. We have found no case law that addresses this issue in the context of an administrative decision. However, without the director's signature on the order of revocation, the director has not adopted the recommendations of the

hearing officer as the official and final order of the Department, as stated in the "Certificate of Adoption and Order." We conclude that the signature of the director of the Department is required for an order of revocation to be effectively rendered.

Based on the absence of the director's signature on the Department's order of revocation, we conclude that there has been no "decision and order rendered by the Director" in this case, as required by § 021.01. Therefore, there has been no proper revocation of O'Hara's driver's license from which he could appeal to the district court pursuant to Neb. Rev. Stat. § 60-498.04 (Reissue 2004).

As previously stated, the signature of the director of the Department does appear on the "Certificate of Service," which is located on the same page as the "Certificate of Adoption and Order." We conclude that the signature on the "Certificate of Service" does not qualify the document as a whole to be a signed order. The "Certificate of Service" has a separate purpose from that of an order, and the fact that it happens to appear on the same page as the "Certificate of Adoption and Order" does not make the signature effective for purposes of the director rendering an order.

In addition, the record contains an "Order of Administrative License Revocation" dated April 28, 2004. This document, signed by the director of the Department, informed O'Hara of the driver's license revocation and states that "[t]his order is in addition to and does not supersede any prior order issued by the Department of Motor Vehicles." We conclude that the "Order of Administrative License Revocation," although signed by the director, is not a sufficient rendition of judgment, because it was not accompanied by findings of fact and conclusions of law as required by § 021.01.

Consequently, when the district court reviewed the Department's order of revocation and entered the court's order of affirmance, it was without jurisdiction to do so, because there has not been a rendition of judgment by the director of the Department as required by § 021.01. Because the district court lacked jurisdiction to enter its order of September 22, 2004, we do not have jurisdiction over an appeal from such order, and we

must therefore dismiss the appeal. See *Kroll v. Department of Motor Vehicles*, 256 Neb. 548, 590 N.W.2d 861 (1999).

CONCLUSION

The appeal is dismissed for lack of jurisdiction, and the cause is remanded to the district court with directions to vacate its order of affirmance entered on September 22, 2004.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. CYNTHIA J. CANIGLIA, APPELLEE.

714 N.W.2d 462

Filed May 2, 2006. No. A-05-069.

1. **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.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
4. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
5. **Sentences: Appeal and Error.** When the State challenges a sentence as excessively lenient, the appellate court should consider (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct, (b) to protect the public from further crimes of the defendant, (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.
6. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors.
7. ____. 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.
8. ____. There must be some reasonable factual basis for imposing a particular sentence.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Sentence vacated, and cause remanded for resentencing.

L. Kenneth Polikov, Sarpy County Attorney, and Tricia A. Freeman for appellant.

Thomas P. Strigenz, Sarpy County Public Defender, and Patrick J. Boylan for appellee.

CARLSON, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

The State of Nebraska appeals from the order of the district court for Sarpy County which terminated the probation of Cynthia J. Caniglia as unsuccessful. Because we find that the termination of probation resulted in an excessively lenient sentence, we vacate the new sentence imposed by the district court upon termination of Caniglia's probation and remand the cause with instructions for a different judge to impose a greater sentence.

BACKGROUND

Caniglia was convicted in the Sarpy County District Court of driving under the influence of alcohol (DUI), fourth offense, a Class IV felony punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. Caniglia was driving on a suspended driver's license at the time of her January 29, 2003, offense. We note that Caniglia was also convicted of fourth-offense DUI in the Douglas County District Court and sentenced by that court on July 30, 2003, to 60 months' intensive supervision probation (ISP). The charges in that case stemmed from Caniglia's DUI arrest in Douglas County 8 days prior to her DUI arrest in the present Sarpy County case.

On August 1, 2003, the Sarpy County District Court sentenced Caniglia to 18 months' probation. In sentencing Caniglia, the court stated:

> While you were at [a treatment center] last January you went on a binge and committed offenses in two counties of driving while intoxicated. You were arrested, you then went back to [the treatment center] and appear to be doing okay

> there. I have read a copy of the sentence by [the Douglas County District Court] which gives you probation under intensive supervision. I'm going to place you on probation also, not under intensive supervision, to run concurrently with your current probation so there won't be duplication. I have not ordered certain of the costs for running the probation since it would be a duplication.
>
> When you complete your time at [the treatment center], you're going to need to get a job. The Court notes you had a job for about 20 years that you kept. You're going to have to get one when you get out. You got a lot of fines and costs to pay both here and in Douglas County. There's other terms. I'm requiring that you attend two Mothers Against Drunk Driving Panels and several other conditions that are not in your supervised probation.
>
> I have a copy of the probation order in this case for you, but also a copy of what I was going to do before I had heard that you were sentenced by [the Douglas County District Court] which included some time in jail but I won't impose that. I have a copy for you and counsel.

No appeal was taken from Caniglia's conviction and sentence in Sarpy County.

The record shows that on November 19, 2004, the Douglas County District Court entered an order terminating Caniglia from probation in the Douglas County case upon finding that Caniglia had not satisfactorily completed one of the conditions of her ISP, namely that she refrain from the use or possession of alcohol. Also on November 19, the court entered an order sentencing Caniglia to 15 days' jail time, with credit for 18 days served, and revoking Caniglia's driver's license for a period of 15 years.

On December 3, 2004, the State filed a motion to revoke probation in the Sarpy County case, alleging that Caniglia had violated one of the conditions of her probation, namely that she refrain from the use of alcoholic beverages. A hearing on the motion was held on December 27, at which hearing Caniglia admitted the allegations of the motion. The district court found a sufficient factual basis to support Caniglia's admission, and it continued the hearing to January 7, 2005. We note that during the December 27, 2004, hearing, the parties discussed with the court

the disposition of Caniglia's probation violation in the Douglas County case.

At the January 7, 2005, hearing, the Sarpy County District Court terminated Caniglia's probation as unsuccessful, without specifically ruling on the motion to revoke probation. The parties and the court again discussed the disposition of the Douglas County case, including the fact that Caniglia's driver's license had been revoked for 15 years. The court engaged Caniglia in the following dialog:

> THE COURT: You were on probation up in Omaha first, then I put you on probation. Then you violated that probation and then you were — How much time did you spend in jail on that?
>
> [Caniglia]: 18 days in Omaha.
>
> THE COURT: And you've been in jail here since you were picked up on the —
>
> [Caniglia]: The 16th.
>
> THE COURT: Okay.
>
> I'm terminating your probation as unsuccessful. You'll be processed out today and you need to stick with your program. If you drive, it's a felony, you'll go to jail for a long time.

Pursuant to Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2004), the State has appealed from the January 7, 2005, order of the Sarpy County District Court terminating Caniglia's probation as unsuccessful.

ASSIGNMENT OF ERROR

The State asserts that the district court abused its discretion and imposed an excessively lenient sentence when it terminated the probation as unsuccessful.

STANDARD OF REVIEW

[1,2] 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. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly

depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

[3] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

ANALYSIS

Jurisdiction.

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). Pursuant to § 29-2320, the State appealed from the district court's order terminating Caniglia's probation as unsuccessful. Section 29-2320 allows appeals by the prosecuting attorney from a felony sentence "if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient." The jurisdictional question present in this case stems from the fact that the appeal is not from the initial sentencing order—the August 1, 2003, order of probation—but, rather, is from the January 7, 2005, order terminating Caniglia's probation. The sentencing order of August 1, 2003, was not appealed, and clearly, the State cannot now assert that the original sentence of probation was excessively lenient. See Neb. Rev. Stat. § 29-2321 (Cum. Supp. 2004) (appeal must be filed by prosecuting attorney within 20 days of imposition of sentence). Although the district court did not technically impose a sentence on January 7, 2005, the court's termination of Caniglia's sentence of probation as unsuccessful is the practical equivalent of revoking probation and imposing a new sentence of no imprisonment or fine under the original charge. See Neb. Rev. Stat. § 29-2268 (Reissue 1995). In other words, the new sentence is zero incarceration, no fine, and no license revocation.

Under the circumstances of this case, we conclude that the district court's order of January 7, 2005, is a sentencing order from which the prosecuting attorney may appeal under § 29-2320.

Excessively Lenient Sentence.

The State asserts that the district court abused its discretion and imposed an excessively lenient sentence when it terminated

the probation as unsuccessful. Caniglia was convicted of DUI, fourth offense, a Class IV felony punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. §§ 60-6,196 (Cum. Supp. 2002) and 28-105 (Cum. Supp. 2004).

[5] When the State challenges a sentence as excessively lenient, the appellate court should consider (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct, (b) to protect the public from further crimes of the defendant, (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent. *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005). See Neb. Rev. Stat. § 29-2322 (Reissue 1995).

[6-8] A sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Rice, supra.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* But there also must be some reasonable factual basis for imposing a particular sentence. *Id.*

Caniglia has a history of alcohol-related offenses, with the present offense being her fifth DUI arrest. Caniglia's first DUI arrest occurred on August 5, 1991, for which she received a $150 fine and 6 months of probation. Caniglia was arrested for negligent driving on May 13, 1993, and received a $100 fine. Caniglia's second DUI offense occurred on July 24, 1995, for which she received a $200 fine and 24 months of probation. On April 15, 1999, Caniglia was arrested a third time for DUI, which offense was amended to a second-offense DUI. Caniglia was fined $500 and sentenced to 90 days in jail. On January 21, 2003, Caniglia was arrested in Douglas County for DUI, fourth offense. As noted previously, Caniglia received 60 months of ISP, which was terminated on November 19, 2004, as unsatisfactory. On January 29, 2003, 8 days after her Douglas County arrest,

Caniglia was arrested for the present Sarpy County DUI offense after performing poorly on several field sobriety tests and being given a preliminary breath test. Ultimately, a test of her breath registered .238 grams of alcohol per 210 liters of breath.

Caniglia was 45 years old at the time of the present offense and had a high school education, plus some business college courses. Caniglia was essentially unemployed at the time of the presentence report (PSR) in this case, dated July 25, 2003, due to being a resident in a substance abuse treatment center. Caniglia became employed again in March 2004, but she was fired from that job in November after being jailed for the Douglas County probation violation. Caniglia reported no major hospitalizations or illnesses in the 5 years prior to the PSR but stated that she was on medication for chronic depression.

Caniglia described her parents as recovering alcoholics and her sister as a practicing alcoholic. Caniglia is engaged to a recovering alcoholic. Caniglia first tried alcohol at age 17 and began drinking on a regular basis at age 23 or 24. Caniglia is a self-described alcoholic who consumed 2 pints to a fifth of vodka every day at the height of her addiction. Caniglia previously received inpatient substance abuse treatment in 1988, 1995, and 1998. Caniglia entered residential treatment again in September 2002, but she left early in January 2003 without approval from the staff and was shortly thereafter arrested for the Douglas County offense and the present Sarpy County offense. Caniglia returned to residential treatment in May 2003 and was still there at the time the PSR was compiled in July. Her counselor reported that upon reentering treatment, Caniglia seemed different—more focused on treatment and more involved in her program. Caniglia apparently graduated from the treatment center in May 2004, prior to the relapse that led to her current probation violation.

Caniglia completed a "Driver's Risk Inventory" on June 24, 2003. Caniglia scored in the maximum problem range for alcohol, driver risk, drugs, and stress coping. Caniglia's cumulative point total on the "Automated Offender Selection Worksheet" placed her within the ISP target population. The probation officer who completed the July 25, 2003, PSR made no recommendation

regarding sentencing but did recommend certain conditions in the event probation was granted.

Caniglia's initial August 1, 2003, sentencing order of probation required, among other things, that Caniglia refrain from the use or possession of alcoholic beverages and all use or possession of controlled substances unless prescribed by a physician. According to the factual basis for Caniglia's admission of a probation violation, provided at the December 27, 2004, revocation hearing, Caniglia "had missed work on a couple of days and admitted drinking alcohol on those days, among some other days." Police officers checked with Caniglia at her residence and determined that at least twice she had tested positive for the consumption of alcohol, in violation of probation.

A probation officer submitted a letter to the court just prior to the January 7, 2005, hearing. In this letter, dated January 5, 2005, the probation officer commented as follows:

> It is apparent . . . Caniglia is no longer a suitable candidate to remain on probation due to her non-compliance thus far. . . . Caniglia did refuse help and guidance after having it offered from the supervising probation officer in Douglas County. . . . Caniglia received a big break from the Douglas County Courts with only serving 18 days in jail for a Fourth Offense, DUI. It is this officer[']s opinion that . . . Caniglia needs to be held accountable to the fullest standard on her Sarpy County docket and sentenced to the Women's Penal Complex in York, NE as outlined in the statutes. This would enable . . . Caniglia to be able to participate in their substance abuse unit for her to get the help she needs. . . . Caniglia is unwilling to go back to a residential setting to receive the treatment she needs for her alcohol problem. Outside of this, this officer is making no recommendations in regards to sentencing of . . . Caniglia.

As stated above, in its order of January 7, 2005, the Sarpy County District Court essentially imposed a new sentence of zero incarceration, no fine, and no license revocation. It is also clear that the court, in referring to the Douglas County proceedings, essentially determined that it was of no benefit to impose an identical sentence in this case. However, given Caniglia's repeated pattern of alcohol-related offenses, the new sentence

imposed by the district court does not adequately reflect the seriousness of the offense, promote respect for the law, or provide just punishment. Caniglia clearly needs additional help in overcoming her alcohol abuse problem, but she is unwilling to receive further treatment in a residential setting. Caniglia has not been deterred from drinking and driving in the past by either probation or license suspension. There is nothing in the record to suggest that such measures are likely to succeed now. Caniglia has continued to relapse into alcohol abuse and to drink and drive, despite having obtained treatment on a number of occasions, having been fined and placed on probation, and having had her license suspended. We conclude that the new sentence imposed by the district court is excessively lenient.

CONCLUSION

Pursuant to Neb. Rev. Stat. § 29-2323(1) (Reissue 1995), we vacate the new sentence imposed by the district court and remand the cause to the district court with instructions to impose a greater sentence. The sentence should be imposed by a different district court judge than the original sentencing judge.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

PRESTON GRIFFIN, APPELLANT, V. DRIVERS MANAGEMENT, INC., A NEBRASKA CORPORATION, APPELLEE.

714 N.W.2d 749

Filed May 2, 2006. No. A-05-995.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. ____: ____. 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.

4. **Workers' Compensation.** The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
5. ____. For calculation purposes in workers' compensation cases, the average weekly wage pertains to periods of time during which an employee's rate of wages is fixed by the day or hour or by the output of the employee.
6. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy concerning an employee's claim for workers' compensation.
7. **Workers' Compensation.** The determination of causation is, ordinarily, a matter for the trier of fact.
8. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
9. **Workers' Compensation: Expert Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
10. **Workers' Compensation.** Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact.
11. **Workers' Compensation: Words and Phrases.** Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. It does not mean a state of absolute helplessness but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

James E. Harris and Michaela Skogerboe, of Harris Kuhn Law Firm, L.L.P., for appellant.

Daniel R. Fridrich for appellee.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Preston Griffin appeals an order of a three-judge review panel for the Nebraska Workers' Compensation Court. Griffin asserts that the review panel erred in reversing the trial court's finding of Griffin's average weekly wage, in reversing the trial court's award of penalties, in affirming the trial court's finding that

Griffin failed to prove he is permanently totally disabled, and in affirming the trial court's finding that Griffin failed to prove that a stroke and related complications were causally related to the work injury. We find that the review panel erred in reversing the trial court's finding of Griffin's average weekly wage, and we reverse that portion of the review panel's order. We remand the case to the review panel with directions to affirm the trial court's holding concerning the average weekly wage calculation. We find no merit to the remaining assertions of error, and we affirm the remainder of the review panel's order.

II. BACKGROUND

Griffin has a history of problems with rheumatoid arthritis. The arthritis prevented Griffin from being able to work between 1998 and 2000. Griffin began taking various medications to treat the arthritis, and in 2000, he was able to return to work.

Griffin first began working for Drivers Management, Inc. (DMI), in October 2000. In March 2001, Griffin voluntarily left his employment with DMI for personal reasons. Griffin was rehired by DMI on or about November 26, 2001. When he returned to DMI, Griffin was first required to complete a probationary period of 75 hours as a "co-driver." As a "co-driver," Griffin was required to drive with another driver and was paid a flat salary of $375 per week. In late December 2001, Griffin's status with DMI changed from "co-driver" to "company driver," in which capacity Griffin was allowed to drive by himself and was no longer on a probationary status. As a "company driver," Griffin drove more hours and was paid a contractual rate of 27 cents per mile. Griffin testified that he earned approximately $1,258 the first week he was a "company driver."

On December 31, 2001, Griffin made a delivery to a location in Oklahoma City, Oklahoma. After having his truck unloaded and having paperwork completed, Griffin was walking across a parking lot to return to his truck when he slipped and fell on some ice. Griffin suffered injuries to his right side and right hip.

Griffin received treatment at a hospital, where x rays revealed a right hip fracture. Griffin was also diagnosed with a right femoral neck fracture, and he underwent surgery. Griffin received continuing followup treatment with an orthopedic physician in Alabama, Dr. Bony Barrineau. On January 15, 2002, Dr. Barrineau

ordered Griffin to remain off work. On June 3, Dr. Barrineau performed hip surgery on Griffin.

On December 17, 2002, Griffin underwent a functional capacity evaluation. The functional capacity evaluator opined that Griffin had demonstrated activity consistent with the requirements for driving a heavy truck but that Griffin's limitations continued to include decreased muscle strength and hip pain. The evaluator recommended a road test. On December 31, Dr. Barrineau released Griffin to return to work, but Dr. Barrineau also recommended a road test.

Griffin reported to a DMI terminal in Atlanta, Georgia, in early January 2003 to return to work. Griffin testified at trial that DMI did not give him a road test, but that DMI instead gave him the keys to a truck and indicated that he would be given an assignment as soon as the truck was ready. Griffin attempted to drive the cab portion of the truck around the parking lot, but he had difficulty driving the cab, even without a loaded trailer attached. Several days later, when DMI informed Griffin that the truck was ready for an assignment, Griffin informed DMI that he was experiencing hip pain and that he was going to return home to see Dr. Barrineau. Griffin never returned to work with DMI. On January 21, Dr. Barrineau released Griffin to return to work, without restrictions, and determined that Griffin did not need further surgery.

Griffin testified that he did not feel he was capable of driving a truck and that he understood his discussion with Dr. Barrineau on January 21, 2003, to mean that it was "up to [Griffin] whether [he] could try to go back again or not." In a report dated October 28, 2004, Dr. Barrineau indicated that Griffin, like any patient who has undergone hip replacement surgery, needed to use "common sense" in performing activities within his capabilities and that Griffin's sitting for long periods of time could result in pain and stiffness in his hip.

Griffin also continued to treat with Dr. Randall Ayers, a rheumatoid arthritis physician. Griffin testified that he had discussions with Dr. Ayers after Griffin's attempt to return to work in January 2003 and that Griffin understood those conversations to indicate that he was not released to return to work as a truck-driver. Dr. Ayers opined that Griffin's hip injury "combined with,

aggravated, and exacerbated his pre-existing arthritis" and that "Griffin was totally disabled and unable to return to work following the work-related accident . . . due to a combination of his hip injury and active rheumatoid arthritis."

On July 17, 2003, Griffin was admitted to a hospital after suffering a stroke. After the stroke, Griffin experienced weakness, numbness, loss of sensation, loss of short-term memory, and vision problems. In October, Griffin suffered facial burns while removing a "pot pie" from his oven. On October 27, Griffin was diagnosed with a second-degree burn and secondary infection. On June 29, 2004, Griffin was again admitted to a hospital, this time with a seizure disorder. Griffin suffered a fractured humerus, which was surgically repaired. Medical records suggest that the seizure disorder was causally related to Griffin's July 2003 stroke.

On November 10, 2004, Griffin filed an amended petition seeking workers' compensation benefits. Griffin alleged that he had suffered a work-related accident on December 31, 2001, and that his average weekly wage at the time was $1,056. Griffin alleged that he had suffered various injuries as a result of the accident, that those injuries aggravated his arthritis, that the pain medication he had taken for the injuries caused his stroke, and that his subsequent medical problems were causally related to the stroke. Griffin alleged that he was permanently totally disabled or, in the alternative, that he should be found to be "an 'odd-lot' employee." Griffin alleged that he was also entitled to an award of penalties.

On November 17, 2004, DMI filed an answer. DMI alleged that it had paid all benefits due to Griffin; that Griffin's medical problems were caused by his rheumatoid arthritis, not by the work-related accident; and that there was no causal connection between Griffin's stroke and the work-related accident.

On February 4, 2005, the trial court entered an award of benefits. The court found that Griffin had suffered a work-related accident and compensable injuries. The court found that Griffin had proven causation of his hip injury and that the injury was an injury to Griffin's body as a whole. The court found that Griffin had failed to adduce sufficient evidence to prove a causal connection between the work-related accident and subsequent arthritis

problems or the subsequent stroke. The court found that Griffin had reached maximum medical improvement on December 31, 2002, and awarded temporary total disability benefits for the period of time between December 31, 2001, and December 31, 2002. The court also found that Griffin was permanently partially disabled and awarded benefits for a 25-percent loss of earning capacity. The trial court also awarded Griffin future medical expenses and a vocational rehabilitation evaluation. Finally, the court found that there was no reasonable controversy and that Griffin was entitled to a 50-percent waiting-time penalty.

In the trial court's award, the court engaged in a lengthy discussion and analysis of Griffin's average weekly wage. The court found that the purpose of an average weekly wage computation is to approximate an injured employee's wages at the time of the accident. The court found that it would not make sense to include in the average weekly wage calculation the period of time during which Griffin was a probationary "co-driver" and was paid a fixed weekly salary. As such, the trial court based Griffin's benefit award on an average weekly wage calculation that included only the period of time during which Griffin was a "company driver" and was paid based on his mileage.

DMI appealed to the review panel, and Griffin cross-appealed. On August 3, 2005, the review panel entered an order of reversal. The review panel held that the trial court, in determining Griffin's average weekly wage, erred in limiting Griffin's earnings to the period of time he was a "company driver." The review panel remanded the matter with instructions to the trial court to determine how much, if any, of Griffin's earnings as a probationary "co-driver" being paid a fixed weekly salary should be used in the calculation of his average weekly wage. The review panel also reversed the trial court's holdings regarding loss of earning capacity and waiting-time penalties. The review panel affirmed the remainder of the trial court's award. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

Griffin has assigned eight errors on appeal, which we consolidate for discussion to four. First, Griffin asserts that the review panel erred in reversing the trial court's holding on Griffin's average weekly wage. Second, Griffin asserts that the review panel

erred in reversing the trial court's holding that Griffin is entitled to a waiting-time penalty. Third, Griffin asserts that the review panel erred in affirming the trial court's holding that Griffin failed to prove the causal connection between the work-related accident and the subsequent stroke. Fourth, Griffin asserts that the review panel erred in affirming the trial court's holding that Griffin failed to prove that he is permanently totally disabled.

IV. ANALYSIS

1. Standard of Review

[1-3] 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. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003); *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002); *Meredith v. Schwarck Quarries*, 13 Neb. App. 765, 701 N.W.2d 387 (2005). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Morris v. Nebraska Health System, supra*; *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001); *Meredith v. Schwarck Quarries, supra*. 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. *Morris v. Nebraska Health System, supra*; *Frauendorfer v. Lindsay Mfg. Co., supra*; *Meredith v. Schwarck Quarries, supra*.

2. Average Weekly Wage

Griffin first challenges the review panel's reversing of the trial court's holding concerning Griffin's average weekly wage for purposes of awarding benefits for permanent partial disability.

Griffin asserts that his average weekly wage should be calculated by taking into account only the wages he earned as a "company driver" when he was paid based upon mileage and that his average weekly wage calculation should not take into account the wages he earned as a "co-driver" when he was paid a fixed weekly salary. We agree with Griffin.

[4] The starting point for calculating Griffin's average weekly wage is Neb. Rev. Stat. § 48-126 (Reissue 2004), which provides in relevant part:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. . . . In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his or her weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer . . . .

Further, the determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law. *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000).

There is no dispute in this case that Griffin was continuously employed by DMI or that immediately prior to the accident, Griffin's rate of wages was fixed by Griffin's output. The dispute in this case centers upon Griffin's contention that the basis of calculation should include only the period of time during the preceding 6 months during which Griffin was recompensed as a "company driver" based upon output and should not include the period of time during which Griffin was paid a fixed weekly salary as a probationary "co-driver." The trial court agreed with Griffin, but the review panel disagreed and thus reversed the trial court's holding.

Our research of case law in Nebraska concerning average weekly wages indicates that there are no recent decisions addressing the specific issue presented: whether, for the purpose of

calculating the employee's average weekly wage, periods of time during the 6 months preceding an accident during which an employee was paid a weekly salary should be included along with periods of time during which the employee was paid a rate of wages fixed by the day or hour or by the output of the employee. However, we find several prior cases involving the calculation of average weekly wages to be instructive.

In *Ramsey v. State, supra*, the 6-month period of time preceding the employee's injury included periods of time during which the employee was compensated at the rate of $5.337 per hour and later periods of time during which the employee was compensated at the rate of $6.772 per hour. The Nebraska Supreme Court concluded that the employee's actual earnings during the 6-month period should be used to calculate her average weekly wage and that the calculation should not be limited only to the hourly rate in effect at the time of the accident. The Supreme Court held that "§ 48-126 does not permit the backward extrapolation of a wage increase so as to distort the average weekly wage actually earned by the worker prior to a compensable injury." *Ramsey v. State*, 259 Neb. at 183, 609 N.W.2d at 23.

In *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999), the parties stipulated that the employee's weekly earnings were $487.21 per week. The dispute centered around the fact that the employee received a $30 per diem payment on 6 days during the 6 months preceding the accident. The trial court included the $30 per diem payment for the entire 6-month period rather than for only the 6 days on which the employee actually received the payment. The Supreme Court held that including the $30 per diem payment for days on which the employee did not receive it "distorted the calculation of [the employee's] average weekly wage." *Id.* at 429, 604 N.W.2d at 820.

In the present case, the review panel relied on the decision of the Nebraska Supreme Court in *Mutchie v. M. L. Rawlings Ice Co.*, 122 Neb. 297, 240 N.W. 267 (1932), in concluding that the trial court was incorrect to include in the average weekly wage calculation only those earnings Griffin was paid based on his mileage. In *Mutchie*, the employee was initially paid a weekly salary and was later paid an hourly wage. The Nebraska Supreme Court, in including all of the earnings in the average weekly wage

calculation, emphasized that the employee was "engaged in the same character of employment" under both pay scales. *Id.* at 301-02, 240 N.W. at 269.

[5] We find the key in both *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000), and *Harmon v. Irby Constr. Co., supra*, to be the emphasis on not distorting *the employee's average weekly wage*. A plain reading of § 48-126 suggests that the average weekly wage pertains only to periods of time during which an employee's rate of wages is fixed by the day or hour or by the output of the employee. It would be incongruous and would distort this "average" to include a period of time during which the employee's rate of wages was a weekly salary and was not fixed by the day or hour or by the output of the employee. Nonetheless, the Supreme Court appears to have done just that in *Mutchie v. M. L. Rawlings Ice Co., supra*. However, in *Mutchie*, the Supreme Court emphasized that although the employee's wage schedule changed, he continued to be employed in *the same character of employment*. We find the Supreme Court's emphasis on the employee's character of employment to be important to the court's resolution.

In the present case, we find that the character of Griffin's employment was not the same under the different wage schedules. When Griffin was paid a weekly salary, he was a "co-driver," was on a probationary status, and was required to drive with another person. When Griffin's wage schedule changed to a per-output rate, he became a "company driver," was no longer on a probationary status, and was allowed to drive alone. When Griffin became a "company driver," his hours on the road increased significantly. Because of this change in the character of Griffin's employment, the Supreme Court's holding in *Mutchie v. M. L. Rawlings Ice Co., supra*, is distinguishable. Applying the teachings of the Supreme Court in *Ramsey v. State, supra*, and *Harmon v. Irby Constr. Co., supra*, we conclude that including Griffin's earnings when he was paid a salary and was engaged in a different character of employment would distort Griffin's average weekly wage calculation.

We conclude that the trial court correctly calculated Griffin's average weekly wage, including from the 6 months preceding the accident only the earnings Griffin was paid based upon his

output. As such, we conclude that the review panel erred in reversing that holding of the trial court. We therefore reverse the review panel's holding on Griffin's average weekly wage calculation, and we remand the case to the review panel with directions to affirm the trial court's average weekly wage calculation. Additionally, we note that the review panel also reversed the trial court's finding and remanded the case to the trial court with directions to recalculate Griffin's loss of earning capacity, because the review panel had reversed the trial court's average weekly wage calculation. In light of our holding about Griffin's average weekly wage, and in light of our conclusion below on Griffin's assertion of error concerning permanent total disability, the review panel's holding concerning Griffin's loss of earning capacity is also reversed, and the review panel is directed to affirm the trial court's loss of earning capacity calculation.

3. Waiting-Time Penalty

Griffin next asserts that the review panel erred in reversing the trial court's award of penalties and attorney fees. The trial court found that there was no reasonable controversy concerning Griffin's average weekly wage and, accordingly, awarded penalties and attorney fees. The review panel, inasmuch as it reversed the trial court's average weekly wage calculation, disagreed and reversed the award of penalties and attorney fees. We conclude that there was a reasonable controversy concerning Griffin's average weekly wage, and we affirm the review panel's reversal of the trial court's award of penalties and attorney fees.

[6] Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy concerning an employee's claim for workers' compensation. *Milliken v. Premier Indus.*, 13 Neb. App. 330, 691 N.W.2d 855 (2005). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation

Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Milliken v. Premier Indus., supra.* To avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. *Id.*

In the instant case, our discussion above concerning the proper calculation of Griffin's average weekly wage demonstrates that there was a reasonable controversy. The instant case is arguably a case of first impression, being distinguishable from the only prior case involving the inclusion of both a salaried compensation and a rate of compensation fixed by output. As such, we conclude that the review panel correctly found that the trial court erred in awarding waiting-time penalties and attorney fees.

4. Causation of Stroke

Griffin next asserts that the review panel erred in affirming the trial court's holding that Griffin had failed to prove a causal connection between the accident and Griffin's subsequent stroke and related complications. Griffin argues that he demonstrated a direct and natural causal connection. We conclude that the trial court's finding on this matter was not clearly wrong.

[7-9] The determination of causation is, ordinarily, a matter for the trier of fact. *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005). In testing the sufficiency of the evidence to support the findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party. *Id.* As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.*

In the instant case, the trial court found that Griffin's evidence concerning causation of his stroke "was not altogether persuasive as to the amounts of Vioxx taken by [Griffin] or the periods of time during which it was ingested." The trial court further expressly found that Griffin was not obligated to overcome "some high hurdle of proof" but that Griffin had "left [the court] scratching its proverbial head over some obviously unanswered questions, i.e. degree of required dosage, extent of usage, and passage

of time between termination of use and onset of stroke." The court concluded with the following question: "Is any stroke suffered by one who ingested Vioxx at some point in the past to be deemed a result thereof?"

In light of the foregoing, we determine that with regard to Griffin's stroke, there is sufficient evidence in the record to warrant the decision of the trial court that Griffin failed, regarding questions of fact, to prove causation. Accordingly, we find that the review panel did not err in affirming the trial court's finding on this issue.

5. Permanent Total Disability

Finally, Griffin asserts that the review panel erred in affirming the trial court's holding that Griffin did not prove that he was permanently totally disabled as a result of the accident. Griffin asserts that the trial court erred in relying on evidence from DMI's expert witness, Dr. D.M. Gammel, and in not finding that Griffin's hip injury combined with his preexisting arthritis to render him permanently totally disabled. We find sufficient evidence to support the trial court's findings.

[10,11] Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. It does not mean a state of absolute helplessness but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Id.*

Griffin first asserts that the trial court erred in relying on the opinion of DMI's expert witness, Dr. Gammel. A review of the trial court's award, however, reveals that the trial court concluded Griffin failed to prove the accident aggravated his arthritis but that the trial court did not solely rely on Dr. Gammel's opinions. Rather, the trial court specifically found that Dr. Gammel's opinions and testimony concerning the subject of rheumatoid arthritis in general were enlightening. The trial court specifically found that Griffin's expert witness, Dr. Ayers, did not provide

sufficient "analysis or discussion" to support his conclusion on aggravation. The trial court's holding was that as a question of fact, "the [c]ourt simply remain[ed] unconvinced that a sufficient causal link [had] been shown between the hip injury found to be compensable and [Griffin's] claim of an aggravation of his rheumatoid arthritis." We do not find the trial court to be clearly wrong in this regard.

With respect to the ultimate question of whether Griffin proved permanent total disability, the trial court specifically indicated that it had "carefully reviewed the medical evidence submitted as well as the lay testimony offered" and concluded that Griffin had proven that he is permanently partially disabled. The trial court specifically relied upon the functional capacity evaluation that indicated Griffin met the general physical demands set forth for a truckdriver, Griffin's work history, and the medical and lay testimony. We will not reweigh the evidence in this case, and we do not find the trial court's factual conclusion that Griffin is not permanently totally disabled to be clearly wrong. Accordingly, we affirm the review panel's affirmance of the trial court's holding on this issue.

V. CONCLUSION

We reverse the review panel's holding that the trial court erred in calculating Griffin's average weekly wage. We remand the case to the review panel with directions to affirm the trial court's holding concerning Griffin's average weekly wage. We also reverse the review panel's holding that the trial court needed to recalculate Griffin's loss of earning capacity, and we direct the review panel to also affirm that holding of the trial court. We affirm the review panel's order in all other respects.

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

CASSEL, Judge, dissenting in part.

I respectfully dissent from that portion of the majority opinion reversing the review panel's determination concerning Griffin's average weekly wage. Neb. Rev. Stat. § 48-126 (Reissue 2004) defines "wages" in two respects relevant to the case before us.

The first definition in § 48-126—"the money rate at which the service rendered is recompensed under the contract of hiring in

force at the time of the accident"—simply takes a weekly salary, or a monthly or annual salary converted to its weekly equivalent, and utilizes that amount. Thus, if Griffin's weekly salary at the time of the accident had been $1,258 (the amount he testified that he earned the first week under the different wage arrangement), § 48-126 would have recognized that amount as his "wages."

However, § 48-126 recognizes a different method of calculation where (1) the employment is "continuous" and (2) "immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee." The majority concedes that both of these conditions are satisfied, but nevertheless declines to apply the method of calculation dictated by the statute in that event.

Based upon the majority's "plain reading" of § 48-126, it characterizes as "incongruous" the inclusion of the period in which Griffin's rate of wages was a weekly salary. Nevertheless, the majority acknowledges that the Nebraska Supreme Court did "just that" in *Mutchie v. M. L. Rawlings Ice Co.*, 122 Neb. 297, 240 N.W. 267 (1932).

The majority justifies its decision by attempting to distinguish the instant case from *Mutchie*, asserting that the character of Griffin's employment was not the same under the different wage schedules. While I agree that the "character of employment" was important in the Supreme Court's analysis in *Mutchie*, I contend that the majority misinterprets that phrase in the context of § 48-126.

In *Mutchie*, the "character of employment" was the employee's "making deliveries [of ice] and doing common labor." 122 Neb. at 298, 240 N.W. at 267. Prior to August 23, 1930, the employee was paid a weekly salary and evidently worked solely for the employer. However, after August 23, the employee was paid 30 cents an hour for delivering ice for the employer "afternoons, evenings and Sundays" and also worked "forenoons" as an independent contractor using his brother's truck. *Id.* at 302, 240 N.W. at 269. While the present memory of the "ice business" described in *Mutchie*, 122 Neb. at 298, 240 N.W. at 267, applies only to persons of middle age or older, and while the working times and wage rates in *Mutchie* differ considerably from modern norms, it is clear from the Supreme Court's opinion that the employee's

work schedule after August 23 was considerably different from the schedule in effect prior to that date. The Supreme Court necessarily looked to the nature of the work, rather than the change of schedule, in determining that the employee was engaged in the "same character of employment." *Id.* at 301-02, 240 N.W. at 269.

In the instant case, the majority treats the increase in Griffin's working hours as a change in the character of his employment. I disagree. Just as the Nebraska Supreme Court in *Mutchie* considered the employee's functions—delivering ice and providing common labor—as the same character of employment before and after the change in schedule, I view Griffin's employment as a truckdriver during his period of service as a "co-driver" as constituting the same character of employment as his performance as a truckdriver when he was labeled a "company driver." The evidence does not support a change in the nature of Griffin's function, but only a change in the number of hours he worked. The decision in *Mutchie* shows that the statute requires that Griffin's amount of wages be determined by the alternative method applicable to continuous employment where the rate of wages is fixed by the output of the employee.

Although the majority does not characterize it as such, it appears that the majority views Griffin's work as a "co-driver" to be an entirely separate employment than his service as a "company driver." The majority's implicit approach conflicts with settled law defining "continuous employments" under § 48-126. In *Newberry v. Youngs*, 163 Neb. 397, 401-02, 80 N.W.2d 165, 168 (1956), the Nebraska Supreme Court held:

> [T]he term continuous employments in section 48-126 . . . relates to the contract of hiring and is applicable to those situations where the relationship of employer and employee is a continuing one. It does not depend in its application on the number of hours an employee works in a day or the number of days an employee works in a week. Those questions go to the matter of the performance of the contract and not to the nature of the contract.

In the case before us, Griffin was employed by DMI as a truckdriver. During the time that Griffin was designated a "co-driver," DMI and Griffin enjoyed the relationship of employer and employee. That relationship did not change when DMI

changed Griffin's title to "company driver." The "nature of the contract" did not change when Griffin's title changed. Within the meaning of § 48-126, Griffin's time of service as a "co-driver" and his period of employment as a "company driver" constituted a single period of continuous employment.

Where the employment was continuous and the rate of wages immediately prior to the accident was fixed by Griffin's output, § 48-126 requires us to determine his weekly wages by using his "average weekly income for the period of time ordinarily constituting his . . . week's work, and using as the basis of calculation his . . . earnings during as much of the preceding six months as he . . . worked for the same employer."

I attribute importance to the use of the word "income" in the phrase "average weekly income." That word connotes a broader scope than "wages" or "salary" and is sufficiently comprehensive to include both "wages" and "salary."

My analysis is not driven by the result, nor do I believe that the majority's interpretation is result oriented. Naturally, the parties having a financial interest in the outcome of the case may be influenced by the resulting effect of the alternative approaches. In *Mutchie v. M. L. Rawlings Ice Co.*, 122 Neb. 297, 240 N.W. 267 (1932), the court's calculation worked to the benefit of the employee, because his wages were higher during the earlier period than at the time of his accident. In the case before us, the same method of calculation works to the benefit of the employer, because Griffin's earnings were lower during the earlier period.

This potential result has been apparent for over 70 years, ever since the decision of the Nebraska Supreme Court in *Mutchie*. When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). I recognize that the entire objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. See 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 93.01[1][e] (2005). If I felt free to do so, I would depart from the interpretation in *Mutchie*.

However, it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy

of this state. *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004). Indeed, the Legislature has already provided in § 48-126 for an adjustment of the employee's wages if "such method of computation does not fairly represent the earnings of the employee," but limited that adjustment to employees engaged in seasonal employment or employment dependent upon the weather. The Legislature has not chosen to provide an exception to authorize the result sought by Griffin in the instant case. I do not believe that this court can properly depart from the settled meaning of the statute. In my opinion, because the character of Griffin's employment did not change during the period of his continuous employment, § 48-126 requires the result reached by the review panel on this issue.

I agree with the majority opinion concerning its resolution of the other issues presented by this appeal.

IN RE INTEREST OF ANDREW S., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,
V. STACEY T., APPELLANT, AND BRIAN S.,
APPELLEE AND CROSS-APPELLANT.

714 N.W.2d 762

Filed May 2, 2006. No. A-05-1335.

1. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Although an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, an order under Neb. Rev. Stat. §§ 43-254 and 43-247(3)(a) (Reissue 2004) after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing is final and thus appealable.
2. **Juvenile Courts: Final Orders: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. §§ 43-2,106.01(1) (Reissue 2004) and 25-1912(1) (Cum. Supp. 2004), an appellant has 30 days after the entry of a final order in which to file an appeal.
3. **Jurisdiction: Time: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction, including a notice of appeal filed within the prescribed time.
4. **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.

5. **Juvenile Courts: Jurisdiction.** The juvenile court in each county shall have jurisdiction of any juvenile who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile.
6. **Parental Rights.** The rights of the parent and the child are protected separately by the adjudication and dispositional phases of juvenile proceedings.
7. ____. Allegations in a petition brought under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) are brought on behalf of the child, not to punish the parents.
8. ____. The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
9. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), the State must prove the allegations of the petition by a preponderance of the evidence.
10. **Minors: Juvenile Courts.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
11. ____: ____. The juvenile code must be construed to ensure the rights of all juveniles to care and protection.
12. **Juvenile Courts: Parental Rights: Evidence.** The fact that a parent has previously relinquished an adjudicated child is relevant evidence in an adjudication proceeding concerning a child born soon thereafter.
13. **Juvenile Courts: Parent and Child: Records.** Given the purpose of the Nebraska Juvenile Code, one's history as a parent is a permanent record and may serve as a basis for adjudication depending on the circumstances.

Appeal from the Separate Juvenile Court of Lancaster County: DANIEL J. BECKWITH, County Judge, Retired. Affirmed.

Stephanie R. Hupp, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for appellant.

Gary E. Lacey, Lancaster County Attorney, and Rodney D. Reuter for appellee State of Nebraska.

Gene T. Oglesby, of Oglesby Law Offices, P.C., for appellee Brian S.

SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Stacey T. appeals, and Brian S. cross-appeals, the decision of the Lancaster County Separate Juvenile Court which adjudicated their minor child Andrew S. pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004).

FACTUAL AND PROCEDURAL BACKGROUND

Stacey and Brian are the biological parents of Andrew, who was born July 19, 2005. Prior to Andrew's birth, Stacey and Brian relinquished their parental rights as to Aryssa S., born January 13, 2002, and Anna S., born January 12, 2003. At the time of those relinquishments, Stacey was pregnant with Andrew.

On July 20, 2005, the day after Andrew's birth, the State filed a "Petition and Praecipe" alleging that he was a child as defined by § 43-247(3)(a) because he lacked proper parental care by reason of the fault or habits of Stacey and Brian in that

> [i]n prior juvenile court proceedings held in Lancaster County, Nebraska, [the juvenile court] found that Stacey . . . and Brian . . . had failed to provide proper parental care to their minor children due to the faults and/or habits of Stacey . . . and Brian . . . . Since that adjudication, Stacey . . . and Brian . . . failed to sufficiently participate in the court-ordered rehabilitation plan that was designed to correct, eliminate or ameliorate those conditions adjudicated by the court. Those conditions adjudicated by the court have not been corrected, eliminated, or ameliorated. This situation exposes [Andrew] to a risk of harm.

In an "Amended Petition and Praecipe," which appears to have been filed simultaneously with the "Petition and Praecipe," as it has the same date and time stamp, the State alleged that Andrew was a child as defined by § 43-247(3)(a) because he lacked proper parental care by reason of the fault or habits of Stacey and Brian in that

> [i]n prior juvenile court proceedings held in Lancaster County, Nebraska, [the juvenile court] found that Brian . . . had failed to provide proper parental care to his minor children due to the faults and/or habits of Brian . . . and that those children were in situations dangerous to life or limb or injurious to the health or morals of said juveniles as it related to the parental care provided by Stacey . . . . Since that adjudication, Stacey . . . and Brian . . . failed to sufficiently participate in the court-ordered rehabilitation plan that was designed to correct, eliminate or ameliorate those conditions adjudicated by the court. Those conditions adjudicated by the court have not been corrected, eliminated,

> or ameliorated. This situation exposes [Andrew] to a risk of harm.

Also on July 20, 2005, the State filed a "Motion for Temporary Custody" alleging that Andrew fell within the meaning of § 43-247(3)(a) and that he was "in such condition or surroundings that [his] welfare and best interest requires [sic] that [his] custody be immediately assumed by the Court." In support of its motion, the State attached the affidavit of Lisa Kreifels, the Nebraska Department of Health and Human Services (DHHS) care coordinator assigned to Andrew's case through DHHS' integrated care coordination unit.

In her affidavit, Kreifels stated that Stacey gave birth to Andrew on July 19, 2005. Kreifels also stated that Stacey and Brian had relinquished their parental rights as to the two other children, Aryssa and Anna—Brian on March 18, 2005, and Stacey on March 29. Kreifels stated that Aryssa was placed into the temporary custody of DHHS on December 19, 2002, and that Anna was placed into the temporary custody of DHHS on January 15, 2003.

Kreifels set forth the reasons for Aryssa's December 19, 2002, removal from the parental home, recounting the following matters adjudicated by the juvenile court: Aryssa was born on January 13, 2002; on or between that date and the following September 18, Stacey and Brian engaged in domestic assaults or domestic arguments on one or more occasions; during at least one such occasion, Aryssa was present; on September 3, Stacey was cited for assaulting Brian; during an incident on September 3, Stacey attempted to leave with 8-month-old Aryssa when the Lincoln Police Department was called; and Stacey allegedly assaulted an officer on September 3 by biting him on the hand and head-butting him. Kreifels noted that adjudication documentation concerning Aryssa stated that Stacey had been diagnosed with adjustment disorder, depression, personality disorder, disturbance of mood, and alcohol and marijuana abuse.

Kreifels stated that the adjudicated matters had not been corrected in order to allow the State to safely return Aryssa and Anna to their parents' care, despite reasonable efforts to assist the parents in correcting those matters. Kreifels averred that the conditions giving rise to a concern that Andrew was at risk of

harm were Stacey's untreated mental health issues and unresolved drug and alcohol issues, as well as the domestic violence issues between Stacey and Brian. Kreifels reiterated that Stacey and Brian had "failed to correct the original adjudication" and had not "complete[d] the court orders to gain custody" of Aryssa and Anna; she stated that both parents were to complete substance abuse treatment but had not done so and that Brian had refused to complete court-ordered urinary analyses. Kreifels stated that she believed Andrew's safety could not be ensured in the parental home—noting that the family had not followed safety plans in the past—and that thus, there was no effective safety plan which would allow Andrew to remain in the parental home.

In an order filed on July 20, 2005, the juvenile court granted immediate temporary custody of Andrew to DHHS because "Andrew would be at risk of harm if permitted to remain in the parent[s'] custody [due] to their failure to correct prior adjudicated matters." After a July 27 hearing on the merits, the court filed an order on August 2, finding that reasonable efforts had been made to return Andrew's legal custody to Stacey and Brian, that there was no evidence that the prior adjudicated matters had been corrected, and that it was not in Andrew's best interests to return him to the parental home. The court ordered that Andrew should remain in the temporary custody of DHHS for placement, treatment, and care; that Stacey and Brian should have reasonable rights of supervised visitation; and that the guardian ad litem assigned to Andrew's case should have access to Andrew and to all case information. The court also noted that the judge who presided over the July 27 hearing would recuse himself and that the matter would be reset for adjudication before a different judge.

An adjudication hearing was held on September 26, 2005. At this hearing, the State offered into evidence a complete transcript of the July 27 hearing held before the subsequently recused judge and a series of certified copies of documents (pleadings and orders) involving Aryssa and Anna, as well as Kreifels' July 20, 2005, affidavit in support of an order for temporary custody of Andrew. All exhibits were received into evidence without objection. The evidence from the July 27 hearing shows that Stacey

and Brian both testified that state services were terminated once they relinquished their parental rights as to the girls. Both Stacey and Brian also testified that since those relinquishments, there had been no new incidents of domestic violence. Brian testified that since the relinquishments, he had had trouble financing counseling services and drug and alcohol treatment. Stacey testified that she was not seeing a therapist at the time of the hearing, but was taking medication for depression. Kreifels testified at the July 27 hearing that it was her recommendation that the temporary custody order remain in effect, based upon the concerns set forth in her affidavit, and that it would be in Andrew's best interests for DHHS to maintain temporary custody. Kreifels acknowledged on cross-examination that the parents had not completed the rehabilitation program of the court, but that services had not been provided to the parents since they relinquished their rights as to Aryssa and Anna. Kreifels also acknowledged that since the time of the relinquishments, she had not been aware of any police contacts regarding Stacey, any episodes of domestic violence between Stacey and Brian, or any problems with alcohol or drug use by Stacey.

On September 30, 2005, the juvenile court filed its order stemming from the September 26 adjudication hearing, finding that the allegations of the amended petition were true by a preponderance of evidence. The juvenile court adjudged that Andrew was a child as defined by § 43-247(3)(a) because he lacked proper parental care and support by reason of the fault or habits of Stacey and Brian. The juvenile court also found, "Both parents have failed to correct all the conditions that place . . . Andrew . . . in a situation dangerous to life or limb or injurious to the health or morals of such juvenile." The court continued final disposition pending completion of a case plan and court report. It appears that at the time of the adjudication, Brian was living at a diagnostic and evaluation center and was awaiting sentencing on October 3 upon charges not specified in the record—but the suggestion was offered that the sentence could be 1 to 2 years' imprisonment.

Stacey timely appeals the order of the juvenile court, and Brian timely cross-appeals.

ASSIGNMENTS OF ERROR

Both parents assert that the juvenile court erred (1) in taking jurisdiction over Andrew under § 43-247(3)(a); (2) in removing the custody of Andrew from his biological parents and placing his custody with DHHS; (3) because the original juvenile court judge ruled on emergency and temporary custody, then recused himself; and (4) in excluding from the evidence testimony regarding the terms of Stacey's and Brian's relinquishments of their parental rights as to Aryssa and Anna.

Stacey has filed a motion to withdraw her assignment of error No. 2 because Andrew has been returned to her physical custody during the pendency of this appeal, and we granted such motion. At oral argument, counsel for Brian withdrew Brian's assignment No. 2, stating that Brian was in a penitentiary and was therefore not in a position to have custody.

JURISDICTION

[1,2] Both parents' assignments of error Nos. 3 and 4 relate to the order, filed on August 2, 2005, that the temporary custody of Andrew would remain with DHHS, from which order neither Stacey nor Brian appealed.

> Although an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, an order under Neb. Rev. Stat. § 43-254 (Cum. Supp. 2000) and § 43-247(3)(a) after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing is final and thus appealable.

In re Interest of Stephanie H. et al., 10 Neb. App. 908, 914, 639 N.W.2d 668, 675 (2002). The above quote describes the August 2 order precisely. An appellant has 30 days after the entry of a final order in which to file an appeal. See Neb. Rev. Stat. §§ 43-2,106.01(1) (Reissue 2004) (any final order or judgment entered by juvenile court may be appealed to Court of Appeals in same manner as appeal from district court to Court of Appeals) and 25-1912(1) (Cum. Supp. 2004) (notice of appeal shall be filed within 30 days after entry of final order of district court).

[3] "An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction,

including a notice of appeal filed within the prescribed time." *In re Interest of B.M.H.*, 233 Neb. 524, 527, 446 N.W.2d 222, 224 (1989). Because Stacey and Brian failed to timely appeal the order of August 2, 2005, which was clearly a final order, we have no jurisdiction with respect to their assignments of error Nos. 3 and 4, which relate solely to the August 2 order. Therefore, we do not address such assignments.

We do, however, have jurisdiction of errors asserted with respect to the September 30, 2005, order, as the appeal was perfected within 30 days of that order. Therefore, we will address whether the juvenile court erred in taking jurisdiction over Andrew under § 43-247(3)(a) based on the parents' failure to correct the conditions which caused their two other children to be adjudicated and removed from their parental care.

STANDARD OF REVIEW

[4] 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 Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). 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.*

ANALYSIS

The record reveals that Aryssa and Anna were adjudicated under § 43-247(3)(a) because of domestic assaults or domestic arguments occurring between Stacey and Brian during at least one of which Aryssa was present—Aryssa was adjudicated on November 19, 2002, and Anna was adjudicated on February 20, 2003. The juvenile court's orders in Aryssa's and Anna's cases required that Brian participate in a psychological evaluation as arranged by DHHS; Stacey and Brian participate in and successfully complete a parenting program as arranged by DHHS; Brian comply with a drug and alcohol evaluation; Brian comply with random drug testing as arranged and required by DHHS; Brian not consume drugs or alcohol, unless prescribed, prior to visitation; Stacey participate in ongoing psychiatric care and take any medications prescribed for her; Stacey participate in

programming to address substance abuse and alternatives to violence; Stacey participate in drug and alcohol treatment as recommended by her evaluation; and Stacey and Brian not engage in any domestic or physical altercations in the presence of Aryssa and Anna. The record indicates that after the girls' adjudications, Stacey was in a correctional facility for a period of time, given that some of her court-ordered corrective requirements were subject to the availability of such programs in the correctional facility during her incarceration. Stacey and Brian relinquished their parental rights as to the girls in March 2005 after Aryssa and Anna had been in DHHS' custody for 27 months and 26 months respectively—although the record reflects that Anna was temporarily returned to Stacey's custody for a few weeks in February and March 2003.

Kreifels' affidavit in support of an order for temporary custody of Andrew was admitted into evidence at Andrew's September 26, 2005, adjudication hearing, and we have previously detailed the contents of the affidavit. According to Kreifels, the conditions that gave rise to a concern that Andrew was at risk of harm were Stacey's untreated mental health issues and unresolved drug and alcohol issues, as well as the domestic violence issues between Stacey and Brian and the failure of Stacey and Brian to correct conditions leading to Aryssa's and Anna's adjudications in order to regain their custody. Kreifels averred that both parents were to complete substance abuse treatment but had not done so and that Brian had refused to complete court-ordered urinary analyses. Kreifels stated that she believed Andrew's safety could not be ensured in the parental home—noting that the family had not followed safety plans in the past—and that thus, there was no effective safety plan which would allow Andrew to remain in the parental home.

[5-9] Therefore, the question is whether the juvenile court erred in taking jurisdiction over Andrew under § 43-247(3)(a) based on the parents' failure to correct the conditions which caused their two previous children to be removed from parental care. Section 43-247 states:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .

> (3) Any juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian . . . or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . .

In *In re Interest of Dylan Z.*, 13 Neb. App. 586, 594, 697 N.W.2d 707, 716 (2005), this court said:

> The rights of the parent and the child are protected separately by the adjudication and dispositional phases of juvenile proceedings. . . . Allegations in a petition brought under § 43-247(3)(a) are brought on behalf of the child, not to punish the parents. . . . The purpose of the adjudication phase is to protect the interests of the child . . . . The parents' rights are determined at the dispositional phase, not at the adjudication phase.

(Citations omitted.) And, "[a]t the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence." *In re Interest of Heather R. et al.*, 269 Neb. 653, 663, 694 N.W.2d 659, 667 (2005).

[10-13] The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990). Moreover, the juvenile code must be construed to ensure the rights of all juveniles to care and protection. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995). The parents' argument, when reduced to its essence, is that the relinquishments of their parental rights as to their two other children give them a "clean slate" with respect to Andrew. (Stacey's and Brian's briefs both read, "Currently, the logic behind a voluntary relinquishment, instead of proceeding to a contested hearing on the termination of parental rights, is the opportunity to have and protect the parental rights to afterborn children." Brief for appellant at 13 and brief for appellee Brian S. on cross-appeal at 13.) We believe that the adoption of this "clean slate" notion would ignore the larger purposes of the juvenile code, and it would produce an illogical result which could endanger Andrew. Clearly, the parents had plenty of "work" to do to regain custody of their two daughters,

but they chose to forgo such efforts and relinquished their parental rights as to those children. These facts do not bode well for Stacey's and Brian's stability and ability as parents, and they serve to convince us that this child, Andrew, is at risk. The fact that a parent has previously relinquished an adjudicated child is relevant evidence in an adjudication proceeding concerning a child born soon thereafter. In short, given the purpose of the juvenile code, one's history as a parent is a permanent record and may serve as a basis for adjudication depending on the circumstances. Relinquishments of parental rights are not any sort of "pardon," which is how Stacey and Brian would have us treat the relinquishments they made. They cite no authority on point for such notion, and while we have found none either, we suggest that one's history as a parent speaks to one's future as a parent. To ignore the fact that Stacey and Brian chose to relinquish their rights as to their first two children would be folly on our part and would unnecessarily expose Andrew to a risk of harm. Moreover, the time lag between those relinquishments and Andrew's birth was a mere 3 months, a fact which further convinces us that Kreifels correctly apprehends the danger to Andrew, as did the trial court. We find that grounds for the adjudication of Andrew were shown by the requisite standard of proof. Thus, we affirm.

CONCLUSION

For the reasons stated above, we find that the juvenile court properly took jurisdiction over Andrew under § 43-247(3)(a).

AFFIRMED.

MOORE, Judge, participating on briefs.

DOROTHY M. CAMPAGNA AND ANTHONY W. CAMPAGNA, APPELLEES AND CROSS-APPELLANTS, V. ANN HIGDAY, TRUSTEE OF THE ANN HIGDAY INTER VIVOS TRUST, APPELLANT AND CROSS-APPELLEE.

714 N.W.2d 770

Filed May 16, 2006. No. A-04-1251.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of

the findings of the trial court, provided that 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. **Boundaries: Adverse Possession.** When properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under Neb. Rev. Stat. § 34-301 (Reissue 2004).
4. **Boundaries: Ejectment.** Boundary disputes cannot be determined in a quiet title action. Rather, boundary disputes are properly brought as an action in ejectment or pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2004).
5. **Boundaries: Quiet Title.** When the parties pursue a boundary dispute as a quiet title action without objection, the mode of procedure is no longer in question.
6. **Boundaries: Notice: Time.** Absent evidence that prior owners of property within the preceding 10 years had knowledge or notice of a purported boundary line asserted by neighboring landowners, landowners cannot prevail on a claim of mutual recognition and acquiescence.
7. **Boundaries: Notice.** In order to claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary, and therefore, the mere establishing of a line by one party and the taking by that party of possession up to that line is insufficient.
8. **Quiet Title: Proof.** The burden of proof in a quiet title action involving mutual recognition and acquiescence is preponderance of the evidence.
9. **Real Estate: Presumptions.** As to parties sharing a parental or filial relationship, possession of land of one by the other is presumed to be permissive.
10. **Trial: Evidence: Appeal and Error.** Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed as modified.

Patrick J. Sullivan and Michael F. Polk, of Adams & Sullivan, P.C., for appellant.

Kevin J. McCoy, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellees.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Ann Higday, trustee of the Ann Higday Inter Vivos Trust, appeals and Dorothy M. Campagna and Anthony W. Campagna, husband and wife, cross-appeal from an order of the district court for Sarpy County setting aside certain property to the Campagnas by virtue of mutual recognition and acquiescence. For the reasons set forth below, we affirm as modified.

BACKGROUND

The record shows that Ann has lived on an 80-acre piece of property in Sarpy County near Bellevue since January 1956. Ann's grandson, Mark Michalek, lives on the same property. In January 1956, Ann and her husband, Gerald Higday, purchased the property, and in March, they deeded approximately 40 acres of the property to Ann's brother and his wife, Joseph Tribulato and Alice Tribulato. The Higdays deeded the north portion of the property to the Tribulatos while retaining the south portion. After Alice died, Joseph deeded his property in 1985 to the Tribulatos' daughter, Dorothy, reserving a life estate. Upon Joseph's death in 1996, Dorothy became the owner of the property and added Anthony's name to the property's title. In 2001, Ann, who had become the sole owner of the Higdays' property due to Gerald's death, conveyed title to the property to the Ann Higday Inter Vivos Trust.

There is no record of any boundary disputes between the families until the Campagnas' daughter, Linda Roth, ordered a survey of the property, which was completed on November 25, 2002.

On June 3, 2003, the Campagnas filed an amended petition to quiet title to two parcels of land within the original 80-acre property, which parcels we will refer to as "Parcel 1" and "Parcel 2." As to Parcel 1, the Campagnas stated that after the Tribulatos purchased their 40 acres from Ann, the Tribulatos constructed a house in which they resided until their respective deaths. A tenant of the Campagnas currently leases that home. The Campagnas noted that the 2002 survey indicates that the south side of the house extends 8.6 feet south of the surveyed boundary line, onto Ann's property.

The record shows that south of the house and approximately 35 feet south of the surveyed boundary line are two large trees that were planted at the time the house was built. From the 1950's until about 5 years prior to trial, there was a white fence just south of the two trees, which fence ran east to west and ended just a few feet east of the north-south road providing access to both properties.

The Campagnas alleged that from the 1950's to the present, the fenced area served as a side yard for the house. Therefore,

this portion of the property will be referred to hereinafter as the "side yard of Parcel 1."

Besides the portion of Parcel 1 described above, the Campagnas requested that the trial court quiet title to the remainder of Parcel 1. Specifically, the Campagnas described an area involving a crop line southwest of their house which, according to the survey, extends south onto Ann's property. The Campagnas alleged that they or their agents had farmed the entire area north of the crop line every year since the 1950's. Hereinafter, we will refer to this property as the "crop line of Parcel 1."

As to the two pieces of land constituting Parcel 1, the Campagnas alleged that for more than 10 years they had been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership. In the alternative, the Campagnas alleged that they were entitled to quiet title of Parcel 1 by mutual recognition and acquiescence.

Concerning Parcel 2, the Campagnas alleged that in the 1960's, the Higdays constructed a fence running east to west in the east section of the parties' properties. The Campagnas alleged that from that date forward, the Tribulatos and their successors farmed the land north of the fence. The Campagnas also stated that the 2002 survey indicates that the legal boundary between the parties' properties is approximately 120 feet north of the present fence line. The Campagnas stated that by virtue of adverse possession, they are entitled to quiet title to the strip of land lying between the southern boundary of their property as surveyed and the position of the fence approximately 120 feet further south, which strip is legally described as Parcel 2.

The Campagnas alleged that at all times since the construction of the fence, and for more than the past 10 years, they and the Tribulatos have been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership to Parcel 2. The Campagnas also alleged that in the alternative, they are entitled to quiet title to Parcel 2 because the Higdays have recognized and acquiesced in the fence as a boundary between the properties.

On June 16, 2003, Ann filed an answer to the Campagnas' amended petition. As an affirmative defense, Ann stated that the Campagnas' possession of any of the real estate in Parcels 1

and 2 was by permission. Ann also stated that the Campagnas and their predecessors in interest, by virtue of their family relation to her, were required to give actual notice that such possession was adverse and that they failed to do so. Furthermore, Ann stated that any and all fences on both parcels were installed out of convenience and were never erected to establish or recognize boundaries.

Trial was held on September 27, 28, and 30, 2004. With regard to the side yard of Parcel 1, Dorothy testified that she was aware that her house extends onto Ann's property, but could not remember when she learned of that fact. Dorothy testified that there is a yard on the south side of the house. Both Dorothy and her daughter, Linda, testified that until a few years prior, a white rail fence had run east to west behind the house, encompassing the yard. Dorothy testified that her father, Joseph, had mowed the grass within the fence. Ann did not contradict Dorothy's testimony regarding the side yard, stating that Joseph had a yard in back of his house which he mowed and that that yard was Joseph's property.

As to the remaining property in Parcel 1—the area denoted by the crop line—the record contains a survey dated January 28, 2003, which shows that the surveyors located a crop line on Ann's property, just south of the actual dividing line between the properties as surveyed. Dick Daniel testified that from 1992 to 2002, he farmed the entire area north of the crop line for the Campagnas. Dick testified that the proceeds from the crops north of the crop line went to the Campagnas while the proceeds from the crops south of the crop line went to Ann. Dick testified that the crop line was easily visible to both families. Dick also testified that the crop line was along the same east-west course as the former white rail fence south of the house.

Steve Roth testified that he farmed the Higdays' land from 1992 through 2002, and he also stated that he followed the crop line, farming the area south of the crop line but not the area north of the crop line. Steve testified that the crop line was apparent, given that he and Dick would normally plant different types of crops.

Dick and Steve also testified in detail regarding the fence line on Parcel 2. Dick testified that he farmed the Tribulatos' or

Campagnas' property from the 1970's until 2002 and that he farmed the Higdays' land until 1991. Dick testified that in the mid-1970's, the Higdays built a fence between the eastern properties, on the southern edge of Parcel 2. The record shows that trees subsequently grew within the fence, eventually forming a dense tree line. Dick testified that from the mid-1970's until the mid-1980's, he farmed the property on the north side of the fence for the Tribulatos but did not farm south of the fence for the Higdays, given that the Higdays pastured horses on that side of the fence.

Dick testified that when the Higdays stopped pasturing horses in the mid-1980's, he began farming south of the fence for the Higdays. Dick testified that Ann never indicated to him that she owned the property north of the fence. Dick testified that during the time he farmed both sides of the fence, he gave the proceeds from the crops north of the fence to the Tribulatos or the Campagnas and the proceeds from the crops south of the fence to the Higdays. Dick testified that he did so because he "assumed that the fence was the property line." Dick testified that to his knowledge, the Higdays never gave the Campagnas or the Tribulatos permission to farm the north side of the fence. Dick described Ann as "very businesslike," meaning that "if she had a dollar coming, it was hers."

Dick testified that when the Higdays farmed the land south of the fence, there was an opening in the tree line which would allow access to the other side of the fence. Dick testified that at times, the Higdays had used the contested area north of the fence to ride four-wheelers or horses.

Steve testified that he had farmed the Higdays' land since 1992, which land included the property up to the fence line but never past it. Steve testified that Ann never indicated that she owned any of the property north of the fence.

Scott Roth, Linda's husband, testified that in the spring of 1985, he was approached by the Higdays and Joseph to prepare an estimate for removing the trees within the fence line. Scott testified that he talked to Ann about it and that she told him she wanted only the trees removed, not the fence, because the fence line reflected the property line. Scott testified that at the time, the trees in the fence line were approximately 10 to 15 feet high,

in contrast to their height of 30 to 40 feet at the time of trial. Scott testified that the parties wanted the trees removed so that they could farm closer to the fence. Scott also testified that he never removed the trees, because Joseph would not pay for his half of the cost, despite an agreement between Joseph and Ann to split the costs.

Linda testified that the parties always recognized the tree line as the boundary between the properties until the 2002 survey revealed otherwise. Linda testified that she had the survey done because she was considering purchasing the property. Linda testified that prior to completion of the 2002 survey, surveyors placed stakes indicating that the property line was well south of the fence line. Linda testified that after Ann expressed concern over this fact, she told Ann not to worry and that Linda would continue to recognize the fence line as a boundary. Linda testified that eventually, the survey showed the property line was actually north of the fence, and that Ann refused to talk about the subject further.

Mark, Ann's grandson, testified that he helped Gerald build the fence on Parcel 2 in the spring of 1975 to keep horses out of the crops in the summer. Mark testified that there is a 25- to 30-foot break in the fence. Mark testified that the Higdays continued to use the contested area north of the fence after the fence was erected. Specifically, Mark testified that they rode horses, hunted, and rode snowmobiles on that property when crops were not in the field. Mark stated at trial, "To this day, we all cross the property."

Mark testified that while installing the fence, Gerald used an old river map as a guide. Mark testified that Gerald walked off 600 feet worth of paces, being careful not to go over the property line, although Mark acknowledged that for much of the fence, Gerald went well beyond the property line. When asked if it was possible that Gerald was trying to follow the actual boundary line, Mark stated that it was not, given that Gerald was trying to keep the fence 60 feet short of the Tribulatos' land.

Mark testified that he did not consider the fence line to be the boundary between the two properties, but Mark acknowledged that in his deposition, he stated that he had recognized the fence line as a boundary for the last 27 years. Mark also testified that

prior to 2002, he never heard anybody in his family indicate that the boundary line was not the fence line.

Dorothy testified that she considered the area north of the fence line to be her property and that since 1985, she or her father had received the proceeds from the crops in the area north of the fence. Although Ann testified that she is unsure if the fence line is the boundary between the two properties, she did state that the land on the south side of the fence belonged to her and the property to the north side of the fence belonged to Joseph.

In an order filed October 12, 2004, the district court found that the Campagnas had established a boundary line by mutual recognition and acquiescence regarding the side yard of Parcel 1 and the fence line on Parcel 2, but not as to the crop line of Parcel 1. The court found that the Campagnas had failed to prove adverse possession as to both parcels. The trial court ordered that a survey be completed in order to legally describe the properties' boundaries.

On October 21, 2004, the Campagnas filed a motion to alter or amend the judgment for the limited purpose of incorporating the survey requested by the court or, in the alternative, asking the court to reference in its order the legal descriptions as set forth in the exhibits offered at trial. The trial court granted the Campagnas' motion and filed an amendment to the decree setting forth the legal boundaries "[i]n accord with the recommendations of counsel for both parties." Ann appeals, and the Campagnas cross-appeal.

ASSIGNMENTS OF ERROR

On appeal, Ann contends that the trial court erred in (1) concluding that the Higdays and the Campagnas mutually recognized and acquiesced in the side yard of Parcel 1 as a boundary between the properties and in the fence line on Parcel 2 as another boundary between the properties, (2) failing to recognize that permissive use of property between owners sharing a close family relationship precludes claims for mutual recognition and acquiescence, and (3) failing to exactly describe the mutually recognized and acquiesced boundaries between the two properties.

In the Campagnas' cross-appeal, they contend that the court erred in (1) failing to receive certain photographs into evidence, (2) failing to quiet title in the Campagnas as to the area north of

the crop line of Parcel 1 on the grounds that the parties recognized and acquiesced in the established crop line as a boundary for more than 10 years, and (3) finding that the Campagnas were not entitled to all or, in the alternative, part of Parcels 1 and 2 by way of adverse possession.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Inserra v. Violi*, 267 Neb. 991, 679 N.W.2d 230 (2004). In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that 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. *Madson v. TBT Ltd. Liability Co.*, 12 Neb. App. 773, 686 N.W.2d 85 (2004).

ANALYSIS

Appeal and Cross-Appeal—Mutual Recognition and Acquiescence.

On appeal, Ann contends that the trial court erred in concluding that the parties mutually recognized and acquiesced in the side yard of Parcel 1 as a boundary between the properties and in the fence line on Parcel 2 as another boundary between the properties. In the Campagnas' petition, they asked the court to quiet title to Parcels 1 and 2.

[3] When properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under Neb. Rev. Stat. § 34-301 (Reissue 2004). *Kraft v. Mettenbrink*, 5 Neb. App. 344, 559 N.W.2d 503 (1997).

[4,5] Initially, we note that a dispute in which each owner admits the title of the other but disagrees as to the physical location of the boundary is a boundary dispute, not a title controversy. Boundary disputes cannot be determined in a quiet title action. Rather, boundary disputes are properly brought as an action in ejectment or pursuant to § 34-301. *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). When the parties pursue a boundary dispute as a quiet title action without objection, the mode of procedure is no longer in question. *Id.*

Therefore, given that the Campagnas brought this action as a quiet title action and there was no objection, we treat this action as one to quiet title.

[6-8] Absent evidence that prior owners of property within the preceding 10 years had knowledge or notice of a purported boundary line asserted by neighboring landowners, landowners cannot prevail on a claim of mutual recognition and acquiescence. See, § 34-301; *Kraft v. Mettenbrink, supra*. In order to claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary, and therefore, the mere establishing of a line by one party and the taking by that party of possession up to that line is insufficient. *Kraft v. Mettenbrink, supra*. We note that in an adverse possession action, the burden of proof is preponderance of the evidence, and we extend that burden of proof to the instant action involving mutual recognition and acquiescence. See *Nye v. Fire Group Partnership*, 265 Neb. 438, 657 N.W.2d 220 (2003).

In the instant case, the record clearly shows that the Campagnas proved by a preponderance of the evidence that both families had knowledge of the existence of both the fence line on Parcel 2 and the side yard of Parcel 1 as boundaries between the properties. In regard to the fence line on Parcel 2, Ann argues that the fence line is a mere barrier, erected to contain horses, and was not intended as a boundary between the properties. We disagree.

Besides the evidence that both families cultivated only the property on their side of the fence, there is evidence that the Higdays considered the fence to be a boundary rather than a barrier. At trial, Linda testified that prior to completion of the 2002 survey, surveyors placed stakes indicating that the property line was well south of the fence line. Linda testified that after Ann expressed concern over this fact, she told Ann not to worry and that she would continue to recognize the fence line as a boundary. Linda testified that Ann told her that she had contacted an attorney who told her not to worry because the property was hers. Linda testified that eventually, the survey showed that the property line was actually north of the fence. Linda testified that at that point, Ann changed her mind and refused to talk about the fence line continuing to be the boundary. At trial, Ann testified

that she is unsure if the fence line is the boundary between the two properties, but she did state that the land on the south side of the fence belonged to her while the property on the north side of the fence belonged to Joseph.

Additionally, Scott testified that in the spring of 1985, he was approached by the Higdays and Joseph to prepare an estimate for removing the trees within the fence line. Scott testified that he talked to Ann specifically and that she told him she wanted only the trees removed, not the fence, because the fence line reflected the property line.

As to the side yard of Parcel 1 behind the Campagnas' house, the record shows that after the house was built in the 1950's, a fence was erected behind the house, and the property between the house and the fence was used by the Campagnas as a side yard. Ann did not dispute the Campagnas' use of this property in that manner, nor is there is any evidence that Ann objected to it. Rather, at trial, Ann testified that Joseph had a yard around his house which he mowed and that it was his own property. Given our de novo review of the evidence on this record, we conclude that the Campagnas proved by a preponderance of the evidence that both parties mutually recognized and acquiesced in the fence line on Parcel 2 and the side yard of Parcel 1 as boundaries between the properties.

[9] Ann urges us to apply the presumption set out in adverse possession cases that as to parties sharing a parental or filial relationship, possession of land of one by the other is presumed to be permissive. See *Kraft v. Mettenbrink*, 5 Neb. App. 344, 559 N.W.2d 503 (1997). Our review of this law shows that this presumption has not been applied to a Nebraska case involving mutual recognition and acquiescence.

Furthermore, even if we were to apply this presumption in the instant case, Ann's argument must fail. On this record, the Campagnas presented evidence to rebut a presumption of permissiveness. Specifically, when Ann was asked if she ever told Joseph that he could farm part of her property, she stated: "No. He farmed his part." Additionally, both Dick and Steve testified that the Higdays never gave the Campagnas permission to farm the area north of the fence, and Dorothy specifically denied that Ann had ever given Dorothy permission to farm any of the

Higdays' land. Therefore, we reject Ann's argument that a presumption of permissive use applies to the instant case.

In the Campagnas' cross-appeal, they argue that the trial court erred in failing to quiet title in them as to the area north of the crop line of Parcel 1. The Campagnas argue that the parties recognized and acquiesced in the established crop line as a boundary for more than 10 years. The record contains a survey dated January 28, 2003, which shows that the surveyors located a crop line on the Higdays' property, just south of the actual dividing line between the properties as surveyed. Dick testified that from 1992 to 2002, he farmed for the Campagnas the entire area north of the crop line. Dick also testified that the proceeds from the crops north of the crop line went to the Campagnas while the proceeds from the crops south of the crop line went to Ann.

Steve testified that he farmed the Higdays' land from 1992 through 2002, and he also stated that he followed the crop line, farming the area south of the crop line but not the area north of the crop line. Steve testified that the crop line was apparent, given that he and Dick would normally plant different types of crops.

The Campagnas argue that the trial court did not find mutual recognition and acquiescence as to the crop line because of the court's opinion that a crop line can never be a boundary. In *Nebraska State Bank v. Gaddis*, 208 Neb. 136, 138, 302 N.W.2d 686, 688 (1981), the Nebraska Supreme Court upheld a finding of adverse possession, stating: "There was no fence, but the crop line of the farmland formed a boundary line between the two properties. The land was cultivated each year and the crop line did not vary over the years." The court further noted, "None of the disputed strip was cultivated by the [party opposing adverse possession]." *Id.* Given the court's holding in *Nebraska State Bank v. Gaddis* and the uncontradicted evidence at trial regarding the parties' use of the crop line, we conclude that the trial court erred in failing to find that the Campagnas proved mutual recognition and acquiescence in the crop line of Parcel 1. Therefore, we modify the trial court's legal description of Parcel 1 to state the following:

> 2. A parcel of land being part of tax lot 3B3, located in the Northwest One-quarter of Section 3, Township 13 North, Range 13 East of the 6th P.M., Sarpy County,

Nebraska, being more particularly described as follows: beginning at the northwest corner of said tax lot 3B3; thence S89°17′25″ E (assumed bearing) 776.99 feet along the north line of said tax lot 3B3; thence S01°08′55″ W 35.00 feet; thence N85°04′52″ W 150.00 feet; thence N88°09′11″ W 627.35 feet to the west line of said tax lot 3B3 and to the west line of said Northwest One-quarter of Section 3; thence N01°11′34″ E 11.54 feet along said west line to the point of beginning. Described parcel contains 15,558.53 square feet or 0.36 acres, more or less including 986.69 square feet of road right-of-way.

Appeal—Alleged Failure to Describe Property.

Ann contends that the trial court erred, given that its descriptions of the boundaries between the properties differed in the court's original order and its order as amended. After the court issued its order setting forth a general description of the boundaries using landmarks, the Campagnas filed a motion to alter or amend the judgment. The Campagnas did so for the purpose of incorporating the survey requested by the court or, in the alternative, asking the court to reference in its order the legal descriptions as set forth in the exhibits offered at trial. The Campagnas based their motion on *Inserra v. Violi*, 267 Neb. 991, 679 N.W.2d 230 (2004), which requires a court to include a precise legal description of property rather than general descriptions based on landmarks. The trial court then granted the Campagnas' motion and filed an amendment to the decree setting forth the legal boundaries "[i]n accord with the recommendations of counsel for both parties." Therefore, on this record, we cannot find that the trial court erred in amending its judgment to include precise descriptions of the boundaries at issue.

Cross-Appeal—Failure to Receive Certain Photographs.

In the Campagnas' cross-appeal, they contend that the court erred in failing to receive into evidence certain photographs of the properties. The Campagnas argue that the photographs were relevant and valuable to the record.

[10] We note, though, that where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error. See *Chadron Energy Corp. v. First*

Nat. Bank, 236 Neb. 173, 459 N.W.2d 718 (1990). Because the photographs were merely cumulative to other testimony in this record, we cannot conclude that the trial court abused its discretion in excluding the photographs.

Cross-Appeal—Adverse Possession of Parcels 1 and 2.

The Campagnas also argue that the trial court erred in finding that they are not entitled to Parcels 1 and 2 by way of adverse possession. Given our finding that the Campagnas are entitled to Parcels 1 and 2 under the theory of mutual recognition and acquiescence, we conclude that we need not consider whether the Campagnas are also entitled to Parcels 1 and 2 by adverse possession. 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).

CONCLUSION

After reviewing the record, we conclude that the trial court did not err in concluding that the Higdays and the Campagnas mutually recognized and acquiesced in the side yard of Parcel 1 and in the fence line on Parcel 2 as boundaries between the properties. Similarly, the trial court did not to fail to exactly describe the boundaries between the two properties in its amended order. In regard to the Campagnas' cross-appeal, the trial court did not err in failing to receive certain photographs into evidence or in failing to find that the Campagnas are not entitled to Parcels 1 and 2 by way of adverse possession. The trial court did err in failing to quiet title in the Campagnas as to the area north of the crop line of Parcel 1, because the parties recognized and acquiesced in the established crop line as a boundary for more than 10 years. For this reason, we modify the trial court's order so as to quiet title in the Campagnas to the entirety of Parcel 1 as set forth in this opinion. The rest of the trial court's order is affirmed in its entirety.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF JAMIE M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. GERMAI M., APPELLANT.

714 N.W.2d 780

Filed May 16, 2006. No. A-05-438.

1. **Juvenile Courts: Evidence: Witnesses: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Evidence: Proof.** The State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2004) exists and that termination is in the child's best interests.
3. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
4. **Parental Rights: Homicide.** Neb. Rev. Stat. § 43-292(10) (Reissue 2004) provides that parental rights may be terminated when the parent has (1) committed murder of another child of the parent; (2) committed voluntary manslaughter of another child of the parent; (3) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent; or (4) committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.
5. **Convictions: Sentences: Judgments: Appeal and Error.** A conviction and sentence are not considered final judgments until after an appeal, if there is indeed an appeal.
6. **Convictions: Collateral Estoppel: Liability: Appeal and Error.** A criminal conviction being appealed cannot be used to invoke the doctrine of collateral estoppel as to the defendant's liability in a civil suit.
7. **Courts: Judicial Notice: Convictions: Parental Rights: Appeal and Error.** The Nebraska Court of Appeals can properly take judicial notice of the fact that the convictions forming the basis for termination of parental rights have been affirmed by the Nebraska Supreme Court.
8. **Parental Rights.** A court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child.

Appeal from the County Court for Hall County: GERALD R. JORGENSEN, Judge. Affirmed.

Hunter A.H. Campbell, of Campbell Law Office, for appellant.

Mark J. Young, Hall County Attorney, for appellee.

Jay B. Judds, guardian ad litem.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Germai M. appeals from the March 3, 2005, order of the county court for Hall County, sitting as a juvenile court, terminating his parental rights to his daughter, Jamie M. The State's case for termination was based on the claim that Germai had murdered Jamie M.'s sister.

FACTUAL AND PROCEDURAL BACKGROUND

Jamie, born September 16, 2002, was removed from her home and placed in emergency foster care on July 23, 2003, after her father, Germai, was arrested for the death of Jamie's sister, Diana M.

On July 24, 2003, the State filed a juvenile petition alleging that Jamie was a minor child pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The judge's notes filed on October 29 show that Jamie's parents entered a plea of no contest and that Jamie was adjudged as alleged. The notes also reflect that Jamie was placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS).

On February 27, 2004, the State filed its motion to terminate the parental rights of Germai to Jamie. Although the motion also made allegations against Jamie's mother, who is Germai's wife, this appeal concerns only the allegations against Germai. The State alleged:

> (1) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> (2) The parent has inflicted upon the juvenile, by other than accidental means, serious bodily injury;
>
> (3) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (4) The parent has (a) committed murder of another child of the parent, (b) committed voluntary manslaughter of another child of the parent, (c) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (d) committed a felony assault that resulted

in serious bodily injury to the juvenile or another minor child of the parent.

The State requested that the court enter an order terminating the parental rights of Germai and place Jamie for adoption. At the March 9 arraignment on the State's motion to terminate, Germai entered a denial of the motion.

At a hearing on the State's motion to terminate his parental rights, Germai testified that he was arrested on July 23, 2003, regarding Diana's death. Germai testified that he had been in custody since his arrest and had not seen Jamie since the time of his arrest. Germai testified that in August 2004, he was convicted by a jury of second degree murder and child abuse resulting in death. Germai was sentenced to 80 years to life in prison for each of the two convictions, with the sentences to be served consecutively, but the convictions had been appealed. Germai acknowledged that he had testified at his murder trial that he believed his wife had committed the crimes against their daughter Diana. Germai testified that while he saw bruises on Diana's body, he "did not call anybody." Germai testified that he was in bed when Diana's injuries occurred and that he did not know whether Jamie was in the room when Diana was injured. Germai testified that since his incarceration, he has inquired of family members about Jamie.

Barbara N. testified that she had been Jamie's foster mother for 18 months and that Jamie originally came to her as an emergency placement. Barbara testified that Jamie was a very traumatized baby—she would act like it hurt if her foster parents touched her, and she was very emotionless, looked sad, and had empty eyes. Barbara testified that at the time of the termination hearing, Jamie was a very happy 2-year-old, though she still had "spells" when she became withdrawn. Barbara testified that Jamie had "identified developmental delays" and that there was concern for her emotional and psychological state. Barbara testified that the school system was working with Jamie on an individual education plan. Barbara also testified that Jamie had become part of the foster family and that she was willing to adopt Jamie.

Judy Pfeifer, a child protection and safety worker, testified that she was assigned to Jamie's case in October 2003. Pfeifer

testified that children who have witnessed abuse or violence toward a sibling "have a tendency to withdraw; loss of appetite, . . . fearful of strangers, or some will do the reverse and be overly friendly with strangers." Pfeifer testified that withdrawing is one of the major issues watched for. Pfeifer testified that if children go back to a violent home, they often end up back in the system. Pfeifer testified that if Germai was released from prison in the near future, she would have concerns about returning Jamie to him because of the extent of the abuse to her sister, Diana. Pfeifer testified that Jamie needs permanency, especially at her age, and that it would be in Jamie's best interests if Germai's parental rights were terminated.

In a journal entry dated March 3, 2005, the juvenile court found that Germai had been convicted of the murder of Diana, Jamie's sister, and that Germai had been sentenced to serve a period of 80 years' to life imprisonment for such offense. The juvenile court also found that it was "abundantly clear to the Court that Jamie . . . has herself either been abused or witnessed traumatic events in her parental home." The juvenile court found that it was in Jamie's best interests that Germai's parental rights be terminated. The juvenile court terminated Germai's parental rights to Jamie. Germai now appeals.

ASSIGNMENT OF ERROR

Germai alleges that the juvenile court erred in terminating his parental rights to his daughter, Jamie.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003).

ANALYSIS

Final Judgment and Use of Criminal Convictions.

Germai argues that no final judgment certifying that he had been convicted of a criminal offense delineated as a statutory

ground requiring termination was available to the trial court, and thus, there was no clear and convincing evidence meriting the termination of his parental rights. Germai argues that because his conviction is presently under appeal, the State failed to establish that a final judgment has been entered. Germai argues that "[a criminal] conviction that is appealed does not establish by clear and convincing evidence that criminal conduct ever took place." Brief for appellant at 3. In support of his argument, Germai cites *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003). While *Gales* states that "[a] *sentence* is not a final judgment until the entry of a final mandate of an appellate court," other authority is more on point. (Emphasis supplied.) See *id.* at 622, 658 N.W.2d at 622.

[2,3] The State moved to terminate Germai's parental rights under Neb. Rev. Stat. § 43-292(2), (8), (9), and (10) (Reissue 2004). And, while the juvenile court's journal entry did not specify under which subsection or subsections Germai's rights were terminated, the court's explanation of the grounds for its termination decision appears to encompass all of the statutory grounds alleged in the State's motion. In its March 3, 2005, journal entry, the juvenile court found that "[f]rom the evidence presented, the juvenile's father, Germai . . . stands convicted of the murder of a sibling of the juvenile, Diana . . . and has been sentenced to serve a period of not less than eighty years to life imprisonment for said offense." Such finding by the juvenile court relates to the statutory ground for termination found in § 43-292(10). The juvenile court also said that "Jamie . . . has herself either been abused or witnessed traumatic events in her parental home." Such finding by the juvenile court relates to the statutory grounds for termination found in § 43-292(2), (8), and (9). "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)). And, 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 the fact to be proved." *In re Interest of Aaron D.*, 269 Neb. 249, 259, 691 N.W.2d 164, 172 (2005).

[4-6] Section 43-292(10) provides that parental rights may be terminated when

> [t]he parent has (a) committed murder of another child of the parent, (b) committed voluntary manslaughter of another child of the parent, (c) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (d) committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.

As stated previously, Germai was convicted by a jury of second degree murder and child abuse resulting in the death of his daughter Diana. But, the record establishes that such convictions are on appeal and thus not yet final. See *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996) (conviction and sentence are not considered final judgments until after appeal, if there is indeed appeal). Accordingly, such convictions cannot be used to prove that Germai abused Diana, resulting in her death, or that he is guilty of second degree murder in her death. See *id.* (criminal conviction being appealed cannot be used to invoke doctrine of collateral estoppel as to defendant's liability in civil suit).

Without the criminal convictions to rely on, the State needed to present an independent case establishing grounds for termination of parental rights, but such case was not presented to the juvenile court here. There is, for example, no evidence showing the extent of Diana's injuries, no coroner's report showing the cause of her death, and no testimony or other evidence that Germai caused Diana's injuries or death. Instead, the State relied entirely upon Germai's criminal convictions. Therefore, to the extent that the juvenile court's order of termination rests on the criminal convictions and the fact that Germai murdered Jamie's sister, such finding cannot stand. Thus, grounds for termination of Germai's parental rights to Jamie did not exist under § 43-292(10).

[7] Clearly, the evidence before the juvenile court was inadequate, as Germai's criminal convictions were not final. Therefore,

for the sake of judicial economy, we have purposely waited for the outcome of the criminal appeal, which gives finality to Germai's convictions. See *Shuck v. Jacob, supra*. Thus, despite the evidentiary shortcomings in our record, we can and do take judicial notice of the Nebraska Supreme Court's recent opinion which makes the convictions final. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Grounds for termination of Germai's parental rights to Jamie now exist under § 43-292(10).

Best Interests.

[8] Although Jamie has not yet experienced actual injury or physical harm, " 'a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child.' " *In re Interest of Anthony V.*, 12 Neb. App. 567, 583, 680 N.W.2d 221, 233 (2004) (quoting *In re Interest of S.L.P.*, 230 Neb. 635, 432 N.W.2d 826 (1988)). Furthermore, Pfeifer testified that Jamie needs permanency, especially at her age, and that it would be in Jamie's best interests if Germai's rights were terminated. Upon de novo review, we conclude that it is in Jamie's best interests to terminate Germai's parental rights.

CONCLUSION

For the reasons stated above, we find that the State failed to prove to the juvenile court by clear and convincing evidence grounds for terminating Germai's parental rights to Jamie. However, we take judicial notice of the Nebraska Supreme Court's recent opinion which makes Germai's criminal convictions for the death of Jamie's sister, Diana, final. Thus, grounds now exist under § 43-292(10) to terminate Germai's parental rights to Jamie, and such termination is in her best interests.

AFFIRMED.

FERNANDO LECUONA III, COMMISSIONER, NEBRASKA WORKFORCE DEVELOPMENT, DEPARTMENT OF LABOR, APPELLANT, V. DENISE M. CRAMER, APPELLEE.

714 N.W.2d 786

Filed May 23, 2006. No. A-05-822.

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. **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 not arbitrary, capricious, or unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. ____: ____. A proper result will not be reversed merely because it was reached for the wrong reason.
5. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
6. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
7. **Employment Security.** The Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished.
8. **Employment Security: Labor and Labor Relations.** The general test whether a person is available for work is whether the claimant is able, willing, and ready to accept suitable work which he or she does not have good cause to refuse.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

John H. Albin and Thomas A. Ukinski for appellant.

No appearance for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

The Commissioner of Labor appealed from the decision of the district court for Sarpy County which ruled that the claimant

was eligible to receive unemployment benefits because she was no longer a student. Although our reasoning differs from the district court's, we affirm.

BACKGROUND

Denise M. Cramer was working full time for Amsan, LLC, when she was admitted into an accelerated degree program on July 23, 2004, at Bellevue University (Bellevue). Bellevue's accelerated degree program allows a student to obtain a bachelor of science or arts degree in 1 year of study. As a prerequisite to the accelerated program, students must have either an associate degree or 60 hours of transferable credit. An additional prerequisite to beginning the program is that students be employed at least 30 hours per week in a work setting where the academic content of the major can be applied. Bellevue classifies students in the accelerated program as "full-time students," and Cramer testified that she was a "full-time" student under Bellevue's classification scheme. Cramer was pursuing a bachelor of science degree in marketing management via the accelerated program, and her classes were held on Saturdays from 8 a.m. to 12 p.m. Cramer testified that she typically devoted 1 to 2 hours of time outside of class each day for the course.

On August 26, 2004, 2 days before classes began, Cramer received notice from Amsan that her position was being eliminated and that her last day at Amsan would be September 30. On October 6, Cramer filed a claim for unemployment insurance benefits. The claim was based on wages Cramer earned at Amsan during the base period of the third quarter of 2003 through the end of the second quarter of 2004.

On October 15, 2004, Cramer received a "Notice of Adjudicator's Determination" which stated that she was disqualified from receiving unemployment benefits. The determination stated as follows:

> You are currently enrolled as a full time student. The majority of the wage credits used to establish your claim were not earned while you were a student. You are therefore disqualified from receiving benefits while you are enrolled and attending school as a full time student. You

> may reapply for benefits when you are no longer a full time student.
>
> You are disqualified from benefits effective 10-03-2004.

Cramer appealed to the Nebraska Appeal Tribunal. The tribunal reversed the determination and denial of benefits, finding that although a student " 'registered for full attendance' " would be disqualified from receiving benefits under Neb. Rev. Stat. § 48-628(7) (Reissue 2004), Cramer's particular situation did not meet this statutory definition. The tribunal found that despite Bellevue's classification of Cramer as a "full-time" student, attending class on Saturdays for 4 hours was not "full attendance" under the statute. Fernando Lecuona III, the Commissioner of Labor (the Commissioner), appealed to the district court.

The district court affirmed, albeit on a different basis than the tribunal. The district court first found that Bellevue's program required Cramer to be employed 30 hours per week. The district court then found that when Cramer was terminated from her employment with Amsan, this effectively terminated her status as a full-time student, and that therefore, Cramer was not disqualified from receiving benefits based on a "student" status. The Commissioner appeals.

ASSIGNMENT OF ERROR

The Commissioner assigns, rephrased, that the district court erred when it found that Cramer was no longer a student and, thus, was entitled to benefits, because this finding was not supported by competent evidence.

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. *Lecuona v. McCord*, 270 Neb. 213, 699 N.W.2d 403 (2005). 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 not arbitrary, capricious, or unreasonable. *Id.* In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.*

ANALYSIS

The Commissioner asserts that the district court erred when it found that Cramer was no longer a student and, thus, was eligible for benefits. Specifically, the Commissioner claims that the district court's finding that Cramer was terminated from the accelerated program when she was terminated from her employment with Amsan was not supported by competent evidence.

In general, students are disqualified from receiving unemployment benefits under § 48-628(7). In finding that Cramer was not disqualified from receiving benefits as a "student," the district court stated that "because the program in which [Cramer] was enrolled required her to be employed 30 hours per week, when her employment ended by downsizing[,] her status as a full time student would have terminated, [and] therefore she is not disqualified." No further discussion was given regarding the district court's conclusion.

The record from the tribunal proceedings, which was admitted into evidence at the district court proceedings, includes an excerpt from Bellevue's course catalog. Under the heading "Prerequisite for the Major," the catalog states that "[p]rior to beginning" the accelerated degree program, the student must "[c]urrently be employed at least 30 hours per week in a work setting where the academic content of the major can be applied." A plain reading of this excerpt seems to indicate that employment is a prerequisite to beginning the program, rather than a requirement for maintaining enrollment in the program as the district court found. Further, the record also includes a letter from Bellevue's "Office of the Registrar," dated November 18, 2004, which states that Cramer was currently enrolled in the program. This indicates that Cramer was still enrolled in the program as of November, even though her employment with Amsan was terminated September 30. The record does indicate that at times, Cramer's testimony was unclear regarding whether the 30-hour work requirement was a condition to beginning the program or a requirement for maintaining enrollment in the program. However, this testimony was more fully developed upon questioning by the tribunal, and Cramer indicated that the work requirement was a prerequisite to first entering the program.

The record does not support the finding that Cramer was terminated from the accelerated program when she lost her job with Amsan. We have reviewed the district court's order for errors appearing on the record, and we find that the order is not supported by competent evidence.

[4] While we hold that the district court's finding that Cramer was no longer a student at Bellevue was not supported by competent evidence, we agree with the district court's conclusion that Cramer was not disqualified from receiving benefits as a student. 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).

In general, students are disqualified from receiving unemployment benefits under § 48-628(7). Section 48-628 provides, in relevant part, as follows:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (7) For any week of unemployment if such individual is a student. For the purpose of this subdivision, student shall mean an individual *registered for full attendance* at and *regularly attending* an established school, college, or university, unless the major portion of his or her wages for insured work during his or her base period was for services performed while attending school, except that attendance for training purposes under a plan approved by the commissioner for such individual shall not be disqualifying.

(Emphasis supplied.)

Section 48-628(7) provides that "student[s]" are disqualified from receiving unemployment benefits, with two exceptions: when the majority of the student's wage credits were earned while the student was attending school or if the student is enrolled in a training program approved by the Commissioner of Labor. Neither of those exceptions applies in the present case, and Cramer is disqualified from receiving benefits if she meets the statute's definition of "student": an individual (1) registered for full attendance and (2) regularly attending. Neither party disputes that Cramer was "regularly attending" Bellevue. Thus, the primary issue before us is whether Cramer was "registered for full attendance" at Bellevue.

[5,6] The meaning of "registered for full attendance" under § 48-628(7) is an issue of first impression in Nebraska. The Commissioner asserts that the plain meaning of this statutory phrase is that the individual is registered as a "full-time student" at the school, college, or university. Brief for appellant at 15. The Commissioner further argues that because Bellevue classified Cramer as "full-time," Cramer is disqualified from receiving benefits. *Id.* We disagree and find that the meaning of the phrase is ambiguous and subject to interpretation. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Id.*

In our research, we have found no cases which interpret the particular phrase "registered for full attendance" for disqualification purposes. But see *Lee v. Job Service North Dakota*, 440 N.W.2d 518 (N.D. 1989) (holding that similar statute which disqualifies full-time college students from unemployment benefits does not violate due process and equal protection clauses of state and federal Constitutions). However, we have found cases which interpret student exclusions in the context of similar "nontraditional" students which we find instructive. The Supreme Court of Idaho, in *Smith v. Department of Employment*, 100 Idaho 520, 521, 602 P.2d 18, 19 (1979), was called upon to interpret Idaho's statutory unemployment compensation exclusion for persons "'"attending a regular established school excluding night school."'" The claimant in that case was attending early morning summer college classes, from 7 to 8:30 or 9 a.m. 5 days a week. Despite the literal language of the statute, the court resorted to statutory construction in determining that the claimant was entitled to receipt of unemployment compensation benefits. The court concluded:

> In order to construe this section of the [Idaho] Employment Security Act to be consistent with the purposes

> of the act, *i. e.*, to provide unemployment compensation to those persons who are unemployed through no fault of their own, who are desirous of employment, and who are not engaging in any activity which would preclude their availability for full time work, we conclude that the language of [the statute] permits receipt of benefits by an otherwise eligible claimant whose enrollment in school does not affect the claimant's availability for suitable full time employment.

Smith, 100 Idaho at 522-23, 602 P.2d at 20-21.

In a more recent case, the Illinois Appellate Court addressed a similar issue in *Moss v. Department of Employment Sec.*, 357 Ill. App. 3d 980, 830 N.E.2d 663, 294 Ill. Dec. 251 (2005). The claimant in that case was attending college classes from 7 a.m. until noon Wednesday to Saturday. The relevant state statute made a person ineligible for unemployment benefits if his or her "'principal occupation'" was that of a student. *Id.* at 985, 830 N.E.2d at 668, 294 Ill. Dec. at 256. The court in *Moss* first reviewed the primary purpose of Illinois' unemployment insurance act, which it found is to provide compensation benefits to unemployed individuals to alleviate their economic distress caused by involuntary unemployment. The court noted that one of the factors determining eligibility for benefits under the act is whether the claimant is "able and available for work" and that an individual is deemed unavailable for work when his principal occupation is that of a student. *Id.* The court found that the plain language of the statute does not render *all* students ineligible, just those whose principal occupation is that of a student. The court stated that the correct focus in determining whether a claimant's principal occupation is that of a student is on whether the claimant has placed restrictions on her job search because of her status as a student. According to the *Moss* court, the analysis should focus on whether work is subordinate to and geared around an educational program as well as on the claimant's availability to work a full-time job with her school commitments. Finally, the court recognized that the circumstances of each case must be considered before making the determination whether someone's principal occupation is that of a student. Since the claimant in *Moss* was available for work and scheduled school around work, remaining willing to change her school schedule to

accommodate a full-time job, the court determined that she was eligible for benefits.

[7,8] We now turn to an analysis of Nebraska's unemployment law. The Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished. *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985); *Memorial Hosp. of Dodge Cty. v. Porter*, 4 Neb. App. 716, 548 N.W.2d 361 (1996). A condition to being eligible to receive unemployment benefits is that the individual be "available for work." See Neb. Rev. Stat. § 48-627(3) (Reissue 2004). The general test whether a person is available for work is whether the claimant is able, willing, and ready to accept suitable work which he or she does not have good cause to refuse. *Robinson v. Commissioner of Labor*, 267 Neb. 579, 675 N.W.2d 683 (2004).

It is reasonable to construe the exclusionary phrase relating to students "registered for full attendance" under § 48-628(7) in conjunction with whether the claimant is "available for work" under § 48-627. This determination must be made based upon the particular facts and circumstances of each case. In this case, Cramer attended classes only on Saturdays from 8 a.m. to 12 p.m. We find that unlike a more traditional course of study, wherein students registered for 12 or more credit hours attend classes held throughout the week during the day, Cramer's particular educational program allowed her to be "available for work." In fact, the Bellevue catalog states that the accelerated programs are offered to "working adult students," and the fact that classes are held on Saturday mornings certainly seems to accommodate a full-time job. Cramer herself testified that she was seeking full-time employment and that she was willing to work full time. Cramer would not have had to place restrictions on her job search because of her status as a student. Nor did Cramer's work appear to be subordinate to and geared around her enrollment in the accelerated program. Cramer would have been able to work a full-time job with her school commitments.

Our decision, however, is not meant to open the door for all students to seek unemployment benefits when they find themselves out of work.

> "It should not be assumed that this decision will set a precedent for large numbers of college students to finance their college education by way of unemployment compensation benefits. The factual situations in this case . . . are clear, and they permit the courts to draw a line between claimants who are basically students and claimants who are basically committed to the work-force but in addition are attempting to better themselves by continuing their education."

Moss v. Department of Employment Sec., 357 Ill. App. 3d 980, 987-88, 830 N.E.2d 663, 670, 294 Ill. Dec. 251, 258 (2005), quoting *Patronas v. Unemployment Comp. Bd. of Review*, 5 Pa. Commw. 491, 291 A.2d 118 (1972).

Under the particular facts of this case, we find that Cramer is not disqualified from receiving unemployment benefits, because Cramer is not a "student" as defined by § 48-628(7). Although our reasoning differs from that of the district court, we agree with the district court's ultimate determination that Cramer was not disqualified from receiving benefits based on a "student" status. The district court's order affirming the appeal tribunal's determination that Cramer is entitled to benefits for weeks claimed, if otherwise eligible, is affirmed.

CONCLUSION

The district court's order was not supported by competent evidence. However, the district court was correct when it concluded that Cramer was not disqualified from receiving benefits based on a "student" status. For the reasons stated, we affirm the order of the district court.

AFFIRMED.

MARY J. PETERSON, APPELLANT AND CROSS-APPELLEE, V. PAUL R. PETERSON, APPELLEE AND CROSS-APPELLANT.

714 N.W.2d 793

Filed May 30, 2006. No. A-04-893.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.

This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.

2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when 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.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Motions for New Trial: Time: Appeal and Error.** An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Appeal dismissed.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellant.

Mark J. Milone, of Govier & Milone, L.L.P., for appellee.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Mary J. Peterson appeals the decision of the district court for Sarpy County dissolving her marriage to Paul R. Peterson, and Paul has cross-appealed. For the reasons set forth herein, we dismiss both Mary's appeal and Paul's cross-appeal for lack of jurisdiction.

STATEMENT OF FACTS

On August 28, 1993, Mary and Paul were married. No children were born of the marriage. On March 26, 2003, Mary filed a petition for dissolution, and a trial was held on April 12, 2004.

On May 3, 2004, a document titled "Opinion and Findings" was file stamped and filed by the clerk of the district court. This document was signed by the trial judge and set forth the following:

JURISDICTION

The Court finds it has jurisdiction over the parties and subject matter of action and that there is sufficient evidence, and the Court finds the marriage is irretrievably broken and should be dissolved.

INSURANCE

Medical

The Respondent [Paul] shall maintain the Petitioner [Mary] insured during the interlocutory period, and shall, if requested by the Petitioner do all things necessary to allow the Petitioner to obtain COBRA benefits at her own expenses.

REAL PROPERTY

The Petitioner and Respondent are owners of the following described real estate, to wit: 7533 South 22nd Street, Bellevue, Nebraska.

The above real estate is awarded to the Petitioner, subject to the mortgage or mortgages thereon and the Petitioner shall hold the Respondent harmless from the payment of the same.

PERSONAL PROPERTY

The Petitioner and Respondent have each submitted to the Court exhibits regarding the division of the parties [sic] personal property. The Court having reviewed each exhibit finds the Respondent should be awarded the items as set out in Exhibit #1 attached hereto, along with any other personal property now in his possession[.]

Each party is awarded any checking or savings accounts in their respective names.

AUTOMOBILES

Petitioner is awarded the 1994 Chevrolet Silverado truck, the Respondent is awarded the 1991 Chevrolet Caprice and the 1986 Ford Econoline Van, subject to any liens thereon.

DEBTS

Petitioner and Respondent shall pay all debts in their own names.

PENSION

Petitioner is awarded all interest in his 401K plan with National Bedding[.]

ALIMONY

The Court having reviewed the evidence determines that due to the length of the marriage, need for the Petitioner to seek additional training, need for Petitioner to obtain employment, that she should be awarded alimony in the sum of $500.00 per month for a period of 60 months. The same to terminate upon the death of either party or remarriage of the Petitioner.

ATTORNEY FEES AND COSTS

Petitioner is awarded the sum of $1500.00 for the services of her attorney in these actions, with the Respondent to pay the cost of the action.

ARREARAGE

Any unpaid amounts of temporary support shall be preserved and shall not merge into the decree. The court finding the non-payment of spousal support to be wilful.

[Petitioner's counsel] to prepare a Decree in conformance with the Court's findings and submit the same to opposing Counsel for approval, then to the Court for signature.

IT IS SO ORDERED.

On the following day, May 4, the court entered an order nunc pro tunc, which stated:

An Opinion and Order having been issued by the Court on May 3, 2004, the Court finds that in said Opinion scribners [sic] errors have occurred and the following corrections are made.

AUTOMOBILES

Respondent is awarded the 1994 Chevrolet Silverado truck, the Petiti[on]er is awarded the 1991 Chevrolet Caprice and the 1986 Ford Econoline Van, subject to any liens thereon.

PENSION

Respondent is awarded all interest in his 401K plan with National Bedding[.]

IT IS SO ORDERED.

Thereafter, on May 28, 2004, a "Decree of Dissolution of Marriage" was filed. This document was also signed by the trial judge and file stamped, and it set forth essentially the same findings that were set forth in the previous "Opinion and Findings" as

amended by the May 4 order nunc pro tunc. On June 4, Mary filed a motion for new trial, which motion was denied on July 8. On August 3, Mary filed a notice of appeal. Paul has cross-appealed.

ASSIGNMENTS OF ERROR

On appeal, Mary contends that the district court erred (1) in dividing the parties' marital property, specifically in finding that her house was a marital asset, in whole or in part; (2) in awarding inadequate alimony; (3) in awarding inadequate attorney fees; (4) in failing to disregard Paul's testimony regarding his expenses; and (5) in failing to implement coercive sanctions for contempt of court following a finding of willful failure to pay temporary spousal support.

On cross-appeal, Paul contends that the district court erred (1) in awarding alimony for an unreasonable length of time, (2) in finding that Paul's nonpayment of spousal support was willful, and (3) in awarding Mary attorney fees of $1,500.

STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[3] 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. *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002).

ANALYSIS

[4] 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. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004) provides in pertinent part:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
>
> (3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

In the instant case, a document titled "Opinion and Findings" and signed by the judge was file stamped on May 3, 2004. Thereafter, a "Decree of Dissolution of Marriage," which was also signed by the judge, was file stamped on May 28, 2004. This raises an issue as to which filing is the final order in this case.

The Nebraska Supreme Court recently considered a nearly identical factual situation in *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006). In that case, 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 of Ashland 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.

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. Since the November 22 journal entry disposed of all the claims, the appeal taken from the November 22 journal entry was timely.

Another case involving a similar factual situation is *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). In *Hosack*, the Nebraska Supreme Court was faced with the determination of which action by the district court finally determined the rights of the parties: the journal entry, signed by the district court judge and filed on October 15, 2002, or the decree, likewise signed and filed on November 14.

In considering whether the journal entry was a final order, the Supreme Court noted that the district court's journal entry set out the district court's findings regarding the property division, alimony, attorney fees, and health insurance coverage in the dissolution case. However, the journal entry also stated: " 'Counsel shall advise the court, by written motion, if the court failed to rule on any material issue presented. If no motion is filed within 10 days from the date of this order, all matters not specifically ruled upon are deemed denied.' " 267 Neb. at 936, 678 N.W.2d at 750.

The Supreme Court held that the trial court's journal entry was not a final determination of the parties' rights because the journal entry left certain matters unresolved, i.e., the notation directing

counsel to advise the district court by written motion if the court had failed to rule on a material issue. Thus, the dissolution decree was the final order, and the appeal in *Hosack* was timely.

We further note that the Supreme Court has specifically disapproved of the practice of a trial court's filing a journal entry which describes an order that is to be entered at a subsequent date.

> "The filing of both a journal entry and a subsequent order creates the potential for confusion. Instead, the trial court should notify the parties of its findings and intentions as to the matter before the court by an appropriate method of communication without filing a journal entry. The trial court may thereby direct the prevailing party to prepare an order subject to approval as to form by the opposing party. See commentary to Canon 3(B)(7) of the Nebraska Code of Judicial Conduct. Only the signed [judgment, decree, or] final order should be filed with the clerk of the court."

City of Ashland v. Ashland Salvage, 271 Neb. 362, 368, 711 N.W.2d 861, 868 (2006) (quoting *Hosack, supra*).

In the instant case, the "Opinion and Findings" document signed by the trial judge was file stamped on May 3, 2004. The document set forth the court's determination of the issues which had been presented to the court for resolution and left no matters unresolved. The content of the document, rather than the intention of the judge or any interpretation of a party, dictates whether the document constitutes "the final determination of the rights of the parties." See § 25-1301. See, also, *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), and *Gutierrez v. Gutierrez*, 5 Neb. App. 205, 557 N.W.2d 44 (1996) (in interpreting decree, neither what parties thought judge meant, nor what judge thought he or she meant, is of any relevance after time for appeal has passed; what decree means as matter of law is determined from four corners of document). The language directing a party to prepare another document does not contradict the document's function as the final determination of the rights of the parties, just as the journal entry in *City of Ashland, supra*, directing the city to prepare an injunction did not alter the journal entry's status as a final, appealable order.

Furthermore, on May 4, 2004, the court entered an order nunc pro tunc, which modified the previously entered "Opinion and

Findings." A nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended. *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005). See *Walsh v. City of Omaha*, 11 Neb. App. 747, 660 N.W.2d 187 (2003). If the May 3 "Opinion and Findings" was not a final order, the subsequently entered order nunc pro tunc would not have been necessary to correct the clerical errors included in that order. The entry of the order nunc pro tunc, which, like the first order, did not contain any reference to an anticipated or potential later change in the substantive determinations of the court, reinforces the plain reading of the effect of the first order. Under Nebraska case law, the substantive determinations made by the court, rather than the format utilized to present the order, control the proper interpretation concerning the finality of the order.

Further, the dissolution decree filed on May 28, 2004, did not alter the determination of the issues as set out in the "Opinion and Findings" as amended by the nunc pro tunc order. Thus, the court's "Opinion and Findings," as amended by the nunc pro tunc order, was the final determination of the parties' rights in this action, and the parties had 30 days from May 3, 2004, from which to appeal. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004).

[5] Since Mary's notice of appeal was not filed until August 3, 2004, it was clearly filed out of time. Further, Mary's motion for new trial was filed on June 4, outside the 10-day time limit, and thus, this motion did not operate to toll the running of the appeal clock. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

CONCLUSION

Having found that Mary's appeal and Paul's cross-appeal were filed outside the 30-day time limit for filing an appeal, we must dismiss this cause for lack of jurisdiction.

APPEAL DISMISSED.

IRWIN, Judge, dissenting.

I dissent from the majority's decision in this case, and I write separately to further address the majority's application of both the plain language of Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004) and the holdings in *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006), and *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004), to the facts of the instant case. I would conclude that application of the plain language of § 25-1301 demonstrates that there is no jurisdictional defect in the instant case. Similarly, I would conclude that application of the holdings in *Ashland Salvage* and *Hosack* dictate a conclusion that there is no jurisdictional defect.

1. § 25-1301

It is fundamental that 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). The majority quotes the relevant language of § 25-1301 but does not apply the statute's plain language. Section 25-1301(1) plainly indicates that only "the final determination of the rights of the parties in an action" can be considered a "judgment." Sections 25-1301(2) and (3) then provide how a "judgment" must be rendered and entered to be appealable. The majority focuses its attention on rendition and entry, but disregards the essential notion of § 25-1301(1) that there first be a *final* determination of the rights of the parties before there is a judgment to be either rendered or entered.

As the majority also quotes above, the May 3, 2004, document filed by the court specifically indicated that counsel was "to prepare a Decree in conformance with the Court's findings *and submit the same to opposing Counsel for approval, then to the Court for signature*." (Emphasis supplied.) This language demonstrates that the May 3 document was not a final determination of the rights of the parties just as much as if the court had specifically stated the following: These findings are not the final determination of the rights of the parties and the final determination will be made only after counsel prepares a decree in

conformance with the findings, submits the same to opposing counsel for approval, and then to the court for rendition and entry. See *Hosack v. Hosack, supra* (journal entry directing party to prepare later decree and advise court if matters left unresolved was not final determination of rights). This is clear from the actions of everyone involved in this case. More than 3 weeks after the May 3 document was filed, counsel actually did present the trial court with a decree in conformance with the May 3 document's findings. Mary filed a motion for new trial from this later decree. On appeal to this court, neither party has asserted that the May 3 document was a "final determination" of anything.

Without a final determination of the rights of the parties, the May 3, 2004, document cannot be considered a "judgment" under the plain language of § 25-1301. The majority does not explain how the May 3 order—which the record demonstrates nobody intended, understood, or contemplated to be a final determination of rights—can be taken to be a final determination of the rights of the parties. The only way to reach such a result is to disregard the explicit language in the May 3 document which clearly indicates to the contrary. As a result, I would not sua sponte find a jurisdictional defect in this case, but I would find that the May 3 document was not a judgment within the meaning of § 25-1301(1) and that the appeal was timely.

2. *City of Ashland v. Ashland Salvage* and *Hosack v. Hosack*

Similarly, application of the holdings in *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006), and *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004), demonstrates that there is no jurisdictional defect in the present case. As the majority correctly notes, *Ashland Salvage* and *Hosack* involved similar factual situations to the facts presented in the instant case. Application of the Supreme Court's holdings in *Ashland Salvage* and *Hosack* should result in a similar resolution in the instant case.

In *Hosack*, the district court signed and filed a document which indicated that the court had " 'considered all matters properly before it' " and set forth the court's findings on all matters presented. 267 Neb. at 935, 678 N.W.2d at 750. One provision in the document was that counsel should " 'advise the court . . .

if the court failed to rule on any material issue presented.' " (Emphasis supplied.) *Id.* at 936, 678 N.W.2d at 750. Finally, the document 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 document, the court signed and filed the decree, and an appeal was taken.

This court ruled that the first document filed by the district court was intended to be a final determination and that the appeal was untimely. This court dismissed the appeal for lack of jurisdiction. On further review, the Supreme Court reversed that decision. The Supreme Court first focused on the plain language of § 25-1301(1) and focused on "which action by the district court finally determined the rights of the parties: the [first document] filed [by the district court] or the decree [prepared by counsel and then signed and] filed [by the court]." *Hosack v. Hosack*, 267 Neb. at 938-39, 678 N.W.2d at 752. The Supreme Court determined that the first document 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 first document "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 first document filed by the court, was timely.

The similarities of the facts in *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004), to the facts of the instant case are striking. In both cases, the district court filed a first document setting forth the court's findings on the material issues. In both cases, those findings did resolve all material issues; in *Hosack*, the court directed the parties to file a written motion if any material issues were not resolved, but there is no indication that any such unresolved issues existed. In both cases, the first document directed counsel to prepare a decree for review by opposing counsel and for rendition and entry by the court. In both cases, this direction was followed.

Finally, although the Supreme Court did specifically caution against a trial court's filing both the journal entry and the subsequent decree in these cases, the Supreme Court in no way suggested that if the trial court does file both documents, then the first one is somehow transformed into something it is not—a final determination of the rights of the parties. The decision in *Hosack* was released 4 days after the first document in the instant case was filed by the district court. The fact that the district court in the instant case failed to comply with the Supreme Court's caution does not change the fact that the first document filed by the court was not a final determination and was not a judgment that could be rendered and entered.

In *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006), the district court file stamped a journal entry which ruled in favor of the City of Ashland, declared the boundaries of Ashland Salvage's property, and found the existence of public rights-of-way. The journal entry also directed the city to prepare an " 'injunction.' " *Id.* at 365, 711 N.W.2d at 866. A later " 'Order of Permanent Injunction' " was filed by the court. *Id.* at 366, 711 N.W.2d at 866. Nonetheless, the city filed a timely appeal from the journal entry, prior to the entry of the later order.

On appeal, the Supreme Court held that the appeal was timely, because "the district court's file-stamped journal entry . . . disposed of all claims and constituted a judgment for purposes of § 25-1301." *City of Ashland v. Ashland Salvage*, 271 Neb. at 368, 711 N.W.2d at 868. In so holding, the Supreme Court distinguished the journal entry in *Ashland Salvage* from the journal entry in *Hosack*, specifically indicating that the journal entry in *Hosack* "left certain matters unresolved." *City of Ashland v. Ashland Salvage*, 271 Neb. at 368, 711 N.W.2d at 868.

A review of the Supreme Court's opinion in *Hosack*, as discussed above, does not indicate that any substantive matter was actually unresolved by the district court's journal entry, except that the journal entry directed preparation of a decree for approval by the opposing party and allowed for the preparing party to alert the court to any unresolved issues. By comparison, the journal entry in *Ashland Salvage* which the Supreme Court held "disposed of all claims and constituted a judgment" directed

preparation of a decree, but the journal entry did not provide for approval by the opposing party and did not allow for the preparing party to alert the court to any unresolved issues. As such, the journal entry in *Ashland Salvage* constituted a judgment under § 25-1301, because the journal entry did not provide for any disagreement by the parties about the court's resolution and did not provide for the parties to alert the court to any unresolved issues. In this regard, the journal entry in the present case is distinguishable from the journal entry in *Ashland Salvage*. Here, the journal entry, which is substantially identical to the journal entry in *Hosack*, did require approval by the opposing party and did allow for the preparing party to alert the court to any unresolved issues.

3. Resolution

Because the district court's journal entry in the present case is not significantly distinguishable from the district court's journal entry in *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004), I respectfully dissent from the majority's opinion. I would conclude that the journal entry in this case was not a judgment, and I would not sua sponte find a lack of jurisdiction. The Supreme Court's recent opinion in *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006), further suggests that a journal entry like the one in the present case, which document calls for preparation of a decree to be approved by the opposing party, allows for the parties to alert the court to any unresolved issues and is not a judgment. Because I believe the only consistent application of the Supreme Court's holdings in *Hosack* and *Ashland Salvage* would be to find that the journal entry in the present case was not a judgment, I would find no jurisdictional default and would resolve this case on its merits.

CLARK H. PICKREL, APPELLANT, V. CRISTY K. PICKREL, APPELLEE.

717 N.W.2d 479

Filed June 6, 2006. No. A-04-1150.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **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. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
4. **Parent and Child: Child Support.** Support of one's children is a fundamental obligation which takes precedence over almost everything else.
5. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Tracy A. Follmer, of Keating, O'Gara, Davis & Nedved, P.C., for appellant.

Chris F. Blomenberg and Mary Kay Hansen, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Clark H. Pickrel appeals from a decree of dissolution entered by the district court for York County, which decree dissolved his marriage to Cristy K. Pickrel and ordered Clark to pay child support. For the reasons that follow, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

Clark and Cristy were married on June 3, 1988, and three children were born to their marriage: a son born February 5,

1993, a daughter born December 9, 1994, and a daughter born November 11, 1997. Cristy is an architect and, at the time of trial, was employed with a firm in Lincoln, earning $72,500 a year. Cristy's firm also supplied her with a company car and reimbursed her expenses for commuting from York, where the family lived, to Lincoln each workday.

Clark received a bachelor of science degree in agriculture in 1988 and thereafter began farming. In 1991, Clark incorporated his farming operation as "Pickrel, Inc." Clark is the president of Pickrel, Inc., and is also its sole shareholder and employee. In 2001, Clark's father retired, and in 2002, Clark began farming his father's land under an annual cash rent arrangement. The addition of Clark's father's land significantly increased the number of acres Clark farmed, from 360 to approximately 760.

Clark also has received education in financial matters. In 1988, Clark received a "Series 7" stockbrokerage license, and he had three clients in this capacity from 1988 until the early 1990's. Clark no longer holds the Series 7 license. Clark also took some classes in certified financial planning for educational purposes, but did not take the final examination in order to become certified. Clark handled the family's finances and investments throughout the marriage, and Cristy testified that he did a good job managing the family's investments. At the time of trial, the value of the parties' investment accounts was at least $450,000.

On April 1, 2003, Clark filed a petition for legal separation in the district court for York County. On June 9, Clark filed an amended petition for dissolution of marriage.

Prior to trial, the parties settled issues of child custody and property division. The parties agreed to share joint legal and physical custody of their three children. As part of the property settlement, Clark received the parties' investment accounts and was required to pay Cristy a sum of $200,000 as a judgment to equalize the division of assets and debts. Clark testified that he would make this payment by liquidating some of the investment accounts. The agreement did not provide for spousal support for either party.

Trial was held on June 3, 2004, and the main issue was child support. Cristy's wage stub from her employer was received into

evidence. Clark offered a proposed child support calculation which was admitted into evidence. Clark based his "monthly income" for child support purposes solely on Pickrel, Inc.'s income. Pickrel, Inc.'s income from 1998 to 2002 was detailed on the first page of the proposed calculation. Clark calculated each year's income by taking the "Taxable Income" value and adding to it the "Depreciation" value from the relevant year's corporate tax return. The income from each of the 5 years was then averaged, and that amount was divided by 12, for a proposed monthly income of $1,416. The second page of the proposed calculation was entitled "Child Support Calculator" and appeared to be a combination of worksheets 1 and 3 from the Nebraska Child Support Guidelines. Clark used $1,416 as his proposed gross monthly income and $6,042 as Cristy's, which resulted in a child support obligation of Clark in the sum of $173.16 monthly for three children, under a joint custody calculation, prior to any adjustment under paragraph R of the guidelines. Clark's monthly income as shown on the proposed calculation did not include any earnings from his investment accounts. Neither did it include his salary from the corporation, which ranged from $2,700 to $3,480 between 1998 and 2002. This salary, as well as other personal expenses that were paid for by the corporation, was deducted from the total corporate income to arrive at the taxable income figures utilized by Clark. Cristy did not offer into evidence any proposed child support calculations.

Additional evidence was adduced in an effort to show Clark's earning capacity. This evidence included a loan application completed by Clark in 2003 showing his monthly income as $7,000 and an investment account information document from 2003 showing annual income (from all sources) of "$50,000 - 99,999." In addition, testimony from a vocational rehabilitation consultant indicated that Clark would have employment opportunities in two areas: as a farm manager and as a financial securities sales representative, with average earnings in Nebraska of $48,000 and $66,000 to $88,000, respectively.

In its dissolution decree entered September 10, 2004, the court approved the parties' agreements with respect to child custody and property division. Clark was ordered to pay child support in the following amounts: $338 per month for the three minor

children, $285 per month when two of the children were minors, and $194 per month for one minor child.

Incorporated into the dissolution decree was a separate "Journal Entry of Decision on Contested Issues" which detailed the court's child support calculations. A majority of the document was devoted to calculating Clark's monthly income, as the court noted that determining Clark's monthly income for purposes of child support "presents difficulties." The court's determination of Cristy's monthly income was relatively simple. Cristy's monthly income was calculated by adding two things: her gross monthly income of $6,042 and the employment benefit she received each month—the company car and reimbursement of commuting expenses—which benefit the court calculated to be $98. This resulted in a total gross income of $6,140 per month for Cristy.

To determine Clark's monthly income, the court stated, it needed to "construct a reasonably predictable earning capacity," which would require the court to "look past the corporate form and into the reality of Clark's financial situation." The court used a 5-year average to compute Clark's income.

To determine Clark's income for each of the 5 years, the court looked to Pickrel, Inc.'s corporate tax returns. The court first added (1) Clark's salary from Pickrel, Inc.; (2) the retained earnings of the corporation; and (3) the depreciation claimed on the corporation's tax return, finding that Clark failed to carry the burden of establishing an entitlement to a depreciation deduction under paragraph D of the child support guidelines. After this, the corporate taxable income or loss was either added or subtracted. Next, an annual amount of $23,000 was added for telephone, utilities, and other household expenses paid for by the corporation, an amount which Clark had apparently conceded in his written submission to the court following trial. Finally, a $60,000 amount was added for year 2002 because Clark had deducted the rent paid to his father for farmland twice that year, one of which deductions was for an advance payment of the 2003 cash rent. The court then averaged the 5 years' income to determine an average yearly income figure. Next, the court added $19,250 to this figure as "projected investment income." The court then divided this final amount by 12 to

determine a monthly income of $11,570. A summary of the court's calculation follows:

Year	1998	1999	2000	2001	2002
Salary	$ 2,800	$ 2,700	$ 3,120	$ 3,320	$ 3,480
Retained earnings	43,786	90,647	68,010	54,424	53,098
Depreciation	12,589	30,450	22,764	23,430	30,198
	$59,175	$123,797	$93,894	$81,174	$ 86,776
Subtract or add corp. taxable income	(2,278*)	31,829	(17,627)	(16,231)	(17,557)
	$56,897	$155,626	$76,267	$64,943	$ 69,219
Household expenses	23,000	23,000	23,000	23,000	23,000
	$79,897	$178,626	$99,267	$87,943	$ 92,219
2002 duplicate rent					60,000
					$152,219

5-year income: $79,897 + $178,626 + $99,267 + $87,943 + $152,219 = $597,952

5-year average income: $597,952 ÷ 5 = $119,590

Add in $19,250 projected investment income: $119,590 + $19,250 = $138,840

Reduced to monthly figure: $138,840 ÷ 12 = $11,570

(*This figure is an error. The 1998 return shows –$14,867 for the taxable income loss.)

Clark timely appealed from the portion of the dissolution decree which ordered him to pay child support.

ASSIGNMENTS OF ERROR

Clark asserts that the district court abused its discretion in the following respects: (1) by including the retained earnings of Pickrel, Inc., as income of Clark in calculating his child support obligations when there was no evidence presented that the retained earnings were "excessive or inappropriate" and (2) in failing to include projected investment income of Cristy in calculating her child support obligation when the projected investment income of Clark was included despite the fact that the assets that would produce the projected income were divided between them.

STANDARD OF REVIEW

[1,2] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial

court will be affirmed in the absence of an abuse of discretion. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). 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

Corporate Retained Income

Clark claims that the district court abused its discretion when it included the retained earnings of Pickrel, Inc., as income of Clark in calculating his child support obligation because there was no evidence that the earnings were "excessive or inappropriate." Clark argues that paragraph D of the Nebraska Child Support Guidelines provides for the inclusion of retained earnings of a corporation only when there is evidence that the earnings were " 'excessive or inappropriate.' " (Emphasis omitted.) Brief for appellant at 5. Clark claims that no evidence of this excessiveness or inappropriateness was presented at trial and that therefore, it was error for the court to include the retained earnings in calculating Clark's monthly income. The relevant portion of the child support guidelines is as follows:

> D. Total Monthly Income. This is income of both parties derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages. This would include income that could be acquired by the parties through reasonable efforts. *For instance, a court may consider as income the retained earnings in a closely-held corporation of which a party is a shareholder if the earnings appear excessive or inappropriate.*

(Emphasis supplied.)

The evidence in this case concerning the retained earnings is very scant. The corporate tax returns indicate the amount of retained earnings for the years 1998 through 2002, and Clark's testimony confirmed that earnings had been retained in the corporation from time to time. There was no testimony given as to

whether the amount of retained earnings in this corporation was excessive or inappropriate. The retained earnings shown in the corporate tax returns are found on "Schedule L," which is a balance sheet showing total assets together with total liabilities and shareholders' equity. Retained earnings are included on the liabilities and equity portion of the balance sheet. The balance sheet shows the amount of retained earnings at the beginning and the end of each tax year. We summarize the following pertinent information from the 1998 through 2002 returns:

	Total assets	**Loans/ mortgages**	***Retained earnings beginning of year***	**Retained earnings end of year**
1998	$252,557	$160,781	*$58,699*	$43,786
1999	293,748	155,111	*43,786*	90,647
2000	354,611	238,611	*90,647*	68,010
2001	342,859	240,445	*68,010*	54,424
2002	358,486	257,398	*54,424*	53,098

A review of the tax returns makes it clear, as the parties conceded at oral argument, that the retained earnings figures are cumulative from year to year, as opposed to new annual amounts as treated by the district court. Thus, it was clearly inappropriate to add the entire amount of retained earnings to each year's income in the child support calculation.

The question still remains as to whether any portions of the retained earnings, or annual fluctuations thereof, should be included in Clark's income. We note that while the retained earnings have fluctuated over the 5-year period in question, both upward and downward, the net effect between the beginning of the tax year in 1998 and the end of the tax year in 2002 is an overall reduction of over $5,000 in the retained earnings shown on the balance sheets. The above information further reveals that the corporation's total assets have generally increased over the 5-year period, as has the debt. Other than in the year 1999, the retained earnings have been between approximately 15 and 19 percent of the value of the total assets. Without further evidence of what is reasonable for a corporation such as Pickrel, Inc., to retain as unappropriated earnings, it is difficult to say from this evidence that the retained earnings in question were excessive or inappropriate.

The district court cited case law from other jurisdictions which have considered retained earnings of a corporation as income for purposes of calculating child support where the party is a majority or sole shareholder and has control over the distribution of profits or where there is no business explanation for the retained earnings other than to increase personal assets at the expense of income. The district court then recited, in support of its inclusion of the corporate retained earnings in Clark's total income, that Clark is the controlling shareholder of Pickrel, Inc., and that he proffered no business purpose, other than increasing personal assets at the expense of current income, for the level of the corporation's retained earnings. However, the district court did not discuss, or make any finding under, the specific language of the Nebraska Child Support Guidelines, which state that retained earnings may be considered income if the earnings appear excessive or inappropriate. See *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003) (error to include passive income from closely held corporation and family partnership in computing mother's income where passive income does not represent income that mother earns or can reasonably expect to earn and where there is no evidence of retained earnings or that any retained earnings are excessive or inappropriate).

[3] Despite the lack of evidence concerning the appropriateness of the retained earnings in this case, we are mindful that the paramount concern and question in determining child support is the best interests of the children. See *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). The Nebraska Supreme Court has recognized the necessity of taking a flexible approach in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). In *Gangwish, supra*, the court was required to determine whether the district court erred in including income from the father's farming corporation for purposes of determining child support. The court noted that a party's income, for purposes of determining child support, does not necessarily stop at the corporate structure of a closely held corporation. The court determined that

> under the appropriate factual circumstances, equity may require a trial court to calculate a party's income by looking through the legal structure of a closely held corporation of which the party is a shareholder. Stated otherwise, equity may demand that a court consider as income the earnings of a closely held corporation of which a party is a shareholder.

Id. at 912, 678 N.W.2d at 514. The court went on to summarize the facts of the case which weighed in favor of looking to the corporation to determine the father's income, including that the corporation paid for many of the parties' living expenses, that the parties were the sole owners of the corporation, that the father was in sole control of the corporation's financial decisions, and that the father was paid a low salary while building value in the corporation. The court stated that in cases such as these, a trial court should not only add " 'in-kind' " benefits derived from an employer to a party's income, but also take into consideration the party's actual earning capacity. *Id.* at 913, 678 N.W.2d at 514. See Nebraska Child Support Guidelines, paragraph D. See, also, *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001) (noting importance of determining party's actual earning capacity in child support cases). The court in *Gangwish* also noted that the need to examine a party's earning capacity is " 'especially true when it appears that the parent is capable of earning more income than is presently being earned.' " 267 Neb. at 913, 678 N.W.2d at 515, quoting *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

[4] The *Gangwish* court recognized that while building equity in a corporation in lieu of taking salary can be a wise business decision, the " 'support of one's children is a fundamental obligation which takes precedence over almost everything else.' " 267 Neb. at 913, 678 N.W.2d at 515, quoting *Rauch, supra.* Thus, the court concluded that it would simply be inequitable for the children to suffer because of the father's decision to build value in the corporation by depressing his salary. Because the Supreme Court was unable to determine how the trial court arrived at its income figure for the father, it remanded for a new determination of the father's income, holding that the trial court was within its discretion to look to the corporation to determine the father's income. The trial court was instructed to consider, in

addition to looking at the father's reported income, (1) the in-kind benefits, e.g., perquisites, that the father received from the corporation; (2) the corporation's depreciation expenses; and (3) with due regard for business realities, the amount of the corporation's income which should equitably have been attributed to the father.

The court in *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004), did not specifically address "retained earnings" of the corporation, but, rather, talked only of the income or earnings of the corporation and the appropriateness of considering corporate income (plus depreciation expenses) in setting child support. Neither did the *Gangwish* court refer to that section of paragraph D of the guidelines which discusses retained earnings. In the present case, Clark included the taxable corporate income, plus the depreciation expense, of Pickrel, Inc., for the 5 years from 1998 through 2002 in estimating his average annual and monthly income, which inclusion appears to be consistent with the conclusion from *Gangwish*. Likewise, Clark apparently conceded after trial that it was appropriate to consider the value of the "in-kind" contributions from the corporation, which the district court valued at $23,000 annually, and Clark does not assert error regarding such consideration by the court. However, Clark failed to include the salary, albeit relatively minor in amount, that he received from the corporation, which should be included in the equation, as recognized by the district court. We conclude that under the facts of this case, it is appropriate to include in Clark's income his annual salary; the taxable income from Pickrel, Inc., together with the depreciation expenses; and the value of the "in-kind" contributions from the corporation received by Clark. In addition, no error was asserted, and we find none, with regard to the district court's addition of the duplicate rent paid in 2002. Because there was no evidence from which to conclude that the retained earnings of Pickrel, Inc., were excessive or inappropriate, we determine that it was an abuse of discretion to include the retained earnings in the calculation of Clark's income.

In summary, we affirm the district court's calculation of Clark's earning capacity and total monthly income, with the exception of the inclusion of the retained earnings of Pickrel, Inc., and as corrected for the misstated 1998 corporate income or loss

amount noted above. We determine Clark's annual income (prior to consideration of investment income) as follows:

	1998	1999	2000	2001	2002
Salary	$ 2,800	$ 2,700	$ 3,120	$ 3,320	$ 3,480
Corp. tax. income	(14,867)	31,829	(17,627)	(16,231)	(17,557)
Depreciation	12,589	30,450	22,764	23,430	30,198
"In-kind"	23,000	23,000	23,000	23,000	23,000
Duplication of rent expense					60,000
TOTAL	$ 23,522	$ 87,979	$ 31,257	$ 33,519	$ 99,121

Total for 5 years: $275,398

Average: $275,398 ÷ 5 = $55,080 ÷ 12 = $4,590 monthly gross income

Projected Investment Income

Clark claims that the court abused its discretion when it failed to include projected investment income of Cristy in calculating her child support obligations when the projected investment income of Clark was included despite the fact that the assets that would produce the projected income were divided between them. In other words, Clark claims that it was error for the court to include projected investment earnings in calculating his monthly income, but not include the same for Cristy when calculating her monthly income.

In determining Clark's monthly income for purposes of child support, the court included $19,250 as "projected investment income." This amount was calculated by taking the value of the investments Clark would have after paying Cristy, which the court determined to be $275,000, multiplied by the value that Clark testified he expected to receive on his investments, 7 percent. The court then added this amount to Clark's average annual income before dividing the entire amount by 12 to arrive at an average monthly income.

The court explained its decision to attribute projected investment income to Clark but not Cristy as follows:

> Clark speculated at trial that Cristy would invest the funds that she is receiving in the property division and that she would also earn income from her investments. However, this money is not in hand and there is no evidence setting forth how Cristy will use the funds. It is speculative, at best, what

will happen to Cristy's funds. We know Clark is good at investment; we have no track record upon which we may assess Cristy's investment skills.

Clark claims that if the court included projected investment income in calculating his monthly income, the court should have added the same to Cristy's monthly income as well, based on the $200,000 judgment she would receive under the property settlement agreement. Cristy did not testify at trial as to how she planned to use the $200,000 payment. Clark testified that if Cristy used the money as an investment, she could make as good a rate of return as he could, but he also testified that he did not know how Cristy would use the money or what expenses or obligations she might have to meet with those funds.

[5] Our de novo review indicates that it was an abuse of discretion for the court to include projected investment income in calculating Clark's monthly income, but not to do the same in calculating Cristy's monthly income. The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). Under the property settlement agreement, Cristy is to receive a $200,000 payment from Clark "within 60 days," whereafter interest will accrue at the judgment rate. However, we do not believe that it is reasonable to attribute to Cristy's judgment a rate of return similar to the one the court applied to Clark's investment, given the apparent disparity in their investment expertise. Rather, pursuant to Neb. Rev. Stat. § 27-201 (Reissue 1995), we determine that a reasonable rate of return to attribute to Cristy would be that of an insured, interest-bearing instrument, which we find to be 4 percent. Therefore, assuming a 4-percent return on $200,000, Cristy would earn $8,000 a year, which would be approximately $667 a month. When this amount is added to the court's previous determination of her monthly income, $6,140, Cristy's total gross monthly income for child support purposes is $6,807. Likewise, we add the sum of $1,604 ($19,250 ÷ 12) to Clark's monthly income for a total gross monthly income of $6,194.

As a result of our conclusion that the district court erred in including the retained earnings of Pickrel, Inc., in Clark's total

monthly income and in calculating Cristy's total monthly income, we reverse the district court's order of child support and remand for a determination of child support based upon a gross total monthly income for Cristy of $6,807 and for Clark of $6,194.

CONCLUSION

We find that the district court abused its discretion in the determination of Clark's earning capacity for purposes of child support. We also find that the court abused its discretion in determining Cristy's monthly income for purposes of child support. We reverse the court's decision in both respects and remand the cause with directions for a determination of child support consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY MURPHY, APPELLANT.

716 N.W.2d 453

Filed June 6, 2006. No. A-05-881.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. ____: ____: ____. 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.
3. **Entrapment: Appeal and Error.** Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law.
4. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for the commission of the criminal offense.

5. **Criminal Law: Entrapment: Intent.** Under the "origin of intent" test, the defendant was entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
6. **Entrapment: Evidence: Proof.** Because entrapment is in the nature of an affirmative defense, the burden of going forward with evidence of the element of governmental inducement is on the defendant.
7. **Criminal Law: Entrapment: Evidence: Proof.** In assessing whether the defendant has satisfied his or her burden of going forward with evidence of governmental inducement, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. This determination is made as a matter of law, and the defendant's evidence of inducement must be more than a scintilla.
8. **Evidence: Words and Phrases.** To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction.
9. **Criminal Law: Entrapment: Evidence: Proof.** Where the State has induced an individual to break the law, it must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.
10. **Criminal Law: Entrapment: Evidence.** Predisposition to commit the criminal act must be independent and not be the product of the attention of the government directed at the defendant. This is not to say that statements made after the government's inducement can never be evidence of predisposition. If, after the government begins inducing a defendant, he or she makes it clear that he or she would have committed the offense even without the inducement, that would be evidence of predisposition. However, only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition.
11. **Entrapment: Circumstantial Evidence.** Predisposition may be shown by circumstantial evidence.
12. **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.
13. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
14. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
15. ____: ____. If the words of the statute are plain, direct, and unambiguous, an appellate court will not resort to interpretation to ascertain the meaning of those words.
16. **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.

17. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
18. **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.
19. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
20. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
21. ____. 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.
22. ____. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
23. ____. A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
24. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Timothy L. Ashford for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

INBODY, Chief Judge.

INTRODUCTION

Timothy Murphy appeals his conviction for conspiracy to commit first degree sexual assault on a child and the sentence imposed thereon. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On October 7, 2004, Omaha police officer David G. Rieck, of the vice unit, began an investigation of Michelle Royce after

complaints were made that she was a prostitute. Acting undercover, Rieck met with Royce in a hotel room where they engaged in a conversation wherein Royce mentioned that she had a client who wanted to have sex with underage girls. Royce was arrested for soliciting prostitution and massaging without a license. After Royce's arrest, she agreed to participate in the investigation of the client that wanted sex with underage girls. While no specific promises or inducements were made for Royce's cooperation, the police did agree to speak with the prosecutor if she cooperated.

On October 7, 2004, attempts to contact Murphy failed because of misdialing Murphy's telephone number. The following Monday, October 11, Royce called Murphy and left a voice mail message. The following day, officers met with Royce and set up a recording device on her telephone. The police instructed Royce to convey to Murphy that she found what he was looking for, to ask Murphy what he wanted to do with the underage girl, to try to get Murphy to state what he was willing to spend to have sex with the underage girl, and to ask Murphy if he wished to use condoms or not. During the recorded conversation, which occurred at approximately 11:11 a.m., Murphy asked, "How old?" to which Royce responded, "11," and Murphy replied, "Perfect." Murphy agreed to a price of $200 for the underage girl and stated that he did not want to use a condom. The encounter was to occur at Royce's residence during Murphy's lunch hour.

At 11:28 a.m., approximately 17 minutes after the initial recorded telephone contact, Murphy called back to confirm the meeting was going to take place over his lunch hour. This telephone call was not recorded because the tape recorder did not work. Murphy called Royce back again at 11:51 a.m. and asked if the $200 included oral sex and asked if "it was a setup." Rieck was able to listen to Murphy's statements in this conversation, but this telephone call was not recorded because officers did not believe that there would be any further telephone communications, so recording equipment had been left in their vehicles.

Murphy arrived at Royce's residence shortly after 12 p.m., Royce identified Murphy by looking at him through the window, and Murphy was arrested after he knocked on the door. When

Murphy was arrested, he had the agreed-upon price of $200 in his right front coin pocket and the telephone number on his cellular telephone was consistent with Royce's telephone number.

On November 18, 2004, an information was filed in Douglas County District Court charging Murphy with conspiracy to commit first degree sexual assault on a child. The information alleged that on or about October 12, Murphy

> with intent to promote or facilitate the commission of a felony to wit: first degree sexual assault on a child, did then and there agree with another, that they would engage in or solicit the conduct, cause or solicit the result specified by the definition of the overt act in pursuance of the conspiracy to wit: agreed and planned to have sex with a twelve year old female for $200, and met at the predetermined location, [in Douglas County, Nebraska.]

In April and May 2005, Murphy filed several motions in limine generally asserting that the testimony of Royce and three other witnesses, D.P., C.H., and A.V., was inadmissible because the witnesses were jailhouse informers within the meaning of Neb. Rev. Stat. § 29-1929 (Cum. Supp. 2004) and the State had not complied with certain provisions of that statute. Murphy alleged that D.P., C.H., and A.V. were criminal suspects, as each had admitted under oath to having engaged in a sexual act with Murphy for money in violation of Neb. Rev. Stat. § 28-801 (Reissue 1995). Further, Murphy contended that Royce was an accused defendant because she was arrested for soliciting prostitution and massage without a license and she was a criminal suspect in the criminal conspiracy case. The district court denied the motions in limine because the witnesses were not " 'in custody' " as required by the statute.

Trial was held on May 25 through 27, 2005. At trial, evidence was adduced that set forth the facts as set forth above. Rieck also testified that Murphy's date of birth was November 1, 1966.

Royce testified that she met Murphy in the summer of 2004 through a friend, D.P. Between the first meeting and October 2004, Royce and Murphy met approximately 15 times to have sex for which Royce received money. Throughout that time period, Royce conversed with Murphy on the telephone about 25 times. Royce stated that during most of these telephone

conversations, Murphy said that he was looking for a younger girl, which Royce interpreted to mean his wanting to have sex with such a girl. Royce told Murphy she could find a 13-year-old. Murphy asked Royce four times how old the girl was and when Royce could find her. These conversations took place prior to Royce's arrest on October 7. Royce also testified that Murphy came to her house on October 12 to have sex with an 11-year-old. At trial, Murphy acknowledged that the $200 in his pocket was the agreed-upon price to have sex with someone that Royce told him was 11.

D.P., born January 25, 1987, was interviewed on December 30, 2004, at the Douglas County Youth Center. D.P. testified she met Murphy in July 2004. D.P. met Murphy approximately five times from July to September 2004 to introduce him to girls for which Murphy paid D.P. At one point, Murphy asked D.P. if she could find him a girl as young as 11 or 12.

C.H., born on September 7, 1987, was interviewed by police in January 2005 while she was in the Geneva Youth Development Center. She testified that she met Murphy through D.P. at the end of September or the beginning of October 2004, and before the current charges were public. When C.H. met Murphy, she told him that she was 11 years old. Murphy, while masturbating, told C.H. he liked 11-year-olds because they were "fresh" and "clean." Murphy paid C.H. $200 for this encounter.

A.V., born May 24, 1988, was first interviewed by police in January 2005. In June 2004, A.V. met Murphy through D.P. D.P. arranged for A.V. to meet Murphy at a house to have sex for money. A.V. told Murphy she was in seventh grade and that she was 12 years old. A.V. and Murphy had sex for which A.V. received money. At the time of the encounter, A.V. was actually 16 years old.

Following trial, the State moved to amend the information by interlineation to reflect the testimony as provided throughout the trial. The information, as amended, alleged that on or about October 12, 2004, Murphy

> with intent to promote or facilitate the commission of a felony to wit: first degree sexual assault on a child, did then and there agree with another, that they would engage in or solicit the conduct, cause or solicit the result specified by

> the definition of the overt act in pursuance of the conspiracy to wit: agreed and planned to have sex with a female child under the age of sixteen for $200, and met at the predetermined location, [in Douglas County, Nebraska.]

On May 27, 2005, the district court stated, "It is the opinion of this Court that [Murphy] has not shown that the government induced him to commit the offense. . . . While I do not find any evidence of inducement, even if there was, there was substantial evidence [Murphy] was predisposed to commit this offense." The court found Murphy guilty of the charge of criminal conspiracy to commit first degree sexual assault on a child. On July 12, Murphy was sentenced to 8 to 10 years' imprisonment. Murphy has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Murphy contends that the district court erred in failing to find that the State failed to prove beyond a reasonable doubt that he had not been entrapped; that the court erred in overruling his motions in limine and allowing witnesses D.P., C.H., and A.V. to testify based upon the court's ruling that they were not "in custody" pursuant to Neb. Rev. Stat. § 29-1928 (Cum. Supp. 2004); and that the sentence imposed was excessive.

STANDARD OF REVIEW

[1,2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). When reviewing a criminal conviction for sufficiency of the evidence to sustain a 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. McPherson, supra*; *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

ANALYSIS

Entrapment.

Murphy contends that the district court erred in failing to find that that State failed to prove beyond a reasonable doubt that he had not been entrapped.

[3] Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001).

[4,5] Under Nebraska law, entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense. *State v. Graham*, 259 Neb. 966, 614 N.W.2d 266 (2000); *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). Nebraska has adopted the "origin of intent" test to determine whether a defendant was entrapped. Under this test, the defendant was entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *State v. Graham, supra*; *State v. Stahl, supra.*

[6-8] Because entrapment is in the nature of an affirmative defense, the burden of going forward with evidence of the element of governmental inducement is on the defendant. *State v. Graham, supra*; *State v. Stahl, supra.* In assessing whether the defendant has satisfied his or her burden of going forward with evidence of governmental inducement, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. *State v. Graham, supra*; *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984). This determination is made as a matter of law, and the defendant's evidence of inducement must be more than a scintilla. *Id.* To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction. *Id.*

The evidence in the instant case established that Royce offered Murphy what he had previously requested, i.e., that she find him an 11-year-old girl with whom he could have sex. During a recorded telephone conversation, Murphy asked, "How old?" to which Royce responded, "11," and Murphy replied, "Perfect." Murphy agreed to a price of $200 for the underage girl and stated that he did not want to use a condom. The encounter was to occur at Royce's residence during Murphy's lunch hour. Murphy called back to confirm that the meeting was going to take place over his lunch hour and then called back a second time and asked if the $200 included oral sex and asked if "it was a setup." Murphy arrived at Royce's residence shortly after noon. When Murphy was arrested, he had the agreed-upon price of $200 in his right front coin pocket and the telephone number on his cellular telephone was consistent with Royce's telephone number.

Quite simply, Murphy was merely given the opportunity to commit the charged offense and Murphy jumped at the opportunity. If there had been an underage girl at Royce's residence on October 12, 2004, there is no question that Murphy intended to have sexual relations with the girl for the price of $200. The State did not induce Murphy to commit the offense of conspiracy to commit first degree sexual assault on a child.

[9-11] Furthermore, even if the State did induce Murphy to commit the offense, the State proved beyond a reasonable doubt that Murphy was predisposed to engage in sexual relations with a minor child.

> Where the State has induced an individual to break the law, it must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents. . . . Predisposition to commit the criminal act must be independent and not be the product of the attention of the government directed at the defendant. . . . [T]his is not to say that statements made after the government's inducement can never be evidence of predisposition. If, after the government begins inducing a defendant, he or she makes it clear that he or she would have committed the offense even without the inducement, that would be evidence of predisposition. . . .

> However, only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition. . . . Predisposition may be shown by circumstantial evidence.

(Citations omitted.) *State v. Canaday*, 263 Neb. 566, 585-86, 641 N.W.2d 13, 28 (2002).

The testimony of D.P., C.H., and A.V. is direct evidence of Murphy's prior desire to meet underage girls for the purpose of engaging in sexual intercourse. Between July and September 2004, D.P. testified, Murphy asked her if she could find him a girl as young as 11 or 12. C.H. testified that at the end of September or the beginning of October 2004, and before the current charges became public, D.P. introduced her to Murphy for the purpose of C.H.'s having sex with Murphy for $200. At the time, C.H. was 17 years old but was instructed to tell Murphy that she was 11 years old. Murphy, while masturbating, told C.H. he liked 11-year-olds because they were "fresh" and "clean." A.V. testified that in June 2004, D.P. arranged for 16-year-old A.V. to meet Murphy at a house to have sex for money. A.V. told Murphy that she was 12 years old and was in seventh grade. A.V. and Murphy had sex for which A.V. received money. Each of these events occurred prior to Royce's contact with Murphy. This evidence establishes, beyond a reasonable doubt, that Murphy was predisposed to commit the criminal act prior to first being approached by government agents.

In sum, the State did not induce Murphy to commit the charged offense. Furthermore, the evidence established, beyond a reasonable doubt, that Murphy was predisposed to commit the criminal act prior to first being approached by government agents. Consequently, Murphy's claim of entrapment is without merit.

Motion in Limine.

Next, Murphy contends that the district court erred in overruling his motions in limine and allowing "jailhouse informers" D.P., C.H., and A.V. to testify based upon the court's ruling that they were "not 'in custody.'" Murphy contends that the court erred in its analysis of the jailhouse informer statutes by concluding that a jailhouse informer "must be 'in custody.'"

Section 29-1928 provides:

> The Legislature finds and declares that the interests of justice may be thwarted by unreliable testimony at trial. There is a compelling state interest in providing safeguards against the admission of testimony the reliability of which may be or has been compromised through improper inducements.
>
> The Legislature further finds and declares that the testimony of a jailhouse informer is sometimes unreliable. A jailhouse informer, due to the receipt or promise of a benefit, is presumed to provide testimony that may be unreliable.
>
> For purposes of sections 29-1928 and 29-1929, a jailhouse informer is a person in custody as: An accused defendant, a convicted defendant awaiting sentencing, a convicted defendant serving a sentence, or a criminal suspect.

Section 29-1929 provides:

> Before the testimony of a jailhouse informer is admissible in court, the following requirements must be met:
>
> At least ten days before trial, the state shall disclose to the person against whom the jailhouse informer will testify, or to such person's counsel:
>
> (1) The known criminal history of the jailhouse informer;
>
> (2) Any deal, promise, inducement, or benefit that the state or any person acting on behalf of the state has made or may make in the future to the jailhouse informer;
>
> (3) The specific statements allegedly made by the person against whom the jailhouse informer will testify and the time, place, and manner of disclosure;
>
> (4) All cases known to the state in which the jailhouse informer testified or offered statements against a person but was not called as a witness, whether or not the statements were admitted as evidence in the case, and whether the jailhouse informer received any deal, promise, inducement, or benefit in exchange for or subsequent to such testimony or statement; and
>
> (5) Whether at any time the jailhouse informer recanted testimony or statements and, if so, a transcript or copy of such recantation.

The briefs cite us to no cases interpreting or applying §§ 29-1928 and 29-1929, and our independent research has uncovered none. Thus, the instant case presents an issue of first impression regarding the meaning of the language contained in § 29-1928 defining a "jailhouse informer" as "a person in custody as: An accused defendant, a convicted defendant awaiting sentencing, a convicted defendant serving a sentence, or a criminal suspect."

[12] 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. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005); *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005).

[13,14] In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003); *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004).

[15-17] If the words of the statute are plain, direct, and unambiguous, an appellate court will not resort to interpretation to ascertain the meaning of those words. *In re Interest of Valentin V.*, 12 Neb. App. 390, 674 N.W.2d 793 (2004). 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. *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002); *In re Interest of Valentin V., supra*. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Heathman v. Kenney, supra.*

Murphy asks us to determine that a jailhouse informer is either a person "in custody" or " 'an accused defendant, a convicted defendant awaiting sentencing, a convicted defendant serving a sentence, or a criminal suspect.' " Brief for appellant at 27-28. A reading of the plain language of the statute, giving effect to all the language contained therein, makes it clear that this is not what the language of the statute provides. Section 29-1928 defines a "jailhouse informer" as "a person in custody as: An accused defendant, a convicted defendant awaiting sentencing, a convicted defendant serving a sentence, or a criminal suspect." Thus, in order to qualify as a "jailhouse informer," the informer must be "a person in custody." See *id.* Consequently, the district court properly analyzed the statutes in question and properly allowed D.P., C.H., and A.V. to testify in the instant case.

Excessive Sentence.

Finally, Murphy contends that the sentence imposed upon him was excessive. Murphy was convicted of conspiracy to commit first degree sexual assault on a child, a Class II felony, punishable by 1 to 50 years' imprisonment. See, Neb. Rev. Stat. § 28-202 (Reissue 1995) (conspiracy statute); Neb. Rev. Stat. § 28-319(1)(c) and (2) (Reissue 1995) (first degree sexual assault); Neb. Rev. Stat. § 28-105 (Cum. Supp. 2004) (felonies; classification of penalties). Murphy was sentenced to 8 to 10 years' imprisonment.

[18-21] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Aldaco, supra*; *State v. Losinger, supra*. 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. Aldaco, supra*; *State v. Losinger, supra*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Aldaco, supra*; *State v. Losinger, supra*.

[22] Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Aldaco, supra*; *State v. Losinger, supra.*

[23,24] A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Griffin, supra.*

Murphy is a 39-year-old man with a high school education. At the time of trial, he was undergoing a divorce and had three dependent children. Murphy's criminal history includes convictions for failure to obey a traffic signal, driving without proper plates, no valid registration, and no operator's license. He has also been convicted of altering a public record and issuing a bad check. Although Murphy argues that there was no victim in this case, the fact remains that Murphy conspired to have sex with an 11-year-old girl, and, had there been an 11-year-old girl at Murphy's destination that day, she would have been the victim of a sexual assault for the price of $200. The sentence imposed by the court was not an abuse of discretion.

CONCLUSION

Having considered each of Murphy's assigned errors and finding them to be without merit, we hold that Murphy's conviction and sentence are affirmed.

AFFIRMED.

IN RE INTEREST OF JEFFREY K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JEFFREY K., APPELLANT.

717 N.W.2d 499

Filed June 27, 2006. No. A-05-1033.

1. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised.
2. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. of Prac. 9E (rev. 2006) and to properly raise and preserve the issue before the trial court.
3. **Constitutional Law: Rules of the Supreme Court.** The Nebraska Supreme Court insists upon strict compliance with Neb. Ct. R. of Prac. 9E (rev. 2006) before it will consider a constitutional challenge.
4. **Constitutional Law: Rules of the Supreme Court: Statutes: Notice.** Neb. Ct. R. of Prac. 9E (rev. 2006) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief.
5. **Constitutional Law: Statutes: Service of Process.** If a statute is alleged to be unconstitutional, the Attorney General must be served with a copy of the proceeding.
6. **Statutes: Demurrer.** Under Nebraska law, a motion to quash or a demurrer is the proper procedural method for challenging the facial validity of a statute.
7. **Constitutional Law: Statutes: Pleas.** Challenges to the constitutionality of a statute as applied to the defendant are properly preserved by a plea of not guilty.
8. **Juvenile Courts: Appeal and Error.** The standard of review for juvenile proceedings involving an adjudication is de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings.
9. ____: ____. The findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses and can better judge their credibility.
10. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
11. **Criminal Law: Evidence: Circumstantial Evidence: Intent: Proof.** When the sufficiency of the evidence as to criminal intent is in issue, a direct expression of intention by the defendant is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. The requisite state of mind is a question of fact and may be proved by circumstantial evidence.
12. **Criminal Law: Statutes.** Penal statutes are to be strictly construed against the government and are to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.

13. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
14. **Criminal Law.** No person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against the spirit of the written law.
15. **Criminal Law: Words and Phrases.** Neb. Rev. Stat. § 28-311.03 (Cum. Supp. 2004) defines the offense of stalking as willfully harassing another person with the intent to injure, terrify, threaten, or intimidate.
16. ____: ____. Neb. Rev. Stat. § 28-311.02 (Cum. Supp. 2004) defines the term "harass" as engaging 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.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Reversed.

Thomas C. Riley, Douglas County Public Defender, and David J. Tarrell for appellant.

Stuart J. Dornan, Douglas County Attorney, Amy Schuchman, and Stacy Jo Ferrel, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jeffrey K. appeals an adjudication by the separate juvenile court of Douglas County finding the allegations in the State's petition to be true. The court found that Jeffrey had committed the criminal offense of stalking as defined in Neb. Rev. Stat. § 28-311.03 (Cum. Supp. 2004). Jeffrey asserts on appeal that § 28-311.03 is unconstitutional, that application of § 28-311.03 on the facts of the present case is an unconstitutional infringement of Jeffrey's free speech rights, and that there was insufficient evidence to support the court's adjudication. We are without jurisdiction to rule on Jeffrey's constitutional challenges to § 28-311.03, but we find that there was not sufficient evidence to support a finding that Jeffrey violated § 28-311.03. We reverse.

II. BACKGROUND

On April 15, 2005, the State filed a petition seeking to have Jeffrey adjudicated by the juvenile court for allegedly violating

§ 28-311.03. The State alleged that Jeffrey had willfully harassed the victim with the intent to injure, terrify, threaten, or intimidate her. The events giving rise to this petition allegedly occurred between September and November 2004 at the school attended by both Jeffrey and the victim.

At the adjudication hearing, the victim testified about the conduct which led to the filing of the petition against Jeffrey. The victim testified that her first encounter with Jeffrey was in September 2004. The victim testified that Jeffrey and his friends called the victim and her friends various names, including "fat ass[es]," "fat penguins," "whores," and "fat bitch[es]." The victim testified that the name calling became a daily occurrence and that Jeffrey and his friends called the victim and her friends "fat ass[es]" approximately 75 to 100 times, "whores" approximately 25 times, "fat penguins" approximately 25 times, and "fat bitch[es]" approximately 10 times. The victim specifically testified that Jeffrey's tone of voice was "mean but not really — like, a threatening voice" and that it "was more kind of for his joy . . . his pleasure."

The victim testified that in addition to the name calling, there were other incidents between Jeffrey and the victim. The victim testified about two different occasions when a chair was kicked toward her and struck her feet, although she did not trip or fall on either occasion. The victim testified that with respect to the first chair incident, she told Jeffrey that the action "was not funny" and slapped Jeffrey in the back of the head after the incident. The victim testified that with respect to the second chair incident, she was not sure that Jeffrey was the one who kicked the chair toward her. Additionally, the victim testified that on three or four occasions, Jeffrey and his friends threw food, such as candy, potato chips, or French fries, at the victim and her friends. Finally, the victim testified about an incident wherein somebody placed some meat in her backpack and she witnessed Jeffrey and his friends laughing, although she was not able to identify who placed the meat in her backpack.

The victim testified that the incidents involving Jeffrey had emotionally impacted her in a negative way. She testified that to avoid Jeffrey, she changed her routine at school, such as the lunch table she used and the route she followed around school.

The State also presented testimony from an assistant principal at the school. The assistant principal testified that the victim had made several complaints about Jeffrey. The assistant principal testified, however, that he had received no other complaints about Jeffrey from other female students, although he testified that he had received some complaints from male students about Jeffrey's bullying, harassing students, name calling, and committing vandalism. The assistant principal testified that Jeffrey had been suspended from the school and enrolled in an alternative school because of Jeffrey's repeated "harassment and bullying." The assistant principal also testified about an Internet page on which Jeffrey had acknowledged being considered a bully at school, although Jeffrey had told the assistant principal that the page was only a joke.

The record presented on appeal does not contain any motion to quash filed on behalf of Jeffrey, but at the beginning of the adjudication hearing, Jeffrey moved the court to withdraw a motion to quash. The court granted the motion. At the conclusion of the adjudication hearing, Jeffrey's counsel argued that application of the criminal stalking statute amounted to criminalizing Jeffrey's speech and was an unconstitutional violation of Jeffrey's free speech rights. Additionally, Jeffrey argued that the State had failed to prove that Jeffrey intended to injure, terrify, threaten, or intimidate the victim.

On August 15, 2005, the juvenile court entered an order adjudicating Jeffrey to be within the jurisdiction of the juvenile court. The court found that the allegations that Jeffrey had violated the criminal stalking statute had been proven beyond a reasonable doubt. This appeal followed.

III. ASSIGNMENTS OF ERROR

Jeffrey has assigned three errors on appeal. First, Jeffrey asserts that the court erred in not finding that § 28-311.03 was unconstitutional. Second, Jeffrey asserts that the court erred in not finding that application of § 28-311.03 to the facts of his case constituted an unconstitutional infringement of Jeffrey's free speech rights. Third, Jeffrey asserts that the court erred in finding that sufficient evidence was presented to support adjudication.

IV. ANALYSIS

1. Constitutional Issues

Jeffrey's first two assignments of error challenge the constitutionality of § 28-311.03: first, by asserting that the statute is both vague and an overbroad restriction of speech based on content and, second, by asserting that the statute is unconstitutional as applied to Jeffrey. This court is without authority to rule on the constitutionality of statutes, and accordingly, we are without authority to rule on the merits of Jeffrey's assertions in his first two assignments of error.

[1,2] This court cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before us, we do have jurisdiction to determine whether a constitutional question has been properly raised. *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005). To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. of Prac. 9E (rev. 2006) (we note 2006 revisions to rule 9 did not alter rule 9E) and to properly raise and preserve the issue before the trial court. See, *Olson v. Olson, supra* (requiring strict compliance with rule 9E); *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997) (requiring raising and preserving issue before trial court). See, also, *State v. Schreck*, 226 Neb. 172, 409 N.W.2d 624 (1987) (failure to properly raise constitutionality issue in trial court results in waiver of issue).

[3-5] The Nebraska Supreme Court insists upon strict compliance with rule 9E before it will consider a constitutional challenge. *Olson v. Olson, supra*. Rule 9E requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief. Additionally, if a statute is alleged to be unconstitutional, the Attorney General must be served with a copy of the proceeding. Neb. Rev. Stat. § 25-21,159 (Cum. Supp. 2004). The record before us demonstrates that Jeffrey properly and timely filed a separate written notice that a constitutional question was being raised, and also properly and timely served notice of the proceeding on the Attorney General.

[6] As for Jeffrey's facial challenge to the overbreadth and vagueness of § 28-311.03, under Nebraska law, a motion to quash

or a demurrer is the proper procedural method for challenging the facial validity of a statute. *State v. McKee, supra.* In the instant case, Jeffrey specifically withdrew his motion to quash prior to the commencement of the adjudication hearing. As a result, Jeffrey failed to properly preserve the facial validity of the statute.

[7] Challenges to the constitutionality of a statute as applied to the defendant are properly preserved by a plea of not guilty. *Id.* In the instant case, the record does not contain Jeffrey's denial of the allegations of the State's petition, but it is apparent that Jeffrey did deny the allegations, inasmuch as an adjudication hearing was held and evidence was adduced to prove the allegations. Additionally, a review of the closing arguments indicates that the constitutionality of § 28-311.03 was specifically argued to the district court. Nonetheless, even if the issue was properly raised, this court is without authority to offer any relief on Jeffrey's constitutional challenge.

2. Sufficiency of Evidence

Jeffrey also asserts that the juvenile court erred in finding that sufficient evidence was presented to demonstrate that Jeffrey violated § 28-311.03. Specifically, Jeffrey challenges the sufficiency of the evidence to demonstrate that Jeffrey had the requisite intent to violate the statute. We find that the State failed to adduce sufficient evidence to support a finding that Jeffrey violated § 28-311.03.

[8-10] The standard of review for juvenile proceedings involving an adjudication is de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings. See *In re Interest of Kyle O., ante* p. 61, 703 N.W.2d 909 (2005). The findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses and can better judge their credibility. See, *In re Interest of K.L.C. and K.C.*, 227 Neb. 76, 416 N.W.2d 18 (1987); *In re Interest of Anthony P.*, 13 Neb. App. 659, 698 N.W.2d 457 (2005). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Anthony P., supra.*

[11] When the sufficiency of the evidence as to criminal intent is in issue, a direct expression of intention by the defendant is not required; the intent with which an act is committed involves a

mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Peterson*, 236 Neb. 450, 462 N.W.2d 423 (1990). The requisite state of mind is a question of fact and may be proved by circumstantial evidence. *Id.*

[12-14] Penal statutes are to be strictly construed against the government and are to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004); *In re Interest of Anthony P., supra.* In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002); *In re Interest of Anthony P., supra.* No person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against the spirit of the written law. *In re Interest of Anthony P., supra.* See *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986).

[15,16] With these principles in mind, we turn to the relevant statutory provisions. Section 28-311.03 defines the offense of stalking as willfully harassing another person "with the intent to injure, terrify, threaten, or intimidate." Neb. Rev. Stat. § 28-311.02 (Cum. Supp. 2004) defines the term "harass" as engaging "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." Further, the Legislature specified in § 28-311.02(1):

> It is the intent of the Legislature to enact laws dealing with stalking offenses which will protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated by individuals who intentionally follow, detain, stalk, or harass them or impose any restraint on their personal liberty and which will not prohibit constitutionally protected activities.

As noted, § 28-311.03 requires harassment "with the intent" to injure, terrify, threaten, or intimidate another person. Jeffrey

asserts on appeal that the State failed to adduce sufficient evidence of his intent in order to demonstrate a violation of § 28-311.03. The State did not adduce any direct expression of intent by Jeffrey. Thus, the question becomes whether there was sufficient evidence to support the juvenile court's factual determination that the circumstantial evidence demonstrated this requisite state of mind.

There is no evidence in the record which would support a finding that Jeffrey intended to injure, terrify, or threaten the victim. The victim herself testified that Jeffrey's tone of voice was not threatening, and she did not testify that she was ever injured or threatened by any of Jeffrey's conduct. The record in this case does not present an issue of credibility; there was no conflicting evidence, and the victim's testimony was that Jeffrey was not threatening. The victim even testified that on one occasion, after Jeffrey pushed a chair toward her foot in the cafeteria, her reaction was to slap Jeffrey in the back of the head. The juvenile court specifically held that Jeffrey "has engaged in a course of conduct, a pattern and practice calculated to intimidate [the victim] herein, daily, verbal put-downs, denigrating statements to her *causing himself amusement*." (Emphasis supplied.) The court noted that there was no "legitimate purpose" for Jeffrey's conduct. Although we do not disagree that there appears to be no "legitimate purpose" for Jeffrey's conduct and that his conduct was "excessive, uncalled for," we do not find that it rises to the level of demonstrating a criminal intent to intimidate the victim.

Rather, the record indicates that Jeffrey called the victim names, threw food at her, and on at least one occasion pushed a chair toward her, all for his own juvenile amusement. The victim herself testified that Jeffrey's tone of voice was such that he appeared to be engaging in this conduct "for his joy . . . his pleasure." There was no evidence presented to suggest that Jeffrey intended criminal intimidation of the victim. Although Jeffrey's actions in this case cannot be condoned or approved of, on our de novo review, we find the evidence insufficient to support the adjudication, and we reverse the decision of the juvenile court.

V. CONCLUSION

We are without jurisdiction to address Jeffrey's constitutional challenges to § 28-311.03. Nonetheless, we find that the State

adduced insufficient evidence to support the adjudication, and we reverse the decision of the juvenile court.

REVERSED.

CARLSON, Judge, dissenting.

The majority concludes that the record fails to show that Jeffrey intended to intimidate the victim, given that Jeffrey called the victim names, threw food at her, and on at least one occasion pushed a chair toward her for his own juvenile amusement. I disagree. The fact that Jeffrey found his behavior amusing does not justify the conclusion that Jeffrey did not intend to intimidate the victim. Rather, Jeffrey's words and actions, the extensive nature of Jeffrey's conduct, and the victim's reactions to Jeffrey's behavior all clearly show that Jeffrey intended to intimidate the victim.

At trial, the victim testified that on multiple occasions, Jeffrey yelled at her and her friends in front of other students at school. Specifically, the victim stated that in a mean voice, Jeffrey called her and her friends "fat ass[es]" approximately 75 to 100 times, "whores" and "fat penguins" approximately 25 times each, and "fat bitch[es]" approximately 10 times. The victim testified that Jeffrey appeared to engage in this behavior for his own joy and pleasure. Additionally, the victim testified that Jeffrey pushed a chair out in front of her in order to trip her and that Jeffrey threw food at her in the cafeteria, hitting her on 9 or 10 occasions. The evidence shows that these incidents occurred in a 3-month time period—September, October, and November 2004.

The victim also testified that given Jeffrey's repeated actions, she and her friends sat at a different table in the cafeteria, in addition to completely changing their paths inside school "[t]o get away from all of it. So it would make less chance of him embarrassing us in front of everybody." The victim further testified that Jeffrey's behaviors had impacted her quite negatively, "[e]motionally, very badly," and that she felt "very put-down."

After reviewing these facts, the juvenile court held that Jeffrey intended to intimidate the victim, specifically finding that Jeffrey had "engaged in a course of conduct, a pattern and practice calculated to intimidate [the victim] herein, daily, verbal put-downs, denigrating statements to her *causing himself amusement*." (Emphasis supplied.) As the majority notes, Jeffrey's state of mind is a question of fact and may be proved by circumstantial

evidence. See *State v. Peterson*, 236 Neb. 450, 462 N.W.2d 423 (1990).

On this record, I cannot say that the trial court's finding that Jeffrey intended to intimidate the victim was erroneous. Under the law, we are required to give great weight to the trial court's factual findings, given that the trial court heard and observed the witnesses. See *In re Interest of Anthony P.*, 13 Neb. App. 659, 698 N.W.2d 457 (2005). Therefore, I would affirm Jeffrey's adjudication, finding that the State adduced sufficient evidence to find Jeffrey guilty of stalking under Neb. Rev. Stat. § 28-311.03 (Cum. Supp. 2004).

IN RE INTEREST OF DENNIS W., ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. DENNIS W., APPELLANT, V. MENTAL HEALTH BOARD OF HALL COUNTY, NEBRASKA, APPELLEE.

717 N.W.2d 488

Filed June 27, 2006. No. A-05-1397.

1. **Mental Health: Appeal and Error.** In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, appellate courts will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing.
2. **Rules of Evidence: Mental Health.** Pursuant to Neb. Rev. Stat. § 71-955 (Cum. Supp. 2004), the rules of evidence in civil proceedings shall apply at all hearings held under the Nebraska Mental Health Commitment Act.
3. **Rules of Evidence: Witnesses.** According to Neb. Rev. Stat. § 27-615 (Reissue 1995), the general rule is that witnesses shall be excluded from a proceeding at the request of a party.
4. ____: ____. Neb. Rev. Stat. § 27-615 (Reissue 1995) has certain exceptions to witnesses that may be excluded, including a person whose presence is shown by a party to be essential to the presentation of its cause.
5. **Expert Witnesses.** An expert witness may be present in the courtroom, in contravention of a sequestration order, upon a showing that his or her presence is essential to the presentation of a party's case.
6. **Rules of Evidence: Physician and Patient.** According to Neb. Rev. Stat. § 27-504(2)(a) (Reissue 1995), a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his or her physical, mental, or emotional condition among himself or herself, his or her physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

7. ____: ____. The privilege set forth in Neb. Rev. Stat. § 27-504(2)(a) (Reissue 1995) is nullified in proceedings to hospitalize the patient for physical, mental, or emotional illness if the physician, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.
8. **Rules of Evidence: Words and Phrases.** Neb. Rev. Stat. § 27-504(1)(b) (Reissue 1995) defines "physician" as including a person licensed as a psychologist under the laws of any state or nation who devotes all or a part of his or her time to the practice of psychology.
9. **Mental Health.** A mental health board can commit a person for inpatient treatment.
10. ____. According to Neb. Rev. Stat. § 71-925(6) (Cum. Supp. 2004), a treatment order by the mental health board under this section shall represent the appropriate available treatment alternative that imposes the least possible restraint upon the liberty of the subject.
11. ____. Neb. Rev. Stat. § 71-925(6) (Cum. Supp. 2004) states that the mental health board shall consider all treatment alternatives, including any treatment program or conditions suggested by the subject, the subject's counsel, or other interested person. Inpatient hospitalization or custody shall only be considered as a treatment alternative of last resort.
12. ____. The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Stacy R. Nonhof, Deputy Hall County Public Defender, for appellant.

Matthew R. Molsen, Deputy Hall County Attorney, for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

The Hall County Mental Health Board (the Board) found the appellant, Dennis W., to be a mentally ill and dangerous person and found that the least restrictive treatment option available was inpatient care through the Nebraska Department of Health and Human Services. The district court for Hall County affirmed the decision of the Board by concluding that there was no error in allowing Dr. James Fish to remain present during the hearing, that there was no privilege Dennis could claim with respect to Dr. Mary Paine, and that the decision to commit Dennis to an inpatient facility was the least restrictive treatment alternative, given the unrefuted testimony of two expert psychologists. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 31, 2000, Dennis pled nolo contendere to two counts of sexual assault of a child, Class IIIA felonies. The district judge released Dennis pending sentencing. A presentence investigation was completed, and on March 20, 2000, the district judge found that Dennis was not a fit candidate for probation and sentenced Dennis to 4½ to 5 years' imprisonment on count I and to 4½ to 5 years' imprisonment on count II, with the sentences to run consecutively. In addition, the district judge ordered that within 60 days of the date of commitment, the Department of Public Institutions would conduct an evaluation of Dennis for purposes of determining whether a treatment program would be appropriate.

Approximately 5 years later, on March 13, 2005, the Nebraska Department of Correctional Services (DCS) released Dennis. On March 15, 2 days later, Dennis joined the "House for New Life," a Christian-based transitional living facility for ex-offenders located in a residential neighborhood in Lincoln, Nebraska. There are two elementary schools within a 12-block radius of the House for New Life and an ice cream store nearby. On April 6, Dennis began seeing Dr. Paine, a licensed psychologist, on an outpatient basis.

On April 28, 2005, a deputy Hall County Attorney, representing the State of Nebraska, petitioned the Board to institute proceedings in behalf of Dennis, alleging that he was a mentally ill and dangerous person. The petition was supported by an affidavit from the deputy attorney which referred to a letter from an employee of DCS regarding the facts surrounding Dennis' conviction and release. On July 30, Dennis was taken into emergency protective custody and was sent to Richard H. Young Hospital (Richard Young Hospital) for an evaluation. Dr. Fish, a clinical psychologist, evaluated Dennis. Dr. Fish met with Dennis on August 1 and 3 for approximately 1½ hours each time. Dennis told Dr. Fish that Dennis was released from confinement in March 2005. During the evaluation, Dr. Fish requested that Dennis sign a release to both Dr. Paine, whom Dennis indicated he had been seeing for treatment on an outpatient basis since his release, and DCS, where there was a sex offender treatment program that Dennis said he had participated in. Dennis signed

a release for Dr. Paine but not for DCS. While at Richard Young Hospital and before Dr. Fish contacted Dr. Paine regarding Dennis' treatment, Dennis spoke with Daniel Stogsdill, an attorney and a cofounder of the House for New Life. Stogsdill told Dennis to provide Richard Young Hospital with a written notice revoking the release of information, which Dennis did. Dr. Fish did not have time to speak with Dr. Paine before Dennis' revocation. During the evaluation, Dr. Fish formed an opinion as to Dennis' diagnosis; however, Dr. Fish needed the background information about Dennis' prior treatment to form an opinion as to Dennis' level of risk of reoffending and to the least restrictive option for Dennis' treatment.

On August 11 and 12, 2005, a hearing to determine whether Dennis was mentally ill and dangerous was held before the Board. The State's attorney agreed to the defense attorney's request for sequestration of the witnesses, with the exception of Dr. Fish. The Board ruled that before it would allow Dr. Fish to be present for the other witnesses' testimony, the State would have to show that his presence was necessary to its case. After the parties stipulated that Dr. Fish was a licensed practicing psychologist and an expert, he testified to his role in evaluating Dennis for the purpose of the emergency protective custody hearing. Dr. Fish testified about his attempt to secure releases of medical information from Dr. Paine and from DCS, which we earlier detailed. Dr. Fish testified that the background information was important in forming an opinion as to Dennis' level of risk of reoffending and to the least restrictive treatment option for Dennis. In particular, Dr. Fish testified that he needed to know

> how [Dennis] has responded to treatment, whether [Dennis] has been in treatment, whether [Dennis has] completed treatment successfully, what the opinions of those professionals were with regard to [Dennis'] progress and outcome to that treatment [and] to what extent [Dennis] has been able to identify his own risk factors as well as employ strategies to prevent any sort of reoffending.

Dr. Fish also stated that knowing how well a patient reported his or her history to others would assist the doctor in forming an opinion as to the least restrictive treatment option. Dr. Fish said that it would be possible to form an opinion as to the least restrictive

treatment option, and also as to the potential dangerousness, if he were allowed to listen to the testimony of Dr. Paine and Michael Pella, a licensed mental health practitioner at DCS. The Board found that Dr. Fish's presence during the testimony of such witnesses was "necessary" and "essential to the presentation of the State's case," and therefore, Dr. Fish was not sequestered.

The parties stipulated to Dr. Paine's qualifications as a licensed psychologist and her ability to testify as an expert about the psychological health of Dennis. Dr. Paine stated that she has a private practice and consults for the Community Mental Health Center, where there is an outpatient sex offender treatment program called the "Stop Program." Dr. Paine testified that the House for New Life referred Dennis to the Community Mental Health Center to be evaluated for treatment. As a result, Dr. Paine met with Dennis a total of nine times beginning on April 6, 2005, and ending on June 22.

The State asked Dr. Paine whether during the course of her treatment of Dennis she believed that he should be hospitalized. Dennis' counsel objected on the basis of psychologist-patient privilege. Dr. Paine testified that she believed Dennis should be hospitalized, and thereafter, the Board found that no privilege existed under Neb. Rev. Stat. § 27-504 (Reissue 1995). Thus, the objection was overruled. Dr. Paine testified that during the intake process for the Stop Program, she had told Dennis that he was in need of an inpatient program. Dr. Paine stated that she tried to have Dennis "EPC'd"—referring to an emergency protective custody order—after reviewing his medical information from DCS and a letter from Pella indicating that upon Dennis' release from incarceration, he should be "picked up."

During Dr. Paine's testimony, she described the intake process and evaluation of Dennis, stating that she detailed Dennis' clinical history, offense history, and sexual history; assessed his mental health problems; and attempted to complete a "battery of testing," which she was unable to complete because Dennis "did not come in enough times to finish." One of the tools that Dr. Paine used was the "Multiphasic Sex Inventory," which is used in the diagnosis of a potential sexual offender. The Multiphasic Sex Inventory demonstrated to Dr. Paine that Dennis was a pedophile, which Dennis admitted and which had already been established,

according to Dr. Paine. This tool also provided information about Dennis' progress, if any, since his prior sex offender treatment. Another tool that Dr. Paine used was the "Static 99," which is used only for individuals who have been convicted of a sexual offense. This tool assists the clinician in forming an opinion as to the level of risk that the offender will reoffend, as well as to the possible treatment options. Dennis obtained a score of six on the Static 99, and Dr. Paine stated that a score of six "places him in the high-risk category to sexually reoffend" and indicates that there is a "39 percent likelihood that [Dennis] would sexually reoffend within a period of five years, and a 45 percent likelihood that he would sexually recidivate in a period of ten years."

Dr. Paine testified that Dennis had told her about his prior convictions of sexual assault of a child, his estimated 30 victims (all male children) during his lifetime, his wide victim pool, and his predatory pattern of grooming his victims and befriending the parents in order to gain access to his victims. Also, Dr. Paine testified that Dennis' records indicated that he threatened to kidnap at least three children if their mother did not bring the children to his apartment. Dr. Paine also said Dennis told her that he used physical restraint with at least one child.

Regarding Dennis' past treatment, Dr. Paine testified that Dennis had told her he participated in and was terminated from an inpatient sex offender treatment program while he was incarcerated at DCS. Although Dennis told Dr. Paine that he could not remember why he had been terminated from the program, Dr. Paine discovered that his participation in the program was terminated because he was not disclosing information adequately, he was secretive and guarded, and he was "approaching boyish-appearing males on the unit for sexual contact."

Dr. Paine further testified that Dennis estimates "anywhere from 65 to 70 percent of his sexual energies, attractions, and urges are towards children." Dr. Paine stated that while Dennis had initially told her that he did not want to hurt any more children, he later stated to her that he did not believe that he hurt his victims. Dr. Paine testified as to her concerns about Dennis' inadequate and sometimes conflicting knowledge of the risk factors surrounding his pedophilia and concerns that he had become "treatment-savvy after three years-plus of sex-offender

treatment." Dr. Paine also determined that Dennis was "ego-syntonic," meaning that he is not uncomfortable with his sexual deviance.

Based upon Dennis' extensive history and clinical records from DCS, Dr. Paine's interviews with him, and the diagnostic tools such as the Multiphasic Sex Inventory and the Static 99, Dr. Paine diagnosed Dennis with pedophilia and avoidant personality disorder. She concluded that he was at the highest level of risk to reoffend, that his progress was "fairly minimal" during his participation in the program at DCS, and that he is "in need of sex-offender-specific therapy in an inpatient setting," which therapy is available only at the Lincoln Regional Center. When asked about other treatment options, Dr. Paine stated that she considered outpatient treatment but that she concluded outpatient treatment would not be sufficiently intense, "given the severity of [Dennis'] problem." Further, Dr. Paine stated that inpatient treatment was more appropriate than outpatient treatment because Dennis had already participated, but exhibited minimal progress, in the program at DCS, which program would have been more intense than an outpatient program.

After listening to the testimony of the State's other witnesses, Dr. Fish testified regarding his evaluation pursuant to the emergency protective custody order. Dr. Fish testified that he completed both a clinical personality assessment and the "Nebraska Sex Offender Risk Assessment Instrument," which was developed at the Lincoln Regional Center, and did an extensive history and clinical interview with Dennis. Dr. Fish stated that the Nebraska Sex Offender Risk Assessment Instrument classified Dennis as a Level 3 sex offender after he received a score of 165—a score as low as 130 means that one has a high risk of sexually reoffending. Dr. Fish testified that with Dennis' Level 3 classification, Dennis posed a "very high risk to offend again" with young children. With respect to the extensive history which Dr. Fish took, he said Dennis indicated that he "had been perpetrating since the age of 12 to the age of 27, at which time he was arrested," and that he had assaulted approximately 30 victims during that time. Dr. Fish also testified that Dennis admitted to keeping on his computer a list of 200 other potential victims. Dr. Fish stated that Dennis told him about Dennis' conviction and his

treatment while he was incarcerated and that Dennis' participation in the program was terminated for "assaultive and predatory" behavior. Based upon Dr. Fish's two interviews with Dennis, the testing done at Richard Young Hospital, the current risk factors, and Dennis' past history, Dr. Fish diagnosed Dennis with pedophilia, specifically with sexual attraction to males, which Dr. Fish said was "essentially . . . the same" as Dr. Paine's diagnosis. Dr. Fish testified that he discussed his diagnosis with Dennis and that Dennis agreed with the diagnosis. Dr. Fish stated that Dennis' insufficient knowledge of "using adequate behavioral strategies to keep his impulses under control," his "lack of internal motivation," his "past treatment failure," and his "continued attraction to young boys," as well as Dr. Paine's testimony that Dennis was ego-syntonic, led Dr. Fish to conclude that Dennis had a high risk for reoffending. Dr. Fish's opinion was that the least restrictive treatment option for Dennis was an inpatient program specifically for sexual offenders. When asked about considering less restrictive treatment options, Dr. Fish responded that he considered an outpatient treatment program but that such treatment would be insufficient because of the "level of risks" and because "[Dennis has] not yet successfully refocused [his] sexual attraction to adults." Dr. Fish further stated that an outpatient program would be insufficient for Dennis because of his inability to manage his impulses, to verbalize an awareness of the risk factors, and to use coping strategies to control his impulses.

With respect to the House for New Life, where Dennis was residing since his release from DCS, Pamela J. Hill, who lived at the House for New Life after her release from incarceration and worked there "on and off" for approximately 10 years, and Stogsdill testified about the level of supervision and the procedures at the House for New Life. Neither Hill nor Stogsdill is a psychologist.

Hill and Stogsdill testified that the House for New Life screens its potential applicants and then places them on an "Individualized Success Plan" (ISP). Dennis' ISP included attending his sessions with Dr. Paine, going to work daily, maintaining his hygiene, and attending Alcoholics Anonymous meetings once a week. Hill and

Stogsdill testified that children are not present in the House for New Life without adult supervision.

With respect to Dennis' work, Hill testified that Dennis worked for Staffing Services, which is a temporary staffing service that pays its workers on a daily basis. Hill stated that Staffing Services sent Dennis out of town for a job in Kansas, where he was not supervised by the staff at House for New Life and was out of town for at least 4 days. Hill further testified that Dennis was not supervised on his walks to and from work. Hill said that Dennis was not supervised when he attended his sessions with Dr. Paine, and Hill acknowledged that Dennis missed his counseling sessions with Dr. Paine on various occasions, including the entire month leading up to the hearing. Hill admitted that during the time since Dennis joined the House for New Life, she had not checked on whether Dennis attended his sessions with Dr. Paine. Stogsdill testified that Dennis had access to the Internet, while Hill testified that he did not.

Hill and Stogsdill both opined that the Board should allow Dennis to remain at the House for New Life with various restrictions and increased responsibilities as outlined in a proposed outpatient treatment plan designed specifically for Dennis. Stogsdill acknowledged that while he discussed the possible treatment plan with Dr. Paine, she did not endorse it. The Board questioned Stogsdill about the third item on the proposed treatment plan which reads: "Dennis . . . must have no contact with minors." Stogsdill acknowledged that this would not be possible because the House for New Life is in a residential neighborhood, children attend its church services, and Stogsdill's own son and a coworker's grandson visit the House for New Life.

On August 12, 2005, the Board decided that the evidence was clear and convincing that Dennis was mentally ill and dangerous to others. The Board further determined that the least restrictive treatment alternative available was inpatient care through the Department of Health and Human Services. The Board noted that based upon Dennis' high risk level of reoffending, the House for New Life was not an appropriate program. After Dennis appealed to the district court for Hall County, the Board's decision was affirmed in all aspects. Dennis then perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Dennis asserts that the district court for Hall County erred in affirming the decision of the Board because (1) Dr. Fish was allowed to remain present during the testimony of other witnesses, (2) Dr. Paine testified over a privilege objection by Dennis, and (3) the Board found that the least restrictive treatment alternative is commitment to the Department of Health and Human Services.

STANDARD OF REVIEW

[1] In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, appellate courts will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing. *In re Interest of S.B.*, 263 Neb. 175, 639 N.W.2d 78 (2002). See *In re Interest of Kinnebrew*, 224 Neb. 885, 402 N.W.2d 264 (1987).

ANALYSIS

Sequestration of Witnesses.

[2-4] The rules of evidence in civil proceedings shall apply at all hearings held under the Nebraska Mental Health Commitment Act. Neb. Rev. Stat. § 71-955 (Cum. Supp. 2004). Further, according to Neb. Rev. Stat. § 27-615 (Reissue 1995), the general rule is that witnesses shall be excluded from a proceeding at the request of a party. This rule has certain exceptions, including "a person whose presence is shown by a party to be essential to the presentation of his cause." *Id.*

Here, Dennis asserts that the district court erred in affirming the decision of the Board to allow Dr. Fish to remain present during the testimony of the State's witnesses. The Board ruled that before it would allow Dr. Fish—who had the responsibility of evaluating Dennis in anticipation of the emergency protective custody hearing—to remain during the testimony, the State's attorney would have to show that Dr. Fish's presence was necessary to its case. We have recounted Dr. Fish's testimony about his efforts to secure background information via releases directed to DCS and to Dr. Paine. Dr. Fish explained how and why securing information, including Dennis' participation in a sex offender program while imprisoned, was unsuccessful, and we will not recount the entirety of that testimony here.

Dr. Fish testified that he formed an opinion as to Dennis' diagnosis after the evaluations of Dennis on August 1 and 3, 2005. Dr. Fish further testified that in order to determine Dennis' likelihood of reoffending and the least restrictive treatment alternative, Dr. Fish needed to know

> how [Dennis] has responded to treatment, whether [Dennis] has been in treatment, whether [Dennis has] completed treatment successfully, what the opinions of those professionals were with regard to [Dennis'] progress and outcome to that treatment [and] to what extent [Dennis] has been able to identify his own risk factors as well as employ strategies to prevent any sort of reoffending.

Dr. Fish stated that knowing how a patient reported his or her history to others would assist the doctor in forming an opinion as to the least restrictive treatment option. Due to Dennis' refusal to release his prior and relevant treatment information, in order for Dr. Fish to complete his clinical opinion, he needed to listen to Dr. Paine's testimony explaining Dennis' prior treatment, his responsiveness to the treatment, and how he reported his history to others. The Board found that Dr. Fish's presence during the testimony of such witnesses was "necessary" and "essential to the presentation of the State's case," and therefore, the Board did not sequester Dr. Fish.

[5] In *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989), the Supreme Court of Nebraska held that an expert witness may be present in the courtroom, in contravention of a sequestration order, upon a showing that his or her presence is essential to the presentation of a party's case. In *Jackson*, the prosecutor explained to the court why the presence of the State's expert witness was necessary, as follows: "[The expert] ha[d] no opportunity under the law, unless the defense allow[ed], to examine the defendant at all, other than to be present in court when she testifie[d]." *Id.* at 213, 435 N.W.2d at 897. Accordingly, we find that the law set forth in § 27-615 and in *Jackson* is clear, and the exception to the sequestration of witnesses is applicable to the present case.

Without Dr. Fish's presence during the testimony of Dr. Paine, he would not have obtained important background information about Dennis' prior treatment, including the fact that Dennis'

participation had been terminated from the sex offender program at DCS for approaching boyish-looking inmates for sexual contact, for not disclosing sufficiently, and for being secretive. Absent such important information, Dr. Fish would not have been able to accurately form his clinical opinion as to Dennis' likelihood of reoffending and to the least restrictive treatment alternative. Therefore, the district court did not err in affirming the Board's allowance of Dr. Fish's presence during the testimony of the State's witnesses.

Physician-Patient Privilege.

[6-8] Section 27-504(2)(a) sets forth the following physician-patient privilege that applies to individuals such as a licensed psychologist:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his or her physical, mental, or emotional condition among himself or herself, his or her physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

However, under § 27-504(4)(a), such privilege is nullified in "proceedings to hospitalize the patient for physical, mental, or emotional illness if the physician, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization." Section 27-504(1)(b) defines "physician" as including "a person licensed as a psychologist under the laws of any state or nation who devotes all or a part of his or her time to the practice of psychology." Contrary to Dennis' assertion that Neb. Rev. Stat. § 71-1,206.29 (Reissue 2003) trumps the rule set forth in § 27-504 and the exception therein, § 71-1,206.29 specifically mentions the applicability of § 27-504. Accordingly, it is clear that § 27-504 and the exception therein are applicable to Dr. Paine's testimony.

In this case, Dennis is asserting that the district court erred in affirming the Board's decision to allow Dr. Paine to testify over Dennis' privilege objection. We disagree. The requirements for the exception to the privilege in § 27-504(4)(a) were clearly met because (1) the parties stipulated that Dr. Paine was a licensed psychologist, (2) Dr. Paine testified that she was diagnosing and

treating Dennis during their nine sessions, and (3) Dr. Paine, prior to her testimony about her specific treatment of Dennis, testified that she believed Dennis should be hospitalized and that she made such determination in the course of her diagnosis and treatment of him. Additionally, Dr. Paine testified that she attempted to have an emergency protective custody order issued on Dennis.

The Board had ample evidence before it that the exception to the privilege found in § 27-504 applied, and therefore, we find that the district court correctly affirmed the Board's allowance of Dr. Paine's testimony after the Board ruled that there was no privilege under § 27-504(4)(a).

Least Restrictive Treatment Alternative.

[9-12] Dennis' third assignment of error asserts that the district court erred in affirming the Board's decision that the least restrictive treatment alternative is commitment to the Department of Health and Human Services. In *In re Interest of Vance*, 242 Neb. 109, 115, 493 N.W.2d 620, 624 (1992), the Nebraska Supreme Court wrote that "a board can commit a person for inpatient treatment," but as explained in Neb. Rev. Stat. § 71-925(6) (Cum. Supp. 2004), "[a] treatment order by the mental health board under this section shall represent the appropriate available treatment alternative that imposes the least possible restraint upon the liberty of the subject." Section 71-925(6) additionally states: "The board shall consider all treatment alternatives, including any treatment program or conditions suggested by the subject, the subject's counsel, or other interested person. Inpatient hospitalization or custody shall only be considered as a treatment alternative of last resort. . . ." The *In re Interest of Vance* court held: " ' "The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others." ' " 242 Neb. at 115, 493 N.W.2d at 624, citing *In re Interest of McDonell*, 229 Neb. 496, 427 N.W.2d 779 (1988).

According to the facts before us, it is obvious that the Board had clear and convincing evidence that Dennis was dangerous to others, especially young boys. Dennis does not assign error to the Board's conclusion that he was mentally ill and dangerous. Rather, Dennis attacks the district court's affirmance of the

Board's finding that the least restrictive treatment option for Dennis was inpatient treatment. In determining whether inpatient treatment was the least restrictive option, we find Dr. Paine's and Dr. Fish's testimonies compelling.

Dr. Paine's opinions were based upon the extensive history and clinical records from DCS, her interviews with Dennis, and diagnostic tools such as the Multiphasic Sex Inventory and the Static 99. Dr. Paine diagnosed Dennis with pedophilia, and Dennis did not disagree. Dr. Paine testified that she realized Dennis should be in an inpatient program and that she so informed Dennis. Dr. Paine stated that Dennis was at the highest level of risk to reoffend, that his progress was "fairly minimal" during his participation in the program at DCS, and that he was "in need of sex-offender-specific therapy in an inpatient setting," which therapy is available only at the Lincoln Regional Center. Dr. Paine testified that she considered outpatient treatment for Dennis but that she decided outpatient treatment would not be sufficiently intense, "given the severity of [Dennis'] problem." Dr. Paine also stated that inpatient treatment was more appropriate than outpatient treatment because Dennis had already participated, but exhibited minimal progress, in the program at DCS, which program would have been more intense than an outpatient program.

In addition to Dr. Paine's expert opinion, Dr. Fish also testified that he diagnosed Dennis with pedophilia and that Dennis had a high risk of reoffending. Dr. Fish stated that the Nebraska Sex Offender Risk Assessment Instrument classified Dennis as a Level 3 sex offender after he received a score of 165, which places Dennis in a "very high risk to offend again" with young children—a score as low as 130 means that one has a high risk of sexually reoffending. Dr. Fish testified that the least restrictive treatment option for Dennis was an inpatient program specifically for sexual offenders. Dr. Fish stated that he considered less restrictive treatment options but that such treatment would be insufficient because of the "level of risks" and because "[Dennis has] not yet successfully refocused [his] sexual attraction to adults." Dr. Fish further stated that an outpatient program would be insufficient for Dennis because of his inability to manage his impulses, to verbalize an awareness of the risk factors, and to use coping strategies to control his impulses.

The Board considered a less restrictive treatment alternative—living at the House for New Life. This proposed outpatient treatment plan designed specifically for Dennis called for "no contact with minors." However, Stogsdill acknowledged that this was not possible due to the location of the House for New Life, the fact children visit the House for New Life, and the fact children attend services at its church. Under the proposed outpatient treatment plan, Dennis would not be supervised while walking to and from work; at work, including when he works out of town; or in the waiting room at his counseling sessions. The Board did not err in rejecting the outpatient treatment plan, because of Dennis' high risk level of reoffending.

We find that the Board considered the treatment alternatives. In the end, the Board followed the unrefuted clinical opinions of the two expert psychologists. We find that as a matter of law, the district court's judgment affirming the Board's conclusion that the least restrictive treatment alternative is inpatient treatment is supported by clear and convincing evidence. See, *In re Interest of S.B.*, 263 Neb. 175, 639 N.W.2d 78 (2002); *In re Interest of Kinnebrew*, 224 Neb. 885, 402 N.W.2d 264 (1987). We affirm the district court's decision that inpatient treatment is the least restrictive treatment alternative.

CONCLUSION

The district court did not err in affirming the decision of the Board. The Board's allowance of Dr. Fish to remain present during the testimony of Dr. Paine and Pella was not error. The Board's finding that Dr. Paine could testify over the privilege objection by Dennis was correct. Finally, after the Board considered the treatment options, the Board correctly determined that the least restrictive treatment alternative was an inpatient program. The evidence presented with respect to Dennis' pedophilia, his high risk of reoffending, and his need to be in an inpatient treatment program provides clear and convincing evidence that as a matter of law, the district court correctly affirmed the Board's findings. We affirm.

AFFIRMED.

MICHAEL A. LINCH, SR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER A. DARSAKLIS, DECEASED, APPELLANT, V. NORTHPORT IRRIGATION DISTRICT AND MORRILL COUNTY, NEBRASKA, APPELLEES.

717 N.W.2d 522

Filed July 3, 2006. No. A-04-1395.

1. **Actions: Dismissal and Nonsuit: Appeal and Error.** Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal.
2. **Appeal and Error.** 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.
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.
4. **Actions: Parties: Death: Abatement, Survival, and Revival.** At common law, a personal injury action did not survive the death of the plaintiff or the defendant, but abated upon the death of either party.
5. ____: ____: ____: ____. Neb. Rev. Stat. § 25-1402 (Reissue 1995) states that no action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant.
6. **Decedents' Estates: Death.** The powers of a personal representative cease upon the death of the individual exercising those powers.
7. **Actions: Parties: Death: Abatement, Survival, and Revival.** The substitution of a new party to proceed with the prosecution or defense of a claim is the revivor of an action. The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to the decedent until someone is substituted for the decedent as a party.
8. **Actions: Parties: Death: Abatement, Survival, and Revival: Motions for Continuance.** The right to revive or continue a pending action at law after the death of a party is purely statutory; there may be a revival or continuance when and only when the case is within a statute permitting it and strict compliance with the statutory requirements is shown.
9. **Actions: Parties: Death.** If before judgment a party plaintiff dies, the action can no longer proceed in his name, but must be revived in the name of his representative or successor.

Appeal from the District Court for Morrill County: BRIAN SILVERMAN, Judge. Reversed and remanded for further proceedings.

Samuel W. Segrist, of Meister & Segrist, P.C., L.L.O., for appellant.

Terrance O. Waite and Keith A. Harvat, of Waite, McWha & Harvat, for appellee Northport Irrigation District.

Steven W. Olsen, of Simmons Olsen Law Firm, P.C., for appellee Morrill County.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Michael A. Linch, Sr., personal representative of the estate of Peter A. Darsaklis, deceased, purportedly appeals from the dismissal for want of prosecution of his petition against Northport Irrigation District (Northport) and Morrill County, Nebraska. The district court entered its order after being informed by Linch's counsel that Linch had died. Because the proceedings were suspended by Linch's death and were not revived before the dismissal for want of prosecution, we reverse, and remand for further proceedings.

BACKGROUND

On July 6, 2001, Linch, acting as personal representative for Darsaklis' estate, filed a petition against Northport and Morrill County. The petition alleged that on July 7, 1999, Darsaklis was involved in a one-vehicle accident caused by the negligence of Northport and Morrill County, and it requested damages for personal injuries sustained by Darsaklis in the accident. Northport and Morrill County answered the petition on September 6, 2001, and August 27, 2001, respectively, and each defendant essentially denied liability for Darsaklis' accident and injuries. On September 21, Linch filed replies asserting general denials in response to Northport's and Morrill County's answers.

On July 12, 2004, the district court entered an order dismissing the case without prejudice, effective November 1, unless the case was tried by that date or good cause was shown in writing prior to that date.

On October 25, 2004, Linch's counsel filed a showing of good cause why the petition should not be dismissed. It reported that Linch had died and that counsel required additional time for the appointment of a new personal representative. An attached affidavit of counsel stated that he had informed Darsaklis' family of

the circumstances but that "no one yet ha[d] come forward to agree to be a personal representative in this claim."

On November 9, 2004, the district court conducted a hearing on its order of July 12. At the hearing, Linch's counsel stated, "Linch the [personal representative] the only other family member we were aware of is a brother [whose] last known address is in Denver. We have contacted him and received no response." The district court received two exhibits: the October 25 affidavit and an affidavit filed November 9. In the November 9 affidavit, Linch's counsel alleged that he had taken over the case, along with many others, from Linch's former counsel. The affidavit requested an additional 6 months to try the case or settle it.

On November 24, 2004, the district court entered an order finding that no good cause had been shown why the matter should not be dismissed and dismissing the case without prejudice. Linch's counsel filed this appeal, signing the notice of appeal as attorney for Darsaklis.

ASSIGNMENT OF ERROR

Linch's counsel alleges, rephrased and consolidated, that the district court abused its discretion in dismissing the petition for failure to prosecute despite a showing of good cause.

STANDARD OF REVIEW

[1] Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal. *Billups v. Jade, Inc.*, 240 Neb. 494, 482 N.W.2d 269 (1992).

ANALYSIS

[2,3] The parties frame the issue as whether the district court abused its discretion in dismissing the petition for lack of prosecution. All of the parties concede that Linch is deceased, but they fail to address the significance of that fact. 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. *Krumwiede v. Krumwiede*, 258 Neb. 785, 606 N.W.2d 778 (2000). 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 Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). We note plain error in the failure to recognize the significance of Linch's death.

[4,5] At common law, a personal injury action did not survive the death of the plaintiff or the defendant, but abated upon the death of either party. See *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 314 N.W.2d 19 (1982). The enactment of the survivorship statutes, Neb. Rev. Stat. §§ 25-1401 and 25-1402 (Reissue 1995), in 1867 changed the common-law rule, "and then only to the limited extent provided by statute." *Rhein v. Caterpillar Tractor Co.*, 210 Neb. at 324, 314 N.W.2d at 22. Pursuant to § 25-1402, "[n]o action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant." Therefore, under § 25-1402, the cause of action filed by Linch on behalf of Darsaklis did not abate as a result of Linch's death. See *Murray v. Omaha Transfer Co.*, 95 Neb. 175, 145 N.W. 360 (1914) (action for personal injuries does not abate by death of plaintiff).

[6] Neb. Rev. Stat. § 25-1405 (Reissue 1995) provides, "Where one of the parties to an action dies, or his powers as a personal representative cease, before the judgment, if the right of action survives in favor of or against his representatives or successor, the action may be revived, and proceed in their names." The powers of a personal representative cease upon the death of the individual exercising those powers. Neb. Rev. Stat. § 30-2452 (Reissue 1995). Accordingly, where, as in the instant case, a deceased personal injury plaintiff's personal representative dies (and, thus, the personal representative's powers cease) before the judgment, such action is not abated and may be revived.

[7,8] In *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003), the defendant in a personal injury action died while the action was pending. Although a special administrator was appointed for the deceased and served with summons, the record did not disclose an order reviving the action in the name of the special administrator. Because the analysis of the Nebraska Supreme Court in *Fox v. Nick* closely tracks the controlling law in the instant case, we quote extensively from the Supreme Court's opinion:

Although the enactment of § 25-1402 changed the common law pertaining to the abatement of pending actions, as we observed in *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 324, 314 N.W.2d 19, 22 (1982), such changes are "only to the limited extent provided by statute." To that effect, a pending action which survives the defendant's death must be revived in the manner provided by statute. *Workman v. Workman*, 167 Neb. 857, 872, 95 N.W.2d 186, 195 (1959) (stating that "[p]rocedure for revivor is provided by statute upon the death of a litigant in a cause pending in his lifetime if the cause of action did not abate upon his death"); *Murray v. Omaha Transfer Co.*, 95 Neb. 175, 179, 145 N.W. 360, 362 (1914) (stating that "[t]he action not having abated, the statutes make provision for revivor"). See, also, *Vogt v. Daily*, 70 Neb. 812, 813, 98 N.W. 31, 32 (1904) (stating "[m]anifestly, if before judgment a party plaintiff die, the action can no longer proceed in his name, but must be revived in the name of his representative or successor"); *A.J. Armstrong Company v. Hufstedler*, 75 N.M. 408, 410, 405 P.2d 411, 412 (1965) (stating that "[i]t is fundamental that a pending action cannot be prosecuted after the death of a party defendant thereto, so as to affect the decedent's estate, until it is revived against his personal representative or successor in interest").

As observed in 1 C.J.S. *Abatement and Revival* § 155 at 211-12 (1985):

"The substitution of a new party to proceed with the prosecution or defense of a claim is the revivor of an action. The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to decedent until someone is substituted for decedent as a party.

"The right to revive or continue a pending action at law after the death of a party is purely statutory; there may be a revival or continuance when and only when the case is within a statute permitting it, and strict compliance with the statutory requirements is shown."

If a pending action is not revived in the manner provided by statute, "such pending action has no force and effect" as to any entity in whose name revivor was required. *Smith*

> *v. Ralph*, 18 Ohio App. 2d 235, 238, 248 N.E.2d 208, 210 (1969); *A.J. Armstrong Company v. Hufstedler*, 75 N.M. at 410, 405 P.2d [at] 412 (noting that "[s]ince the revival of actions at law is purely statutory, they may be revived only as prescribed by [a New Mexico statute]" nearly identical to Neb. Rev. Stat. § 25-1411 (Reissue 1995)). See, also, Neb. Rev. Stat. § 30-2404 (Reissue 1995) ("no proceeding to enforce a claim against the estate of a decedent . . . may be revived . . . before the appointment of a personal representative").

265 Neb. at 991-92, 660 N.W.2d at 885-86.

We conclude that the same rationale applies in the event of the cessation of a personal representative's powers as a result of the representative's death. Upon Linch's death and the resulting cessation of his powers as personal representative, the cause of action, while still surviving, was suspended or "dormant," see *Fitzgerald v. Clarke*, 9 Neb. App. 898, 903, 621 N.W.2d 844, 848 (2001), until such time as it was revived or stricken from the docket in accordance with the procedure set forth by statute. See, Neb. Rev. Stat. § 25-1414 (Reissue 1995) (action may not be revived as to plaintiff without consent of defendant after expiration of 1 year); Neb. Rev. Stat. § 25-1415 (Reissue 1995) (if action cannot be revived, it shall be stricken from docket).

Under Neb. Rev. Stat. § 25-1407 (Reissue 1995),

> [t]he order [of revivor] may be made on the motion of the adverse party, or of the representatives or successor of the party who died, or whose powers ceased, suggesting his death or the cessation of his powers, which, with the names and capacities of his representatives or successor, shall be stated in the order.

Although Linch's counsel filed a showing claiming that good cause existed not to dismiss the action, stating that Linch had died and requesting additional time for the appointment of a personal representative, it was not presented as a motion for revivor. Additionally, the record does not contain an order made by consent of the parties, as described by Neb. Rev. Stat. § 25-1408 (Reissue 1995), or any order reviving the cause of action pursuant to Neb. Rev. Stat. § 25-1406 (Reissue 1995), which provides that revivor shall be by an order that the action shall be

revived in the names of the representatives or successors of the deceased party. Indeed, counsel's affidavit plainly shows that no successor personal representative had yet been appointed.

[9] With no revivor having occurred, the instant case could not proceed after the district court learned of Linch's death. See, *Vybiral v. Schildhauer*, 144 Neb. 114, 12 N.W.2d 660 (1944) (if plaintiff dies before judgment, there must be revival before action can proceed); *Vogt v. Daily*, 70 Neb. 812, 813, 98 N.W. 31, 32 (1904) ("[m]anifestly, if before judgment a party plaintiff die, the action can no longer proceed in his name, but must be revived in the name of his representative or successor"). The revivor statutes only authorized the district court to revive the action upon a proper motion or to strike the action from the docket if no revivor could occur. See §§ 25-1407 and 25-1415. Because the record does not show that Linch had died more than 1 year prior to the court's dismissal order, we cannot construe that order as an order striking the action from the docket pursuant to § 25-1415. Therefore, we conclude that the district court committed plain error in dismissing the petition for want of prosecution when Linch's death had suspended the action. Accordingly, we reverse, and remand for further proceedings. Although we probably would not have found an abuse of discretion in the district court's order dismissing the action for want of prosecution, given the apparent inadequacies of the affidavits of Linch's counsel, the showing of Linch's death shifted the applicable statutory framework from the statutes pertaining to diligent prosecution to those concerning abatement and revivor.

CONCLUSION

Because Linch's powers as personal representative ceased upon his death and the action became suspended or dormant until it could be revived in the name of Linch's successor personal representative or until stricken from the docket, we conclude that the district court committed plain error in dismissing the action for want of prosecution, and we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. LEON TAYLOR, APPELLANT.

716 N.W.2d 771

Filed July 3, 2006. No. A-05-721.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.
3. ____: ____. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
4. **Postconviction.** For postconviction relief to be granted under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the claimed infringement must be constitutional in dimension.
5. **Constitutional Law: Right to Counsel: Courts: Appeal and Error.** The constitutional right to counsel extends only to a criminal defendant's first appeal as a matter of right and does not extend to a petition for further review by the Nebraska Supreme Court from a decision of the Nebraska Court of Appeals.
6. **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 Dakota County: ROBERT V. BURKHARD, Judge. Affirmed.

John F. Loos, Jr., of Loos Law Office, for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Leon Taylor was convicted in the district court for Dakota County, Nebraska, of operating a motor vehicle to avoid arrest. Following an enhancement hearing, Taylor was sentenced as a habitual criminal. Taylor's conviction and sentence were affirmed on appeal to this court. See *State v. Taylor*, 12 Neb. App. 58, 666 N.W.2d 753 (2003). Taylor filed a motion for postconviction relief assigning numerous errors, which relief was denied by the

district court. Taylor now appeals, claiming the district court erred in not ordering an evidentiary hearing or granting postconviction relief based on alleged denial of counsel and ineffective assistance of counsel. We affirm.

BACKGROUND

Following a jury trial in the district court for Dakota County, Taylor was convicted on April 24, 2002, of operating a motor vehicle to avoid arrest. On July 17, Taylor was sentenced as a habitual criminal to a term of 10 to 15 years in prison, with credit for time served. Taylor filed an appeal on July 29, 2002, and Taylor's conviction and sentence were affirmed on direct appeal to this court in a decision dated July 29, 2003. See *id.*

On July 11, 2003, while Taylor's direct appeal to this court was still pending, Taylor was transported to Rock County, Wisconsin, for legal proceedings. Taylor remained in the Rock County jail until August 26. Taylor claims that while in Wisconsin, he tried to make telephone contact with his attorney, but that he was unable to do so. After receiving notice of this court's decision on July 29, Taylor's attorney attempted to contact Taylor by mailing a copy of the opinion to Taylor at the Nebraska correctional facility in Lincoln. After receiving no response, on August 13, Taylor's attorney mailed Taylor a second letter, which discussed the possibility of filing a petition for further review asking the Nebraska Supreme Court to review this court's decision. On August 25, Taylor's attorney received both letters back, marked "Return to Sender, Address Correction Requested," along with a personal note stating that " 'he is at Rock County Corrections, Wisconsin no forwarding address.' "

Taylor returned to Nebraska on August 27, 2003, and made contact with his attorney "during the P.M. hours." Taylor apparently indicated his desire to file a petition for further review, because his attorney completed the petition and placed it in the mail the next day, on August 28. The record indicates that the petition for further review was filed with the court on August 29.

The State filed a motion to dismiss the petition for further review as being filed out of time, and Taylor and his attorney filed a "resistance" to such motion to dismiss, explaining the circumstances of the situation. On September 17, 2003, the State's

motion to dismiss was sustained by the Nebraska Supreme Court, and Taylor subsequently received notice that his petition was filed out of time under Neb. Ct. R. of Prac. 2F(1) (rev. 2002). Taylor then filed on September 25 a motion for reconsideration, which was denied by the Nebraska Supreme Court on October 21.

Taylor then filed a "Verified Motion for Postconviction Relief" with the district court for Dakota County on April 13, 2005, alleging numerous errors, including allegations that Taylor received both a denial of counsel and ineffective assistance of counsel in the filing of his petition for further review. In an order filed May 26, 2005, the district court found that Taylor was not entitled to postconviction relief and denied Taylor's request for an evidentiary hearing. Taylor now appeals the denial of his motion for postconviction relief.

ASSIGNMENT OF ERROR

Taylor alleges that the district court erred in not ordering an evidentiary hearing or granting Taylor's motion for postconviction relief based on a denial of counsel and ineffective assistance of counsel.

STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006). On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous. *Id.*

ANALYSIS

Taylor asserts that he was denied the right to counsel during the 30 days within which Taylor could have filed a petition for further review. Specifically, Taylor claims that because he was in the custody of the State and was transferred out of Nebraska, during which time he was unable to contact his attorney, this was an effective denial of his right to counsel. Taylor also asserts that he received ineffective assistance of counsel when his attorney failed to timely perfect his petition for further review.

[3] We must first address the State's assertion that Taylor's claim is procedurally barred because it was not raised in the district court. The State argues that Taylor's motion for postconviction relief did not raise the issues of denial of counsel and ineffective assistance of counsel in connection with the failure to timely file the petition for further review. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). However, a review of Taylor's pro se motion for postconviction relief indicates that while Taylor may not have used the most sophisticated legal terminology and analysis, his third argument or "ground" for relief did address the Supreme Court's dismissal of his petition for further review for being filed out of time, and we find that these allegations effectively placed at issue the denial of counsel and ineffective assistance of counsel with respect to the failure to timely file the petition for further review. Moreover, it appears that the district court interpreted this ground as an ineffective assistance of counsel claim, since the court addressed it as such in its order.

[4] Before reaching the merits of Taylor's claim, we must next address whether Taylor had a constitutional right to further review by the Nebraska Supreme Court after his conviction and sentence were affirmed by this court on direct appeal. This issue is of obvious importance because if Taylor had no constitutional right to further review, it follows that he would therefore have had no right to counsel for that appeal and, accordingly, no basis for a claim of ineffective assistance of counsel. For postconviction relief to be granted under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the claimed infringement must be constitutional in dimension. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

Neb. Const. art. I, § 23, confers the right to appeal to this court or to the Nebraska Supreme Court, as provided by the Legislature. The text of article I, § 23, is as follows:

> In all capital cases, appeal directly to the Supreme Court shall be as a matter of right and shall operate as a supersedeas to stay the execution of the sentence of death until further order of the Supreme Court. In all other cases,

> criminal or civil, an aggrieved party shall be entitled to *one appeal* to the appellate court created pursuant to Article V, section 1, of this Constitution or to the Supreme Court as may be provided by law.

(Emphasis supplied.) The Legislature has implemented the right to appeal from the district court, see Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004), and most cases are docketed in the Court of Appeals, as was the case before us in Taylor's direct appeal, see Neb. Rev. Stat. § 24-1106 (Reissue 1995). Further, the Nebraska Supreme Court and Court of Appeals rules of practice and procedure provide, in pertinent part: "Further review by the Supreme Court is not a matter of right, but of judicial discretion." Rule 2G.

As applied to the present case, Taylor was entitled to one appeal as a matter of right, which Taylor exercised to this court in his first direct appeal of his conviction and sentence. Taylor was not entitled to further review by the Supreme Court as a matter of right, and therefore, Taylor was not entitled to the assistance of counsel, effective or ineffective, in filing the petition requesting further review.

The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to assistance of counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Similarly, Neb. Const. art. I, § 11, confers on criminal defendants the right to appear and defend in person or by counsel. In *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), the U.S. Supreme Court held that in first appeals as of right, states must appoint counsel to represent indigent defendants. However, the U.S. Supreme Court in *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), clarified that the right to counsel does not extend to discretionary appeals to a state's highest court. The Nebraska Supreme Court has held that the Nebraska Constitution's provision for assistance of counsel in a criminal case is no broader than its counterpart in the federal Constitution. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993).

While Nebraska appellate courts have not previously addressed the question of whether a criminal defendant is entitled to appointment of counsel in connection with further review by

the Nebraska Supreme Court following a decision in this court, we have, in *State v. Hughan*, 13 Neb. App. 862, 703 N.W.2d 263 (2005), addressed the issue in the context of a defendant's right to counsel in a second appeal as of right. In that case, Cary Lyn Hughan was convicted in county court for driving under the influence of alcohol and subsequently appealed to the district court, where the public defender appeared on her behalf. Following the district court's affirmance of Hughan's conviction and sentence, Hughan filed notice of intent to appeal to this court and filed a poverty affidavit and a request for counsel. Following the district court's declination to appoint further legal representation for Hughan, she filed with this court a motion for court-appointed counsel. Based upon the U.S. Supreme Court's pronouncement in *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), that the right to counsel as described in *Douglas v. California, supra*, is limited to the first appeal as of right, this court held that Hughan's appeal as a matter of right from county court to district court was her only appeal subject to the Sixth Amendment right to counsel. We concluded that even though Hughan had a right to a further appeal in this court pursuant to Neb. Const. art. I, § 23, she had no further right to appointed counsel.

[5,6] We hold in this case that the constitutional right to counsel extends only to a criminal defendant's first appeal as a matter of right and does not extend to a petition for further review by the Nebraska Supreme Court from a decision of the Nebraska Court of Appeals. Although our reasoning differs from that of the district court, we find that the court did not err in denying Taylor's motion for postconviction relief based upon the denial of counsel or the ineffective assistance of counsel. 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). The decision of the district court is affirmed.

CONCLUSION

Because we find that Taylor was not entitled to further review by the Supreme Court as a matter of right, Taylor therefore had

no right to counsel to perfect the petition for further review. The decision of the district court is affirmed.

AFFIRMED.

GABRIEL VALERIANO-CRUZ, JR., APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, AND THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEES.

716 N.W.2d 765

Filed July 3, 2006. No. A-05-808.

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 not arbitrary, capricious, or unreasonable.
3. **Implied Consent: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 60-6,197(1) (Reissue 2004) provides that any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.
4. **Administrative Law: Motor Vehicles: Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004) provides that if a person arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004) refuses to submit to the chemical test of blood, breath, or urine required by § 60-6,197, the arresting peace officer shall within 10 days forward to the director a sworn report stating (a) that the person was arrested as described in § 60-6,197(2) and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Words and Phrases.** A sworn report in an administrative license revocation proceeding is, by definition, an affidavit.
6. **Affidavits: Words and Phrases.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.
7. **Affidavits: Proof.** An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.

8. **Public Officers and Employees: Evidence.** A certificate of a notary public, bearing the notary's signature and official seal, shall be received in all courts of this state as presumptive evidence of the facts therein certified to.
9. **Public Officers and Employees.** A failure to literally comply with the provision requiring the notary to write under his or her official signature the date of the expiration of his or her commission does not render the authentication of the instrument void.

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, and Laura L. Neesen for appellees.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Gabriel Valeriano-Cruz, Jr., appeals the judgment of the district court for Scotts Bluff County affirming the revocation of Valeriano-Cruz' motor vehicle operator's license. We conclude that the failure of the notary public to endorse his commission's expiration date on the arresting officer's sworn report did not invalidate the report, and we affirm.

BACKGROUND

On September 9, 2004, the Department of Motor Vehicles (Department) received a report stating that Valeriano-Cruz had refused to submit to a chemical test after a traffic stop. On September 15, Valeriano-Cruz filed a petition for a hearing before the Department, and the hearing was conducted on October 20.

Lt. Raymond Huffman of the Scotts Bluff County sheriff's office testified that on September 5, 2004, he received a report of a disturbance involving the occupants of a certain vehicle. He encountered the vehicle, which was exceeding the speed limit, weaving, and bearing Wyoming license plates that were not on file with the State of Wyoming. Huffman stopped the vehicle and approached it to identify the driver. Valeriano-Cruz and another male were inside the vehicle, and Huffman smelled a

strong odor of alcohol coming from inside the vehicle. The men in the vehicle admitted that they had been at the location of the reported disturbance. Huffman administered field sobriety tests and arrested Valeriano-Cruz. Huffman transported Valeriano-Cruz to the county jail for a chemical test of his breath. According to Huffman, Valeriano-Cruz refused to sign the post-arrest chemical test advisement form and refused to submit to a chemical test.

Huffman testified that he completed and signed a sworn report in the presence of a notary public. Over Valeriano-Cruz' objections, the hearing officer received a copy of the report. It included Valeriano-Cruz' name and personal information, and it stated that Valeriano-Cruz was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) for the following reasons: "Citizen[s] complained of a drunk male leaving their home with a drunk friend. Gave vehicle description. I observed vehicle weaving in the lane and over the fog line. Odor of alcohol. Failed [f]ield [s]obriety." Huffman checked a box showing that Valeriano-Cruz had refused to submit to a chemical test upon request. The report contained the following language, with the underlined language being handwritten on blank lines: "Subscribed and sworn to before me this 5 day of Sept, 2004, at Gering, Scotts Bluff, NE. Notary Public's Signature: Stephen J. Wescher." The notary's seal is located below his signature. Valeriano-Cruz objected to the report, in part, because the notary did not include on his notarial seal the expiration date of his commission.

The hearing officer determined that Huffman had probable cause to believe that Valeriano-Cruz was operating or in actual physical control of a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004) and that Valeriano-Cruz had refused to submit to a chemical test after being requested to do so by a peace officer. The hearing officer recommended revocation of Valeriano-Cruz' operator's license.

On October 25, 2004, the director of the Department entered an order revoking Valeriano-Cruz' operator's license for 1 year, effective October 20. Valeriano-Cruz appealed to the district court, and after a hearing, the district court affirmed the director's revocation of Valeriano-Cruz' driving privileges. Valeriano-Cruz now appeals to this court.

ASSIGNMENT OF ERROR

Valeriano-Cruz alleges that the district court erred in not reversing the order of revocation, because the report was not properly completed.

STANDARD OF REVIEW

[1,2] 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. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). 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 not arbitrary, capricious, or unreasonable. *Hahn v. Neth, supra.*

ANALYSIS

[3] Valeriano-Cruz argues that Huffman's report was insufficient to confer authority on the director to revoke Valeriano-Cruz' operator's license, because it lacked the expiration date of the notary's commission. We recall that Nebraska statutes provide that motorists impliedly consent to chemical testing for impairment by alcohol, empower law enforcement officers under certain circumstances to require a motorist to submit to a chemical test, and impose consequences for a failure to submit to such a test. Section 60-6,197(1) provides:

> Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

An authorized peace officer may require a motorist arrested for operating a motor vehicle while under the influence of alcohol to submit to a chemical test, if the officer has reasonable grounds to believe that the motorist was driving the vehicle in violation of § 60-6,196. See § 60-6,197(2). Refusal to submit to chemical tests subjects the motorist to criminal prosecution and administrative license revocation (ALR) procedures. See § 60-6,197(3) and (4).

[4] Nebraska ALR procedures authorize the use of a law enforcement officer's sworn report to impose on the motorist a burden of proof in subsequent ALR proceedings. Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004) sets forth the ALR procedures as follows:

> 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 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 refused to submit to the required test.

Once the Department establishes that the officer provided a sworn report containing the recitations required by statute, it has made a prima facie case for license revocation, and the director is not required to prove that the recitations are true. See *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). "Rather, it becomes the motorist's burden to prove that one or more of the recitations in the sworn report are false." *Id.* at 167, 699 N.W.2d at 35.

Valeriano-Cruz relies on *Hahn v. Neth, supra*, in which the Nebraska Supreme Court recently focused on a report that was sworn, but was incomplete in that it failed to set forth some of the information required by the statute. In that case, the officer's sworn report was properly notarized, sworn, and timely submitted to the Department. However, the officer neglected to complete portions of the form, such as whether the failed chemical test was of the motorist's blood or breath. The district court vacated the Department's revocation of the motorist's operator's license because the sworn report did not meet the requirements of Neb. Rev. Stat. § 60-6,205 (Cum. Supp. 2002) (now found at § 60-498.01). The issue before the Nebraska Supreme Court on appeal was whether the sworn report, as submitted, was sufficient to confer authority on the director of the Department to revoke the motorist's operator's license. The Nebraska Supreme Court discussed cases from other jurisdictions with similar statutory schemes, which cases concluded that the statutory requirement that the report be " 'sworn' " was jurisdictional. *Hahn v.*

Neth, 270 Neb. at 170, 699 N.W.2d at 37. The *Hahn* court asked, "If a complete but unsworn report defeats jurisdiction in an [ALR] proceeding, is the same true of a sworn but incomplete report?" *Id.* at 170, 699 N.W.2d at 38. In affirming the district court's holding, the Nebraska Supreme Court concluded that the test to determine whether an omission on a sworn report is a jurisdictional defect rather than a technical one "should be whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute." *Id.* at 171, 699 N.W.2d at 38.

In the instant case, however, we are faced with a report that was complete in the sense that it contained the content required by the applicable statute, and instead, we must determine whether the report was "sworn." The report conveyed the information required by § 60-498.01—the report stated that Valeriano-Cruz had been arrested pursuant to § 60-6,197 and the reasons for the arrest, that he was asked to submit to the chemical test, and that he refused. Valeriano-Cruz argues that the report is defective, not because content required by § 60-498.01 was omitted, but, rather, because the notary failed to endorse the expiration date of his commission. We do not find the answer to this question in *Hahn v. Neth, supra*. While *Hahn* acknowledges that an unsworn report defeats administrative jurisdiction in some states, it does not discuss what constitutes a sworn report in Nebraska.

[5-7] To answer the question whether the report in the case before us constitutes a "sworn" report, we first recognize that a sworn report in an ALR proceeding is, by definition, an affidavit. See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *Id.* An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same. *Id.*

[8] Neb. Rev. Stat. § 64-107 (Reissue 2003) empowers a notary public to administer oaths and affirmations in all cases and contemplates proof of those acts as follows: "Over his [or her] signature and official seal, he [or she] shall certify the performance of such duties so exercised and performed under the provisions of

this section, which certificate shall be received in all courts of this state as presumptive evidence of the facts therein certified to." Section 64-107 requires only the notary's signature and official seal to authenticate the certification, and such certification constitutes presumptive evidence of the performance of the notary's official acts.

The general requirements for the content of a notarial seal and for a statement of the date of expiration of a notary's commission are set forth in a separate statute. Neb. Rev. Stat. § 64-210(1) (Cum. Supp. 2004) provides:

> Each notary public, before performing any duties of his or her office, shall provide himself or herself with an official seal on which shall appear the words State of Nebraska, General Notary or State of Nebraska, General Notarial, and his or her name, and in addition, at his or her option, the date of expiration of his or her commission. A notary public may use the initial letters of his or her first name and middle name. A notary public shall authenticate all his or her official acts with such seal. Under his or her official signature, on all certificates of authentication made by him or her, a notary public shall write, stamp, or otherwise show the date when his or her term of office as such notary public will expire if such date of expiration is not engraved on the seal.

Although § 64-210(1) states that the expiration date of the notary's commission shall appear on all certificates of authentication, the statute treats the date as a component apart from the notarial seal. Case law supports our determination that the presence of the notarial seal and the notary's signature serves as presumptive evidence of the performance of the notary's duty. In the instant case, the notary's signature and seal provide presumptive evidence that the notary administered the oath to Huffman and that therefore, the report was "sworn."

[9] In *Sheridan County v. McKinney*, 79 Neb. 223, 115 N.W. 548 (1908), the Nebraska Supreme Court examined the then newly codified provision regarding the expiration date of the notary's commission. In that case, the certificate of the notary public attached to a mortgage which the appellants sought to foreclose contained the notary's seal and signature, but not the expiration date of the notary's commission. The mortgage itself

named the notary. At that time, the applicable statute stated that "under his official signature on all certificates of authentication made by him, such notary public shall write the date at which his term of office, as such notary public will expire. Provided such date of expiration is not engraved on the seal." Comp. Stat., ch. 61, § 5 (1903). The Nebraska Supreme Court stated:

> It must be observed that the amendment requiring the notary to write under his official signature the date of the expiration of his commission applies to, and is contained in, the optional or permissive part of the statute, and therefore a failure to literally comply with it should not render the authentication of the instrument void. Indeed, we think it may be presumed that if the [L]egislature had so intended it would have been so expressed by the amendment. Where an acknowledgment is actually taken by an officer, having power to act, who certifies the fact in due form and authenticates his act in the manner provided by law, it would be unreasonable to hold, in the absence of a statute requiring it, that his failure to state that his commission had not expired renders the acknowledgment void. If the commission of a notary has in fact expired, and he has no power to take an acknowledgment, his statement that it is still in force cannot serve to change the existing fact or validate his action. On the other hand if he is still such officer, and has the power to perform the official act, his action is valid, without regard to his statement or declaration concerning that fact.

Sheridan County v. McKinney, 79 Neb. at 226-27, 115 N.W. at 549-50. The Nebraska Supreme Court concluded that the body of the certificate attested to the notary's official character and that the notary's certification was valid despite the absence of the expiration date of the notary's commission.

More recently, the Nebraska Supreme Court considered a somewhat different situation that provides support, albeit indirectly, for our conclusion. In *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995), the defendant filed a notice of his intention to appeal, a motion to proceed in forma pauperis, and a purported poverty affidavit. The poverty affidavit represented that it was signed before a named notary public, who was a public

defender, and set forth the signature of the purported notary public, but it did not bear a notarial seal. Because of the absence of a notarial seal, the Nebraska Supreme Court issued an order to show cause why the appeal should not be dismissed. The *Haase* court entered an additional order directing that an affidavit be filed attesting to whether the purported notary was " 'a duly qualified notary public in the State of Nebraska' " at the time of the signing. *Id.* at 819, 530 N.W.2d at 618. The Nebraska Supreme Court ultimately dismissed the appeal because at the time of the signing, the notary at issue was a notary public in the State of Iowa, but not in the State of Nebraska. By issuing an order to show cause in *State v. Haase, supra*, the Nebraska Supreme Court suggested that the absence of the notarial seal would not vitiate the document's status as an affidavit if it could be shown that the named individual was, in fact, a notary in the State of Nebraska.

In the instant case, the report provided a space for the notary to identify himself as such and to complete a jurat memorializing that the contents of the report were sworn. In addition, Huffman testified that he had signed the report before a notary. Applying the rationale of *Sheridan County v. McKinney*, 79 Neb. 223, 115 N.W. 548 (1908), and *State v. Haase, supra*, we conclude that the notary's signature and seal provided presumptive evidence that the report was "sworn" by Huffman before a notary, despite the absent expiration date.

We next determine that Valeriano-Cruz did not rebut the presumption flowing from the notary's certification. Valeriano-Cruz did not adduce any evidence to demonstrate that the notary was not a duly qualified notary public in the State of Nebraska or that his commission was not in full force and effect. See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003) (ALR motorist who alleged notary had conflict of interest failed to challenge presumption of § 64-107). We find no error on the record.

CONCLUSION

Despite the absence of a statement of the expiration date of the notary's commission, the notary's signature and seal constituted presumptive evidence that the report was "sworn," and Valeriano-Cruz did not rebut that presumption. The sworn report complied with the requirements of § 60-498.01, thereby

establishing a prima facie case for license revocation, and the district court correctly affirmed the Department's order revoking Valeriano-Cruz' operator's license. We affirm the judgment of the district court.

AFFIRMED.

FRANCES DARTMANN, APPELLEE, V.
STEVEN DARTMANN, APPELLANT.

717 N.W.2d 519

Filed July 3, 2006. No. A-05-1021.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Divorce: Child Support.** Child support payments become a vested right of the payee in a dissolution action as they accrue.
4. **Judgments.** The district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.

Appeal from the District Court for Pierce County: PATRICK G. ROGERS, Judge. Affirmed.

Bryan C. Meismer for appellant.

Lori McClain Lee, of Legal Aid of Nebraska, for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Steven Dartmann appeals from the order of the district court for Pierce County that denied his postdecree motion concerning child support, in which motion he argued that because the decree of dissolution did not specifically preserve the accrued temporary child support, those arrearages were effectively terminated. We affirm.

BACKGROUND

A decree of dissolution of the marriage of Steven and Frances Dartmann was entered on April 14, 2005. The relevant portions of the decree ordered the parties to comply with the terms of their settlement agreement, including a provision that required Steven to pay child support for their minor children in the amount of $190.58 per month, commencing May 1. The settlement agreement also stated, in part, that the stipulation "is made in good faith, and for the purpose of settling all matters pertaining to child custody [and] child support." No appeal was taken from the order, but on July 14, Steven filed a "Motion to Enforce Divorce Decree Correct Child Support Record." In such motion, Steven alleged that although the decree contained no provision preserving the temporary orders which had been entered by the court, the clerk of the district court was reporting Steven's accumulated temporary child support arrearage as a continuing obligation, and that the Child Support Enforcement Office was attempting to collect the unpaid temporary child support. Steven asked the court to issue an order "compelling the Clerk of the Pierce County District Court to correct the record of the Child Support Enforcement Office so that it is consistent with the language of the Final Order" and to order the Child Support Enforcement Office, the clerk of the district court, and Frances to cease and desist from attempting to collect temporary child support. At the hearing on Steven's motion, he introduced into evidence his affidavit that stated he had entered into the settlement agreement because of his understanding that he would not be obligated to pay the accrued temporary child support.

The district court denied Steven's motion, finding that Steven is obligated to pay the temporary child support arrearage that accumulated during the pendency of the action. Steven appeals.

ASSIGNMENT OF ERROR

Steven asserts that the district court erred in obligating him to perform an act that was not part of the final decree of dissolution.

STANDARD OF REVIEW

[1] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial

court will be affirmed in the absence of an abuse of discretion. *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999).

[2] To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001).

ANALYSIS

Steven argues that the meaning of the decree is to be determined as a matter of law from the four corners of the decree, citing *Boyle v. Boyle*, 12 Neb. App. 681, 684 N.W.2d 49 (2004). Steven asserts that because there is no language in the decree or settlement agreement regarding the temporary child support order, the temporary support is not preserved. We disagree.

[3,4] Neb. Rev. Stat. § 42-369(4) (Reissue 2004) provides, in part, that "[o]rders, decrees, and judgments for temporary or permanent support or alimony . . . have the force and effect of judgments when entered." Child support payments become a vested right of the payee in a dissolution action as they accrue. *Gress, supra*. See *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991). A court may not forgive or modify past-due child support. *Berg, supra*. However, the district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction. *Id.* In *Speicher v. Speicher*, 6 Neb. App. 439, 572 N.W.2d 804 (1998), this court applied these principles in a case involving accrued temporary child support and found that the trial court acted properly in offsetting temporary child support arrearages with the husband's interest in the family home. We concluded that the trial court did not forgive or abate the child support arrearage. The case law is clear that the district court's ability to discharge an arrearage of child support hinges on satisfactory proof that a judgment has been fully paid or satisfied by the act of both parties.

In the present case, there is no evidence to show that Steven's accrued temporary child support was ever "paid or satisfied" by any act of the parties. We find that the statute and case law cited above applies in a situation where the decree is silent with respect

to accrued, unpaid temporary child support. Steven's argument is without merit.

CONCLUSION

We affirm the district court's denial of Steven's motion to enforce the divorce decree and the court's finding that Steven is obligated to pay the temporary child support arrearage.

AFFIRMED.

IN RE INTEREST OF EDEN K. AND ALLISON L., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KELLI G., APPELLANT.

717 N.W.2d 507

Filed July 3, 2006. No. A-05-1567.

1. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence.
2. **Evidence: Words and Phrases.** Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved and, further, that it is more than a preponderance of evidence, but less than proof beyond a reasonable doubt.
3. **Parental Rights: Evidence: Appeal and Error.** If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in Neb. Rev. Stat. § 43-292 (Reissue 2004), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
4. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
5. **Parental Rights.** A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
6. **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.
7. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

8. **Parent and Child.** The law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.
9. **Juvenile Courts: Parental Rights.** Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.
10. **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 Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded for further proceedings.

Paula J. Fritz for appellant.

Stuart J. Dornan, Douglas County Attorney, Chad M. Brown, and April Franklin, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Kelli G. appeals from the order of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights to Eden K. and Allison L. and overruling her motion for continued visitation. For the reasons set forth herein, we reverse the judgment of the juvenile court and remand for further proceedings consistent with this opinion.

II. STATEMENT OF FACTS

On April 22, 2004, the State filed a petition alleging that Eden and Allison came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), in that they lacked proper parental care by reason of the faults or habits of Kelli. Specifically, the State alleged that Kelli's "use of alcohol and/or controlled substances" placed the children at risk for harm; that Kelli had engaged in domestic violence with her boyfriend in Eden and Allison's presence; that Kelli had failed to provide safe, stable, and independent housing for the children; and that Kelli was incarcerated. On July 6, the juvenile court found that Eden and Allison were children within the meaning of § 43-247(3)(a).

On August 9, 2005, the State filed a motion for termination of Kelli's parental rights with regard to Eden and Allison. The State contended that Kelli "was ordered to comply with various plans of rehabilitation by the Separate Juvenile Court of Douglas County, Nebraska, to-wit: August 9, 2004; December 6, 2004 and April 22, 2005." The State alleged that Eden and Allison came within the meaning of Neb. Rev. Stat. § 43-292(2) (Reissue 2004) because Kelli had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection; § 43-292(4) because Kelli was unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct was seriously detrimental to the health, morals, or well-being of the children; and § 43-292(7) in that Eden and Allison had been in an out-of-home placement for 15 or more months of the most recent 22 months. The State further alleged that terminating Kelli's parental rights was in the best interests of Eden and Allison.

On October 6, 2005, Kelli filed a motion to continue visitation. In her motion, Kelli asked to continue to participate in supervised visits with Eden and Allison even if her parental rights were terminated. She alleged that "a disruption or suspension of visitation would be detrimental to the parent-child bond that currently exists between" herself and Eden and Allison and that allowing her to continue visitation would be in the girls' best interests.

Proceedings were had on the State's motion to terminate Kelli's parental rights beginning on October 11, 2005. The State first called Roxanne Jackson to testify on its behalf. Jackson testified that she worked for the Nebraska Department of Health and Human Services (DHHS) and that she became the ongoing case manager for Eden and Allison in May 2004. Jackson testified that at the time she became involved in the case, Kelli was incarcerated for check forgery and drug charges. Jackson said that she met with Kelli shortly after taking on the case and that they "agreed that [Kelli] needed chemical dependency treatment, she would need to address domestic violence issues, and [she would] work on some of the issues that she had from her childhood." Jackson said that she authored a court report on August 6

and that Kelli was no longer incarcerated at that time. Jackson said that Kelli had not made any progress toward reunification with Eden and Allison between May and August; that "Kelli was very, very focussed on her relationship with [Allison's biological father]"; and that it was "very difficult for [Kelli] to focus on anything else at that particular time." Specifically, Jackson said that Kelli "did not comply with following through with getting urinalysis testing done."

Jackson testified that she authored another court report on December 2, 2004. Jackson said that Kelli had completed a chemical dependency evaluation and a psychological parenting assessment at that time, but that "[t]here were some issues with getting Kelli into a treatment facility" due to "an extensive waiting list with most of the providers in Omaha." Jackson testified that Kelli had another child, Madison L., with Allison's biological father and that "Madison was placed into protective custody shortly after her birth due to testing positive for methamphetamine at birth . . . in August of 2004." She also said that she still had concerns about Kelli's drug use, in that it may have continued since August 2004.

Jackson prepared another court report on February 11, 2005. Jackson testified that in February, Kelli was incarcerated at the women's correctional center in York, Nebraska, due to "violating the conditions of her probation in District Court." Between February and June, Jackson said, she was not able to offer services to Kelli due to her incarceration. Jackson testified that during her work on the case, Kelli never provided her with proof that she had a legal source of income or a home for herself or the children. Jackson said that she was concerned about Kelli's use of methamphetamine because the drug "impairs a parent's ability to [provide] proper parenting." Jackson testified that "Allison also was exposed to drugs during Kelli's pregnancy, so you see a pattern develop and that is concerning." Jackson said that from May 2004 until the time of trial, neither Eden nor Allison had been returned to Kelli's care.

Jackson testified that "[b]ased solely on [Kelli's] circumstances of being incarcerated for the length of time she's going to be incarcerated, [Kelli is] not in a better position to parent . . . Eden and Allison" than she was in May 2004. Jackson testified

that she was also taking into account "the fact that Allison had drugs in her system, as well as Madison in 2004." She said that she "believe[d] it's a pattern of behaviors, and Kelli has struggled and not been able to maintain abstinence from drugs." She testified that in her opinion, it was in Eden's and Allison's best interests to terminate Kelli's parental rights based on "[t]he length of time that the children have already been in care, [Kelli's] history, and the amount of time she's going to be incarcerated." Jackson testified that Kelli would be eligible for parole "some time late in 2007." Jackson testified that the children needed permanency and that Kelli could not provide them with permanency due to "[h]er current circumstances [of] being incarcerated." Jackson said that she was no longer Eden and Allison's caseworker, having ended her connection with the case in June 2005.

On cross-examination by the guardian ad litem for Eden and Allison, Jackson said that at the time of a December 2004 review hearing, Kelli had not submitted to random urine tests as ordered and had not entered treatment as required by her evaluation. On cross-examination by Kelli's attorney, Jackson testified that prior to August 6, Kelli had not been ordered to enter chemical dependency treatment, complete a domestic violence class, or do any individual therapy. Jackson conceded that Kelli completed a chemical dependency evaluation on June 30 and that Kelli submitted to urinalysis testing on July 12 and 20. She also conceded that prior to becoming incarcerated in York, Kelli "was in an inpatient treatment facility." Jackson also admitted that she had not arranged for Kelli to enter chemical dependency treatment. Jackson also testified that while Kelli was in York, Kelli had participated in chemical dependency treatment. Jackson further conceded that at the disposition hearing of December 3, the court ordered supervised visitation for Kelli, but that visitation was not arranged and that Jackson did not arrange visitation between Kelli and the children when Kelli went to York.

Jackson testified that she could not recall whether she had requested that Kelli submit to urinalysis testing after December 2, 2004, or how many times she had met with Eden or Allison. Jackson said that she had never attended a visit between the girls

and Kelli. Jackson testified that Kelli was eligible for parole on April 13, 2007. Jackson said that she did not have any current information regarding Kelli's chemical dependency and that she was unaware whether Kelli had completed chemical dependency treatment in York. She did say that visitation had been arranged after Kelli had been incarcerated and that Kelli had not received any services regarding reunification after her incarceration.

On redirect examination, Jackson said that there were concerns regarding Kelli's July 20, 2004, urinalysis, as the laboratory "would not test [Kelli's sample] because it was out of the normal temperature range, which [the laboratory] say[s] indicates tampering." She also testified that she was unaware of Kelli's whereabouts during a period in November and December 2004. She said that Kelli has convictions for possession of marijuana, possession of drug paraphernalia, and possession of a controlled substance. Jackson said that Kelli had been ordered by the court on August 9 to enter a chemical dependency treatment facility, but that she did not enter until December.

The State also called Susan Larson to testify on its behalf. Larson testified that she was a protection and safety worker for DHHS, that Eden and Allison's case was transferred to her on June 2, 2005, and that she had been assigned to the case since that date. Larson testified that Kelli had not provided her with proof that she had either a legal source of income or a safe, stable home for Eden and Allison "because she's been incarcerated." Larson said that if Kelli "continued to use [drugs,] then she would not be able to properly parent." Larson further testified that in her opinion, it would be in Eden's and Allison's best interests to terminate Kelli's parental rights based "[o]n the fact that the children have been in out-of-home care for over 15 months and they need a sense of permanency in their lives." She explained, "They need to have stable homes and a place where they don't have to feel like they are being tossed around." When asked what services she had provided to Kelli, Larson testified, "Currently, she's receiving supervised visitation. The maximum she's allowed to have is one time per month due to the programs that she's in. She is involved in programs at York to deal with her drug usage." Larson said that Kelli's being incarcerated "hinder[s] some of the serviceability of [DHHS] to offer."

On cross-examination by Kelli's attorney, Larson acknowledged that the current court orders for Kelli were to "take advantage of the rehabilitative services for her drug addiction, and for parenting skills as available with her incarceration; [and] that she have reasonable rights of supervised visitation." Larson conceded that Kelli was in compliance with all of the current court orders and that it would not be possible for Kelli to have an independent source of income or a residence due to her incarceration. Larson also conceded that Kelli was in a substance abuse unit in York and that she "attends classes daily, at least several times a week." Larson explained, "It's a very strict program [wherein] she has to comply with the attendance or she risks being kicked out of the program, and . . . they also do [urinalysis tests] randomly." Larson testified that Kelli was in good standing in that program and that her participation in the program was voluntary. Larson said that she had never observed any visits between Kelli, Eden, and Allison, but that she had "had positive reports from visitation" and that there "haven't been any concerns brought to [her] attention."

The trial was continued on November 28, 2005. Larson testified that Eden and Allison's foster parents as of that date were Kelli's brother and his wife. Kelli's visitation with Eden and Allison was described by Larson as "very good for them, a positive experience." Larson also testified that Kelli, Eden, and Allison had telephone contact; that Kelli had sent letters to Eden and Allison; and that the letters were appropriate. Larson also testified that Kelli had sent gifts to the girls. When asked whether Kelli "has made . . . every effort to stay in contact with her girls, even though she is incarcerated," Larson replied that she had. Larson said that Eden and Allison "look forward to seeing [Kelli] when [visits] are scheduled." Larson testified that Kelli was doing all that she could regarding reunification with Eden and Allison, given her incarceration, and that Kelli was in compliance with all court orders regarding reunification. Larson said that Kelli was actively taking steps toward reunification and that Kelli had not shown "any indication that she is unwilling to do what needs to be done to be reunified with Eden and Allison."

Larson also testified with regard to Kelli's motion for continued visitation in the event her parental rights were terminated.

Larson testified that "everyone basically agreed that since the children would be with family, contact would still be there in some form, regardless of termination or not." Larson further testified:

> I think that they should have visitation, you know, if that's going to be a continued family placement and [Kelli is] going to have contact, but I think it should be with the therapist's recommendations. I mean, if the termination does go through or not, we need to incorporate whatever's in [the children's] best interest for seeing their mom.

At the conclusion of Larson's testimony, the State offered an exhibit and then rested. Kelli made a motion to dismiss, which was overruled; Kelli then rested. After arguments were had, the court took the matter under advisement.

On November 30, 2005, the juvenile court filed its order terminating Kelli's parental rights to Eden and Allison. In its order, the court found, "[T]he State's witnesses were credible and their testimony was probative and reliable, and the exhibits received into evidence were also credible, probative and reliable." The court further found:

> Eden and Allison have been in foster care since approximately April 22, 2004 and have never been returned to their mother due to lack of compliance with the rehabilitative case plan, her failure to correct the issues [that] placed the children into the jurisdiction of the Court and into protective custody, as well as [Kelli's] failure to make meaningful therapeutic progress, and due to [Kelli's] second incarceration, which resulted from her actions, [that] prevents her from providing proper parental care for her children and because she will not be eligible for possible parole until some time in 2007. The children have languished in foster care and deserve permanency. In addition, Madison[, Eden and Allison's younger sister,] tested positive for methamphetamine at birth.

The court held that the State had proved by clear and convincing evidence that Eden and Allison were within the meaning of § 43-292(2), (4), and (7) and held that terminating Kelli's parental rights was in Eden's and Allison's best interests.

The court also overruled Kelli's motion to continue visitation. The court noted that it was denying the motion

> based on the testimony of . . . Larson, where she stated that [DHHS] would need an opinion from a therapist regarding the best interests of the children as to further contact with the mother, and it would be dependent upon the foster/adoptive placement of the children, all of which shows the Court that there is no evidence of a meaningful and significant relationship between [Kelli] and [Eden and Allison], nor that it is in the best interests of the children to have such visitation.

Kelli has timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Kelli alleges, restated, that the juvenile court erred when it terminated her parental rights, when it refused to allow testimony regarding alternatives to terminating Kelli's parental rights, and when it denied her motion to continue visitation.

IV. STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence. *In re Interest of Kindra S., ante* p. 202, 705 N.W.2d 792 (2005).

[2] Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved and, further, that it is more than a preponderance of evidence, but less than proof beyond a reasonable doubt. *Id.*

V. ANALYSIS

1. Termination of Parental Rights

(a) Statutory Basis

Kelli first alleges that the juvenile court erred when it found that the State had proved, by clear and convincing evidence, that her parental rights should be terminated. In the instant case, the State sought to terminate Kelli's parental rights under § 43-292(2), (4), and (7). Section 43-292 provides the following, in relevant part:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;
>
> . . . .
>
> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months.

The juvenile court held that the State had proved that Eden and Allison were within the meaning of each of the aforementioned statutory grounds and held that terminating Kelli's parental rights was in Eden's and Allison's best interests.

[3] If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). It is clear from the record that Eden and Allison were placed in the temporary custody of DHHS pursuant to a juvenile court order on April 22, 2004, and that they had been in an out-of-home placement between that date and the August 9, 2005, filing of the motion to terminate Kelli's parental rights. As of the filing of the motion to terminate Kelli's parental rights, Eden and Allison had been in an out-of-home placement for nearly 16 consecutive months. The State proved this by clear and convincing evidence, and therefore, we need not further address the sufficiency of the evidence to support termination under either

§ 43-292(2) or (4), although we note that the evidence offered by the State to prove these statutory grounds will be relevant in considering whether or not terminating Kelli's parental rights is in Eden's and Allison's best interests.

(b) Best Interests

Kelli also alleges that the juvenile court erred when it found that the State had proved, by clear and convincing evidence, that terminating her parental rights would be in Eden's and Allison's best interests.

[4-6] It is well established that a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *Id.* 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. *Id.*

Kelli contends that the facts in the instant case strongly resemble those seen in *In re Interest of Aaron D., supra.* In *In re Interest of Aaron D.*, the State sought to terminate a mother's parental rights solely on the basis of § 43-292(7), which was not the case here. However, an examination of the case is instructive. The Nebraska Supreme Court noted the following, with respect to the "best interests" analysis:

> We acknowledge that the record does not reflect that [the mother] has accomplished all of the goals set forth in her case plan. However, the record indicates she has progressed, and, as will be explained below, her "opportunities for compliance [with the case plan] may have been limited.". . . Most significant, however, is the failure of the State to produce the clear and convincing evidence required to show that termination would be in [the child's] best interests.
>
> As previously stated, the sole witness to testify for the State at trial was [the DHHS caseworker]. Obviously, [DHHS'] caseworker for a particular family is likely to be an important witness for all the parties. But here, the State

> used [the caseworker] as a proxy for all of the other witnesses whose expertise and testimony would have been helpful, and perhaps essential, in determining what was in [the child's] best interests. [The caseworker's] testimony was based to some extent on her own observations, but in large measure on [the caseworker's] review of the records and reports generated by the family support workers, therapists, foster parents, and others who directly observed the parties.
>
> In short, much of [the caseworker's] testimony—and thus, much of the State's case—was based on hearsay. While the Nebraska Evidence Rules do not apply in juvenile proceedings, the basic requirements of due process oblige a court to consider the type of evidence used by the State in order to determine the weight to be given to that evidence. . . . It is very difficult, with the record presented in this case, to give substantial weight to some of the key allegations made by [the caseworker].

(Citations omitted.) *In re Interest of Aaron D.*, 269 Neb. at 261-62, 691 N.W.2d at 173-74.

The Nebraska Supreme Court further determined that the State had not proved, by clear and convincing evidence, that terminating the mother's parental rights was in the child's best interests:

> Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition. . . . Yet, the juvenile court in this case, and this court for its de novo review, was not provided with such evidence. [The child's] therapists did not testify. [DHHS'] family support workers, who actually observed [the child] and [the mother], did not testify, nor did [the child's] foster parents, nor [the child's] teachers. The State seems to have forgotten that the focus of this proceeding is not [the mother], but [the child], and the State thus did not present evidence directly adduced from many of the people most able to testify as to [the child's]

> condition, circumstances, and best interests, both before and after the filing of the termination petition. The standard for proving that termination of parental rights is in a juvenile's best interests is clear and convincing evidence, and the evidence in this record is, simply stated, neither clear nor convincing.
>
> . . . .
>
> We have stated that termination of parental rights is permissible " '[i]n the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . .' " . . . After our de novo review of the record, we do not find clear and convincing evidence that termination was in [the child's] best interests. "[T]he law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.". . . Those things are present here.

(Citations omitted.) *In re Interest of Aaron D.*, 269 Neb. 249, 263-65, 691 N.W.2d 164, 175-76 (2005).

Kelli also suggests that the case at bar is factually similar to that seen in *In re Interest of Skye W. & McKenzie W., ante* p. 74, 704 N.W.2d 1 (2005). Again, in *In re Interest of Skye W. & McKenzie W.*, the State sought to terminate the mother's parental rights to her children solely on the basis of § 43-292(7). This court concluded that terminating the mother's parental rights was not in the children's best interests:

> In the present case, the sole witness called by the State to prove the need for termination of parental rights was the assigned caseworker. The sum total of the State's evidence for terminating [the mother's] rights to parent these children consisted of approximately 43 pages of testimony and one exhibit. The caseworker, as a proxy for expert medical testimony, attempted to present testimony about [the mother's] mental health issues and opined that [the mother] needed individual therapy, proof that she was taking medications, and regular psychiatric checkups to deal with a diagnosis of suffering from bipolar disorder. The caseworker, however, acknowledged that she did not recall what

> medications [the mother] was supposed to be taking and did not know if [the mother] still needed to be on medication.
>
> In addition, the caseworker's testimony was based in large measure on information reported to her, rather than on her own personal observations. For example, the caseworker opined that the children would not be safe in [the mother's] care, based on [the mother's] diagnosis of bipolar disorder and on a review of visitation reports. The caseworker acknowledged, however, that there had never been any concerns about the children's safety during any visitation but that [the mother] had not made progress toward unsupervised visitation. The caseworker never made it clear why a lack of progress toward unsupervised visitation amounted to a concern for the safety of the children such that the children's best interests would be served by terminating [the mother's] parental rights.
>
> . . . .
>
> The State presented no evidence from a medical expert or therapist in this case—either for the children or for [the mother]—concerning [the mother's] diagnosis, medicinal needs, or ability to successfully parent the children. The State presented no evidence from any foster parent or education provider. The State essentially presented no evidence whatsoever concerning the children at issue in this case—their needs or their best interests.

In re Interest of Skye W. & McKenzie W., ante at 79-80, 704 N.W.2d at 5-6.

At trial, the only witnesses to testify were Jackson and Larson, two caseworkers who had been assigned to work with Eden, Allison, and Kelli. Jackson opined that terminating Kelli's parental rights would be in the children's best interests. Jackson testified that in her opinion, it was in Eden's and Allison's best interests to terminate Kelli's parental rights based on "[t]he length of time that the children have already been in care, [Kelli's] history, and the amount of time she's going to be incarcerated." Jackson testified that the children needed permanency and that Kelli could not provide them with permanency due to "[h]er current circumstances [of] being incarcerated." Larson said that she believed terminating Kelli's parental rights would serve the best

interests of Eden and Allison based "[o]n the fact that the children have been in out-of-home care for over 15 months and they need a sense of permanency in their lives." She explained, "They need to have stable homes and a place where they don't have to feel like they are being tossed around."

[7] Both Jackson and Larson focused on the fact that Eden and Allison deserve permanency in their lives. It is well established that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. See *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006). However, in the instant case, there is no evidence that adoption is a possibility for Eden and Allison. Instead, as of November 14, 2005, the children were placed in the care of Kelli's brother and his wife. There is nothing in the record to suggest that terminating Kelli's parental rights would provide the children with any more permanency than they would have otherwise.

At trial, Jackson testified that she could not recall how many times she had met with Eden or Allison, and she said that she had never attended a visit between the girls and Kelli. Larson testified that Kelli was in compliance with all of the current court orders and that Kelli was in a substance abuse unit in York. Larson testified that Kelli "attends classes daily, at least several times a week." She explained, "It's a very strict program [wherein] she has to comply with the attendance or she risks being kicked out of the program, and . . . they also do [urinalysis tests] randomly." Larson testified that Kelli was in good standing in that program and that her participation in the program was voluntary. Larson said that she had never observed any visits between Kelli, Eden, and Allison, but that she had "had positive reports from visitation" and that there "haven't been any concerns brought to [her] attention."

Kelli's visitation with Eden and Allison was described by Larson as "very good for them, a positive experience." Larson also testified that Kelli, Eden, and Allison had telephone contact; that Kelli had sent letters to Eden and Allison; and that the letters were appropriate. Larson also testified that Kelli had sent gifts to the girls. When asked whether Kelli "has made . . . every effort to stay in contact with her girls, even though she is incarcerated," Larson replied that she had. Larson said that Eden and

Allison "look forward to seeing [Kelli] when [visits] are scheduled." Larson testified that Kelli was doing all that she could regarding reunification with Eden and Allison, given her incarceration, and that Kelli was in compliance with all court orders regarding reunification. Larson said that Kelli was actively taking steps toward reunification and that Kelli had not shown "any indication that she is unwilling to do what needs to be done to be reunified with Eden and Allison."

[8-9] This is not to suggest that Kelli is a perfect, or even a good, parent. It is indisputable that she has made terrible decisions in the past, resulting in her current incarceration. She also gave birth to a daughter, Madison, who had methamphetamine in her system at the time. However, it is equally indisputable that Kelli has made some positive strides in her life. She has been participating in drug rehabilitation treatment, and she has also continued to have positive visits with Eden and Allison. Larson testified that Kelli was actively taking steps toward reunification and that she was complying with all requests and orders made of her. The law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *In re Interest of Skye W. & McKenzie W., ante* p. 74, 704 N.W.2d 1 (2005). Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code. *Id.*

We find that the State failed to prove, by clear and convincing evidence, that terminating Kelli's parental rights would be in Eden's and Allison's best interests. In *In re Interest of Skye W. & McKenzie W.*, this court found, "The State almost completely failed to provide the juvenile court, and by extension this court, with testimony from many of the people whose opinions and observations would have been most pertinent to the principal issue—the children's best interests." *Ante* at 82, 704 N.W.2d at 7. Similarly, in the instant case, the State presented no testimony from Eden and Allison's therapists or foster parents; in fact, the State essentially presented no evidence whatsoever concerning the needs or interests of either Eden or Allison. Our de novo review of the record suggests that Kelli has made improvements

in her parenting skills, and it appears that her relationship with Eden and Allison is beneficial. While it is true that she will be incarcerated until at least April 2007, there is no evidence in the record that the children are candidates for adoption or that terminating Kelli's parental rights would provide Eden and Allison with any additional permanency. Accordingly, we conclude that the juvenile court erred in finding that the State established, by clear and convincing evidence, that termination of Kelli's parental rights is in the children's best interests. The judgment of the juvenile court is reversed.

2. Additional Assignments of Error

[10] Kelli also alleged that the juvenile court erred when it refused to allow evidence regarding alternatives to terminating her parental rights and when it overruled her motion for continued visitation should her parental rights be terminated. However, having determined that the juvenile court erred when it terminated Kelli's parental rights, we need not address Kelli's additional assignments of error. See *In re Interest of Christopher R.*, 13 Neb. App. 748, 700 N.W.2d 668 (2005) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

VI. CONCLUSION

We find that the juvenile court erred when it found that the State had proved, by clear and convincing evidence, that terminating Kelli's parental rights would be in Eden's and Allison's best interests. Accordingly, we reverse the judgment of the juvenile court, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

STATE BANK OF TRENTON, A NEBRASKA BANKING CORPORATION, APPELLANT, V. MARLIN AND GLORIA LUTZ, APPELLEES.

719 N.W.2d 731

Filed July 11, 2006. No. A-05-846.

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 the 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. **Trusts: Deeds.** A trust deed is a security device created by statute.
4. **Trusts: Deeds: Statutes.** Because trust deeds did not exist at common law, the trust deed statutes are to be strictly construed.
5. **Trusts: Deeds: Breach of Contract: Sales: Foreclosure.** The only two statutory remedies for breach of a trust deed are set forth in Neb. Rev. Stat. § 76-1005 (Reissue 2003), which states that a power of sale may be conferred upon the trustee which the trustee may exercise and under which the trust property may be sold in the manner provided in the Nebraska Trust Deeds Act after a breach of an obligation for which the trust property is conveyed as security, or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale shall be expressly provided for in the trust deed.
6. **Trusts: Deeds: Sales.** According to Neb. Rev. Stat. § 76-1006 (Cum. Supp. 2004), the power of sale of trust property shall not be exercised until the trustee files for record in the office of the register of deeds in the county where the trust property is located a notice of default identifying the trust deed.
7. ____: ____: ____. If there is a deficiency after a sale of property under a trust deed, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security.
8. **Trusts: Deeds: Foreclosure.** When the beneficiary of a trust deed elects to judicially foreclose, the law governing foreclosure of mortgages applies; under some circumstances, a cause of action for monetary damages may lie in favor of a mortgagee.
9. **Actions: Fraud: Proof.** To recover on a fraudulent misrepresentation claim, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result.
10. **Deeds: Records: Time: Notice.** According to Neb. Rev. Stat. § 76-238(1) (Cum. Supp. 2004), all deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice.

Appeal from the District Court for Dundy County: JOHN J. BATTERSHELL, Judge. Affirmed.

Robert B. Reynolds and Robert S. Harvoy, of McGinley, O'Donnell, Reynolds & Edwards, P.C., L.L.O., for appellant.

James D. Owens for appellees.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

State Bank of Trenton (State Bank) appeals the decision of the district court for Dundy County granting the motion of Marlin and Gloria Lutz for summary judgment and dismissing the action.

FACTUAL BACKGROUND

On May 1, 1993, Marlin and Gloria signed to a bank in Benkelman a "Security Assignment" which included the following piece of real estate: southwest quarter of Section 33, Township 3 North, Range 39 West of the 6th P.M., Dundy County, Nebraska. The security assignment was recorded on June 18, 1993, in book 53, of mortgages, page 3, in the office of the Dundy County register of deeds.

Approximately 6 years later, on March 15, 1999, Marlin and Gloria signed and delivered a "Deed of Trust" to State Bank for the southwest quarter of Section 33, Township 3 North, Range 39 West of the 6th P.M. in Dundy County. The deed of trust states, "This Deed of Trust secures the debt of Richard M. and Lona J. Lutz," and "The lien of this Deed of Trust shall not exceed at any one time $200,000.00." The deed of trust was filed on March 17 in the office of the Dundy County register of deeds and recorded in book 58, of mortgages, page 399. The deposition testimony of Charles Sandman, who was State Bank's senior "ag loan officer" when the deed of trust was executed, testified that Marlin and Gloria had no indebtedness to State Bank on March 15, the day they signed the trust deed, and that the deed of trust was to provide additional collateral for the debt of Marlin and Gloria's son, Richard Lutz, who was indebted to State Bank.

On June 1, 2001, Marlin and Gloria sold the property listed in the deed of trust to Richard and Lona Lutz—Marlin and Gloria's son and daughter-in-law—for $1 and other good and valuable consideration. The warranty deed to Richard and Lona was recorded in book 52, of deeds, page 544.

PROCEDURAL BACKGROUND

On February 24, 2003, State Bank filed a complaint against Marlin and Gloria, alleging two causes of action: (1) breach of the deed of trust agreement and (2) fraudulent misrepresentation. The only fact of consequence applicable to both causes of action is that Marlin and Gloria executed a deed of trust "granting [State Bank] security interest in the Southwest corner [sic] of Section 33." We observe that there is no allegation that Marlin and Gloria are indebted to State Bank, for example, on an underlying promissory note. State Bank alleged that Marlin and Gloria

> breached the Deed of Trust Agreement in one or more of the following but not limited to:
>
> A. In transferring the land to Richard & Lona Lutz;
>
> B. In transferring or giving a Deed of Trust to the . . . Bank [in] Benkleman [sic];
>
> C. Failing [to] remain in possession of the above land;
>
> D. By misrepresenting whether or not there [were] any prior or existing liens on the property to [State Bank.]

State Bank also alleged in its second cause of action that Marlin and Gloria "fraudulently misrepresented whether or not the . . . land was free and clear of encumbrances and liens" and that State Bank "relied on the above representations and on the Deed of Trust agreement itself, thereby extending money to [Marlin and Gloria's] son and daughter-in-law." State Bank alleged that it was damaged in the amount of $200,000. Marlin and Gloria filed their answer disputing such claims on May 20, 2003.

On December 18, 2003, State Bank filed a motion for summary judgment, claiming that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. In support of its motion, State Bank stated it was relying on the pleadings filed in the case, the warranty deed from Marlin and Gloria to Richard and Lona, the deed of trust signed by Marlin and Gloria to State Bank on March 15, 1999, and the affidavit of Kent Franzen, the vice president of State Bank. A hearing

on State Bank's motion was apparently held on May 17, 2005, although documentation of such hearing does not appear in our record. The district court's May 25, 2005, journal entry overruled State Bank's motion for summary judgment.

On May 26, 2005, Marlin and Gloria filed a motion for summary judgment claiming that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. In support of their motion, Marlin and Gloria stated they were relying on the pleadings filed in the case; the warranty deed from Marlin and Gloria to Richard and Lona dated June 1, 2001; the deed of trust executed by Marlin and Gloria to a bank in Benkelman on May 1, 1993; the affidavits of Marlin, Gloria, and Richard; and the deposition of Sandman dated May 10, 2005.

A hearing on Marlin and Gloria's motion was held on June 14, 2005. At the hearing on the motion for summary judgment, Marlin and Gloria offered into evidence the affidavits of Franzen, Marlin, Gloria, and Richard; the deed of trust executed by Marlin and Gloria to State Bank on March 15, 1999; the warranty deed from Marlin and Gloria to Richard and Lona dated June 1, 2001; the security assignment executed by Marlin and Gloria to a bank in Benkelman on May 1, 1993; and the deposition of Sandman. The court received all of these exhibits. State Bank offered into evidence the affidavit of the president of the bank formerly known as State Bank, but such was not received into evidence because it was not provided to Marlin and Gloria prior to the day of the hearing. After finding that there were no disputes regarding material facts, the district court's June 23, 2005, journal entry granted Marlin and Gloria's motion for summary judgment and dismissed the action. State Bank timely appeals.

ASSIGNMENTS OF ERROR

State Bank alleges that the district court erred in (1) granting Marlin and Gloria's motion for summary judgment upon the facts, (2) finding that there is no dispute regarding material facts, and (3) denying State Bank's motion for summary judgment.

STANDARD OF REVIEW

[1] 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. *Blair v. State Farm Ins. Co.*, 269 Neb. 874, 697 N.W.2d 266 (2005).

[2] In reviewing a summary judgment, an appellate court views the evidence in the 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. *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005).

ANALYSIS

Breach of Trust Deed.

The deed of trust executed by Marlin and Gloria to State Bank on March 15, 1999, contains a section entitled "Rights and Remedies on Default." According to the deed of trust, in the event of a default, State Bank "may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:" (1) accelerate the indebtedness and (a) take possession of the property, (b) commence an action to foreclose the deed of trust as a mortgage, and (c) deliver to Marlin and Gloria a written declaration of default and demand for sale or (2) foreclose by power of sale. Furthermore, the deed of trust states that the remedies are not exclusive, that State Bank "shall be entitled to enforce payment and performance of any indebtedness or obligations secured by this Deed of Trust," and that "[n]othing in this Deed of Trust shall be construed as prohibiting [State Bank] from seeking a deficiency judgment against [Marlin and Gloria] to the extent such action is permitted by law."

[3,4] In State Bank's complaint, it seeks damages of $200,000 for the alleged breach of the deed of trust and for fraudulent misrepresentations regarding encumbrances and liens on the land. A trust deed is a security device created by statute. See, *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993). Because trust deeds did not exist at common law, such statutes are to be strictly construed. See, generally, *J.K. v. Kolbeck*, 257 Neb. 107, 595 N.W.2d 875 (1999) (garnishment is legal, not equitable, remedy unknown at common law and is

purely statutory remedy; being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes). We see the holding of *J.K. v. Kolbeck, supra*, as analogous, because a garnishment is a statutory debt collection remedy, as is a deed of trust.

[5,6] The law governing trust deeds is found in the Nebraska Trust Deeds Act, Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 2003 & Cum. Supp. 2004). The only two statutory remedies for breach of a trust deed are set forth in § 76-1005, which states:

> A power of sale may be conferred upon the trustee which the trustee may exercise and under which the trust property may be sold in the manner provided in the Nebraska Trust Deeds Act after a breach of an obligation for which the trust property is conveyed as security, or at the option of the beneficiary a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale shall be expressly provided for in the trust deed.

See, also, *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997). And, § 76-1006 provides that the power of sale shall not be exercised until the trustee files for record in the office of the register of deeds in the county where the trust property is located a notice of default identifying the trust deed.

[7] There is nothing in the record to suggest that State Bank filed the required notice of default, which is obviously a precondition to the exercise of the power of sale; nor is there any evidence that the land has been sold. State Bank seeks monetary damages, a remedy at law which is simply unavailable for breach of a trust deed according to the applicable statutes. The creditor's statutory remedy is sale by the trustee of the land covered by the trust deed. See *Bank of Papillion v. Nguyen, supra.* If there is a deficiency, an action may be commenced to recover "the balance due upon the obligation for which the trust deed was given as security." § 76-1013. State Bank's first cause of action is not a suit for recovery of deficiency under § 76-1013. Therefore, summary judgment in favor of Marlin and Gloria was proper, because they are entitled to judgment as a matter of law on State Bank's purported cause of action.

[8] We recognize that under the Nebraska Trust Deeds Act, one of the remedies available to the beneficiary of a trust deed is to judicially foreclose. § 76-1005. It naturally follows that when the beneficiary elects to judicially foreclose, the law governing foreclosure of mortgages applies. Under some circumstances, a cause of action for monetary damages may lie in favor of a mortgagee. See, e.g., 59 C.J.S. *Mortgages* § 319 (1998) (mortgagee is entitled to have mortgage security unimpaired by any acts of mortgagor, assignee, or grantee, and for acts of waste or spoliation on mortgaged property which impair mortgage security, mortgagee is entitled to recover damages in appropriate action). Even if we view State Bank's failure to exercise the power of sale as an election to judicially foreclose, we find no support in the undisputed facts of the instant case for an action for monetary damages.

Fraudulent Misrepresentation.

State Bank also alleged that Marlin and Gloria "fraudulently misrepresented whether or not the . . . land was free and clear of encumbrances and liens" and that State Bank "relied on the above representations and on the Deed of Trust agreement itself, thereby extending money to [Marlin and Gloria's] son and daughter-in-law." While Sandman testified that Marlin and Gloria told him the land covered by the deed of trust was free and clear of liens, Marlin and Gloria deny such claim by their affidavits. However, that dispute of fact is ultimately of no consequence.

[9] In order to recover on an action for fraudulent misrepresentation, State Bank must show

> (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that [State Bank] reasonably did so rely; and (6) that [State Bank] suffered damage as a result.

See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 378, 702 N.W.2d 792, 803 (2005). See, also, *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

[10] Assuming that Marlin and Gloria did tell State Bank that the land was free from encumbrances and liens, State Bank still

cannot show that it reasonably relied on the representation. Neb. Rev. Stat. § 76-238(1) (Cum. Supp. 2004) states in part:

> All deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice.

Thus, State Bank had notice, if they had looked, of the prior "Security Assignment" to a bank in Benkelman, such agreement having been recorded in 1993, as outlined above. Thus, summary judgment in favor of Marlin and Gloria was proper, because any reliance on such alleged oral representation was not reasonable when a senior debt was clearly of record.

CONCLUSION

For the reasons stated above, we find that State Bank did not produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law with respect to Marlin and Gloria. Therefore, the grant of summary judgment in favor of Marlin and Gloria on both causes of action is affirmed.

AFFIRMED.

IN RE INTEREST OF WALTER W., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. MARTINA A., APPELLANT.

719 N.W.2d 304

Filed July 11, 2006. No. A-05-1201.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **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.

3. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
4. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
6. **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.
7. **Parental Rights: Final Orders: Collateral Attack.** An adjudication is a final, appealable order, and case law provides that no collateral attack on an adjudication order is permitted except for a lack of jurisdiction or a denial of due process.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Order vacated, and cause remanded for further proceedings.

Marian G. Heaney, of Legal Aid of Nebraska, for appellant.

Regina T. Makaitis, Special Prosecutor, for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

INBODY, Chief Judge.

INTRODUCTION

Martina A., the natural mother of Walter W., appeals the order of the Douglas County Separate Juvenile Court terminating her parental rights. For the reasons set forth herein, we vacate the lower court's order and remand for further proceedings.

STATEMENT OF FACTS

Walter was born on January 2, 2003. On January 3, a petition was filed alleging that Walter came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) because Martina placed him in a situation dangerous to his life or limb or injurious to his health or morals in that she was unable to provide safe, stable, and independent housing for herself and her child and that her use of alcohol or controlled substances placed Walter at risk for harm. The following day, a motion for temporary custody was granted, and Walter was placed in the care and custody of the Department of Health and Human Services.

At a detention hearing on January 13, 2003, the juvenile court was informed that Martina was an enrolled member of the Yankton Sioux Tribe. The court ordered that the Yankton Sioux Tribe receive notice of all future hearings, and the detention hearing was continued to a later date.

On April 9, 2003, the State filed an amended supplemental petition seeking, among other things, to terminate Martina's parental rights to Walter pursuant to Neb. Rev. Stat. § 43-292(2) and (4) (Reissue 2004). On April 16, Martina filed a motion for a hearing to determine whether the Indian Child Welfare Act (ICWA) applied to this case. On May 2, the juvenile court found that Martina was an enrolled member of the Yankton Sioux Tribe; that Walter was eligible for enrollment; and, consequently, that the ICWA and its State counterpart were applicable to all further proceedings regarding Walter. On April 16, Martina had also filed a motion in limine requesting that the court prohibit the admission of any evidence relating to the State's request for termination of her parental rights because the State failed to provide notice to the Yankton Sioux Tribe as required by the ICWA. The transcript does not reflect a ruling on this motion.

On July 2, 2003, the State filed a second amended supplemental petition seeking adjudication of Walter pursuant to § 43-247(3)(a), alleging that Walter lacked proper parental care by reason of the fault or habits of Martina in that Martina had been under the juvenile court's jurisdiction regarding her other five children for the past 2 years and had not demonstrated sufficient progress, stability, or compliance with the court's orders to be granted either unsupervised visitation or reunification with those five children; in that Walter tested positive for amphetamines at birth; and in that Martina's use of illegal drugs and lack of stability placed Walter at risk for harm.

On November 5, 2003, the Yankton Sioux Tribe filed a notice to intervene and a document stating that Walter was eligible for enrollment in the tribe.

On February 12, 2004, an adjudication hearing was held, and on April 23, the court found that Walter was a child within the meaning of § 43-247(3)(a).

At a review hearing held on November 16, 2004, the guardian ad litem offered into evidence, and the court received, a foster

care review board report dated October 19, 2004. This report, which relates to Walter, reveals that the director of ICWA affairs for the Yankton Sioux Tribe attended the meeting which gave rise to the report. The report stated, in part:

> [The director] indicated that the Yankton Sioux Tribe is not interested in taking jurisdiction of the case. The motion to intervene was filed because the tribe wants to be informed of the progress of the case. [The director] indicated that permanency for Walter is of utmost importance. He indicated that the tribe would not object to termination of [Martina's] rights, as [the tribe] would like Walter to be adopted. [The director] indicated that typically the tribe wants a child to be placed with relatives or with a non-relative Native American family; however if that is not possible any adoptive home is acceptable. [The director] indicated that he has not been able to find a relative who is willing to adopt Walter so he has ended his search for a relative placement. He spoke with four or five family members but none of them wanted to take Walter. Adoption by a non-relative Native American family is preferred; however, the priority is for permanency [for] Walter with any adoptive family.

On December 9, 2004, a second motion for termination of parental rights was filed, alleging § 43-292(2) and (7) as bases for termination. The motion further alleged that active efforts required under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004) had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, but that said efforts were unsuccessful, and that returning Walter to Martina's custody would likely result in serious emotional or physical damage to him. Finally, the motion alleged that termination of parental rights was in Walter's best interests. The transcript does not contain evidence that the Yankton Sioux Tribe was notified, by certified or registered mail with return receipt requested, of the pending proceedings.

The hearing on the motion for termination of parental rights was held on June 3, 2005, and no representative of the tribe was in attendance. On September 2, the juvenile court filed an order terminating Martina's parental rights. Martina has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Martina contends that the juvenile court erred in terminating her parental rights because (1) the State failed to notify an essential party to the proceedings, (2) there was insufficient evidence for the court to find that Walter would suffer serious physical or emotional damage if returned to her custody, (3) there was no evidence of " 'active efforts' " to prevent the breakup of the family between the date of disposition and the hearing on the motion to terminate parental rights, and (4) the evidence was insufficient to establish that termination of her parental rights was in Walter's best interests. Finally, Martina contends that current Court of Appeals case law precluding appeal on the issue of active efforts to prevent the breakup of a family until an order of termination of parental rights has been entered is in violation of state and federal law.

STANDARD OF REVIEW

[1,2] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Dakota L. et al., ante* p. 559, 712 N.W.2d 583 (2006); *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Dakota L. et al., supra*; *In re Interest of Brittany C. et al., supra*. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Interest of Dakota L. et al., supra*; *In re Interest of Brittany C. et al., supra*.

ANALYSIS

Does Natural Mother Have Standing to Raise Issue of State's Alleged Failure to Comply With Notice Requirements of § 43-1505(1)?

First, we consider whether Martina has standing to raise the issue of the State's alleged failure to notify Walter's Indian tribe of the termination of parental rights proceedings as required by § 43-1505(1).

Section 43-1505(1) provides, in pertinent part:

> In any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by certified or registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

See, also, 25 U.S.C. § 1912(a) (2000).

[3] In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001); *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000); *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999).

The parties have not cited to, nor has our independent research uncovered, any Nebraska cases on point. However, cases from other jurisdictions provide instruction. *In re H.D.*, 11 Kan. App. 2d 531, 729 P.2d 1234 (1986), involved a termination of parental rights where the rights of both the mother and the father to a minor child were terminated. The mother was "15/32 degree Indian blood of the Cherokee Tribe," and the father was not Indian. *Id.* at 532, 729 P.2d at 1236. Notice was not served upon either the tribe or the Secretary of the Interior as provided by the Kansas code for care of children, Kan. Stat. Ann. § 38-1501 et seq. (Supp. 1985). Both parents appealed to the Kansas Court of Appeals; the mother subsequently abandoned her appeal. The tribe was not involved in the appeal.

The father claimed that the ICWA applied to the lower court proceedings and that the district court's failure to follow the ICWA's provisions invalidated the termination order. The State of Kansas contended that because the father was not Indian, he had no standing to argue application of the ICWA, and that the mother's abandonment of her appeal rendered the case moot. The appellate court rejected the state's claim, finding that under the ICWA, "'"parent" means any biological parent or parents of an Indian child . . . .' 25 U.S.C. § 1903(9) (1982)." *In re H.D.*, 11 Kan. App. 2d at 532, 729 P.2d at 1236. Further, although the

appellate court did not decide the question of the applicability of the ICWA, the district court's failure to direct that proper notice be served upon the tribe or Secretary of the Interior rendered the order terminating parental rights invalid. Thus, the appellate court reversed the decision of the district court and remanded the cause for further proceedings. See, also, *In re J.J.G.*, 32 Kan. App. 2d 448, 83 P.3d 1264 (2004) (non-Indian father has standing to seek application of ICWA); *K.N. v. State*, 856 P.2d 468 (Alaska 1993) (ICWA applies even where state is seeking to terminate parental rights of non-Indian parent).

Other jurisdictions have also allowed parents to raise issues when the tribe is not involved in the appeal. In *People ex rel. DSS in Interest of C.H.*, 510 N.W.2d 119 (S.D. 1993), the natural mother appealed the termination of her parental rights. The tribe was not involved in the appeal. The natural mother claimed that she was half Choctaw Indian, and the original petition filed by the South Dakota Department of Social Services recognized this claim. Despite the fact that the State of South Dakota had reason to know that an Indian child may have been involved in the case, no notice was given to the Secretary of the Interior and inadequate notice was given to the relevant Choctaw tribe. The South Dakota Supreme Court determined that where there has been inadequate notice to determine whether the ICWA is applicable, the appropriate procedure is to remand the cause to the trial court with instructions to provide proper notice to the tribe. If the trial court subsequently determines that the ICWA is applicable, then the order of termination is to be reversed and further proceedings shall be held in accordance with the provisions of the ICWA. However, if the trial court determines that the ICWA is not applicable, then the order of termination shall be affirmed. See, also, *In re J.T.*, 166 Vt. 173, 693 A.2d 283 (1997) (where court erred when it failed to provide notice pursuant to ICWA even though it had reason to believe children of Indian ancestry were involved in proceedings, requiring remand); *In re M.C.P.*, 153 Vt. 275, 571 A.2d 627 (1989) (Vermont court remanded for adequate notice with instruction that if, on remand, it was determined that ICWA did not apply, original disposition order would stand); *In re Colnar*, 52 Wash. App. 37, 757 P.2d 534 (1988) (appellate court remanded where state failed to give

proper notice pursuant to ICWA, but when trial court subsequently determined ICWA was not applicable, appeals court affirmed trial court's termination of parental rights).

Likewise, in *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005), a father appealed the termination of his parental rights, contending that the State of Iowa did not comply with the tribal notice provisions of the Iowa ICWA. The Iowa Supreme Court determined that because the State of Iowa notified the wrong Indian tribe, further proceedings were required. It held that upon remand, once the proper notice was provided to the correct tribe, if there was a determination that the child was not an Indian child, then the termination would be affirmed. If the child was determined to be an Indian child and the tribe wanted to intervene, the termination of parental rights must be reversed.

We note that the State has cited the case of *R.B. v. State Dept. of Human Resources*, 669 So. 2d 187 (Ala. Civ. App. 1995), wherein parents appealed from a judgment denying their petition to terminate their parental rights to two of their adopted children. On appeal, the parents sought to raise the issue of the trial court's denial of an Indian tribe's motions to intervene and for transfer of jurisdiction pursuant to the ICWA. The appellate court held that the parents could not raise the issue because the tribe had not appealed the trial court's judgment. This case is distinguishable from the instant case because unlike the issue of failure to provide notice to the tribe, in the circumstance where an appeal involves the denial of a tribe's motions to intervene and transfer jurisdiction, the tribe must have been apprised of the pending proceedings in order to file those motions in the first place.

Limiting standing to raise the failure to notify a tribe in many instances will not serve the stated purposes and goals of the ICWA.

> "The ICWA was enacted to promote the stability and security of Indian tribes and families through the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.
>
> "When Congress enacted the ICWA, it had two main goals: (1) protecting the best interests of the Indian children

> and (2) promoting the stability and security of Indian tribes and families. See 25 U.S.C. § 1902. The act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interests. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989)."

In re Interest of Enrique P. et al., ante p. 453, 462-63, 709 N.W.2d 676, 684, (2006) (quoting *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992)).

Because in many, if not most, instances, tribes depend upon parents to notify the State of known or potential Indian ancestry, and because Indian tribes cannot intervene in cases of which they have received no notification, logic dictates that parents may often be best situated to raise claims of inadequate notice to tribes. Therefore, we believe the stated purposes of the ICWA are best served by allowing parents to raise, in their direct appeal from a termination of parental rights, the issue of the State's failure to notify the child's Indian tribe of the termination of parental rights proceedings as required by § 43-1505(1).

Did Juvenile Court Err in Terminating Natural Mother's Parental Rights Because State Failed to Notify Essential Party?

Martina contends that the juvenile court erred in terminating her parental rights because the State failed to notify an essential party to the proceedings.

> "The ICWA was enacted to promote the stability and security of Indian tribes and families through the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.
>
> "When Congress enacted the ICWA, it had two main goals: (1) protecting the best interests of the Indian children and (2) promoting the stability and security of Indian tribes and families. See 25 U.S.C. § 1902. . . ."

In re Interest of Enrique P. et al., ante at 462-63, 709 N.W.2d at 684 (quoting *In re Interest of C.W. et al., supra*).

Section 43-1505(1) provides:

> *In any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is*

> *involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by certified or registered mail with return receipt requested, of the pending proceedings and of their right of intervention.* If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the secretary in like manner, who may provide the requisite notice to the parent or Indian custodian and the tribe. *No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the secretary.* The parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(Emphasis supplied.) See, also, § 1912(a).

[4,5] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003); *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004). In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

The State concedes that the transcript does not contain evidence that the Yankton Sioux Tribe was notified by certified or registered mail with return receipt requested of the pending proceedings as required by § 43-1505(1). Although the State points out that the tribe's representative had stated at a foster care review board meeting that the tribe would not contest termination of Martina's rights, the representative also stated that the tribe intervened because it wanted to be informed of the progress of the case, and the tribe did not waive notice of future proceedings in this case. Since the plain language of the statute provides that "[n]o . . . termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent

or Indian custodian and the tribe or the secretary," *id.*, we determine that the termination hearing conducted in this case was invalid, and thus, the order of termination must be vacated. We therefore remand this cause to the juvenile court for further proceedings to be conducted following provision of proper notice to the Yankton Sioux Tribe.

[6] Having made this determination, we need not consider Martina's assigned errors regarding whether there was sufficient evidence for the court to find that Walter would suffer serious physical or emotional damage if returned to her custody, whether there was evidence of " 'active efforts' " to prevent the breakup of the family between the date of disposition and the hearing on the motion to terminate parental rights, and whether the evidence was sufficient to establish that termination of her parental rights was in Walter's best interests. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

Is Current Case Law Precluding Appeal on Issue of Active Efforts Until Order of Termination of Parental Rights Has Been Entered Violative of State and Federal Law?

Finally, Martina contends that current case law precluding appeal on the issue of active efforts to prevent the breakup of a family until an order of termination of parental rights has been entered is in violation of state and federal law. She claims that a party should be allowed to appeal on the issue of active efforts following an order of adjudication.

[7] Clearly, an adjudication is a final, appealable order, and case law provides that no collateral attack on an adjudication order is permitted except for a lack of jurisdiction or a denial of due process. *In re Interest of Preston P.*, 13 Neb. App. 567, 698 N.W.2d 199 (2005). See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). However, Martina did not appeal the adjudication order. Therefore, her assignment of error is not properly before this court and will not be considered.

CONCLUSION

Having found that the State did not comply with the plain language of § 43-1505(1), which provides that "[n]o . . . termination

of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the secretary," we conclude that the termination hearing conducted in this case was invalid, and thus, the order of termination is vacated and the cause is remanded to the juvenile court for further proceedings to be conducted following provision of proper notice to the Yankton Sioux Tribe.

ORDER VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CHARLES A. MICHEL, APPELLEE, V.
NUWAY DRUG SERVICE, INC., APPELLANT.

717 N.W.2d 528

Filed July 11, 2006. No. A-05-1351.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Expert Witnesses.** Medical testimony offered to support a workers' compensation award must be based on a reasonable degree of medical certainty.
4. **Workers' Compensation: Expert Witnesses: Proof.** Where a physician's testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained.
5. ____: ____: ____. Where conflicting inferences arising from a physician's testimony are not equally consistent and the more probable conclusion is that for which the claimant contends, the claimant sustains his burden of proof on the element involved.
6. **Workers' Compensation: Expert Witnesses.** "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.
7. **Workers' Compensation: Expert Witnesses: Proof: Words and Phrases.** Medical testimony expressed in terms of "possibility" is not sufficient, while such testimony couched in terms of "probability" is sufficient.
8. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise

fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.

9. **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 Nebraska Workers' Compensation Court. Affirmed.

James D. Hamilton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Jerold V. Fennell for appellee.

IRWIN and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Nuway Drug Service, Inc. (Nuway), appeals from an order of a Nebraska Workers' Compensation Court three-judge review panel affirming the trial court's award of benefits to Charles A. Michel. On appeal, Nuway contends that the court erred in finding that Michel's small bowel obstruction was a compensable consequence of, and causally related to, the gunshot brain injury and resultant paralysis suffered by Michel on or about January 5, 1973. For the reasons set forth below, we affirm.

BACKGROUND

On December 3, 2003, Michel filed a petition, stating that on January 5, 1973, he suffered an injury when a bullet struck him above his right eye at work. As a result of his gunshot wound, Michel suffers from left-sided paralysis with associated brain injury, complex partial seizures, and muscle contraction headaches. The parties stipulated that Michel is permanently, totally disabled as a result of his compensable injuries on January 5, 1973. What is at issue are the compensability of a bowel obstruction suffered by Michel in 2001 and whether that obstruction is related to Michel's original injury. In its answer, Nuway denied any liability for Michel's small bowel obstruction. Trial was held on February 18, 2005.

At trial, Michel's deposition was entered into evidence. In that deposition, Michel stated that after his 1973 accident, his

mother cared for him at home from approximately 1975 until 2001. Michel also testified that as a result of his accident, his routine at home involved the use of a weekly suppository in addition to a biweekly enema. Michel testified that he continued this routine into July 2001 and did not have any problems with bowel obstructions until July 6.

On that date, Michel went to the emergency room with complaints of constipation, nausea, and vomiting. Subsequently, Michel "was intubated and placed on a ventilator" and a tracheotomy was performed. The hospital discharged Michel on September 6, 2001, and he was placed at a nursing home. Prior to his discharge from the hospital, doctors diagnosed Michel as having a "[s]mall bowel obstruction of uncertain etiology" and "[s]epsis secondary to [a] line infection."

At trial, Michel introduced evidence from two expert witnesses, Drs. John Hannam and Thomas McGruder. In a letter dated December 7, 2004, Hannam responded "'yes'" to Michel's counsel's question of whether Michel's small bowel obstruction was most probably a complication of Michel's posttraumatic brain condition. Furthermore, Hannam stated, "The left-sided [paralysis] which [Michel] suffers from as a result of the old brain injury does put him at a high risk for a bowel obstruction and/or an ileus."

In a deposition, McGruder also opined that the bowel obstruction suffered by Michel in July 2001 was most probably related to Michel's primary diagnosis of brain injury. Additionally, McGruder stated that in his experience, people with head injuries who are bedridden commonly develop bowel obstructions or an ileus, which is an intestinal obstruction.

Nuway offered the opinion of a third medical doctor, who stated in a letter dated January 31, 2005, that "there is no compelling evidence that [a gunshot wound to the brain] can cause small bowel obstruction."

In an order filed April 22, 2005, the trial court found that Michel's small bowel obstruction was a compensable consequence of and therefore causally related to Michel's brain injury. The trial court ordered Nuway to pay all of Michel's medical expenses relating to his bowel obstruction, in addition to the associated expenses for Michel's residential care and any future

medical expenses deemed reasonably necessary. Nuway appealed, and the review panel affirmed in an order filed October 7. Nuway appeals.

ASSIGNMENTS OF ERROR

On appeal, Nuway contends that the trial court erred in (1) finding that Michel's small bowel obstruction was causally related to Michel's original injury; (2) determining that Michel's expenses related to his small bowel obstruction were necessary, in addition to being fair and reasonable; and (3) finding that Nuway is liable for Michel's residential care and Michel's future medical expenses resulting from the bowel obstruction.

STANDARD OF REVIEW

[1,2] 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. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002).

ANALYSIS

On appeal, Nuway contends that the trial court erred in finding that Michel's small bowel obstruction was causally related to Michel's original injury. Specifically, Nuway contends that the opinions of Hannam and McGruder were not sufficient to establish causation.

In a letter dated December 7, 2004, Hannam responded " 'yes' " to counsel's question of whether Michel's small bowel obstruction was most probably a complication of Michel's post-traumatic brain condition. Furthermore, Hannam stated, "The left-sided [paralysis] which [Michel] suffers from as a result of the old brain injury does put him at a high risk for a bowel obstruction and/or an ileus."

In a deposition, McGruder also opined that the bowel obstruction suffered by Michel in July 2001 was most probably related to Michel's primary diagnosis of brain injury. Additionally, McGruder stated that in his experience, people with head injuries who are bedridden commonly develop bowel obstructions or an ileus, which is an intestinal obstruction.

The trial court found that Michel had met his burden of proof, stating that

> [b]ased on my review of the medical evidence as a whole, I find the small bowel obstruction was a compensable consequence of and, therefore, causally related to the gunshot brain injury which caused the left-sided [paralysis]. . . . Hannam noted that such individuals are at high risk for bowel obstructions and . . . Michel's caregivers have long been cognizant of that risk.

[3-6] Medical testimony offered to support a workers' compensation award must be based on a reasonable degree of medical certainty. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). In *Welke v. City of Ainsworth*, 179 Neb. 496, 504, 138 N.W.2d 808, 813 (1965), the Nebraska Supreme Court stated, "Where the [physician's] testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained." However, "[w]here . . . the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, . . . the claimant sustains his burden of proof on the element involved." *Id.* at 504-05, 138 N.W.2d at 813. The Supreme Court has also stated, " 'Magic words' indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary." *Paulsen v. State*, 249 Neb. at 121, 541 N.W.2d at 643.

[7] In *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 532, 476 N.W.2d 854, 860 (1991), quoting *Welke v. City of Ainsworth, supra*, the Supreme Court held that medical testimony expressed in terms of " 'possibility' " was not sufficient, while such testimony couched in terms of " 'probability' " was sufficient. Specifically, in *Welke v. City of Ainsworth*, the Supreme Court held that the evidence established causation between a

police officer's herniated disk and a scuffle that the officer had engaged in at work while attempting to arrest a person for disturbing the peace and intoxication. The court based its conclusion on a doctor's opinion that the officer's disability was " 'probably' " due to the scuffle. *Id.* at 502, 138 N.W.2d at 812.

In the instant case, both Hannam and McGruder opined that the bowel obstruction suffered by Michel in July 2001 was most probably related to Michel's primary diagnosis of brain injury. Therefore, neither Hannam's nor McGruder's opinions give rise to conflicting inferences, rendering the choice between them a matter of conjecture. Rather, although neither doctor used "magic words," both doctors' opinions indicate a conclusion to a reasonable degree of medical certainty that Michel's bowel obstruction was causally related to the gunshot injury suffered by Michel in 1973. Therefore, we reject Nuway's argument that Hannam's and McGruder's opinions were insufficient to determine causation.

Nuway also argues that McGruder lacked any factual basis for his opinion. More specifically, Nuway points to the fact that McGruder's opinions are suspect because McGruder was unaware of the exact date of Michel's tracheotomy. Our review of the record shows that when Michel's tracheotomy was performed is not relevant to the causation question in the instant case. Furthermore, we note that Nuway did not make any objections to McGruder's opinion on the ground of insufficient factual basis during McGruder's deposition.

[8] If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[9] Nuway also argues the trial court erred in finding that Michel's expenses related to his small bowel obstruction were necessary, fair, and reasonable and that Nuway is liable for Michel's residential care in addition to Michel's future medical

expenses. Although Nuway assigns these as error, it does not discuss them in its brief. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004). Given that we find no plain error, we do not consider Nuway's remaining assignments of error.

CONCLUSION

After reviewing the record, we conclude that the trial court did not err in finding that Michel's small bowel obstruction was causally related to Michel's original injury or in adopting the expert opinions of Hannam and McGruder. Given that Nuway does not address its other assignments of error, we do not discuss them here. For these reasons, the review panel's order affirming the trial court's award of benefits to Michel is affirmed.

AFFIRMED.

SIEVERS, Judge, participating on briefs.

MELISSA SANFORD, APPELLANT AND CROSS-APPELLEE, V. CLEAR CHANNEL BROADCASTING, INC., LINCOLN, APPELLEE AND CROSS-APPELLANT.

719 N.W.2d 312

Filed July 25, 2006. No. A-04-940.

1. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Employment Contracts: Wages: Words and Phrases.** An employment agreement that defines wages contrary to the Nebraska Wage Payment and Collection Act's statutory definition of wages is void, because a company cannot circumvent the statutory definition of wages through its employment agreement.
4. **Employment Contracts: Termination of Employment: Wages: Words and Phrases.** Neb. Rev. Stat. § 48-1229(4) (Reissue 2004) provides that "wages" includes orders on file with the employer at the time of termination of employment. Thus, an employment agreement policy which clearly conflicts with such definition of wages, even though said policy is common within the industry, is void because it is prohibited by the Nebraska Wage Payment and Collection Act.

5. **Courts.** Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system.
6. **Damages: Evidence: Proof.** A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages.
7. ____: ____: ____. Proof of damages to a mathematical certainty is not required, but a plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural.
8. ____: ____: ____. The proof of damages is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.
9. **Damages: Evidence.** The question of whether the evidence of damages is reasonably certain is a question of law, and not a matter to be decided by the trier of fact.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Laura A. Lowe, P.C., for appellant.

James L. Haszard, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Melissa Sanford appeals the decision of the district court for Lancaster County entering judgment in favor of Clear Channel Broadcasting, Inc. (Clear Channel), with regard to the commissions allegedly due her pursuant to the Nebraska Wage Payment and Collection Act. Clear Channel has cross-appealed, claiming, inter alia, that the district court erred in finding that Clear Channel's policy requiring an employee to be employed at the time an advertisement is run in order to be paid a commission is invalid because it violated the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 through 48-1232 (Reissue 2004).

STATEMENT OF FACTS

On September 13, 1999, Sanford began employment with AM/FM as an account executive, selling radio advertising. Clear Channel purchased AM/FM sometime thereafter, and Sanford then worked as an account executive for Clear Channel, selling radio advertising for Clear Channel's cluster of radio stations in Lincoln, Nebraska. Sanford was compensated by Clear Channel

on a 100-percent commission basis for all advertising that she sold. Clear Channel's policy is that a salesperson is not paid a commission on advertising sold unless that person is an employee of the station at the time the advertising airs.

On January 30, 2002, Sanford's employment was terminated by Clear Channel. After Sanford's termination, she was not paid commissions for advertisements which she had sold prior to her termination but which aired after her termination, based on Clear Channel's policy of not paying a salesperson the commission on advertising sold unless that person is an employee of the station at the time the advertising airs. On August 30, Sanford filed a petition seeking judgment against Clear Channel for commissions allegedly due her, pursuant to the Nebraska Wage Payment and Collection Act, for advertising which aired after she was terminated. A trial to the court was held on April 19, 2004.

Sanford testified that as an account executive with Clear Channel, her job involved developing a relationship with current and potential clients by analyzing the advertising needs of their businesses and then by offering advertising solutions which would meet those needs. Sanford would do this by interviewing clients, developing proposals, presenting proposals to the client, and then, hopefully, securing advertising orders. If Sanford did secure an advertising order, she would write up specific orders which included all the pertinent information, such as the client's name, the advertisement to be run, the dates and times that the advertisements were to run, the amount the client was to be charged, the rate the client was to be charged, and the particular radio station to be utilized. Once an order is approved by the sales manager, it is forwarded to Clear Channel's traffic department. A confirmation is then printed and returned to the sales executive, who confirms that the information is correct. Sanford testified that even after an order had been placed, additions or subtractions could be made, and that a customer could, with no penalty, change an order at any time before an advertisement was aired.

Sanford testified that the weekly sales analyzer report is a document that tracks projected revenues for all of an account executive's clients into the future for the next 6 months. According to Sanford, the sales analyzer report is used to know how much

money is on the books for each month, to keep track of the orders that have been turned in, and to make sure the account amounts match the paperwork from the original order.

According to Sanford, there are two types of clients—local/direct and agency. Local/direct clients are face-to-face local clients, for which she was paid an 18-percent commission. For local/direct clients, Sanford would find out what the client wanted in a commercial and she would turn in a production sheet for the commercial, or she might turn in "copy points," which are details the client needs to have in the commercial. The sales production team would then be responsible for writing and creating the commercial. Once a client has approved a script for a commercial, the commercial is produced and the final product is presented to the client.

Agency clients are local advertising agency accounts where the business hired an advertising agency and then the advertising agency placed advertisements for the clients. Sanford received a 12-percent commission on agency accounts. In agency accounts, the advertising agency would produce the commercials and provide them to the radio station.

The director of sales for Clear Channel testified that she had previously worked as a sales manager for Clear Channel. The director testified that the sales analyzer reports are generated by the traffic department of the radio station for the purpose of reserving time for the anticipated advertising.

The business manager for Clear Channel testified that the business office does not book orders for advertising as revenue or as an account receivable until the advertisement is aired. Further, the sales analyzer reports are not used for computing commissions or for billing, and the projections shown in the sales analyzer reports change. The business manager also testified that a salesperson is not paid the commission for an order until that client's advertisement is aired. Further, if the station runs the wrong advertisement or runs the advertisement in the wrong rotation or at the wrong time, the client's bill is adjusted downward, the salesperson is penalized for the mistake, and the salesperson's commission is reduced. Additionally, a salesperson's commission would be reduced if a customer did not pay for the advertising that aired.

The general manager of the Clear Channel stations in Lincoln testified that it is general policy within the radio industry in Nebraska that salespersons do not get paid until advertisements are aired.

Among the exhibits offered and received into evidence were exhibits 4 and 40, which Sanford offered as evidence of her damages. Exhibit 4 is a sales analyzer report which shows projected advertising as of January 24, 2002, for future months through June 2002. Exhibit 40 is Sanford's computation of her commissions for February through December 2002, which exhibit was admitted for the limited purpose of being a summary of Sanford's testimony.

Also admitted into evidence was exhibit 41, which is a memorandum to "All Lincoln AM/FM Salespeople." It was signed by Sanford on January 13, 2000, indicating that she had read and understood the memorandum. The memorandum states:

> To reiterate the policy that is currently in effect, at the time you leave the station(s), whether voluntarily or involuntarily, you will be paid commissions on all advertising which airs on or prior to the final day of employment at the station (assuming you are on straight commission). You will not be paid commission on any advertising airing after your final day of employment with the station(s).
>
> You will receive a final paycheck within fifteen (15) days of your departure date reflecting the total commission due, less any advance draw a salesperson may have received. Management will withhold any commissions from your final paycheck to cover any uncollectible and questionable accounts. The final decision lies solely with the sales manager as to whether or not the amount should be withheld. Once this money is paid to the station (within a reasonable amount of time determined by you and your sales manager) you will then receive back the commissions you were paid originally. We encourage you to help collect this amount during and up to the next 90 days following your last day at the station. Past that time, and/or if the account has been turned over to a collection agency, all commissions will be forfeited.

Additionally, orders and change orders for Sanford's accounts were admitted into evidence as exhibits.

On July 16, 2004, the district court entered an order finding that Clear Channel's policy of not paying a salesperson the commission on advertising sold unless that person is an employee of the station at the time the advertising airs, even though said policy is common within the industry, is in violation of the Nebraska Wage Payment and Collection Act. The district court found that "there is an order on file when the client approves an ad for production or, in the case of an agency client, when the agency begins to send ads to the station for broadcast. Until then, there is just a reservation of air time." The court further found that at the time of her termination, Sanford had orders on file with all but three of her clients. However, because Sanford failed to present evidence sufficient to allow the court to determine her damages without engaging in speculation, the court entered judgment for Clear Channel. Sanford timely appealed to this court, and Clear Channel has cross-appealed.

ASSIGNMENTS OF ERROR

On appeal, Sanford contends that the district court erred in entering judgment in favor of Clear Channel with regard to the commissions due her. Specifically, Sanford contends that the court erred in finding that she failed to meet her burden of proof regarding her damages in that based on the evidence before the court, the amount of commissions due could not be determined without engaging in speculation. Sanford also contends that the court erred in finding that she did not have orders on file with three certain clients on the date of her termination.

Clear Channel has cross-appealed, contending that the trial court erred in finding that its policy requiring an employee to be employed at the time an advertisement is run in order to be paid a commission is invalid because it violates the Nebraska Wage Payment and Collection Act. Clear Channel also assigns that the district court erred in determining that an order is "on file."

STANDARD OF REVIEW

[1] In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the

weight to be given their testimony. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[2] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997); *Roseland v. Strategic Staff Mgmt., ante* p. 434, 708 N.W.2d 841 (2006).

ANALYSIS

Clear Channel's Cross-Appeal.

The initial issue that must be addressed in this case, an issue raised in Clear Channel's cross-appeal, is whether the district court erred in its determination that Clear Channel's policy requiring an employee to be employed with the station at the time an advertisement is run in order to be paid a commission is invalid because it violates the Nebraska Wage Payment and Collection Act. Clear Channel also contends that the district court erred in determining that an order is "on file" when there is a reservation of air time and a client has approved an advertisement for production, or upon an advertising agency's sending an advertisement to the radio station for broadcast.

"Wages" is defined under the Nebraska Wage Payment and Collection Act as "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." § 48-1229(4). "Wages includes commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed." *Id.*

[3] In *Moore v. Eggers Consulting Co., supra*, the Nebraska Supreme Court held that an employment agreement that defines wages contrary to the Nebraska Wage Payment and Collection Act's statutory definition of wages is void. This is because a company cannot circumvent the statutory definition of wages through its employment agreement. *Moore v. Eggers Consulting Co., supra*. Contra *Roseland v. Strategic Staff Mgmt., supra* (language contained in employee handbook is controlling as to employee's entitlement to wages upon termination or resignation).

In *Moore*, the Nebraska Supreme Court held that the Nebraska Wage Payment and Collection Act was violated by the following provisions of the company's employment agreement:

> "Employee shall be entitled only to those commissions which are due and payable on the final day of employment. A commission is due and payable upon collection of the fee from the client. No commission shall be paid to the Employee until such time as the client pays the commission and the Candidate begins employment. In the event of termination for any reason, the Employee shall not be entitled to any bonus, award, prize, or other incentive payment which may be payable at any time after termination."

252 Neb. at 405, 562 N.W.2d at 541.

The Nebraska Supreme Court noted that the Nebraska Wage Payment and Collection Act "clearly states that wages include commissions on all orders on file with the employer at the time of termination. In contrast, the [company's] employment agreement states that employees receive commissions only after such time as the client pays the commission and the candidate begins employment." *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 405-06, 562 N.W.2d 534, 541 (1997). The court held that the company "cannot circumvent the statutory definition of wages through its employment agreement. If an act is prohibited by statute, an agreement in violation of the statute is void." 252 Neb. at 406, 562 N.W.2d at 542.

[4] Clear Channel's policy requiring an employee to be employed with the station at the time an advertisement is run in order to be paid a commission, even though said policy is common within the industry, clearly conflicts with the definition of wages found in § 48-1229(4), which provides that "wages" includes orders on file with the employer at the time of termination of employment. Clear Channel's policy is void because it is prohibited by the Nebraska Wage Payment and Collection Act. Therefore, pursuant to § 48-1229(4), the commissions resulting from orders on file with Clear Channel as of the final day of Sanford's employment are due her, provided said orders had not been canceled at the time the lawsuit was filed.

[5] Further, we reject Clear Channel's claim that the district court erred in its determination that an order is "on file" when

there is a reservation of air time and a client has approved an advertisement for production, or upon an advertising agency's sending an advertisement to the radio station for broadcast. Essentially, Clear Channel claims that holding radio stations to this standard is inequitable, and thus, Clear Channel requests that the holding of *Moore v. Eggers Consulting Co., supra*, be modified. " '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 Fam. Mut. Ins. Co.*, 13 Neb. App. 63, 69, 688 N.W.2d 634, 639 (2004) (quoting *State v. Nichols*, 8 Neb. App. 654, 600 N.W.2d 484 (1999)). Thus, we necessarily reject the request that we modify the Nebraska Supreme Court's decision in *Moore v. Eggers Consulting Co., supra*. In sum, we reject the claims made by Clear Channel in its cross-appeal.

Burden of Proof.

Sanford contends the district court erred in finding that she failed to sufficiently prove her damages because the court found that based on the evidence, the amount of commissions due could not be determined without engaging in speculation.

[6-8] A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). Proof of damages to a mathematical certainty is not required, but a plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural. *Shipler v. General Motors Corp., supra*. See *Pribil v. Koinzan, supra*. The proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness. *Shipler v. General Motors Corp., supra*; *Pribil v. Koinzan, supra*.

[9] The question of whether the evidence of damages is reasonably certain is a question of law, and not a matter to be decided by the trier of fact. *Shipler v. General Motors Corp., supra*. See *Pribil v. Koinzan, supra*.

Sanford contends that her commissions can be calculated from the evidence adduced at trial. However, the evidence established

that sales executives were not paid a commission when a customer did not pay for the advertising aired. Further, if the station ran the wrong advertisement or ran the advertisement in the wrong rotation or at the wrong time, the client's bill was adjusted downward and the salesperson's commission was reduced, even though the mistake was not the salesperson's fault. There was no evidence adduced at trial establishing whether the advertising ran as projected, whether the customers were billed as projected, and whether they paid the projected amounts.

The evidence adduced by Sanford just establishes projected advertising and change orders. If any of these projections were altered in any way, Sanford's commissions would be affected. Thus, calculating Sanford's commissions based upon the evidence adduced would require speculation. Sanford's commissions cannot be calculated with a reasonable degree of specificity or exactness on the evidence adduced at trial. Therefore, the district court properly granted judgment in favor of Clear Channel.

Because of our determination that Sanford did not meet her burden of proof regarding damages, we need not consider Sanford's assignment of error that the district court erred in finding that she did not have orders on file with three certain clients on the date of her termination. 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). Even if the district court erred in its finding regarding the orders on file for three certain clients, Sanford did not adduce sufficient evidence to recover damages on these accounts.

CONCLUSION

In sum, Clear Channel's policy requiring an employee to be employed with the station at the time an advertisement is run in order to be paid a commission, even though said policy is common within the industry, is void because it clearly conflicts with the definition of wages found in § 48-1229(4). However, the district court properly granted judgment in favor of Clear Channel because Sanford failed to meet her burden of proof regarding her damages. Therefore, the decision of the district court is affirmed.

AFFIRMED.

CASSEL, J., concurring.

I fully agree with the portion of the majority opinion holding that the district court did not err in finding that Sanford failed to prove damages or in granting judgment in favor of Clear Channel. For that reason, I do not agree that it is necessary to address Clear Channel's cross-appeal, and therefore, I do not join that portion of the majority opinion. " 'For [a] court's opinion to be binding as [a] precedent, there must have been [an] application of [the] judicial mind to [the] precise question necessary to [be] determine[d] in order to fix [the] parties' rights.' " *Yoder v. Nu-Enamel Corporation*, 140 Neb. 585, 589-90, 300 N.W. 840, 842 (1941), quoting *Mutual Benefit Health & Accident Ass'n v. Bowman*, 99 F.2d 856 (8th Cir. 1938). In other words, a case is not authority for any point not necessary to be passed on to decide the case. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). Because Sanford cannot prevail no matter how this court opines upon Clear Channel's cross-appeal, that question should be left for another day.

IN RE INTEREST OF MICHAEL U., ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. STATE OF NEBRASKA, APPELLEE, V. MICHAEL U., APPELLANT.

720 N.W.2d 403

Filed August 1, 2006. No. A-05-1525.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. ____: ____. In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, appellate courts will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing.
3. **Jurisdiction: Venue: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.
4. **Mental Health: Final Orders: Appeal and Error.** An order adjudicating an individual to be a mentally ill dangerous person and ordering him or her retained for an indeterminate amount of time deprives a person of his or her liberty, and this denial clearly affects a substantial right. Thus, such order is a final order from which an appeal may be taken.

5. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
6. **Rules of Evidence: Mental Health.** Pursuant to Neb. Rev. Stat. § 71-955 (Cum. Supp. 2004), the rules of evidence applicable in civil proceedings shall apply at all hearings held under the Nebraska Mental Health Commitment Act and in no event shall evidence be considered which is inadmissible in criminal proceedings.
7. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), 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.
8. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
9. **Mental Health.** Before a person may be committed for treatment by a mental health board, the board must determine that the person meets the definition of a mentally ill dangerous person as set out in Neb. Rev. Stat. § 71-908 (Cum. Supp. 2004).
10. **Mental Health: Other Acts: Words and Phrases.** According to Neb. Rev. Stat. § 71-908(1) (Cum. Supp. 2004), a mentally ill dangerous person is one who is mentally ill or substance dependent and because of such mental illness or substance dependence presents a substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm.
11. **Mental Health.** In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing.
12. **Mental Health: Evidence: Proof.** Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition.
13. **Mental Health: Other Acts: Proof.** In determining whether an act is sufficiently recent to be probative on the issue of dangerousness, each case must be decided on the basis of the surrounding facts and circumstances.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Bruce E. Stephens for appellant.

C. Jo Petersen, Deputy Hamilton County Attorney, for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Michael U. appeals from the decision of the district court for York County which affirmed the order of the Mental Health

Board of the Fifth Judicial District (Board) finding him to be a mentally ill dangerous person and committing him to involuntary inpatient sex offender treatment. Michael alleges that the Board lacked jurisdiction and venue and erred in receiving certain evidence, that the district court erred in dismissing his appeal from the adjudication order, and that the evidence was insufficient to adjudicate him or to find that inpatient treatment was the least restrictive treatment alternative. We affirm.

BACKGROUND

On May 16, 1994, the State charged Michael with first degree sexual assault based upon acts committed in Hamilton County, Nebraska, against an individual less than 16 years of age. Michael pled not guilty, was subsequently convicted of the offense, and was sentenced in June 1995 to 80 to 240 months' incarceration. Michael was scheduled to be released from his incarceration at the Omaha Correctional Center (OCC) on May 3, 2005.

On April 28, 2005, the State filed a petition with the Board alleging that Michael was believed to be a mentally ill dangerous person and that neither voluntary hospitalization nor other treatment alternatives less restrictive of Michael's liberty than Board-ordered treatment would suffice to prevent the harm described in the statutes. The petition alleged that Hamilton County was Michael's "legal settlement" at the time he was sentenced to incarceration and that the State did not know where Michael intended to reside upon his release from incarceration. The State attached to the petition a March 17, 2005, letter from Dr. Mark E. Weilage, a clinical psychologist and mental health supervisor at the OCC, wherein Weilage recommended that Michael be reviewed by the Board for postincarceration commitment.

The Board held a hearing on May 10, 2005, and Michael denied the allegations of the petition. Michael's counsel objected to both the jurisdiction and the venue of the matter in Hamilton County and asserted that the proceedings should be dismissed or transferred to Douglas County. The Board overruled the objection. The county attorney offered a certified copy of the documentation from the district court for Hamilton County reflecting Michael's conviction for first degree sexual assault, and Michael's counsel objected to the exhibit as hearsay. The county

attorney limited the offer to the purpose of proving that Michael was convicted of a first degree sexual assault and that the exhibit contained the documents reflecting both the grounds for the conviction and the conviction itself. There was no objection to the offer for that purpose, and the Board received the exhibit on that basis.

Dr. Angela Boykin, a psychologist at Mary Lanning Memorial Hospital, testified that one of her duties was to perform an evaluation of an individual brought to the hospital under emergency protective custody, in order to reach a diagnosis and to determine whether that person needed any sort of psychiatric treatment. Boykin testified that in her job, she would specifically determine whether an individual was mentally ill and dangerous, and that she performed approximately 150 such evaluations each year. Boykin evaluated Michael on May 3, 4, 5, and 9, 2005. Boykin testified that nothing in the personality assessment indicated that Michael was a danger to himself or others. When Boykin was asked her opinion on Michael's mental health status, Michael's counsel objected "on grounds of insufficient foundation." The Board overruled the objection, and Boykin testified that she diagnosed Michael with an unspecified adjustment disorder, a history of a prior diagnosis of pedophilia, and a history of alcohol and marijuana abuse. When Boykin was asked if she determined whether Michael was mentally ill, Michael's counsel stated, "Same objection." The Board overruled the objection, and Boykin answered that "there is a mental illness diagnosis." Boykin opined, without objection, that based on Michael's history, "there is concern about the potential dangerousness, and he needs to be further evaluated by someone with expertise in sex offender issues." Boykin opined that Michael needed further inpatient treatment to determine whether he was dangerous. Boykin testified that in reaching her determination that Michael had a history of pedophilia and was potentially dangerous, she relied on Weilage's March 17 letter, the only documentation she had of that history. She based her opinion partially on that document, as well as on her interviews with Michael. The court received Weilage's letter for the purpose of establishing foundation for Boykin's opinion, and Michael's counsel had no objection to admission of such document for that limited purpose. Weilage's letter stated

that Michael fit the profile of a pedophile and that Michael was serving a sentence for his conviction of first degree sexual assault based upon sexual assaults committed against his 8-year-old stepson over a period of 2 to 3 years. Weilage stated in the letter that according to the initial classification study for the Department of Correctional Services, Michael received treatment from age 6 to 11 for being a victim of sexual assaults, was sexually involved with his sister, appeared to have molested other young children in approximately 1987, and participated in sex offender treatment for 1 year at age 15. Weilage's letter stated that Michael participated in Level I of "the generic correctional Mental Health Program" but that Michael had not been involved in any offense-specific treatment during his incarceration. Weilage's letter also stated that Michael was denied placement in the Inpatient Sex Offender Program at the Lincoln Correctional Center due to his denial of his offense. Boykin testified that she was unsure who diagnosed Michael with pedophilia, but she stated Weilage indicated that Michael would fit the profile of pedophilia and that there was a prior diagnosis of pedophilia.

Boykin prepared a report with regard to her evaluation of Michael, and Michael's counsel raised no objection to its receipt into evidence. The first page of the report discussed Weilage's letter. Boykin wrote that Michael spoke willingly about his history but continued to deny that he engaged in any sexually inappropriate behaviors with his stepson. Michael told Boykin that when he went to court, the only evidence was the allegation of molestation made by Michael's ex-wife and stepson, and that a doctor had said there was no physical evidence of any assault. Boykin's report stated that Michael acknowledged a history of prior sex offender treatment and that it appeared Michael's childhood involved significant sexual abuse, sexual assault, and issues related to sexuality. Boykin stated that Michael said he was sexually molested at age 3 by a cousin approximately 20 years older than Michael and that Michael described engaging in sexual intercourse and activities with cousins as he was growing up. Boykin stated that Michael described engaging in sexual intercourse with his sister, who was 4 years younger than Michael, over a period of a couple years when he was approximately ages 10 to 12 and that Michael indicated sometimes his sister was a

willing participant but "other times he pestered her until she relented." Michael told Boykin that relative to the offenses against his sister, he completed a 9-month sex offender program at the age of 15, and that he felt he benefited from the program. Boykin's report stated that Michael said he had never been sexually attracted to children.

Boykin's report stated that Michael did not complete sex offender treatment while incarcerated, that he was in the first level of a 6- or 12-week program, and that he had a passing score prior to taking the "post test," but that the "post test score" pulled his overall score down below the required passing score. Michael told Boykin that he " 'told the counselor where he could put the program' and did not return." Michael told Boykin that he was unable to get into any offense-specific treatment because he would not admit to the allegations against him and that he would be willing to go through treatment but would not admit to something he did not do.

Boykin wrote that Michael said he had never hit anybody first but had gotten into two fights while he was incarcerated. Michael said that he believed he had a bad temper but that he had only lost his temper twice in his life: when he was young and fought with a peer on a bus and when he argued with his ex-wife—he told her he was going to leave to cool off, but she continued to argue and then hit him, and he hit her in return, breaking her shoulder. According to Boykin, Michael said that he generally avoided being raped while incarcerated "by letting people know that he would stab and would kill them if they did something like th[at] to him."

In a section of the report titled "Mental Status Examination," Boykin wrote that Michael's thought processes were "generally logical and goal directed," that he willingly participated in the interview and answered questions, and that on a couple of occasions, he appeared "to become slightly uncomfortable with talking about some of the issues related to sexual interactions, and would refer in vague ways to imply what he meant, without overtly stating the words." Michael denied any suicidal ideation, and there were no signs of any significant issues related to depression or mood disturbances. Boykin wrote, "It does appear that in the past he has had thoughts of harming people as a result

of the social culture in prison." She stated that Michael described having conflicting feelings about his ex-wife during the early part of his incarceration in that he felt he was still in love with her but also had some thoughts about harming her. However, Michael told Boykin that he did not want to hurt anybody or do anything to hurt his ex-wife, that he wanted to go forward in his life, and that he planned to live with a nephew in Iowa upon release from the OCC.

In the section titled "Treatment Recommendations," Boykin wrote that Michael met the criteria for being a mentally ill dangerous individual, and she recommended that he be held for further evaluation and assessment until the Board held a hearing and appropriate treatment recommendations could be made. Boykin stated that the staff on the behavioral services unit at Mary Lanning Memorial Hospital did not have specific expertise in evaluating sex offenders; thus, she recommended that, at a minimum, Michael be committed to the Lincoln Regional Center for further sex offender evaluation so a determination could be made whether Michael needed to be committed to sex offender treatment. Boykin opined that the least restrictive option for Michael would be further evaluation on an inpatient basis. She testified that she did not have "the expertise to form an opinion specifically about treatment."

The State rested, and Michael's counsel moved to dismiss the petition. The Board overruled the motion. Michael's brother testified that he traveled to Omaha on May 3, 2005, to pick up Michael, with the intent to take Michael to Michael's nephew's house in Iowa.

The Board entered an order on May 13, 2005, and an amended order on May 18, adjudicating Michael. The Board found clear and convincing proof that Michael was a mentally ill dangerous person pursuant to Neb. Rev. Stat. § 71-908(1) (Cum. Supp. 2004). Pursuant to Neb. Rev. Stat. § 71-925(7) (Cum. Supp. 2004), the Board directed that Michael be transported to the Lincoln Regional Center or the Norfolk Regional Center for an inpatient psychiatric and psychological evaluation to include evaluation of sex offender treatment needs, which evaluation was to occur before another hearing was scheduled before the Board to determine the entry of a treatment order. The Board found that

Michael's "legal settlement" at the time he was sentenced to the Nebraska Department of Correctional Services was Hamilton County.

On June 3, 2005, Michael filed an appeal from the May 13 order. It appears that he intended to file the appeal with the district court for Hamilton County, but the file stamp shows that it was filed in the district court for York County. The transcript contains "Judges Minutes" filed June 30 in the district court for York County which stated: "This record on appeal contains no final order. Appeal dismissed & case remanded to the Mental Health Board for further proceedings. Motion to continue appeal hearing mooted by dismissal." Michael did not appeal to this court from the district court's order dismissing the first appeal.

On August 11, 2005, the Board held a hearing on disposition. Michael's counsel objected based on jurisdiction, venue, and the fact that one of the Board members was not a member of the Board which heard the adjudication proceedings.

Dr. Daniel Sturgis, a psychologist at the Norfolk Regional Center, evaluated Michael for the sole purpose of determining the appropriate and least restrictive placement for Michael. Sturgis' evaluation consisted of reviewing Michael's records, interviewing him on several occasions, and administering psychological tests, including an intelligence test and a personality inventory. Sturgis explained that he had two "major interviews" with Michael, several testing sessions, and brief meetings to talk with Michael about his situation or answer Michael's questions. Sturgis opined that Michael should ultimately be placed at the Lincoln Regional Center for its inpatient sex offender treatment program. Sturgis based his recommendation on Michael's conviction for sexual assault on a child, on the conviction's being the second time Michael had "had problems with sexual issues," and on Michael's lengthy prison term. Sturgis testified that "virtually at every major point in [Michael's] life, he had sexual activity with somebody. And oftentimes this was in violation of some sort of rules." Sturgis explained that Michael had an affair with a girl friend, had an affair with that girl friend's sister, and had a sexual relationship with a male friend while Michael was married.

At the hearing, Michael testified that contrary to Sturgis' report, Michael dated one sister, broke up with her, and then

began dating the other sister. He married one of the sisters, and he testified that he did not have sexual relations with the other sister while he was married. Michael admitted having a homosexual encounter on one occasion while he was married. He testified that he was drunk at the time of such encounter, that he felt remorse, and that he told his wife about the incident because he had always been honest with her. Michael testified that before he turned 13 years old, he had experimented sexually with "quite a few" of his cousins and had had intercourse with his sister. At age 15, he participated in a treatment program in Oregon, and Michael testified that since age 13, he had "never done anything with any child." On the other hand, Sturgis explained that Michael's actions showed "his inability to maintain a relationship with one person and to respect the feelings of that person that he's having the relationships with."

Sturgis testified that another factor leading him to choose inpatient treatment for Michael was that Michael had been in some kind of care for most of his life, including foster homes since age 12, a treatment facility in Oregon, and prison. Sturgis testified that Michael did not have a positive history of living a responsible and independent life. Sturgis stated that Michael's "lack of acceptance" of his sexually assaulting his stepson made it difficult for Sturgis to recommend that Michael go to any treatment other than a very secure treatment. Sturgis testified that Michael's significant substance abuse for which he had not had treatment was also a problem. The Board received as evidence Sturgis' June 16, 2005, letter to the Board discussing his evaluation of Michael. Sturgis opined that Michael was a pedophile, of nonexclusive type, and that his general social behavior was highly sexualized.

On August 11, 2005, the Board entered an order of final disposition committing Michael to the Department of Health and Human Services for inpatient treatment. On August 29, Michael filed an appeal from that decision. The district court for York County held a hearing on October 3 and received into evidence the certified transcript from the Board and the bills of exceptions from the Board's hearings. Michael's counsel stated that he had objected at both Board hearings to jurisdiction and venue, had objected to judicially noticing the affidavit in support of an

arrest warrant, and had objected to Boykin's diagnosis and the foundation for her opinion.

On December 7, 2005, the district court entered its judgment on appeal. Upon its de novo review of the record, the district court found clear and convincing evidence that Michael was mentally ill and dangerous and that neither voluntary hospitalization nor other treatment alternatives less restrictive of Michael's liberty than the inpatient treatment ordered by the Board were available or would suffice to prevent the harm described in § 71-908. The district court therefore affirmed the Board's adjudication and treatment order and remanded the matter to the Board for further proceedings.

ASSIGNMENTS OF ERROR

Michael assigns nine errors. He alleges, consolidated and restated, that (1) the Board lacked jurisdiction and venue, (2) the Board erred in receiving certain evidence, (3) the district court erred in dismissing his appeal from the adjudication order, and (4) the evidence was insufficient to find that he was mentally ill and dangerous or that voluntary hospitalization or alternatives less restrictive than inpatient treatment would not suffice to prevent the harm described in § 71-908.

STANDARD OF REVIEW

[1,2] The district court reviews the determination of a mental health board de novo on the record. *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003); *In re Interest of Verle O.*, 13 Neb. App. 256, 691 N.W.2d 177 (2005). In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act (Act), appellate courts will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing. *In re Interest of Kochner, supra*; *In re Interest of Verle O., supra.*

ANALYSIS

Jurisdiction and Venue.

Michael asserts that the Board lacked both jurisdiction and venue over this matter. At the beginning of the hearing before the Board on May 10, 2005, Michael's counsel objected "to both the jurisdiction and venue of this matter in Hamilton County,"

and he contended that the proceedings should be dismissed or transferred to Douglas County. Michael's counsel again objected to jurisdiction and venue during the hearing before the Board on August 11 and raised the issue before the district court on October 3.

[3] Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised. *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431 (1983). Finding no specific argument in Michael's brief regarding why he believes the Board lacked jurisdiction, we do not address that assignment of error. See *In re Estate of Matteson*, 267 Neb. 497, 675 N.W.2d 366 (2004) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

Michael states in his brief that the Act apparently no longer has a venue provision, but that either Douglas County or Iowa would be the appropriate forum for any Board commitment. Prior to recodification of the Act, see 2004 Neb. Laws, L.B. 1083, § 21 et seq., the venue provision was found at Neb. Rev. Stat. § 83-1025 (Cum. Supp. 2002). Section 83-1025 provided that the petition "shall be filed: [w]ith the clerk of the district court of any county within the judicial district where the subject is found" or that upon the showing of good cause, a district judge of the judicial district where the subject is found may authorize the petition to be filed in another judicial district. In *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988), the Nebraska Supreme Court held that § 83-1025 was a venue statute.

Presently, the venue provision is found at Neb. Rev. Stat. § 71-921(2) (Cum. Supp. 2004), which provides in pertinent part that the county attorney may file a petition pursuant to the Act

> with the clerk of the district court in any county within: (a) The judicial district in which the subject is located; (b) the judicial district in which the alleged behavior of the subject occurred which constitutes the basis for the petition; or (c) another judicial district in the State of Nebraska if authorized, upon good cause shown, by a district judge of the judicial district in which the subject is located. In such event, all proceedings before the mental health board shall

be conducted by the mental health board serving such other county, and all costs relating to such proceedings shall be paid by the county of residence of the subject.

The petition alleged that Hamilton County was Michael's settlement when he was sentenced by the district court for Hamilton County. The primary basis for the petition was Michael's conviction for sexually assaulting a child, and those acts occurred in Hamilton County. Thus, pursuant to § 71-921(2), the county attorney could file the petition with the clerk of the district court in any county within Hamilton County's judicial district. Hamilton County is located in the Fifth Judicial District, which district also includes the counties of Boone, Butler, Colfax, Merrick, Nance, Platte, Polk, Saunders, Seward, and York. Neb. Rev. Stat. § 24-301.02 (Cum. Supp. 2004). According to the file stamp upon the petition, the Deputy Hamilton County Attorney filed the petition with the clerk of the district court for York County. Because York County is a county within the same judicial district as Hamilton County, venue in York County was proper.

Dismissal of Appeal From Adjudication Order.

[4,5] Many of Michael's assigned errors in this appeal relate to the May 10, 2005, adjudication hearing. Michael appealed to the district court the Board's order adjudicating him to be mentally ill and dangerous and ordering that the sheriff transport Michael to the regional center in either Lincoln or Norfolk for an inpatient psychiatric and psychological evaluation to be conducted before the Board held another hearing to determine final disposition. The district court dismissed the appeal for lack of a final order. An order adjudicating an individual to be a mentally ill dangerous person and ordering him retained for an indeterminate amount of time deprives a person of his liberty, and this denial clearly affects a substantial right. Thus, such order is a final order from which an appeal may be taken. See *In re Interest of Saville*, 10 Neb. App. 194, 626 N.W.2d 644 (2001). It appears that contrary to the district court's ruling, the adjudication order was a final, appealable order; however, Michael did not file a further appeal to this court from the district court's dismissal of the appeal. The district court did not consider the underlying merits of the appeal, but the court's determination

that there was no final order at that time became the law of the case. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

In *In re Interest of Saville*, 10 Neb. App. at 198, 626 N.W.2d at 648, we stated: "Since no appeal was taken from the order adjudicating [the appellant] to be a mentally ill dangerous person, he may not now question the sufficiency of the evidence upon which the Board relied in its adjudication order . . . ." In the instant case, Michael did timely perfect an appeal from the adjudication order, but the first time that the district court considered the issues relating to the adjudication hearing was in the appeal from the dispositional order. Michael has timely perfected an appeal from that order, and he is not precluded from having this court consider the assigned errors arising out of the adjudication hearing.

Receipt of Evidence.

[6] Michael asserts that errors of law occurred during the adjudication hearing with respect to the receipt of certain evidence. Neb. Rev. Stat. § 71-955 (Cum. Supp. 2004) provides: "The rules of evidence applicable in civil proceedings shall apply at all hearings held under the . . . Act. In no event shall evidence be considered which is inadmissible in criminal proceedings."

Michael argues that the Board erred in receiving the affidavit in support of an arrest warrant. The county attorney offered a certified copy of the petition from the district court for Hamilton County reflecting Michael's conviction for first degree sexual assault. Michael's counsel objected on the ground of hearsay to a certain page of the exhibit, such page being the deputy county attorney's affidavit in support of an arrest warrant. The county attorney responded it was being offered to prove that Michael "was convicted of a first degree sexual assault, and that those are in fact the documents from the district court reflecting the grounds for that conviction, and the conviction itself." Michael did not interpose any objection to the county attorney's limited

offer. The Board received the exhibit for the purpose stated by the county attorney. There is no indication that the Board accepted or relied upon the affidavit for "the truth of the matter asserted." We conclude that the Board did not err in receiving the affidavit for the purpose stated by the county attorney.

[7,8] Michael also contends that the Board erred in overruling his objections on foundation to Boykin's opinion as to Michael's mental health and as to whether he was mentally ill. Boykin testified that she was a licensed psychologist, that she had performed mental health evaluations in the past, that she saw Michael on 4 days, and that she performed an evaluation of Michael's mental health. Michael argues that there was insufficient foundation for her opinion because "[t]here was no testimony as to what she did in regards to testing or interviewing [Michael]." Brief for appellant at 11. An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), 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. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). As a licensed psychologist who evaluated Michael, Boykin qualified as an expert, and she had an opinion which would assist the Board. It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004). We find no abuse of discretion by the Board in receiving Boykin's opinions on Michael's mental health.

Sufficiency of Evidence.

[9,10] Michael's remaining assignments of error attack the sufficiency of the evidence at both the adjudicatory and the dispositional hearings. Before a person may be committed for treatment by a mental health board, the board must determine that the person meets the definition of a mentally ill dangerous person as set out in § 71-908. *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003). The Board found that Michael was a mentally ill dangerous person pursuant to § 71-908(1). According to that subsection, a mentally ill dangerous person is one who is

mentally ill or substance dependent and because of such mental illness or substance dependence presents "[a] substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm." *Id.*

Boykin testified that Michael had a mental illness diagnosis and that she diagnosed Michael with an unspecified adjustment disorder, a history of prior diagnosis of pedophilia, and a history of alcohol and marijuana abuse. Michael did not present any evidence to the contrary. Boykin determined that Michael was potentially dangerous and opined that there needed to be further inpatient treatment to determine whether Michael was dangerous.

[11-13] In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981). Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. *Id.* "In order for a past act to have any evidentiary value[,] it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue." *Id.* at 59, 302 N.W.2d at 671. In determining whether an act is sufficiently recent to be probative on the issue of dangerousness, each case must be decided on the basis of the surrounding facts and circumstances. *In re Interest of Kochner, supra.* There is "no 'definite time-oriented period to determine whether an act is recent. . . .' " *Id.* at 124, 662 N.W.2d at 203.

Michael had been incarcerated since his conviction following a trial and subsequent sentencing in 1995 for first degree sexual assault on a child. Neither the Board nor the district court made a finding as to any specific recent violent act or threat of violence by Michael, although the district court's order indicated that the finding of dangerousness was based on Michael's status as a sex offender. Due to his lengthy incarceration and lack of access to prospective underage victims, Michael has not had an opportunity to commit a more recent act. Considering Michael's sexual history and that he has not completed any offense-specific treatment program while incarcerated due to his denial of the offense, we cannot say as a matter of law that the acts committed over 10

years ago were too remote to be probative of Michael's present state of dangerousness. We therefore conclude that the Board did not err in overruling Michael's motion to dismiss made following the State's rest at the adjudication hearing and that the district court did not err in affirming the Board's decision that Michael was a mentally ill dangerous person.

The Board determined that Michael should be committed for inpatient treatment, and Michael argues that the evidence was insufficient to find that there were not less restrictive treatment alternatives. Sturgis opined that Michael should ultimately be placed at the Lincoln Regional Center for its inpatient sex offender treatment program, and he based his recommendation on Michael's conviction for sexual assault on a child, on the conviction's being the second time Michael had "had problems with sexual issues," and Michael's lengthy prison term. Sturgis also noted that Michael had been in foster homes since age 12, had been in a treatment facility at age 15, and then spent 10 years in prison. Michael offered no evidence regarding less restrictive placements. The district court found in its de novo review that neither voluntary hospitalization nor other treatment alternatives less restrictive of Michael's liberty than inpatient treatment were available or would suffice to prevent the harm described in § 71-908. After reviewing the evidence, we conclude that the district court's decision is supported by clear and convincing evidence.

CONCLUSION

We conclude that venue in York County, one of the counties of the Fifth Judicial District, was proper. We cannot say as a matter of law that the district court's judgment affirming the Board's adjudication and commitment order is unsupported by clear and convincing evidence. Finding no merit in Michael's other assignments of error, we affirm.

AFFIRMED.

NATALIE L. DENNES, APPELLANT, V. TIMOTHY F. DUNNING, SHERIFF OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

719 N.W.2d 737

Filed August 15, 2006. No. A-05-182.

1. **Pleadings: Appeal and Error.** Whether a complaint states a cause of action is a question of law, to be reviewed on appeal de novo.
2. **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.
3. **Pleadings: Dismissal and Nonsuit.** In considering a motion to dismiss a complaint for failure to state a cause of action, well-pled factual allegations in the complaint must be assumed to be true and the complaint and all reasonable inferences arising therefrom must be construed most favorably to the pleader.
4. **Civil Rights: Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (2000), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.
5. **Civil Rights: Public Officers and Employees: Actions.** Under 42 U.S.C. § 1983 (2000), official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent and suits against governmental agencies should be treated as suits against the governmental entity.
6. ____: ____: ____. Under 42 U.S.C. § 1983 (2000), personal-capacity suits seek to impose personal liability upon government officers.
7. ____: ____: ____. The distinction between official-capacity suits and personal-capacity suits under 42 U.S.C. § 1983 (2000) is more than a mere pleading device and turns on the capacity in which state officials are sued, not on the capacity in which they acted when injuring the plaintiff.
8. **Civil Rights: Public Officers and Employees: Liability: Proof.** To establish liability in a personal-capacity suit under 42 U.S.C. § 1983 (2000), it is enough to show that the official, acting under color of state law, caused the deprivation of some federal right.
9. **Civil Rights: Public Officers and Employees: Liability.** In an official-capacity suit, a governmental entity is liable under 42 U.S.C. § 1983 (2000) only when the governmental entity is a moving force behind the deprivation, where the governmental entity's policy or custom has played a part in the violation of federal law.
10. ____: ____: ____. A local government cannot be held liable under 42 U.S.C. § 1983 (2000) solely because of injury inflicted by its employees or agents; rather, it can be liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.
11. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Natalie L. Dennes, pro se, and on brief, David L. Herzog, of Herzog & Herzog, P.C., and Kathy Pate Knickrehm for appellant.

Stuart J. Dornan, Douglas County Attorney, and Theresia M. Urich for appellees.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Natalie L. Dennes appeals an order of the district court for Douglas County, Nebraska, which, inter alia, dismissed Dennes' claim pursuant to 42 U.S.C. § 1983 (2000) on the defendants' motion for judgment on the pleadings. Because we find that the district court's order includes findings not supported by the pleadings, we modify the order. We affirm the district court's order as modified.

II. BACKGROUND

1. PROCEDURAL BACKGROUND

On March 30, 2004, Dennes filed a complaint in district court. Dennes named as defendants Douglas County Sheriff Timothy F. Dunning, various John Does who were alleged to be deputy sheriffs, and Douglas County. Dennes sought judgment against the various defendants on the basis of Neb. Rev. Stat. § 28-926 (Reissue 1995); 42 U.S.C. § 1983; U.S. Const. amends. IV, V, and XIV; and Neb. Const. art. I, §§ 1 and 25.

Dennes alleged that on or about December 13, 2003, six deputy sheriffs "mandated [her] to open the door [of her residence] immediately or have it broken and dislodged violently in order [for the deputies] to gain entry." Dennes alleged that at the time, she "had just concluded a bath and had only a towel on her person." Dennes alleged that she opened the door and asked the deputies whether they possessed a warrant. Dennes alleged that "[a] piece of paper held by one of the deputies was displayed to [Dennes] but [Dennes] was not permitted to read it or have a copy." Dennes alleged that "[a]ll of the entering [deputies] were

male persons but did not wear police uniforms" and that the deputies "refused" to provide Dennes with their names.

Dennes alleged that the deputies informed her that they had a warrant for Dennes' arrest, for driving while her license was suspended. Dennes alleged that the male deputies followed her "to her upstairs residence where she kept and maintained her clothes" and that "[a]ll deputies left the room in which [Dennes] was to clothe herself but one male deputy remained while [Dennes] replaced her towel with clothing." Dennes alleged that she "was not permitted to clothe herself in privacy and was subjected to the humiliation, degradation and insult of having to disrobe and exhibit her naked body to a deputy sheriff, a male person," and that "[n]o exigencies existed preventing the arresting agents to have a female officer present when [Dennes] disrobed."

Dennes specifically alleged, "The deputies involved in the foregoing were acting within the scope of their employment by and under the jurisdiction of the Douglas County Sheriff . . . ." Dennes further specifically alleged, "The [defendants] are public servants or peace officers who, by color of or in the execution of their office, designedly, willfully or corruptly injured, harmed and oppressed [Dennes] or attempted to harm, injury [sic] or oppress [Dennes], and is [sic] liable in treble damages to [Dennes]."

On April 14, 2004, Dunning and Douglas County filed an answer, generally denying "each and every allegation contained within [Dennes'] Complaint except those allegations which constitute admissions against [Dennes'] interests." In addition, the answer included various "affirmative defenses," including that Dennes had failed to state a cause of action upon which relief could be granted, that the alleged actions "were reasonably related to the legitimate security interests of the defendants," and that Dennes had "failed to set forth a claim involving policy or custom on the part of Douglas County."

On July 1, 2004, the defendants filed a motion for judgment on the pleadings. They alleged that Dennes had failed to allege facts sufficient to state a cause of action pursuant to § 1983, the U.S. Constitution, the Nebraska Constitution, and § 28-926. The defendants also affirmatively alleged, "These defects cannot be cured by amendment."

On December 9, 2004, the district court entered an order. The order specifically indicates that "[o]n the 16th day of August, 2004, the parties appeared by counsel for a hearing on the Defendants' motion for judgment on the pleadings. The motion was taken under advisement." The order does not indicate that the court received or considered any matters outside the pleadings in disposing of the motion. In the order, the court ultimately found that Dennes failed to state a cause of action pursuant to § 1983, the U.S. Constitution, the Nebraska Constitution, or § 28-926. The court further specifically found that Dennes "by amendment cannot cure the defects upon which this order is based" and, therefore, dismissed Dennes' complaint with prejudice.

With respect to Dennes' § 1983 claim, the court found that Dennes' U.S. Constitutional rights were not violated and that the conduct of the deputies resulted from legitimate security interests. The court also made the following finding concerning Dennes' allegation that her 14th Amendment rights were violated because a female deputy was not available and Dennes was required to dress in the presence of a male officer:

> Contrary to [Dennes'] allegations the Court finds that there is a legitimate governmental interest in the Douglas County Sheriff's practice of sex-neutral arresting units insofar as said policy actually protects the Fourteenth Amendment rights of deputies and deputy applicants and, therefore, that [Dennes'] Fifth Amendment rights were not violated.

2. Record on Appeal

The record presented to us on appeal consists only of a transcript. We note that Dennes filed a praecipe requesting a bill of exceptions to include "any testimony, proceedings, exhibits or documents utilized in the adjudication of these proceedings." However, a certificate from the clerk of the Douglas County District Court certifies that there was no record made of any proceedings in this case.

Additionally, the transcript includes a document captioned "Plaintiff's Rule 12 Submission." The document purports to submit to the district court various responses to discovery requests. As noted above, the court did not indicate in its order ruling on the motion for judgment on the pleadings that any matters outside the pleadings were received or considered by the court,

and the absence of a bill of exceptions suggests that no evidence was ever formally offered to the court. See Neb. Ct. R. of Prac. 5 (rev. 2006).

III. ASSIGNMENT OF ERROR

Dennes' sole assignment of error on appeal is that "[t]he district court erred in finding that Dennes had failed to state a claim under 42 U.S.C. § 1983 of the defendants' deprivation of her constitutional rights under color of law."

IV. ANALYSIS

We initially note that Dennes' complaint in the district court alleged a number of causes of action and included apparent violations of U.S. and Nebraska Constitutional rights and state statutory rights, in addition to her cause of action under § 1983. The district court found, with respect to each, that Dennes failed to state a cause of action. Dennes has raised on appeal only the district court's finding concerning § 1983, and the other causes of action raised in the complaint are not before this court.

Dennes alleges on appeal that the district court erred in finding that she failed to state a claim for relief under § 1983 because the actions of the deputies, as alleged in her complaint, amounted to, inter alia, violations of her privacy rights and her right to be free from unreasonable seizure. The defendants argue on appeal that the district court properly found that Dennes failed to state a claim because she failed to allege any official policy or custom of Douglas County which led to the alleged deprivation of her rights. We agree with the defendants.

1. Standard of Review

The defendants indicated in their motion for judgment on the pleadings that the motion was filed "under Neb.R.Civ.P. 12(b)(6), 12(g), [and] 12(h)(2)." Neb. Ct. R. of Pldg. in Civ. Actions 12(c) (rev. 2003) provides for a judgment on the pleadings to be filed after the pleadings are closed.

Technically, a rule 12(b)(6) motion cannot be filed after an answer has been submitted, but rule 12(h)(2) provides that a defense of failure to state a claim upon which relief may be granted may be set forth in a motion for judgment on the pleadings. See *Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir.

1990). The distinction between rule 12(b)(6) motions and rule 12(c) motions for judgment on the pleadings is largely formal, however, because rule 12(c) motions are reviewed under the standard of review that governs rule 12(b)(6) motions. See *Westcott v. City of Omaha, supra.*

[1-3] 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. See *id.* Well-pled factual allegations in the complaint must be assumed to be true, and the complaint and all reasonable inferences arising therefrom must be construed most favorably to the pleader. See *id.*

2. § 1983

[4] In order to state a cause of action under § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). In relevant part, § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Martin v. Curry, 13 Neb. App. 171, 177, 690 N.W.2d 186, 193 (2004).

[5-7] In *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991), the U.S. Supreme Court specifically addressed the concepts of personal- and official-capacity suits brought under § 1983. The Court emphasized that official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent, and it held that suits against governmental agencies should be treated as suits against the governmental entity. Personal-capacity suits, on the

other hand, seek to impose personal liability upon government officers. *Hafer v. Melo, supra.* Further, the distinction between official-capacity suits and personal-capacity suits is more than a mere pleading device and turns on the capacity in which state officials are sued, not on the capacity in which they acted when injuring the plaintiff. See *id.*

In *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985), the U.S. Supreme Court set forth detailed guidelines for distinguishing between personal- and official-capacity suits. The Court held that as long as the governmental entity receives notice and the opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the governmental entity. It is not a suit against the official personally, because the real party in interest is the governmental entity. *Id.*

In the present case, Dennes named a number of officials as defendants, including Dunning and six "John Does," in addition to naming Douglas County as a governmental entity defendant. The content of Dennes' complaint indicates that the officials were all sued in their official capacity, not in their personal capacity, as they were all sued for official duties and conduct. Dennes specifically alleged, "The deputies involved in the foregoing were acting *within the scope of their employment by and under the jurisdiction of the Douglas County Sheriff . . . .*" (Emphasis supplied.) Dennes further specifically alleged, "The [defendants] are public servants or peace officers who, by color of or in the execution of their office, designedly, willfully or corruptly injured, harmed and oppressed [Dennes] or attempted to harm, injury [sic] or oppress [Dennes], and is [sic] liable in treble damages to [Dennes]." As such, it is apparent from Dennes' complaint that her § 1983 claim in this case was an official-capacity suit.

[8-10] On the merits, to establish liability in a personal-capacity suit under § 1983, it is enough to show that the official, acting under color of state law, caused the deprivation of some federal right. See *Kentucky v. Graham, supra.* More is required in an official-capacity suit, however; a governmental entity is liable under § 1983 only when the governmental entity is a moving force behind the deprivation, where the governmental entity's

policy or custom has played a part in the violation of federal law. *Id.* As such, a local government cannot be held liable under § 1983 solely because of injury inflicted by its employees or agents; rather, it can be liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). See, also, *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998).

In the present case, a review of Dennes' complaint makes clear that Dennes failed to make any allegations that any official policy or custom of Douglas County was the moving force behind the alleged deprivation of her federal constitutional rights. Dennes' complaint includes no reference to any Douglas County policy or custom whatsoever. A review of Dunning and Douglas County's answer reveals that they specifically pled that Dennes had failed to allege any official policy or custom on Douglas County's part. On the pleadings presented, Dennes failed to state a claim against Douglas County (and the other defendants in their official capacities) because she failed to allege any official policy or custom which inflicted the alleged injuries or deprivations of federal rights.

The district court's order specifically found that Dennes failed to state a claim under § 1983 because her allegations failed "to state facts which show her constitutional rights were violated under color of law." The court, however, also made a specific finding that "there is a legitimate governmental interest in the Douglas County Sheriff's practice of sex-neutral arresting units." We find no support anywhere in the pleadings for a finding that Douglas County has any such policy or custom, as neither the complaint nor the answer makes reference to any such policy or custom. Further, as noted above, the record does not indicate that the court received any material outside these two pleadings for consideration on the motion for judgment on the pleadings. Finally, although we have concluded above that Dennes' "Rule 12 Submission" was never properly offered, received, or considered by the district court in consideration of the motion for judgment on the pleadings, we note that a review of that document further does not include any support for the notion that Douglas

County has any such policy or custom of "sex-neutral arresting units." As such, we modify the district court's order of dismissal to strike the district court's reference to such a policy or custom.

3. Opportunity to Amend

As noted above, the district court's order of dismissal includes a specific finding that Dennes "by amendment cannot cure the defects upon which [the dismissal] order is based." The record presented does not indicate that Dennes ever sought leave to amend her complaint to remedy the defect in pleading. On appeal, Dennes has not assigned as error the district court's finding that amendment could not cure the defect in her complaint, and her brief on appeal never makes mention of the court's finding or argues for any right to amend.

[11] Nebraska's new rules of pleading apply to "civil actions filed on or after January 1, 2003." Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003). See, also, *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). Prior to that date, the relevant procedural vehicle for challenging whether the pleadings stated a cause of action was the demurrer. See *id.* See, also, Neb. Rev. Stat. § 25-806 (Reissue 1995). In the context of demurrers, the longstanding and oft-cited rule was that "[w]hen a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect." *Kubik v. Kubik*, 268 Neb. at 342-43, 683 N.W.2d at 335.

When Nebraska statutes provided for the filing of a demurrer, the statutes also specifically provided a party the right to amend his or her pleading if a demurrer was sustained and if the defect could be remedied by way of amendment. See Neb. Rev. Stat. § 25-854 (Reissue 1995). Nebraska's new rules of pleading include rule 12(b)(6), which authorizes a motion alleging that the complaint fails to state a claim upon which relief can be granted; rule 12(c), which authorizes a motion for judgment on the pleadings; and rule 12(h)(2), which authorizes the bringing of a defense of failure to state a claim by way of pleading or motion or at trial. There is no specific rule in the new rules of pleading comparable to § 25-854, providing a right to amend if the court sustains a challenge to the sufficiency of the complaint to state

a claim upon which relief can be granted. Although Neb. Ct. R. of Pldg. in Civ. Actions 15 (rev. 2003) provides authority for the trial court to allow amendment after a responsive pleading has been filed, rule 15(a) specifies that such may be done "only by leave of court or by written consent of the adverse party."

In the present case, then, we are presented with a situation where the trial court specifically found that amendment could not cure the pleading defect, where Dennes did not seek leave to amend and has not assigned as error or argued as error the trial court's finding that amendment could not cure the defect, and where it no longer appears that any specific statute or court rule seems to provide a right to amend. Indeed, Dennes' assignment of error on appeal does not even directly challenge the district court's dismissal of her § 1983 claim, which would arguably support an inference that the court erred in finding that amendment could not cure the defect. Rather, Dennes has chosen to very specifically challenge the district court's finding that her complaint failed to state a claim under § 1983.

On the specific facts of this case, we decline to find plain error in the court's finding that amendment could not cure the pleading defect. We note that even under Nebraska's former system of demurrers, the Nebraska Supreme Court did not uniformly hold that failure to grant an opportunity to amend was reversible error if the adverse party failed to make an effort to seek leave to amend. See *Suzuki v. Gateway Realty of America*, 207 Neb. 562, 299 N.W.2d 762 (1980) (holding that where court was silent on matter of leave to amend and plaintiffs made no effort to amend, Nebraska Supreme Court could only conclude that plaintiffs could not see any manner in which to amend petition to allege cause of action). But see *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990) (holding that trial court abused its discretion in not providing for leave to amend where plaintiffs at no time requested leave to amend). But see, also, *Alston v. Parker*, 363 F.3d 229 (3d Cir. 2004) (noting that in Third Circuit, complaints vulnerable to federal rule 12(b)(6) dismissal should not be dismissed without allowing amendment even when plaintiff does not seek leave to amend). Thus, in this case, where Dennes did not seek leave to amend pursuant to rule 15 and has not raised,

either by assignment or argument, any appellate issue with the district court's finding that Dennes' defective pleading could not be remedied by amendment, we decline to address whether amendment could cure the defect or whether Dennes might have been entitled to leave to amend if she had sought such.

V. CONCLUSION

We modify the district court's order of dismissal to remove any reference to a specific policy or custom of Douglas County concerning "sex-neutral arresting units," as such policy is not apparent from any of the pleadings in the record. We affirm the district court's order of dismissal as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
RANDY DRINKWALTER, APPELLANT.

720 N.W.2d 415

Filed August 22, 2006. No. A-04-988.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Proof.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief.
4. **Postconviction: Constitutional Law.** Postconviction relief is available only when a constitutional right has been infringed or violated.
5. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance 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) such deficient performance prejudiced the defense.
6. **Postconviction: Waiver: Appeal and Error.** Errors which were known to the defendant at trial and which were not raised on direct appeal are waived in subsequent postconviction proceedings.
7. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.

8. **Criminal Law: Pleas: Effectiveness of Counsel.** Where a defendant is represented by counsel during the plea process and enters a plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.
9. ____: ____: ____. A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice received from counsel was not within the range of competence demanded of attorneys in criminal cases.
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 weapon to commit a felony.
11. **Convictions: Plea Bargains: Homicide: Weapons.** Pursuant to a plea agreement which was explained and was entered into knowingly, voluntarily, and intelligently, a defendant can be convicted of and sentenced to imprisonment for both an underlying charge of manslaughter and a charge of use of a weapon to commit a felony.
12. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
13. **Pleas.** A plea of guilty, voluntarily and intelligently made, may be accepted even though the defendant professes his innocence, provided there is a factual basis for a finding of guilty; the judge, in accepting the plea, must have inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.
14. **Effectiveness of Counsel: Proof.** 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.

Appeal from the District Court for Cherry County: MARK D. KOZISEK, Judge. Affirmed.

P. Stephen Potter, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Randy Drinkwalter appeals from an order of the district court for Cherry County, Nebraska, denying his motion for postconviction relief. Drinkwalter's motion was premised upon the notion that one cannot be convicted of both an unintentional crime—manslaughter—and an intentional crime—use of a weapon to commit a felony. Because Drinkwalter's convictions of such crimes are the result of a plea bargain, we reject his claim

and affirm the denial of Drinkwalter's motion for postconviction relief.

FACTUAL AND PROCEDURAL BACKGROUND

Drinkwalter was originally convicted in 1990 of first degree murder and use of a weapon in the commission of a felony for beating his grandmother to death with a hammer and stabbing her in the face with a knife. On March 1, 1991, Drinkwalter was sentenced to death on the murder conviction and 6 to 12 years' imprisonment on the use of a deadly weapon conviction.

Drinkwalter appealed his convictions and sentences to the Nebraska Supreme Court. See *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992). In addition to Drinkwalter's appointed counsel, Leonard P. Vyhnalek, Drinkwalter's family hired another attorney, David C. Huston, to assist in the appeal. The Supreme Court reversed the decision and remanded the cause for a new trial due to evidentiary errors and to comments made by the trial judge to the jury in its preliminary instructions. See *id.* The Supreme Court noted that "[o]n appeal, the defendant does not challenge the sufficiency of the evidence to sustain his conviction." *Id.* at 42, 493 N.W.2d at 322.

After the Supreme Court reversed the decision and remanded the cause, Drinkwalter began preparations for the new trial. The trial judge held five hearings from April 29 to July 9, 1993. During the April 29 hearing, the trial judge informed Drinkwalter of his right to a jury trial and the right to appeal. Drinkwalter acknowledged that he understood what the trial judge told him. The trial judge also explained the charges—first degree murder and using a deadly weapon to commit a felony—and the fact that if convicted, the sentences would run consecutively. Next, the trial judge informed Drinkwalter of the pleas available to him, including pleas of not guilty, guilty, or no contest. The trial judge told Drinkwalter that for purposes of sentencing, a plea of no contest "has the same effect as if you plead guilty," which effect included the waiver of all the rights the court had previously explained. Drinkwalter acknowledged that he understood the pleas available to him and that his attorneys advised him to stand mute before the court. The trial judge then entered a plea of not guilty for Drinkwalter.

Before the retrial began, Drinkwalter's counsel and the prosecutors entered into plea negotiations. As a result, a plea agreement was reached on the day that jury selection was to begin. The agreement was that the first degree murder charge would be amended to a manslaughter charge but that the crime of use of a deadly weapon to commit a felony would still be part of the charges. The trial court examined Drinkwalter about the plea agreement and found that he was acting freely, voluntarily, and intelligently. The State amended the information by interlineation. Drinkwalter stated that he remembered and understood his constitutional rights. After a thorough examination, the trial court found Drinkwalter to be sufficiently competent and intelligent. The trial court explained both the charges against him and the maximum penalties available upon convictions of the crimes, including how the sentences would run consecutively. Drinkwalter told the trial court that his attorneys had explained all of his rights to him, that he was satisfied with their services, and that they had done a competent job. Important for this appeal, the trial court informed Drinkwalter that a no contest plea would waive any defect in the proceedings to that point and Drinkwalter acknowledged that he understood. Drinkwalter entered no contest pleas to the charges of manslaughter and use of a deadly weapon to commit a felony, which pleas the court accepted, and the court found him guilty of the two charges.

On July 9, 1993, Drinkwalter was sentenced to 6 years 8 months' to 20 years' imprisonment on the manslaughter conviction and 6 years 8 months' to 20 years' imprisonment on the use of a weapon to commit a felony conviction, with the sentences to be served consecutively. The trial court filed an order on July 16, 1993, correcting the credit for time previously served by Drinkwalter. No direct appeal was filed.

On August 4, 2003, Drinkwalter filed a verified motion for postconviction relief alleging amongst other assertions that had he known that "he could not have been convicted of Use of a Weapon in conjunction with the manslaughter charge, he would not have pled guilty to such charge, and [would have] instead elected to go to trial." An evidentiary hearing was granted, and counsel was appointed for Drinkwalter. Drinkwalter did not attend the postconviction hearing on July 28, 2004, and did not

testify in any format, such as by deposition. After the hearing, the trial judge denied the motion for postconviction relief, finding that Drinkwalter entered his plea freely, intelligently, and voluntarily and that Drinkwalter thereby waived every defense to the charges. The trial judge also found that there was neither ineffective assistance of counsel nor prosecutorial misconduct. Drinkwalter timely appeals.

ASSIGNMENTS OF ERROR

Drinkwalter assigns seven errors and advances three arguments that, regardless of how stated, are all premised upon the proposition that a criminal defendant cannot be convicted of the intentional crime of use of a weapon to commit a felony when the underlying felony is an unintentional crime, such as manslaughter. The assignments of error raise this issue in the context of "plain error" by the court which accepted his plea, as well as in the context of ineffective assistance of counsel.

STANDARD OF REVIEW

[1,2] A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001). Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

ANALYSIS

[3-6] We begin by recalling that a criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, *State v. Harton*, 230 Neb. 167, 430 N.W.2d 313 (1988), and that such relief is available only when a constitutional right has been infringed or violated, *Kerns v. Grammer*, 227 Neb. 165, 416 N.W.2d 253 (1987). The Nebraska Supreme Court has adopted the two-prong test 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), for proving a claim of ineffective assistance of counsel. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), *disapproved on other grounds, State v.*

Canbaz, 270 Neb. 559, 705 N.W.2d 221 (2005). To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance 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) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. See, *Strickland, supra*; *Nielsen, supra*. Additionally, errors which were known to the defendant at trial and which were not raised on direct appeal are waived in subsequent postconviction proceedings. See, *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002); *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000); *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Malcom*, 12 Neb. App. 432, 675 N.W.2d 728 (2004).

[7] Here, Drinkwalter alleges in his verified motion that had he known that "he could not have been convicted of Use of a Weapon [an intentional crime] in conjunction with the manslaughter charge [an unintentional crime], he would not have pled guilty to such charge, and [would have] instead elected to go to trial." When attacking plea-based convictions, in order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial. *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989).

In attempting to meet the burden of establishing a basis for postconviction relief, Drinkwalter's appointed counsel offered into evidence the deposition of Huston, Drinkwalter's attorney during the direct appeal of the first trial as well as during the second trial and the plea agreement, and the deposition of one of two prosecuting attorneys during both the first trial and the plea agreement. In addition to the depositions, Drinkwalter's counsel offered a copy of the information; the journal entries for the plea agreement and the sentencing; the commitment; the order correcting and modifying the sentence; the affidavit of Vyhnalek, his other attorney; a transcription of the plea and sentencing proceedings; and 20 exhibits from such proceedings. The district court received such evidence, and the parties stipulated that no

direct appeal was taken by Drinkwalter after the plea agreement. Drinkwalter did not testify in person or by deposition at the postconviction hearing.

Drinkwalter's evidence reveals that after the remand for a new trial from the Nebraska Supreme Court, the trial judge thoroughly reviewed the charges, the potential sentences, and the effects of a no contest plea, including that such would be a waiver of every defense to the charges.

[8,9] In *State v. Zarate*, 264 Neb. 690, 694, 651 N.W.2d 215, 221 (2002), the court detailed the defense counsel's obligation in the plea agreement process as follows:

> "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), quoting *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). "[A] defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.' " *Hill*, 474 U.S. at 56-57, quoting *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

Drinkwalter did not present any evidence that Vyhnalek and Huston did not properly explain to him either the charges or his options. And most notably, Drinkwalter did not present any evidence whatsoever that such lawyers did not discuss the crux of his postconviction action, which is the notion that he could not be convicted of an intentional crime such as use of a weapon to commit a felony when the underlying felony was an unintentional crime such as manslaughter, a proposition we will refer to as the "*Ring-Pruett* rule." See, *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002); *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989). As said, Drinkwalter's claim for postconviction relief rests, in one way or another, entirely on this proposition. Therefore, Drinkwalter clearly failed to satisfy his burden of proof under *Zarate, supra*, as outlined above, to show

that his attorneys performed deficiently in the advice given him concerning the plea agreement. Despite this complete failure of proof, we feel that it is appropriate to address Drinkwalter's arguments centering upon the *Ring-Pruett* rule.

Plea Agreement to Charges of Manslaughter and Use of Weapon.

Drinkwalter alleges that the district court erred in its interpretation of the law as it pertains to whether he could be convicted of use of a weapon to commit a felony when the underlying charge is an unintentional crime and when, as in his case, a conviction results from a plea agreement, not a trial.

[10] The Nebraska Supreme Court in *Pruett, supra*, relying on its decision in *Ring, supra*, 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. As a result, the *Pruett* court vacated the defendant's jury conviction and sentence for use of a weapon to commit the underlying felony of manslaughter, an unintentional crime. We note that the defendant was convicted by a jury and that no plea agreement was involved.

Ring, supra, the predecessor case to *Pruett*, reaches the same result but has a slightly different rationale. The *Ring* court found that in order to convict the defendant of the use of a deadly weapon charge under Neb. Rev. Stat. § 28-1205 (Reissue 1985), the State had to prove the defendant used his vehicle (the weapon) "for the purpose of committing a felony" rather than just using it when committing the felony. (Emphasis omitted.) 233 Neb. at 725, 447 N.W.2d at 911. Given that the evidence established that the defendant attempted to avoid the collision which resulted in the motor vehicle homicide conviction by applying the brakes of his vehicle, the *Ring* court found that there was insufficient proof that the defendant was using his vehicle for the purpose of committing a felony. Therefore, the court vacated the defendant's use of a weapon conviction.

[11] With this background of the *Ring-Pruett* rule in place, including the fact that *Pruett* can be seen as establishing a more absolute rule than was articulated in *Ring*, we turn to *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000), which is precisely on point in all respects to the instant case. Pursuant to

a plea agreement, Jeffrey Burkhardt pled guilty to one count of manslaughter and one count of 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. *Id.* The trial court in *Burkhardt* determined that a factual basis had been established, that the plea agreement had been explained, and that the plea was knowingly, voluntarily, and intelligently made. Burkhardt was convicted of both charges and was sentenced to 15 to 20 years' imprisonment for manslaughter and 12 to 30 years' imprisonment for use of a weapon to commit a felony, with the sentences to be served consecutively.

[12] Burkhardt appealed, and relying upon *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), he argued that he could not be convicted of manslaughter and use of a weapon to commit a felony. It is noteworthy that at the time of Drinkwalter's plea agreement, the state of the law was the same as when the Nebraska Supreme Court decided Burkhardt's appeal—*Ring* had been decided but the decision in *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), had not yet come down. Therefore, for Drinkwalter's appeal, *Burkhardt* is the seminal case. The Supreme Court rejected Burkhardt's argument premised on *Ring*, stating: "The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional." *Burkhardt*, 258 Neb. at 1053, 607 N.W.2d at 515. And, while under *Ring* and now *Pruett*, a dual charge of manslaughter and use of a weapon under the applicable version of § 28-1205 may well be subject to a motion to quash, the court in *Burkhardt* said that all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. *Burkhardt, supra*, citing *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). Therefore, Drinkwalter, like Burkhardt, has waived any claim that he cannot be convicted via a plea agreement of both an unintentional felony—manslaughter—and an intentional felony—use of a weapon to commit a felony.

[13] Additionally, we find it noteworthy that Drinkwalter's plea agreement was specifically made as an "*Alford* plea," which in our view further supports our conclusion that pursuant to *Burkhardt, supra*, Drinkwalter has waived any claim based on

the *Ring-Pruett* rule. The nature of an *Alford* plea was detailed in *State v. Beach*, 211 Neb. 660, 666, 319 N.W.2d 754, 757 (1982), as follows:

> In *State v. Leisy,* 207 Neb. 118, 295 N.W.2d 715 (1980), citing *North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), we held that a plea of guilty, voluntarily and intelligently made, might be accepted even though the defendant professes his innocence, provided there is a factual basis for a finding of guilty. Actually, *Alford* imposes one additional requirement, and that is that the judge in accepting the plea must have inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. "Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. . . . Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term." *Id.* at 37.

Although we do not detail all of the plea-taking colloquy involving counsel, Drinkwalter, and the trial judge, we do point out that the judge succinctly boiled the *Alford* plea concept down to its essence by asking Drinkwalter if he understood that such concept allows defendants to plead to a crime they are not admitting they actually did, "but that it's such a good bargain that they can't resist it." Drinkwalter responded affirmatively when the judge asked him, "[I]s that the position that you're taking today?" In *Beach, supra*, the court examined the trial judge's inquiry which attempted to "resolve the apparent conflict between 'the waiver of trial and the claim of innocence.' " 211 Neb. at 667, 319 N.W.2d at 757 (holding that inquiry made by trial court was insufficient to resolve apparent

conflict between waiver of trial and claim of innocence). In the instant case, the trial judge made careful inquiry about the *Alford* plea, whether it was in Drinkwalter's best interests, and, of course, the trial judge was fully aware that Drinkwalter had been tried previously, found guilty of first degree murder, and sentenced to death. Thus, the conflict between the waiver of trial and the claim of innocence was obviously resolved—evidenced by Drinkwalter's attorney's statement that "[Drinkwalter] would not quarrel with the facts raised by [the county attorney]."

In conclusion, as a result of the holding in *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000), and the buttressing effect of the "irresistible" *Alford* plea bargain, Drinkwalter's claim for postconviction relief to set aside his conviction for use of a weapon to commit a felony on the basis of the *Ring-Pruett* rule fails. He has clearly waived any such argument.

Ineffective Assistance of Counsel.

[14] Clearly, the exception to Drinkwalter's waiver of all defenses is that in making the plea, his counsel performed deficiently to his prejudice. As previously stated, to establish that he or she was denied effective assistance of counsel, the defendant first must show that counsel's performance was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). 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, in the context of a plea as here, a reasonable probability that, but for counsel's deficient performance, he or she would have insisted on proceeding to trial rather than taking the plea bargain. See *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002). 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. *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

Drinkwalter received significant benefit from the plea agreement, because in 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, Drinkwalter 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.

Drinkwalter did not show that he was not advised by counsel of the holding of *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989) (remembering that *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), was not yet decided at the time of Drinkwalter's plea bargain), and he did not show that if he had been so advised, there was a reasonable probability that he would have insisted on going to trial. Notwithstanding the fact that Drinkwalter did not present any evidence of deficient performance by his counsel, given his prior conviction and the obviously favorable plea agreement, Drinkwalter has not shown prejudice.

Even if Drinkwalter could overcome the waiver, the lack of evidence of deficient performance, and the lack of prejudice, the argument advanced here based on *Ring, supra*, was available to him on direct appeal. Drinkwalter's failure to raise on direct appeal the argument based on *Ring, supra*, acts as a procedural bar in this postconviction proceeding. See, *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002); *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000); *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Malcom*, 12 Neb. App. 432, 675 N.W.2d 728 (2004). Moreover, Drinkwalter adduced no evidence that he directed his lawyers to file a direct appeal, which direction his lawyers failed to follow.

CONCLUSION

For the multitude of reasons detailed above, the district court did not err in denying Drinkwalter's motion for postconviction relief.

AFFIRMED.

TIMOTHY WESTON, APPELLANT, V. CONTINENTAL WESTERN INSURANCE COMPANY, APPELLEE.

720 N.W.2d 904

Filed August 29, 2006. No. A-04-1185.

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 the 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. **Insurance: Contracts: Damages: Words and Phrases.** The term "stacking" refers to an insured's attempt to recover damages under more than one policy, endorsement, or coverage by placing one policy, endorsement, or coverage upon another and recovering from each in succession either until all of the damages are satisfied or until the total limits of all policies, endorsements, or coverages are exhausted, even though the insured has not been fully indemnified.
4. **Insurance: Contracts: Motor Vehicles: Liability.** Neb. Rev. Stat. § 44-6410 (Reissue 2004) specifically provides that regardless of the number of vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, the limits of liability for uninsured or underinsured motorist coverage for two or more motor vehicles insured under the same policy or separate policies shall not be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident except as provided in Neb. Rev. Stat. § 44-6411 (Reissue 2004).

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed.

David J. Cullan for appellant.

Stephanie Frazier Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Timothy Weston appeals an order of the district court for Box Butte County, Nebraska, which granted summary judgment in favor of Continental Western Insurance Company (Continental) on Weston's complaint to recover uninsured motorist benefits.

On appeal, Weston challenges the district court's holding that Weston is statutorily prohibited from "stacking" multiple uninsured motorist coverages. We find no error in the district court's legal conclusions, and we affirm the court's grant of summary judgment in favor of Continental.

II. BACKGROUND

1. Factual and Procedural Background

On June 1, 2002, Weston was a passenger in a vehicle owned and operated by an uninsured motorist. On that date, the uninsured motorist "lost control of his vehicle [and] proceeded . . . into the . . . ditch and rolled. All passengers, including [Weston], were ejected." Weston alleged that he suffered personal injuries as a result of the accident.

The record indicates that on the date of the accident, Weston had two separate potentially applicable insurance policies, each from a different insurance company. First, Weston was insured by a personal automobile policy with Farmers Insurance Group (Farmers), which policy included uninsured motorist coverage with a policy limit of $100,000. Second, Weston was insured by a "contractors policy" with Continental, which policy also included uninsured motorist coverage with a policy limit of $100,000.

Following the accident, Weston made a claim for uninsured motorist benefits with Farmers and reached a settlement which included payment of $100,000 in uninsured motorist benefits. On December 9, 2003, Weston filed a complaint against Continental seeking additional uninsured motorist benefits pursuant to Weston's policy with Continental. On March 12, 2004, Continental filed an answer in which, inter alia, Continental alleged that Weston had already received the maximum uninsured motorist benefit to which he was legally entitled and that the uninsured motorist coverage in the Continental policy did not cover the accident.

On May 6, 2004, Continental filed a motion for summary judgment. In support of the motion, Continental offered, and the court received, a copy of the complaint, a copy of the answer, and a copy of Weston's answers to requests for admissions. Weston offered no evidence in opposition to the motion, although he did

file a written response to the motion on May 13. Additionally, Weston raised various constitutional issues, including unlawful taking and alleged unconstitutionality of various statutes. None of the constitutional issues has been raised on appeal.

On October 13, 2004, the district court filed a journal entry sustaining Continental's motion for summary judgment. The court held that Weston was prohibited from "stacking" his uninsured motorist coverages from Farmers and Continental. The court specifically held that the maximum uninsured motorist benefit to which Weston was entitled was $100,000 because that sum was the highest limit of either individual potentially applicable policy, that Weston had already received $100,000 from Farmers, and that Continental was entitled to summary judgment because Weston had already received the maximum uninsured motorist benefit to which he was entitled. This appeal followed.

2. Weston's Record on Appeal

As noted above, the only evidence presented to the district court for resolution of the summary judgment motion was the three exhibits offered by Continental: the complaint, the answer, and Weston's answers to requests for admissions. Weston offered no evidence in opposition to the motion for summary judgment, and neither party offered a copy of the Continental policy at issue.

Nonetheless, Weston attached to his appellate brief an "appendix" consisting of four pages which appear to be an excerpt from the Continental policy. Weston also filed, on February 14, 2005, a praecipe for a supplemental transcript, in which he requested a supplemental transcript to include "the following additional pleading with attached Exhibits A and B: 7. Plaintiff's Request for Admission (with Exhibit A and Exhibit B attached thereto)." (Emphasis omitted.) The supplemental transcript prepared in response to this praecipe includes requests for admissions served by Weston on Continental, seeking Continental's admissions to various matters, and also includes what appears to be a copy of the Continental policy. The portion of the supplemental transcript which appears to be a copy of the Continental policy totals more than 130 pages. All contents of the supplemental transcript bear file stamps indicating that the documents were filed with the

district court on February 14, approximately 4 months after the district court rendered its judgment.

Weston's counsel conceded during oral argument that the materials in the supplemental transcript are not properly considered part of the record on appeal. As the parties recognized during oral argument, the Nebraska Supreme Court has held that evidence to be considered on appeal from a summary judgment must be properly marked, offered, and accepted by the trial court as evidence and made a part of the bill of exceptions to be properly considered part of the record on appeal. See, *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003); *Rath v. Selection Research, Inc.*, 246 Neb. 340, 519 N.W.2d 503 (1994). Simply filing documents after a hearing on summary judgment does not make the documents a proper part of the record on appeal and does not provide a basis for the appellate court to consider materials that were never offered to the trial court. See *Rath v. Selection Research, Inc., supra.* "[E]xhibits which were not 'offered, marked, or received by the trial judge at the summary judgment hearing . . . may not be considered on appeal.' " *Zannini v. Ameritrade Holding Corp.*, 266 Neb. at 498, 667 N.W.2d at 229, quoting *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000).

III. ASSIGNMENT OF ERROR

Weston's sole assignment of error on appeal is that the district court erred in granting Continental's motion for summary judgment.

IV. ANALYSIS

1. 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. *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005). In reviewing a summary judgment, an appellate court views the evidence in the 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.*

2. Historical Development of Nebraska Law Concerning "Stacking"

The issue raised by Weston in this appeal is whether the trial court correctly interpreted Nebraska statutory law as prohibiting the "stacking" of uninsured motorist coverages from two separate insurance policies. Resolution of that issue would benefit from a brief review of the historical development of Nebraska law concerning uninsured motorist coverage and "stacking."

[3] The meaning of the term "stacking" was set forth in a clear and concise fashion in the dissenting opinion in *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985). The dissent noted:

> The term "stacking" refers to an insured's attempt to recover damages under more than one policy, endorsement, or coverage " 'by placing one policy, endorsement, or coverage, etc. upon another and recovering from each in succession until either all of his damages are satisfied or until the total limits of all policies, endorsements, coverages, etc. are exhausted, even though the insured has not been fully indemnified.' "

Id. at 772, 366 N.W.2d at 422 (White, J., dissenting), quoting *Lopez v. Foundation Reserve Ins. Co., Inc.*, 98 N.M. 166, 646 P.2d 1230 (1982).

Prior to 1986, Nebraska law required insurers to offer uninsured motorist coverage to insureds, but did not include any specific statutory provision addressing the issue of stacking such coverage. See, Neb. Rev. Stat. § 60-509.01 (Reissue 1978); *Charley v. Farmers Mut. Ins. Co., supra.* The Nebraska Supreme Court recognized as much in *Charley*. In *Charley*, the issue was whether a deceased's estate could stack two uninsured motorist provisions contained within a single policy but covering two vehicles and for which the insureds had paid separate premiums. The court held, "Section 60-509.01 neither require[d] nor prohibit[ed] the aggregation of multiple uninsured motorist coverages." *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. at 769, 366 N.W.2d at 421. "There [was] no language which require[d] that multiple uninsured motorist coverages, once provided, be aggregated no matter what the policy says with respect to the matter. Neither [was] there language which prohibit[ed] the aggregation

of the uninsured motorist coverages provided." *Id.* at 770, 366 N.W.2d at 421.

In *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985), the Nebraska Supreme Court again concluded that the statutes then in effect did not specifically address stacking. The court noted that its decision in *Charley* shifted the focus from looking "to the spirit of the law in interpreting various uninsured motorist provisions" to instead "interpreting insurance contracts under the letter of the law." *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. at 874, 374 N.W.2d at 44. Prior to *Charley* and *Kracl*, the court had viewed § 60-509.01 "as remedial in nature" and had construed the statute broadly "to benefit the innocent victim of the financially irresponsible uninsured motorist." *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. at 874, 374 N.W.2d at 44. As such, in prior cases, the court had viewed stacking as a reasonable expectation of coverage and had allowed stacking "in an attempt to more fully compensate the victim for his injuries at the hands of an uninsured motorist." *Id.*

In 1986, the Nebraska Legislature passed 1986 Neb. Laws, L.B. 573. L.B. 573 created Nebraska's version of the Underinsured Motorist Insurance Coverage Act and included specific statutory provisions addressing stacking of underinsured motorist coverages. See Neb. Rev. Stat. §§ 60-579 and 60-580 (Reissue 1988). Section 60-579 specifically provided that "the limits of liability for underinsured motorist coverage for two or more motor vehicles insured under the same policy or separate policies shall not be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident." Section 60-580(1) specifically provided that "[i]n the event an insured [was] entitled to underinsured motorist coverage under more than one policy . . . the maximum amount an insured may recover shall not exceed the highest limit of any one such policy."

[4] In 1994, the Nebraska Legislature passed 1994 Neb. Laws, L.B. 1074. See Neb. Rev. Stat. §§ 44-6401 through 44-6414 (Reissue 2004). L.B. 1074 created Nebraska's version of the Uninsured and Underinsured Motorist Insurance Coverage Act and made various statutory provisions previously applicable

to just the uninsured or the underinsured applicable to both. Relevant to the present case, § 44-6410 specifically provides:

> Regardless of the number of vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, the limits of liability for uninsured or underinsured motorist coverage for two or more motor vehicles insured under the same policy or separate policies shall not be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident except as provided in section 44-6411.

Section 44-6411(1) specifically provides, "In the event an insured is entitled to uninsured or underinsured motorist coverage under more than one policy of motor vehicle liability insurance, the maximum amount an insured may recover shall not exceed the highest limit of any one such policy."

In *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999), the Nebraska Supreme Court recognized that the plain language of § 60-580(1) (Reissue 1993) concerning underinsured motorist coverage, which language had not changed since its 1986 inception as set forth above and is now codified at § 44-6411(1) concerning both uninsured and underinsured motorist coverage, limited an insured's recovery to the highest limit of any applicable policies. The court noted that

> even if payment of the full amount of [the highest limit set forth in one of the applicable policies] did not result in full compensation, [the insured] would have no right to recover under [another policy] because he would have already received the maximum underinsured motorist recovery permitted . . . i.e., the highest limit of the two applicable policies.

Nicholson v. General Cas. Co. of Wis., 255 Neb. at 941, 587 N.W.2d at 870.

3. Application and Resolution

In the present case, Weston alleges that the trial court erred in relying on §§ 44-6410 and 44-6411 to find that stacking of Weston's uninsured motorist coverages was prohibited, because Weston's insurance policy with Continental did not contain any

specific restrictions to prevent stacking and did not specifically reference §§ 44-6410 and 44-6411. Weston argues that the language of the Continental policy clearly and unambiguously provides that Continental will pay damages to which Weston is legally entitled. As such, Weston argues that the trial court erred in granting summary judgment in favor of Continental. We disagree.

Initially, as noted above, the actual policy at issue in this case is not properly in the record presented by Weston on appeal. Neither party offered the Continental policy as evidence at trial, and the policy was not before the trial court when that court ruled on Continental's motion for summary judgment. The pleadings establish that the policy included a provision for uninsured motorist coverage, with a limit of $100,000. Weston admitted that he had uninsured motorist coverage, with a limit of $100,000, under a separate policy with Farmers and that he had previously negotiated a settlement with Farmers and received a $100,000 payment under that policy, reaching its limit.

For purposes of our discussion, we cannot conclude that the Continental policy contains no restrictions against stacking, and we cannot simply accept the various quotations, allegedly from the policy language, interspersed throughout Weston's appellate brief as being accurate reflections of the actual language of the policy. Weston failed to introduce the policy into evidence and thereby failed to make a proper record for our consideration of the actual policy language on appeal. Even assuming, however, that the policy simply provides uninsured motorist coverage with a limit of $100,000 and makes no specific representations either allowing or prohibiting stacking of the coverage with any other policy or uninsured motorist coverage, we conclude that the trial court correctly concluded that stacking is prohibited by §§ 44-6410 and 44-6411.

As set forth above, there was a time when the Nebraska Supreme Court specifically recognized the lack of any statutory directive concerning stacking of uninsured motorist coverages. See, *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985); *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985). Subsequent to that recognition, however, the Nebraska Legislature enacted specific prohibitions

against stacking of underinsured motorist coverages, and those specific prohibitions now apply to both uninsured and underinsured motorist coverages. See, § 44-6410; *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999). The plain language of §§ 44-6410 and 44-6411 indicates that stacking of uninsured motorist coverages is prohibited and that an insured's maximum recovery of uninsured motorist benefits is the highest limit of any one applicable policy.

Applying past cases and the plain language of §§ 44-6410 and 44-6411 to the facts of Weston's case leads us to conclude the trial court correctly concluded that Weston was not entitled to stack his uninsured motorist coverages, that Weston had already received his maximum recovery for uninsured motorist benefits, and that Continental was entitled to summary judgment. Again, §§ 44-6410 and 44-6411 clearly indicate that an insured may not stack multiple uninsured motorist coverages and that an insured's maximum recovery for uninsured motorist benefits is the highest limit of any one applicable policy. The evidence offered by Continental indicates Weston has admitted that both policies had identical limits of $100,000 for uninsured motorist benefits and that he had previously negotiated a settlement and received benefits of $100,000 under the uninsured motorist coverage of the Farmers insurance policy. As such, Weston would not be entitled to any uninsured motorist benefits from Continental. See *Nicholson v. General Cas. Co. of Wis., supra.*

Finally, we note Weston devotes a significant portion of his brief on appeal to arguing the longstanding propositions in Nebraska that an insurance carrier and its insured are free to contract for more favorable coverage than the minimum required by law, that policies must be interpreted according to their plain language absent ambiguities, and that public policy should favor promoting trust and goodwill by not imposing restrictions on insurance policies that are not clearly set forth in the policies' language. We agree with all of these propositions, but find none of them to have an impact on the resolution of this case.

As Weston notes, § 44-6413(4) specifically authorizes insurers and insureds to negotiate "coverage under terms and conditions more favorable to [the] insured or in limits higher than are required by the act." This court has recognized that "[t]his

provision necessarily suggests, and common sense dictates, that insurers may not issue policies which carry terms and conditions less favorable to the insured than those provided in the act." *American States Ins. v. Farm Bureau Ins.*, 7 Neb. App. 507, 517, 583 N.W.2d 358, 365 (1998). However, as already established, §§ 44-6410 and 44-6411 specifically provide that stacking of uninsured motorist coverages is prohibited. Although § 44-6413(4) would certainly allow an insurer and its insured to negotiate more favorable coverage and would arguably allow for such stacking to be negotiated, there is nothing in the record presented on appeal to suggest that any such negotiation occurred in this case. See *Nicholson v. General Cas. Co., supra* (noting that statutes did not prohibit coverage more favorable than terms required by statutes, but recognizing that policy contained no indication that such coverage was intended). There is nothing in the record presented by Weston on appeal to indicate that any plain language in the Continental policy would suggest that the parties negotiated to allow stacking.

Further, the Nebraska Supreme Court has previously held that there is no public policy requiring stacking. See *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985). As the Nebraska Supreme Court has recognized, because the law allows insurers and insureds to negotiate more favorable coverage than the minimums required by law, if the effect of denying stacking results in an insured's receiving less than complete recovery for his injuries, public policy is not violated. See *id.* It is merely a fact that the insured purchased coverage which was less than adequate to cover the loss. See *id.*

V. CONCLUSION

Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act prohibits stacking of uninsured motorist coverages and provides that the maximum recovery to which an insured is entitled is the highest limit of any one applicable policy. In this case, the trial court did not err in concluding that Weston had already received the maximum recovery to which he was entitled and in granting summary judgment in favor of Continental. The trial court's judgment is affirmed.

AFFIRMED.

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