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STATE OF NEBRASKA, APPELLEE, V. EDWIN KULA, ALSO KNOWN AS ED KULA, APPELLANT.

562 N.W.2d 717

Filed May 9, 1997. No. S-96-301.

1. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Motions for Continuance: Appeal and Error.** An appellate court reviews a ruling on a motion for continuance for an abuse of discretion by the trial court.
3. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
5. **Convictions: Juries: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
6. **Statutes: Rules of the Supreme Court: Appeal and Error.** While Neb. Rev. Stat. § 25-1919 (Reissue 1995) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1996) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit the Supreme Court to note any plain error not assigned.
7. **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.
8. **Constitutional Law: Criminal Law: Pretrial Procedure.** While *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), impose a constitutional mandate for disclosure in criminal cases, a statutory design for discovery such as Neb. Rev. Stat. § 29-1912 (Reissue 1995) can exact more than the constitutional minimum, so that courts must focus on information potentially useful to the defense.
9. **Pretrial Procedure: Prosecuting Attorneys: Evidence: Words and Phrases.** Under Neb. Rev. Stat. § 29-1912 (Reissue 1995), whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
10. **Pretrial Procedure.** The discovery process is not a game of "hide the ball," and discovery orders must be completed in a timely manner.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for a new trial.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, and Adam J. Sipple for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Edwin Kula was convicted by a jury of the first degree murder of Jerry Carlson and the use of a weapon to commit a felony. The district court for Platte County sentenced Kula to life in prison for murder and to a mandatory consecutive term of 6⅔ to 20 years' imprisonment for the use of a weapon to commit a felony.

Because of the State's repeated prejudicial discovery violations, we determine that the district court erred in failing to grant Kula's motion for a continuance prior to opening statements and his motion for new trial following the verdict. As a result, we reverse, and remand for a new trial.

I. BACKGROUND

1. DISCOVERY OF CARLSON'S BODY

On the evening of April 15, 1994, Carlson and his friend Frank Cuba worked on a golf cart at Cuba's auto body repair shop in Silver Creek, Nebraska. Carlson left the shop in his Chevrolet pickup between 11:30 and 11:45 p.m. and turned west on Highway 30 toward Clarks, Nebraska.

At approximately 1:15 or 1:30 a.m. on April 16, Tom Branting stopped at the residence of John Wirrick, village marshal for Clarks, and told Wirrick that there was a vehicle, possibly belonging to Carlson, about 2 miles east of Clarks in a ditch adjacent to Highway 30. Wirrick then contacted the Merrick County Sheriff's Department and met Chief Deputy Richard Miller at the scene.

The officers discovered a pickup with the headlights on and the engine running approximately 20 to 50 yards south of

Highway 30, resting on a tree in a ditch containing a foot of water. The officers found Carlson dead in the pickup with a wound in his back just underneath the left shoulder blade. The rear driver's-side window on the extended portion of the cab was broken out by a single bullet from a high-powered rifle that pierced through the driver's seat, entered Carlson's back, and penetrated his chest.

Originally, Branting and Charles Johnson were arrested for, and charged with, second degree murder in the death of Carlson. The cases were subsequently dismissed.

2. Activities of Kula on April 15

On the evening of April 15, Kula and his 15-year-old son, Travis, visited two bars in Silver Creek. They ate at the Kozy Bar and then went to Li'l Joe's for approximately 3 or 4 hours. Travis did not know what time he and Kula left Li'l Joe's in the Kulas' Dodge minivan, but it "seemed pretty late."

At Kula's direction, Travis drove south out of Silver Creek and then turned around and came back through town. They came to an intersection where they saw two men walking. When Kula saw the two men, Travis noticed that Kula's face changed expressions like "he wasn't real pleased with something." Kula referred to one of the men as being Carlson (the other being Cuba) and then told Travis to turn right. As the minivan approached the two men at approximately 10 to 15 miles per hour, Kula grabbed the steering wheel and turned the minivan within inches of hitting them. Travis asked Kula what was going on and received no reply.

Travis then drove to the Kula farmhouse 3 miles east and one-half mile north of Silver Creek. The trip from Silver Creek to the Kula home takes approximately 10 minutes. When they arrived home, Kula indicated to Travis that he was going back out and said that he did not want Travis to be a witness and have to testify in court and that he (Kula) was going to take care of business. Travis went straight to his room.

Kula's wife, Rose, heard Kula and Travis arrive home between 11:20 and 11:30 p.m. She did not see Kula, but heard someone go back outside. Rose then heard the minivan "[take] off a little fast," looked out the window, and saw the minivan

drive over to the garage. She woke Travis and asked him what was going on. Travis told her that she did not want to know, and she responded that she did. Travis eventually told Rose that Kula was upset with Carlson.

From Travis' window, Rose watched the minivan drive to the end of the farm lane and sit for approximately 5 to 7 minutes. She then left Travis' room and went to the garage to see if any guns were missing. She noted that a .22-caliber pistol was missing that she had seen in the garage earlier that afternoon and that a .22-caliber rifle was missing that Kula had used to shoot birds earlier that day. When Rose saw that the guns were gone, she became concerned, so she and the children went to a Columbus hotel for the night. Rose stated that if Kula was in a bad mood, she "didn't want to be home when he got home."

3. Activities of Branting and Johnson on April 15

On April 15 at approximately 7 p.m., Branting and Johnson went together to the Kozy Bar in Silver Creek. According to Branting and Johnson, the following occurred: They left the bar at approximately 11 p.m. and drove west to Clarks in Johnson's Chevrolet pickup. Branting noticed a car following them that he believed to be that of Rhonda Braun, whom Johnson had been dating. When they got to Clarks, they confirmed that it was Braun's blue Oldsmobile behind them.

At approximately 11:10 or 11:12 p.m., Johnson dropped Branting off at Branting's home in Clarks, where he lived with his sister Juanita Engel and his nephew Trent Engel. Then, with Braun driving, Branting got into her car, and they followed Johnson out to the house of Amy Johnson, Johnson's ex-wife, approximately 3 miles northeast of Clarks. According to Johnson, when he arrived at the house of Amy Johnson, with whom he was attempting to reconcile, her clock said 11:45 p.m., and her clocks are 15 minutes fast. Amy Johnson, who had dated Carlson, testified that when Johnson arrived at her house, her clock showed about 12 midnight, but her clocks are 5 to 10 minutes fast.

Branting rode with Braun back to Clarks. They then drove through Clarks, went to Polk for beer and cigarettes, went back

to Silver Creek, and then headed back west to Clarks. Approximately 3 miles east of Clarks, they noticed a vehicle off the road. Branting, wearing boots, waded down to the vehicle in ankle-deep water and determined that it was Carlson's pickup. He looked inside, saw blood and no movement from Carlson, and then went back to Braun's car. Branting and Braun then drove to Wirrick's residence in Clarks.

4. Basis for Original Charges Against Branting and Johnson

In reporting what he observed, Branting told Wirrick only the whereabouts of the vehicle and that it possibly belonged to Carlson. He did not report that he had gone down to the pickup or that he had seen a body or blood in the pickup. Braun then took Branting home, where he encountered his nephew Trent Engel, who noticed that Branting was wearing penny loafers or some type of dress shoes and was not wearing boots.

Braun was interviewed by the police prior to Branting's and Johnson's being charged. She also testified under oath at both Branting's and Johnson's preliminary hearings, at Kula's grand jury proceeding, and during a pretrial deposition taken by Kula's counsel. During her first interview with Merrick County Deputy Sheriff Rod Williamson and at all subsequent legal proceedings, Braun essentially corroborated the trial testimony of Branting and Johnson—that she followed them on Highway 30 from Silver Creek to Branting's sister's house in Clarks and that nothing unusual happened on the way.

However, prior to Braun's testifying in any legal proceeding, Williamson conducted a second interview with her at the Platte County sheriff's office. During this interview, Braun made statements that differ from those she made during her first interview and from her testimony at the subsequent legal proceedings. Williamson's written report of this second interview was not admitted into evidence at trial, and Braun's statements were not allowed to be used by the defense to impeach her after she was called as a witness by the defense. Williamson's report stated that Braun told him that as she was following Branting and Johnson in her car, as they were heading westbound toward Clarks in Johnson's pickup,

> she then saw Mr. Johnson['s] vehicle swerve into the eastbound lane and another set of tail lights appeared. Mr. Johnson['s] vehicle then went around the second vehicle then the second vehicle swerved and the lights disappeared. She was then behind Mr. Johnson's vehicle again. She then came across a vehicle in a field on the south side of the highway with [its] lights on.
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> . . . .
>
> I then asked her if she was in love with Mr. Johnson? Miss Braun began to cry and stated "yes". I then asked her if that was why she did not tell me the truth the first time I talked to her? She stated "yes". I then asked if she was telling me everything now?
>
> She stated "yes I'll take a lie detector test too if you want". I then asked if she would be willing to take a polygraph if I would set it up? She stated "yes".
>
> I then asked her why she didn't tell me the truth the first time? She stated that she didn't want to get Mr. Johnson in trouble.

During an offer of proof outside the presence of the jury, Braun admitted making these statements to Williamson. However, Braun stated that she made the statements only "after they kept telling me and trying to get me to say that." She elaborated that law enforcement officers put pressure on her, threatened to take her to jail, and treated her poorly. However, Braun also admitted that she essentially repeated these statements 2 hours later to Investigator Mike Phinney of the Nebraska State Patrol in Grand Island, and that, in her opinion, Phinney did not mistreat her in any way.

At trial, Braun was called as a witness only by Kula and testified that she did not see any other westbound vehicles on Highway 30 besides Johnson's pickup. However, she testified that as she was following Branting and Johnson, she saw Johnson's pickup swerve "a little bit" left of the centerline and that she saw "a glimpse of light" on the south side of the field in the area where Johnson made this swerve and where Carlson's pickup was later found.

Shannon Lerch was at the Kozy Bar on the evening of April 15. Lerch testified for Kula that Branting and Johnson left the

bar when she did, which was 11:30 p.m., not 11 p.m. Sheila Cermak was also in the Kozy Bar that evening and testified for the defense that she left between 11:15 and 11:30 p.m. and that Branting and Johnson left at the same time.

Joan Sock lived 2 miles west of Silver Creek on the south side of Highway 30. Sock was called as a witness by the State and testified that she heard what sounded like a gunshot somewhere to the east of her house on the night of April 15, 1994. She stated that she did not know exactly what time it was, but that she lay down on her sofa at 11:10 p.m. and that sometime after that she heard the sound. After she heard the sound, she waited a minute to a couple of minutes and then looked out her window facing Highway 30. She saw two sets of taillights approximately half a mile west of her house, both heading west. The two sets of taillights were close together, and Sock thought that one vehicle was about ready to pass the other. She could not identify the vehicles. She also observed a light-colored smaller car behind the two sets of taillights that turned off on a road going northwest.

Ken Dittmer, another witness called by Kula, lived in Clarks. On the evening of April 15, Dittmer, his wife, and another couple were playing cards. At about 11:25 p.m., Dittmer and his male companion went to Clarks to get more beer but were unable to find an open establishment. Dittmer and his friend then left for Silver Creek, traveling east on Highway 30, with his friend driving. Approximately halfway between Clarks and Silver Creek, Dittmer saw two westbound vehicles which he identified as being "Chevy" pickups. He testified that these vehicles were moving fast and traveling 5 to 10 feet apart, essentially bumper to bumper. Approximately 2 miles behind the Chevrolet pickups, and also proceeding westbound, was a blue car. The record reflects that both Carlson and Johnson were driving Chevrolet pickups and that Braun was driving a blue Oldsmobile on April 15.

At trial, Branting and Johnson were called as witnesses by the State and denied any involvement in the death of Carlson. The record does not reflect that either of them asked for or received any immunity for their trial testimony.

5. STATEMENTS MADE BY KULA AFTER APRIL 15

The day after Carlson was murdered, Kula brought up the subject of Carlson's death to Rose and said that he was upset with Carlson about some of the teasing that Carlson did at work. Rose also testified that Kula said something about having a "blackout" the night that Carlson was murdered. Rose had never heard of Kula having blackouts. Rose never asked Kula if he took any guns with him when he left the house in the minivan. Rose also stated that Kula said that it was a coincidence that he was "going to go with the intent to do bodily harm" to Carlson and that Carlson was killed.

Rose stated that both she and Kula had known Carlson for years. Kula had worked with Carlson at Watts Electric in Osceola for approximately 6 or 7 weeks, a job Kula had quit before Carlson was murdered. As of April 15, Kula had been employed with Grosch Irrigation for approximately 1 month. Rose also stated that her husband had said that Carlson was "okay," but that he had also indicated that he did not care for Carlson because Carlson liked to tease people. She said that it was possible that he had said this within 1 month of the date of Carlson's murder.

Kula was interviewed by Investigator William J. Mach of the Nebraska State Patrol on November 16, 1994. Kula admitted that he and Travis saw Carlson and Cuba walking the night that Carlson was murdered and that he grabbed the steering wheel and swerved toward them as a joke. Kula told Mach that after Travis drove him home, he went into the house to check for more beer and then went back to town and bought a couple of sodas. He drove around for approximately 15 minutes, then went home to find the family gone. He stated that the youngest boy had recurring health problems, so he thought perhaps they had taken him to the doctor. He waited a bit, then called two of his wife's sisters and her mother to try and find Rose, but was unable to, so he went to sleep. The next morning, he went and picked up his last paycheck from Watts Electric and learned of Carlson's murder.

Kula also admitted that he was "tearing around some" with the minivan and that that was not unusual after he had been drinking. He stated that he did not have any guns with him that

night and that all the guns he had were in the house and not in the garage. Kula admitted to having alcohol-induced blackouts. He did not remember why he went into his garage that night. The jury also heard that Kula stated during the interview that he did not think he had anything to do with Carlson's death, but "there's a part of a percent where I know I blacked out and, you know, just kinda worried about that." Unbeknownst to the jury, this statement was made in the context of refusing repeated requests to take a polygraph examination.

6. Terni Carcano Rifle

Jay Richards, formerly the chief of the Clarks Police Department, testified that 4 years earlier, on April 16, 1990, he went to the Kula residence and was given three guns by Rose for safekeeping. He took the guns to the police department, inventoried them, and secured them in the police evidence locker. Approximately 1 to 1½ months later, Rose came to the police department and asked that the guns be returned. An inventory sheet was received as exhibit 61 and shows that one of the guns that Rose had given to Richards for safekeeping was a "1941 XIX Terni, Italy, B61070."

At trial, Sgt. Mark S. Bohaty, a firearms examiner for the Nebraska State Patrol, testified that he examined three bullet fragments taken from Carlson's body. He described the condition of the three fragments and stated that based on his research and experience, there was not enough of the fragments left to determine what caliber the bullet had been.

Bohaty did state that in his opinion the gun that fired the fatal bullet was a center-fire, high-powered rifle and not a rim-fire rifle, such as a .22-caliber rifle. Bohaty expressed the opinion that a Terni Carcano 6.5-mm rifle would be capable of firing the bullet that killed Carlson, but that there are millions of guns in existence in the United States that would have been capable of firing the fatal bullet. Using a Terni Carcano rifle, Bohaty demonstrated to the jury that after a shot is fired, the spent cartridge is not extracted and that a new cartridge is not inserted into the chamber until the rifle's bolt is manually operated.

During his interview with Mach, Kula denied that he ever owned a gun known as a Terni Carcano or a gun made in Terni,

Italy. However, Ed Staniec, Kula's brother-in-law, and Gary Bialas, Kula's nephew, both testified that they had seen Kula in possession of a Terni Carcano rifle. Bialas also stated that Kula usually made him aware of his gun trades or sales and that he was not aware that Kula had traded, sold, or disposed of the Terni Carcano rifle.

Dr. Matthias I. Okoye, a pathologist in Lincoln, was called as a witness by the State and gave the opinion that after being shot, Carlson could have functioned for 4 to 7 minutes and could have driven his vehicle along a straight highway during that period of time. Dr. Charles S. Petty, a pathologist from Dallas, Texas, was called as a witness by Kula and gave the opinion that Carlson would have lost consciousness within a minute or less after being shot and would not have been able to consciously drive his vehicle down a straight road.

II. ASSIGNMENTS OF ERROR

Restated, Kula asserts that the district court erred in (1) overruling his motions to dismiss because the State failed to establish a prima facie case that Kula killed Carlson; (2) failing to dismiss the prosecution or impose appropriate sanctions upon the State for its repeated failure to provide material and/or exculpatory evidence prior to trial; (3) overruling Kula's motion for new trial; (4) sustaining the State's objection to Kula's cross-examination of Branting concerning the fact that Branting demanded and received immunity prior to giving deposition testimony in these proceedings; (5) sustaining the State's motion in limine, precluding Kula from eliciting testimony from Dittmer (adduced under hypnosis) concerning the color of the two Chevrolet pickups he witnessed traveling westbound between Silver Creek and Clarks; (6) sustaining the State's objection and precluding Kula from impeaching Braun with the statements she made to law enforcement officers during two separate interviews concerning what she saw on the night of Carlson's murder; (7) overruling Kula's motion to strike the testimony of Travis after the State improperly impeached Travis with prejudicial prior unsworn statements which were not previously disclosed to Kula and included statements which were never made by Travis; (8) overruling Kula's hearsay and

improper impeachment objections to testimony from Rose concerning prior statements by Travis that were previously admitted to by Travis, had virtually no impeachment value, and were highly prejudicial; (9) overruling Kula's objection to the State's impeachment of Rose with her grand jury testimony compelled over her exercise of the marital privilege; (10) overruling Kula's objection to the State's prejudicial and irrelevant demonstration before the jury of the operation of a Terni Carcano rifle; (11) overruling Kula's objections to Mach's testimony concerning his reenactment tests made from the Grosch Irrigation driveways (south of Highway 30) despite the lack of any evidence that Kula was ever west of Silver Creek on the night of the homicide; (12) overruling Kula's objection to Mach's testimony concerning travel times and distances between Kula's home and the Grosch Irrigation driveways despite the lack of any evidence that Kula was ever west of Silver Creek on the night of the homicide; (13) instructing the jury that Kula had been indicted on the charges upon which he stood trial and that they should not find Kula guilty "unless and until" the jury found that the State proved his guilt beyond a reasonable doubt; (14) instructing the jury on the lesser-included offenses of second degree murder and manslaughter, despite the absence of any evidence supporting those charges; and (15) refusing Kula's instruction concerning his alibi defense.

Because of our ruling, we analyze only Kula's first three assigned errors.

III. STANDARD OF REVIEW

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Cody*, 248 Neb. 683, 539

N.W.2d 18 (1995); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

An appellate court reviews a ruling on a motion to continue for an abuse of discretion by the trial court. See *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

IV. ANALYSIS

1. Sufficiency of Evidence

Kula first asserts that the district court erred in overruling his motion to dismiss at the close of the State's case and again at the close of all the evidence for the reason that the State had not established a prima facie case that Kula killed Carlson.

In our determination whether Kula's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. See, *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

The State's case against Kula consisted solely of circumstantial evidence. No confession was made, no eyewitness was discovered, no murder weapon was found, and no other physical evidence was adduced. However, circumstantial evidence is not inherently less probative than direct evidence. *State v. Pierce, supra*; *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom. *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

Construed most favorably to the State, the evidence shows that after Kula and Travis left the bar in Silver Creek, they saw Carlson and Cuba walking down the street. Travis noticed that Kula's face changed expressions like "he wasn't real pleased with something" and that Kula referred to one of the men as

being Carlson. As the minivan approached Carlson and Cuba, Kula grabbed the steering wheel and turned the minivan within inches of hitting them.

When Kula and Travis arrived home, Kula said to Travis that he did not want Travis to be a witness and have to testify in court, and that he (Kula) was going to take care of business. Rose heard Kula and Travis arrive home between 11:20 and 11:30 p.m. She then heard the minivan "[take] off a little fast" and looked out the window and saw the minivan drive over to the garage. Rose asked Travis what was going on, and Travis told her that Kula was upset with Carlson. From Travis' window, she watched the minivan drive to the end of the farm lane and sit for approximately 5 to 7 minutes. Cuba testified that Carlson left Cuba's shop between 11:30 and 11:45 p.m.

The day after Carlson was murdered, Kula brought up the subject of Carlson's death to Rose and said that he was upset with Carlson about some of the teasing that Carlson did at work. Kula also told Rose that he had a blackout and that it was a coincidence that he was "going to go with the intent to do bodily harm" to Carlson and that Carlson was killed.

Kula had recently quit his job where Carlson also worked. Rose stated that possibly within 1 month of the date of Carlson's murder, Kula had said that he did not care for Carlson because Carlson liked to tease people.

In addition, in response to requests during an interview with Mach to take a polygraph examination, Kula stated that he did not think he had anything to do with Carlson's death, but "there's a part of a percent where I know I blacked out and, you know, just kinda worried about that." While Kula denies ever owning a Terni Carcano rifle, police records show that Kula previously owned a Terni Carcano rifle that Bohaty testified would be capable of firing the fatal bullet.

While the evidence adduced against Kula is not overwhelming, viewed and construed most favorably to the State, the circumstantial evidence shows that Kula had the motive and opportunity to commit the murder and is sufficient to support the conviction. Accordingly, the district court did not err in overruling Kula's motions to dismiss.

2. MOTION FOR CONTINUANCE

Kula next asserts that the district court erred in failing to dismiss the prosecution or impose appropriate sanctions upon the State for its repeated failure to produce material and/or exculpatory evidence prior to trial. Kula contends that the State's untimely disclosures violated the court's discovery order, see Neb. Rev. Stat. § 29-1912 (Reissue 1995), and his rights as guaranteed by the U.S. and Nebraska Constitutions.

On August 3, 1995, Kula filed a discovery motion, requesting in addition to the materials enumerated in § 29-1912, that the State provide "separate and apart from other discovery material, all evidence of any kind or nature whatsoever that may be exculpatory . . . pursuant to *Brady v. Maryland*, 373 U.S. 83, [83 S. Ct. 1194, 10 L. Ed. 2d 215] (1963)." Following Kula's arraignment on August 21, the court heard argument on the matter of discovery, and Kula's counsel stated that

> in this case the exculpatory evidence is available to the state readily because they had to have exculpatory evidence to file charges against the two other individuals, Mr. Johnson and Mr. Branting, by the very nature of the fact that they . . . filed murder charges in this court, they have to have exculpatory evidence. Any evidence that they use to charge those two individuals, by it's very nature, would be exculpatory to Mr. Kula. Rather than just hand us a big huge amount of discovery material, which I anticipate that they have and that we'll receive, and have us sort out what's exculpatory and what's not isn't right and would prejudice the defendant because it would delay his ability to prepare for trial.
>
> Instead, we're asking that the court order that they separate out for us that information that they used to file charges against those two individuals.

That same day, the court granted Kula's discovery motion in its entirety without objection. On the belief that Kula had not received the materials ordered to be produced, Kula's counsel issued a subpoena duces tecum to the State's investigators for the production of their entire police reports. On November 6, 1995, the court heard argument on the State's motion to quash the subpoena duces tecum. At the hearing, Special Prosecutor

Charles W. Campbell stated that "the police work reports just are not discoverable," that "items that may reasonably lead to relevant evidence" are not discoverable in a criminal case, and that "we have provided [Kula] with all of the statutory discoverable items ordered by this court." The district court sustained the State's motion to quash Kula's subpoena duces tecum.

On November 15, Kula filed a motion for reconsideration of the court's order regarding the police reports prepared when the focus of the investigation was on Branting and Johnson. On November 22, a hearing was held on this motion, during which Campbell stated that discovery "is not supposed to be all one-sided" and that "we've given the defense every report that is conceivably exculpatory." That same day, the district court sustained Kula's motion, stating, "[T]he police reports that were prepared to point to . . . former defendants, Branting and Johnson, would be exculpatory and, therefore, I'm going to order that they be produced."

On November 27, the first day of trial, the State filed a certificate of compliance concerning the discovery material prescribed by statute without any reference to the additional material concerning the investigation of Branting and Johnson that was ordered to be turned over to the defense. That day, the State produced police reports concerning the investigation of Branting and Johnson that included (1) statements made by Mark Prososki to law enforcement officers that Johnson had a gun in his truck in the weeks prior to the shooting; (2) a report which led to the discovery of Cermak and Lerch, who testified that Branting and Johnson left the bar at approximately 11:30 p.m., not 11 p.m., as Branting and Johnson stated; (3) information from Trent Engel suggesting Branting had changed shoes sometime after discovering Carlson's body and prior to returning home with Braun at approximately 1:45 a.m.; and (4) information from Kim Koza relating an incident in the weeks prior to Carlson's death wherein Branting and Johnson had expressed hatred of Carlson because Carlson dated Johnson's ex-wife.

On the second day of trial, Kula moved to dismiss and to continue opening statements so that he could discuss the aforementioned witnesses' testimony in his statements. The district court overruled the motions, stating, "[I]n my reading of the reports I

do not find that there is exculpatory and bring out [sic] all the new things that you claim, counsel. Therefore, your motion's overruled."

Kula does not assign the district court's failure to grant his motion for a continuance prior to opening statements as error. While Neb. Rev. Stat. § 25-1919 (Reissue 1995) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1996) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit this court to note any plain error not assigned. *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996). 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. *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

Thus, the issue presented is whether Kula was prejudiced by the district court's failure to grant a continuance after the State failed to produce the aforementioned reports until the first day of trial. While *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), impose a constitutional mandate for disclosure in criminal cases, a statutory design for discovery such as § 29-1912 can exact more than the constitutional minimum, so that courts must focus on information potentially useful to the defense. See *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). Under § 29-1912, whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal. *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). See *State v. Brown, supra*.

In the instant case, the State was fully aware that the court's order required the production of police reports that were prepared to point to Branting and Johnson. Certainly, the State would have also been aware that these reports would lead to the

discovery of Prososki, Cermak, Lerch, and Engel as witnesses and were thus clearly "material" as defined in *State v. Null, supra*, and *State v. Brown, supra*.

We have previously stated that the discovery process is not a game of "hide the ball" and that discovery orders must be completed in a timely manner. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). See, also, Model Rules of Professional Conduct Rule 3.8(d) (1995). Because the State did not produce the material reports until the first day of trial, Kula was unable to outline certain witnesses' testimony in his opening statements. Furthermore, Kula's counsel should not have been forced into investigating the content of the reports by night while defending against a murder charge by day. In effect, Kula's counsel was put in the position of trying this case on the run.

The suppression of this material evidence until the first day of trial was a violation of § 29-1912 and the court's discovery order. Accordingly, the district court abused its discretion and committed plain error in failing to grant a continuance until Kula could adequately investigate the reports and prepare his defense.

3. Motion for New Trial

Next, Kula asserts that the district court erred in overruling his motion for new trial. An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion by the trial court. *State v. Thompson*, 246 Neb. 752, 523 N.W.2d 246 (1994).

Shortly after the jury returned its guilty verdict, Kula's counsel discovered the existence of three red notebooks in the possession of Merrick County Sheriff Dan Schneiderheinz. At the hearing on Kula's motion for new trial, Kula called Schneiderheinz as a witness. In response to the State's objection to calling a new witness and submitting new evidence, the trial court stated, "The thing that concerns me about this, counsel, is all the way through the trial there's been a failure of the State to comply openly with the discovery statutes and, therefore, this may be highly irregular, but I'm going to permit it."

Schneiderheinz testified that the notebooks were compiled at a time when the focus of the investigation into Carlson's mur-

der was on Branting and Johnson. Included in the notebooks was a note by Schneiderheinz stating, "[F]ollow up Helgoth report of receiving calls stating, 'Chuck and Tom did it.' " Schneiderheinz testified that James Helgoth told him that an anonymous female party called the Helgoth residence and stated that Branting and Johnson shot Carlson.

James and Judy Helgoth each submitted affidavits which state in pertinent part that they are residents of Clarks and that their children were very good friends of Carlson. On the day Carlson's body was found, Judy received a call from an anonymous female caller saying, " 'Johnson did it, and he wasn't alone either.' " Judy told James about the phone call, and James called the Merrick County sheriff's office. Schneiderheinz called back 2 days later, and Judy told him about the phone call. Approximately 2 months later, a Merrick County deputy sheriff, Williamson, called Judy and further discussed the phone call.

During the hearing on the motion for new trial, Kula's counsel asked Schneiderheinz the following questions and received the following answers:

> Q Do you know whether that [Helgoth] information was furnished to [Merrick County Attorney Dale] Shotkoski or not?
>
> A He knew about it, yes.
>
> . . . .
>
> Q And whatever information Helgoth had, you made a report of it and submitted it to the Merrick County Attorney, is that right?
>
> A I think so.

We do not know what, if anything, an investigation by Kula into this anonymous phone call would have revealed. However, that is precisely the point. The State was aware that its case was based entirely on circumstantial evidence and that two other persons had already been arrested and charged for the murder. Under these circumstances, " '[a] cat and mouse game whereby the [State] is permitted to withhold important information requested by the accused cannot be countenanced. . . .' " *State v. Brown*, 214 Neb. 665, 674, 335 N.W.2d 542, 547 (1983).

The prosecution's failure to turn over the Helgoth information that it received from the sheriff's department violated the

district court's discovery order and constituted prosecutorial misconduct. Accordingly, the district court abused its discretion in overruling Kula's motion for new trial.

V. CONCLUSION

Because of the State's repeated prejudicial discovery violations, we conclude that the district court erred in failing to grant Kula's motion for a continuance prior to opening statements and his motion for new trial following the verdict. Accordingly, we reverse, and remand for a new trial, without discussing Kula's other assigned errors.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
GABRIEL S. HANSEN, APPELLANT.
562 N.W.2d 840

Filed May 9, 1997. No. S-96-615.

1. **Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
2. **Constitutional Law: Effectiveness of Counsel: Proof.** 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 and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
3. **Rules of Evidence: Hearsay: Conspiracy.** Under Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995), a statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
4. **Conspiracy: Evidence.** To be admissible, the statements of a coconspirator must have been made while the conspiracy was pending and in furtherance of its objects.
5. **Hearsay: Conspiracy.** The coconspirator exception to the hearsay rule is applicable regardless of whether a conspiracy has been charged in the information or not.
6. **Hearsay: Conspiracy: Evidence.** Before a trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of a conspiracy must be shown by independent evidence.

7. **Conspiracy.** The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
8. ____. A criminal conspiracy requires an "overt act." An overt act manifests that a conspiracy is "still at work." It tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. However, an overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
9. **Conspiracy: Circumstantial Evidence.** Frequently, a conspiracy involves intricate situations and several complex acts, which makes it difficult to establish a conspiracy or conspiratorial intent by direct proof. Thus, circumstantial evidence may establish the existence of a conspiracy or the criminal intent necessary for a conspiracy.
10. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
11. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
12. **Homicide: Intent: Words and Phrases.** One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
13. **Homicide: Intent: Weapons.** The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death.
14. **Hearsay: Extrajudicial Statements.** An extrajudicial statement not offered to prove the truth of the matter asserted is not hearsay.
15. **Jury Trials: Waiver.** The decision to waive a jury trial is ultimately and solely the defendant's, and therefore, the defendant must bear the responsibility for that decision.
16. **Effectiveness of Counsel: Jury Trials: Waiver.** Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.
17. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, 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.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

J. William Gallup, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

Following a bench trial, Gabriel S. Hansen was convicted of first degree murder and use of a firearm in the commission of a felony. Hansen appeals.

SCOPE OF REVIEW

A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997).

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 and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996); *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

FACTS

BACKGROUND

At approximately 12:30 a.m. on July 17, 1995, Christopher M. Savin was killed in a drive-by shooting as a result of a gunshot wound to the left side of the head. The weapon used in the shooting was a 15¼-inch sawed-off 20 gauge shotgun loaded with ¾-ounce "deer slugs." Dr. Jerry Jones, a pathologist, testified that based on the fact that he found the composite wadding from the shell embedded in Savin's left eye, the shot was fired no more than 15 feet from where Savin was standing. Hansen admitted at trial that he shot Savin, but pled not guilty to the charges because he denied that he acted with premeditation and that he intended to harm anyone.

At the time of the shooting, Savin, Charles Aguirre, Steven Hopkins, Lavon Harbour, John Dixon, and Larry Bonner, Jr., were standing near a streetlight on the southwest corner of 40th and Franklin Streets in Omaha, Nebraska. Savin was standing on the sidewalk, facing 40th Street. While they were standing there, Hopkins and Bonner noticed a white 1966 Chevy Impala drive past them heading north. Soon thereafter, they noticed the same car coming back toward them heading south. Hopkins stated that as the car came toward them, it seemed like the car was swerving closer to the curb. Bonner stated that he noticed that the car was going slower than the first time it passed them and that it was closer to the curb.

Hopkins testified that as the car came closer, someone near the back passenger window "threw a sign," which drew everyone's attention to the back window. Immediately thereafter, a shot was fired from the front passenger window. Hopkins stated that he was able to briefly see the barrel of a gun, which was pointed out the window, and that Savin was standing directly in front of the gun.

HAMMETT'S TESTIMONY

Marcus Hammett testified that on the night of the shooting, Hansen had picked up Rufus Dennis, James Murry, and him in Hansen's Impala, and that earlier in the evening, "they was like, we gonna go dump on some slobs." He explained that this meant they were going to "[s]hoot us some Bloods." Later in his testimony, Hammett indicated that at the very least, Murry had made this statement.

Prior to the shooting, Hansen was carrying the sawed-off shotgun under the front seat of his car. According to Hammett, Hansen told Hammett that he was carrying the shotgun in his car because some members of the Bloods street gang had been shooting at him approximately 2 weeks earlier. Hammett testified that during the two nights prior to the shooting of Savin, he had gone out with Hansen, and the shotgun had been fired. First, 2 days before Savin was killed, Hammett, Dennis, Murry, and a friend of Murry's had gone with Hansen to a party. They left the party because they had gotten into a fight. As they were pulling out of the driveway, Hansen said, "[L]ight 'em up." At that time, Dennis fired the shotgun, and Murry's friend fired a

.22-caliber gun out the car windows while a group of people were standing nearby. Second, the day before Savin was killed, Hammett, Dennis, and another friend were driving with Hansen in the Impala when Hammett fired the shotgun at a house.

Hammett testified that during the shootings of the previous two nights, the shotgun had been loaded with BB shells. After Hammett fired the last of the BB shells, Hansen told him, "[T]hat ain't gonna do nothin' to nobody, so let's go get some slugs so we can do some damage, you know."

Hammett stated that on the evening of Savin's shooting, after the group had driven around for about 3 hours, they were driving down 40th Street, near Franklin Street, when they saw some people standing near a streetlight. At that time, Murry, referring to this group of people, said, "[T]here go some Trey-Eights right there. They just hit me up." Hammett explained that "Trey-Eights" was a term used for the 38th Street Bloods. According to Hammett, Murry's reference to Trey-Eights "hitting him up" meant that someone from the group "threw him" a gang sign.

Hammett testified that in response to Murry's comments, Hansen told the others that it was his turn to "blast," meaning his turn to fire the shotgun. Dennis then told Hansen that "you can't blast if you're driving," so Hansen and Dennis decided to switch places. Hansen drove a short distance down the street, pulled over, and switched seats with Dennis, so that Dennis was driving and Hansen was in the front passenger seat. Dennis then turned the car around and headed back toward the group standing near the streetlight. At this time, they were driving in the lane nearest to the curb where the group was standing.

Hammett stated that as they drove toward the first group, they noticed another group of people on the other side of the street. Murry suggested that they not go through with the drive-by shooting because the people on the other side of the street could shoot back. According to Hammett, even Hansen said, "[Y]eah, let's not do it." However, Hammett stated that as they were slowing down and Dennis was making a hand signal to turn left onto Franklin Street, Hansen yelled, "What's up, cuz?" swung the shotgun out the window, and fired. Hammett testified that the discharged shell hit him when Hansen pumped the shotgun. After Hansen fired the shotgun once, it apparently jammed,

and in Hammett's words, they were "mobbin out," or driving away quickly.

Hammett explained that "What's up, cuz?" is a phrase which identifies the speaker as a Crip. According to Hammett, if you see a Blood and you say, "What's up, cuz?" the Blood will take it as disrespect.

HANSEN'S TESTIMONY

Hansen testified on his own behalf as to the events surrounding the drive-by shooting. He stated that he owned the Impala in question and that on the evening of July 16, 1995, he picked up Hammett, Dennis, and Murry to go "drive around" and see some girls. He stated that he did not plan on shooting anyone at that time.

Hansen testified that when he bought the shotgun used in the drive-by shooting, it had regular shotgun BB shells with it and that during the two nights prior to the shooting, the shotgun had been used to "blast." During one of these incidents, Dennis fired the shotgun as they were leaving a party, and Hansen admitted that there were people standing nearby when Dennis fired. On the other occasion, Hammett fired the shotgun at a house.

Hansen admitted that on the day of the shooting, he bought deer slugs for the shotgun. He explained that his reason for doing so was that with slugs, which contain only one large piece of metal with a hollow tip, you are less likely to hit someone than you would be firing regular shotgun shells which contain BB's. He loaded the shotgun to capacity with the deer slugs and placed it under the front seat of his car.

Hansen testified that as they were driving north on 40th Street, Murry pointed out that a group of people standing by a streetlight, which consisted of Savin and others, looked like Trey-Eights. Hansen admitted that right after Murry pointed out what he thought were Trey-Eights, Hansen said it was his turn to blast. Hansen then decided to pull the car over and switch places with Dennis so that Hansen was then sitting in the front passenger seat and Dennis was driving. Hansen testified that it was his intent at that time to "scare the shit out of" the group that Murry had pointed out. Hansen then took the shotgun out from under the front seat and placed it on his lap.

Hansen testified that everyone in the car then decided "we wasn't gonna do it." However, without explaining the apparent inconsistency, Hansen testified that as Dennis was about to make a left turn away from the group, Hansen quickly swung the shotgun out the window with one hand and deliberately fired it "up in the air." It was this shot that hit Savin just above the left eyebrow, killing him.

On cross-examination, Hansen admitted that he was in fact pointing the shotgun toward the group of people near 40th and Franklin Streets, although he denied pointing it at anyone in particular. He claimed that he did not know that anyone had been shot until he got to the police station. After the shooting, Hansen and the other occupants of the car went immediately to Dennis' house and hid the shotgun in an abandoned car in the backyard.

Trial Court's Specific Findings

Following trial on March 14, 1996, the court announced specific findings which it stated were not intended to be all-inclusive, but merely to make a record for any reviewing court of the factors that the court found most significant in arriving at its decision in the case. The court noted that Hammett testified that Hansen had purchased the deer slugs for the shotgun and that Hansen had told the others the night before, with reference to the BB's in the shotgun, that " 'that ain't gonna do nothing to nobody, let's get some slugs that will do damage.' " The court stated that it was in the context of that remark and the events of the preceding two evenings that Hansen had purchased this "very devastating ammunition." With that in mind, the court evaluated Hammett's remark that it was Hansen's turn to blast. The court also found of particular significance "a remark that Murry apparently made earlier in the course of the evening, that 'we're gonna go dump some slobs.' " Hammett testified that he took that to mean that they were going to go and kill some Bloods.

The court found two additional matters to be of overwhelming significance. First was the fact that after spotting the group of people on the west side of 40th Street and announcing that " 'it's my turn to blast,' " Hansen traded places with Dennis. By switching to the passenger's side of the vehicle as it headed

south on 40th Street, Hansen put himself in a position where he had a clear shot at the people standing under the streetlight on the west side of the street. The second significant matter was Hansen's testimony that he had purposefully pointed the shotgun and fired it. The court found that even if the group had abandoned its intent to blast, at that point, the intent was rekindled.

The court further noted that in order to eject a shell from the shotgun, the gun must be pumped. Since the record reflected that the discharged shell flew back and hit Hammett in the chest, the court found conclusively that Hansen had both hands on the shotgun. The court stated that there was absolutely no question that Hansen pointed the shotgun in the general direction of Savin and fired, and that there was no question that the intent requisite for conviction of first degree murder was present. Thereupon, the court found Hansen guilty of first degree murder, as alleged in count I of the information, and guilty of use of a firearm in the commission of a felony, as alleged in count II of the information.

ASSIGNMENTS OF ERROR

Hansen assigns as error that his trial counsel was ineffective in (1) failing to object to Hammett's testimony that earlier in the evening, Murry said: "[W]e gonna go dump on some slobs"; (2) failing to object to Hammett's testimony that just prior to the shooting, Murry said: "[T]here go some Trey-Eights right there. They just hit me up"; and (3) waiving a jury trial and allowing Hansen to be tried before a judge who had earlier presided over the trial of Murry, wherein the State had called Hammett as its chief witness and the judge had concluded that he was a truthful and trustworthy witness. Hansen also generally assigns as error that the convictions were not supported by the evidence.

ANALYSIS

Hansen first argues that his trial counsel was deficient because he failed to object to Hammett's testimony that Murry stated: "[W]e gonna go dump on some slobs." Hansen claims that this statement was inadmissible hearsay and that it was extremely damaging, so much so that the trial judge specifically noted these remarks in making his comments upon rendering the judgment against Hansen. Hansen concludes:

> It may be argued that there was other evidence from which that premeditation could have been inferred, but the fact that the district court singled out that specific statement and went on to say that the court found that statement to have been significant, makes any error prejudicial and prevents any fair person from saying that such an error was harmless beyond a reasonable doubt.

Brief for appellant at 13-14.

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 and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996); *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). The two prongs of this test, derived from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order.

Asserting that no reasonably competent trial counsel would have failed to object to Hammett's statement that Murry said, "[W]e gonna go dump on some slobs," Hansen argues that this evidence removed any doubt that may have rested in the mind of the trial judge with respect to the question of whether or not this was a premeditated killing.

The State, in contrast, argues that trial counsel's failure to object to Hammett's testimony did not constitute deficient performance because the testimony was admissible as an exception to the hearsay rule. Specifically, the State asserts that the statement was admissible pursuant to Neb. Rev. Stat. § 27-803(2) (Reissue 1995) to reflect Murry's state of mind at the time he made the statement. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) is not excluded from admission by the hearsay rule. See § 27-803(2).

The State argues that the statement was admissible because it clearly reflected Murry's state of mind and his intent or plan to

shoot some Bloods. However, the state-of-mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant only if the declarant's then existing state of mind is a material issue in the case. See *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994). In this case, the statement in question was material if there is evidence that the declarant, Murry, conspired with Hansen regarding the shooting of Savin. However, because certain statements by a coconspirator are not hearsay under Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1995), we consider whether Murry's statement falls under § 27-801(4).

Under § 27-801(4), "[a] statement is not hearsay if: . . . (b) [t]he statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." To be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects. *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977). The coconspirator exception to the hearsay rule is applicable regardless of whether a conspiracy has been charged in the information or not. *Id.*

Still, the rule is well established that before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. *Id.* The requirement of prima facie proof requires only enough evidence to take the question to the jury. See *United States v. Trotter*, 529 F.2d 806 (3d Cir. 1976). The purpose for this rule is to prevent hearsay evidence from being lifted by its own bootstraps, i.e., relying on the hearsay statements to establish the conspiracy and then using the conspiracy to permit the introduction of the hearsay as evidence in the case. *State v. Bobo, supra* (citing *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

In this case, the question is whether Hansen was deprived of his right to effective assistance of counsel when trial counsel failed to object to Hammett's testimony that Murry stated, "[W]e gonna go dump on some slobs." Regardless of whether a prima facie case of conspiracy had been established at the time Murry's statement was first introduced, we conclude that the

sum of the evidence submitted at trial, considered independently from the declaration in question, established a prima facie case of a conspiracy between Murry and Hansen. As such, the declaration would ultimately have been admissible under the coconspirator exception to the hearsay rule. Murry's statement was relevant to show the intent of the parties and was made in furtherance of the object of the conspiracy. It was made toward the accomplishment of the common object—to blast with the shotgun the parties were carrying. Therefore, trial counsel's failure to object to the statement did not deprive Hansen of his right to effective assistance of counsel.

In so holding, we note that at trial, there was evidence that on the evening of the drive-by shooting, Hansen picked up Hammett, Dennis, and Murry. In the car he was driving, Hansen carried the sawed-off shotgun which was later used to kill Savin. The previous two nights, Hansen had similarly driven his friends around in his car, and the shotgun had been used to blast. On one of these occasions, Murry was in the car when Dennis pulled out the shotgun and fired it out the window as they were leaving a party where there were people standing nearby.

According to Hammett, after two successive nights of blasting, Hansen told Hammett that the BB shells they were using "ain't gonna do nothin' to nobody, so let's go get some slugs so we can do some damage . . . ." Hansen admitted that he then bought the deer slugs for the shotgun and loaded the shotgun to capacity with the slugs during the day immediately preceding the shooting of Savin. The evidence shows that on the night of the shooting, as Hansen, Murry, Dennis, and Hammett were driving around, everyone in the car was aware that the shotgun was there. At one point, the shotgun was passed from the front seat to the back seat to see if they might be able to conceal it there.

Then, Hansen testified that as they were driving north on 40th Street, Murry pointed out that a group of people, including Savin, looked like Trey-Eights. Hammett also stated that Murry said, "[T]here go some Trey-Eights right there. They just hit me up." According to Hammett, this statement made reference to 38th Street Bloods. Hammett stated that Murry's reference to

the Trey-Eights "hitting him up" referred to "throwing" a gang sign.

In response to Murry's comments, Hansen told the group that it was his turn to blast, and he changed places with Dennis so that he was sitting on the front passenger side and Dennis was driving. From this position, Hansen was able to get within 15 feet of Savin and shoot him.

The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). A criminal conspiracy requires an "overt act." An overt act manifests that a conspiracy is "still at work." It tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. *Id.* However, an overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act. *Id.*

Frequently, a conspiracy involves intricate situations and several complex acts, which makes it difficult to establish a conspiracy or conspiratorial intent by direct proof. Thus, circumstantial evidence may establish the existence of a conspiracy or the criminal intent necessary for a conspiracy. *Id.* The foregoing evidence was sufficient to independently establish a prima facie case of a conspiracy to blast at Savin and the others who were standing near the streetlight at 40th and Franklin Streets. Thus, trial counsel was not deficient in failing to object to Murry's statement, because that statement was ultimately admissible under § 27-801(4)(b).

Moreover, we reiterate that under a claim of ineffective assistance of counsel, Hansen must show that trial counsel's performance prejudiced him in such a manner that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See, *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996); *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington, supra.*

Even if Murry's statement had not been admitted, there is no reasonable probability that the result would have been different. Hansen participated in drive-by shootings during the two nights prior to the shooting of Savin. Hansen purchased the deer slugs with the intent to "do some damage." Hansen admitted that he deliberately fired at the area where the group of people was standing. Hansen had both hands on the shotgun and was no more than 15 feet from Savin. Hansen pumped the shotgun after firing the first shot, and it then jammed.

In *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995), we stated that no particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.

The trial court found Murry's remark—"[W]e gonna go dump on some slobs"—significant, but prefaced its remarks by stating that its findings were not intended to be all-inclusive and that the court found in particular two matters of overwhelming significance. First, after spotting the group of people on the west side of 40th Street and announcing " 'it's my turn to blast,' " Hansen traded places with Dennis. This placed Hansen in a position to do the shooting. Second, Hansen aimed and fired the shotgun.

One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *Id.* The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. *Id.* Even without Murry's statement, the evidence overwhelmingly establishes that Hansen killed Savin with premeditated malice. Hansen's first assignment of error is without merit.

Hansen next argues that Murry's second statement—"[T]here go some Trey-Eights right there. They just hit me up"—was inadmissible hearsay and that trial counsel's failure to object to

such testimony violated his right to effective assistance of counsel. Hansen argues that but for the admission of this statement, there would have been no evidence to indicate that anyone on the corner was a gang member, a fact that Hansen seems to concede would support a finding of premeditation.

The statement in question was not hearsay, and therefore, trial counsel's failure to object to the statement on hearsay grounds would not constitute deficient performance. Section 27-801(3) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted . . . ." An extrajudicial statement not offered to prove the truth of the matter asserted is not hearsay. *Stang-Starr v. Byington*, 248 Neb. 103, 532 N.W.2d 26 (1995).

Murry's statement—"[T]here go some Trey-Eights right there. They just hit me up"—was not offered to prove the truth of the matter asserted. It was not offered to prove that Savin and the others standing on the corner of 40th and Franklin Streets were Bloods or to prove that Murry saw them throw a gang sign at Hansen's car. The statement was offered to show Hansen's immediate reaction to the statement. Upon hearing it, Hansen said that it was his turn to blast, and he switched places with Dennis. The statement was not offered to prove the truth of the matter asserted, but was offered as relevant evidence because of its impact on Hansen. Therefore, trial counsel's failure to object to such statement cannot be said to constitute deficient performance. We determine that Hansen's second assignment of error is without merit.

Hansen also argues that his trial counsel was ineffective because he waived a trial by jury and allowed the case to be tried in front of a judge who had previously convicted Murry as an accessory to the homicide of Savin. In Murry's trial, the judge had formed an opinion that Hammett was a credible witness. Hansen contends that his conviction of first degree murder was, therefore, a foregone conclusion. We strongly disagree.

Hansen clearly has not shown that but for trial counsel's allegedly deficient performance, it was reasonably probable that the result in his case would have been different. Particularly, it has not been shown with reasonable probability that any other

judge or jury exposed to Hammett's testimony would not have found Hammett to be a credible witness in Hansen's trial. Nor has it been shown that without a finding that Hammett's testimony was credible, the result would have been different.

Moreover, the decision to waive a jury trial is ultimately and solely the defendant's, and therefore, the defendant must bear the responsibility for that decision. *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981). Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his client's freedom to decide to waive a jury trial or (2) the defendant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. *Id.* Hansen has failed to present evidence of any specific unreasonable advice or interference relative to this waiver and, therefore, has failed to show that trial counsel was deficient in relation to Hansen's decision to waive a trial by jury. Therefore, this assignment of error is also without merit.

Finally, Hansen argues that the evidence was insufficient to support a finding of first degree murder because "the only real evidence of premeditation" was that supplied by the hearsay testimony which, according to Hansen, should have been excluded. Brief for appellant at 16. Hansen asserts that disregarding that evidence, the record is ambiguous with respect to the question of premeditation and that it is extremely doubtful that premeditation was proved beyond a reasonable doubt. For the reasons set forth herein, we find no merit to this argument.

We conclude that the convictions were supported by sufficient evidence. In determining whether evidence is sufficient to sustain a conviction in a bench trial, 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. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997).

The State produced sufficient evidence to prove beyond a reasonable doubt that Hansen committed first degree murder and used a firearm in the commission of a felony. The trier of fact was presented with sufficient evidence of premeditation to disbelieve Hansen's declarations to the contrary. See *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986). Viewing all relevant admissible evidence in a light most favorable to the State, we find no reason to set aside the convictions.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

CONCORDIA TEACHERS COLLEGE, APPELLANT, V. NEBRASKA DEPARTMENT OF LABOR ET AL., APPELLEES.
563 N.W.2d 345

Filed May 16, 1997. No. S-95-467.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
3. **Jurisdiction: Waiver.** While the lack of subject matter jurisdiction cannot be waived nor the existence of subject matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties.
4. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.
5. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
6. **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.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Appeal dismissed.

Kermit A. Brashear and Kermit A. Brashear III, of Brashear & Ginn, for appellant.

John F. Sheaff and John H. Albin for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ENSZ, D.J., and BLUE, D.J., Retired.

ENSZ, D.J.

Plaintiff-appellant, Concordia Teachers College (Concordia), sought a determination from the Nebraska Department of Labor (Labor) concerning Concordia's liability for unemployment insurance tax contributions under Neb. Rev. Stat. § 48-604(6)(g)(1)(ii) (Reissue 1988) (now renumbered as § 48-604(6)(g)(i)(B) (Cum. Supp. 1996); see 1994 Neb. Laws, L.B. 1337). Following an administrative hearing, Labor determined Concordia did not qualify for tax-exempt status. Concordia sought review of Labor's ruling by the district court for Lancaster County. Acting on a stipulated motion, the court remanded the matter for a rehearing by Labor. At the second administrative hearing, Labor again determined Concordia did not qualify for tax-exempt status. Concordia sought review of Labor's second ruling by filing an "Amended Petition" in the previous district court proceedings at the same docket and page number. The district court dismissed Concordia's action for lack of jurisdiction. We likewise dismiss the appeal.

ASSIGNMENTS OF ERROR

Concordia contends the district court erred in dismissing for lack of jurisdiction its request for judicial review of the January 24, 1996, ruling of the Commissioner of Labor (Commissioner).

STANDARD OF REVIEW

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 Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997).

FACTS

The facts in this matter are not in dispute. Concordia is a corporation operating a college in Seward, Nebraska. On June 8, 1990, Concordia notified Labor it intended to initiate proceedings to eliminate its liability for unemployment insurance tax contributions, under Nebraska's Employment Security Law, Neb. Rev. Stat. §§ 48-601 through 48-671 (Reissue 1988), on employees Concordia contended were exempt under § 48-604(6)(g)(1)(ii). On May 30, 1991, Labor's unemployment insurance tax administrator ruled Concordia's employees were not exempt from coverage and, therefore, Concordia would not be accorded tax-exempt status.

On June 19, 1991, Concordia requested a review of the tax administrator's decision by the Commissioner. On August 8, Labor held a telephonic hearing. Following the hearing, on December 9, the hearing officer recommended that the Commissioner affirm the ruling of the tax administrator. On December 23, the Commissioner adopted the hearing officer's recommendation and affirmed the tax administrator's ruling.

On January 22, 1992, Concordia filed a petition for review in the district court for Lancaster County. On December 30, pursuant to Neb. Rev. Stat. § 84-917(5)(b) and (6)(b) (Reissue 1994), Concordia and the defendants (Labor, Commissioner, and the State) submitted to the district court an amended stipulation to remand, requesting the matter be remanded to Labor for further proceedings. On January 4, 1993, the court ordered the case remanded, stating that in accordance with § 84-917(5)(b) and (6)(b), "the interests of justice would be served by the consideration and resolution of issues not previously raised before the agency such that a remand of the matter to the agency for further proceedings is warranted."

On April 27, 1993, Labor held a new hearing concerning Concordia's liability for unemployment insurance tax contributions. In addition to new evidence, the hearing officer received the record of the August 8, 1991, hearing into evidence.

On November 1, 1993, on the basis of the new record, the hearing officer recommended that Concordia's request for tax-exempt status be denied and that the May 30, 1991, ruling of the tax administrator be affirmed. On January 26, 1994, the

Commissioner followed the hearing officer's recommendation and affirmed the tax administrator's May 30 ruling.

On February 24, 1994, Concordia sought review of the Commissioner's January 26 ruling by filing an "Amended Petition" at the same docket and page number with the district court involved in the proceedings commenced on January 22, 1992. Concordia did not file the "Amended Petition" as a separate appeal and did not pay a docket fee nor issue summons at the time it filed the "Amended Petition." Furthermore, Concordia did not seek review of the Commissioner's January 26 ruling in a separate proceeding.

On May 20, 1994, 85 days after filing its "Amended Petition," Concordia filed a praecipe for service of summons seeking service of summons and a copy of the "Amended Petition" upon the Attorney General of the State of Nebraska.

On March 23, 1995, the district court dismissed Concordia's "Amended Petition" for lack of jurisdiction. After finding that § 84-917 of the Administrative Procedure Act provides procedures for judicial review of adverse administrative agency rulings, the court concluded Concordia failed to satisfy those requirements because "Concordia failed to properly perfect its appeal to the district court after the [April 27, 1993,] administrative hearing . . . ."

On April 21, 1995, Concordia appealed to the Nebraska Court of Appeals. We removed the case to this court's docket pursuant to the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) to regulate the dockets of the Court of Appeals and this court.

ANALYSIS

We first consider whether the district court had personal jurisdiction over the Commissioner and Labor. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995). While the lack of subject matter jurisdiction cannot be waived nor the existence of subject matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the

parties. *Id.* One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Id.*

On June 24, 1994, the Commissioner and Labor filed an amended answer stating, as affirmative defenses, that Concordia's "Amended Petition" was improperly filed and not perfected. The filing of the amended answer by the Commissioner and Labor invoked the power of the district court on an issue other than personal jurisdiction and, consequently, conferred on the court personal jurisdiction. Therefore, the district court had personal jurisdiction over the Commissioner and Labor. See *Glass, supra.*

We next consider whether the district court had subject matter jurisdiction. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. See *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

Under § 48-650, an appeal from the ruling of the Commissioner shall be made in accordance with the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1994).

Section 84-917(1) states, in relevant part: "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."

Section 84-917(2)(a) states, in relevant part:

> 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. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

Neb. Rev. Stat. § 25-510.02 (Reissue 1995) states that the "State of Nebraska [and] any state agency . . . may be served by leaving the summons at the office of the Attorney General" in a specified variety of manners. See, also, *Becker, supra.*

Furthermore, although § 25-510.02 provides a petitioner some discretion as to the mode of service, it grants no discretion as to the entity to be served. *Nebraska Methodist Health Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996). Therefore, when § 25-510.02 applies, as it does in the present case, a summons must be served on the Attorney General in order to institute judicial review under the APA. See *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995). See, also, *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994).

The record makes clear that Concordia filed its "Amended Petition" within 30 days of the date the Commissioner's ruling was served upon it; however, Concordia did not obtain service of process until May 20, 1994, more than 30 days after the petition for review was filed with the district court. Moreover, the record discloses that Concordia also failed to fulfill the service requirement of § 84-917(2)(a) in that it mailed a copy of its "Amended Petition" to the Commissioner instead of the Attorney General. Therefore, the service upon the Commissioner in this case was ineffectual. See *Twiss, supra.*

In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). After considering the language of § 84-917(2)(a) in its plain, ordinary, and popular sense, it is apparent that the Legislature intended that a summons be served within 30 days of the filing of the petition for review as a prerequisite to the exercise by the district court of its jurisdiction over the subject matter on an appeal from an adverse decision of an administrative agency. As Concordia failed to invoke the subject matter jurisdiction of the district court in that it failed to serve the proper summons within 30 days of filing its "Amended Petition," the district court did not acquire authority to review the Commissioner's ruling under the APA.

The remaining issue is Concordia's contention that under § 84-917(5)(b) of the APA, the district court had authority to retain jurisdiction over Concordia's action seeking judicial

review of Labor's adverse ruling after the court had remanded the action to the agency for rehearing. Section 84-917(5)(b) states: "If the [district] court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings."

After considering the plain, ordinary, and popular meaning of the language in § 84-917(5)(b), we find nothing which explicitly empowers a district court to retain jurisdiction over an action remanded by the court to an administrative agency for a new hearing. Accordingly, we hold, as a matter of law, that the district court for Lancaster County did not retain jurisdiction over the question of Concordia's claimed tax exemption following the court's order to remand the matter for a second administrative hearing.

CONCLUSION

We therefore dismiss Concordia's appeal for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
RONALD MERRILL, APPELLANT.
563 N.W.2d 340

Filed May 16, 1997. No. S-96-591.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Motions to Suppress: Appeal and Error.** In determining whether a trial court's ruling on a motion to suppress is clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Constitutional Law: Search and Seizure.** The test used to determine if a defendant has an interest protected by the Fourth Amendment to the U.S. Constitution is whether the defendant has a legitimate expectation of privacy in the invaded space.

4. ____: ____. A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.
5. **Police Officers and Sheriffs: Search and Seizure.** Objects' falling within the plain view of an officer, who has the right to be in the position to have such view, does not constitute a search.
6. **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.
7. **Sentences.** 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.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Vicky L. Johnson, Fillmore County Public Defender, for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

We are asked to determine an issue of first impression. That is, whether the appellant, Ronald Merrill, had a "legitimate expectation of privacy" in his driveway so as to invoke his rights under the Fourth Amendment to the U.S. Constitution.

Law enforcement officers reacting to a citizen's tip drove to Merrill's rural residence, stopped in his driveway, and observed growing, cultivated marijuana plants from their patrol vehicle. On the basis of that observation, the officers obtained a warrant to search Merrill's farmyard. Upon serving the warrant, the officers obtained consent from Merrill to search his house.

The district court for Fillmore County overruled Merrill's motion to suppress. We affirm because Merrill did not have a "legitimate expectation of privacy" in his driveway.

ASSIGNMENTS OF ERROR

Merrill asserts that the district court erred in (1) overruling his motion to suppress because the officers' original entry onto his driveway constituted a pretextual search without probable cause and (2) imposing excessive sentences.

BACKGROUND

OFFICERS' INITIAL ENTRY ONTO MERRILL'S DRIVEWAY

In approximately mid-September 1995, Deputy Steven G. Roemmich of the Fillmore County Sheriff's Department received a tip from an identified area resident that plants suspected to be marijuana were growing on Merrill's property. On September 25, 1995, at approximately 1 p.m., Roemmich and Fillmore County Sheriff William L. Burgess drove by Merrill's farmstead and observed Merrill and his wife standing in the yard. The officers pulled into Merrill's driveway and turned around. Merrill approached the officers' vehicle, and Burgess spoke with him for approximately 3 minutes about an unrelated stolen-check case in York County, Nebraska.

While Burgess spoke with Merrill, he and Roemmich observed two plants approximately 20 to 30 feet away, just east of Merrill's garage, that the officers believed to be cultivated, not wild, marijuana. Upon completion of the discussion, the officers pulled out of Merrill's driveway, without having exited their patrol vehicle, and drove to the Fillmore County sheriff's office.

OFFICERS' SUBSEQUENT SEARCH OF MERRILL'S RESIDENCE

At the sheriff's office, the officers prepared an affidavit for a search warrant based on their observations. A warrant was issued for a search of "just the farm ground" at Merrill's residence. At approximately 3:30 p.m., the officers, along with Troopers Thomas Hayes and Thomas Nesbitt of the Nebraska State Patrol, went back to Merrill's residence and served the warrant on Merrill. After the warrant was served, Merrill signed a written voluntary consent to search form and stated that the officers were "welcome to search any place [they] wanted to search." Merrill then showed the officers around the inside of his home.

Evidence seized during the search included two marijuana plants found growing in the yard with no weeds growing around them and a garden hose underneath one of the plants; picked marijuana found on a coffee table in the living room; a brown

shaving kit, found in the closet in Merrill's bedroom, containing two spoons, numerous syringes, and a blue Ziploc bag; and a pipe containing marijuana found in Merrill's back pocket upon his arrest.

PRETRIAL, TRIAL, AND SENTENCE

Merrill was charged by an amended information with three counts: (1) unlawful manufacture of a controlled substance, to wit, marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995); (2) possession of marijuana more than 1 pound, in violation of § 28-416(12); and (3) possession of a controlled substance, to wit, methamphetamine, in violation of § 28-416(3). Merrill moved to suppress all the "evidence gathered at the Merrill farm," arguing that "the original visit to the Merrill farm . . . was pretextual and without probable cause, thus violating [Merrill's] rights under the Fourth Amendment to the United States Constitution."

The district court overruled Merrill's motion to suppress, stating in the judge's minutes on the docket sheet that "the police were in a place where they could lawfully be" when they first spoke with Merrill in his driveway. However, the trial judge stated in his comments at the hearing on the motion to suppress that "I know they were investigating marijuana and they can't pull my leg, that's the only reason they were out there."

At trial, Leon B. Altman, a forensic drug chemist at the Nebraska State Patrol crime laboratory, testified that he conducted a chemical test on one of the spoons and the blue Ziploc bag and that both items tested positive for methamphetamine. Altman also testified that the plants he tested weighed approximately 2 pounds and tested positive for marijuana, as did the loose leafy substance found on the coffee table and the residue in the pipe seized out of Merrill's back pocket incident to his arrest.

The jury returned a verdict of guilty on all three counts, and the district court sentenced Merrill to concurrent sentences as follows: 4 to 5 years' imprisonment for the unlawful manufacture of marijuana, a Class III felony; 2 to 3 years' imprisonment for the possession of marijuana more than 1 pound, a Class IV felony; and 4 to 5 years' imprisonment for the possession of methamphetamine, a Class IV felony. Merrill appeals. We

granted the State's petition to bypass the Nebraska Court of Appeals.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Earl, ante* p. 127, 560 N.W.2d 491 (1997); *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997).

ANALYSIS

MOTION TO SUPPRESS

Merrill first asserts that the district court erred in overruling his motion to suppress. In determining whether a trial court's ruling on a motion to suppress is clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. See, *State v. McCleery, supra*; *State v. Konfrst, supra*.

Merrill contends that the officers' original entry onto his driveway at approximately 1 p.m. on September 25, 1995, constituted a pretextual search for marijuana, without probable cause, in violation of his rights under the Fourth Amendment to the U.S. Constitution. Thus, Merrill argues that the evidence seized later that afternoon, pursuant to the search of his yard by warrant and house by consent, should have been suppressed as a fruit of the earlier unconstitutional search ("fruit of the poisonous tree"). See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Merrill does not assert that the searches of his yard or house were in any other way unlawful.

The State contends that the officers' original entry onto Merrill's driveway did not constitute a search because Merrill did not have a "legitimate expectation of privacy" in his driveway. Thus, the State argues that Merrill has not implicated an interest protected by the Fourth Amendment.

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 invaded space. See, *State v. Konfrst, supra*; *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996). A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. *State v. Sinsel, supra*; *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

It is undisputed that during the officers' original entry onto Merrill's premises, the officers remained upon Merrill's driveway at all times and never exited their patrol vehicle. Thus, in order to determine whether Merrill has implicated an interest protected by the Fourth Amendment, we must analyze whether Merrill had an expectation of privacy in his driveway that society is prepared to recognize as reasonable. This issue is one of first impression in Nebraska. However, other jurisdictions have resolved the issue by focusing on the accessibility and visibility of the driveway from the public roadway. See, *U.S. v. Evans*, 27 F.3d 1219 (7th Cir. 1994) (Federal Bureau of Investigation (FBI) agents' approach to garage in which defendant conducted automobile repair business did not implicate Fourth Amendment interest, since, absent evidence that public had limited access to driveway leading to garage, defendant had no reasonable expectation that members of public or FBI agents would refrain from entering driveway); *United States v. Smith*, 783 F.2d 648 (6th Cir. 1986) (officers did not violate defendant's right to privacy by entering his driveway and observing marijuana plant growing next to his house where there were no obstructions indicating any attempt to limit access to area around house and no effort had been made to screen off or enclose area where marijuana plants were growing); *United States v. Humphries*, 636 F.2d 1172 (9th Cir. 1980), *cert. denied* 451 U.S. 988, 101 S. Ct. 2324, 68 L. Ed. 2d 846 (1981) (where automobile parked in driveway was visible from street and driveway was not enclosed, no reasonable expectation of privacy that would preclude officer from entering driveway to check on license plate number of parked car). See, also, *State v. Winkler*, 552 N.W.2d 347 (N.D. 1996) (police officers investigating fatal hit-and-run accident by entering defendant's driveway and observing his pickup truck in his garage did not violate

defendant's reasonable expectation of privacy because any member of public would have entered upon defendant's property in manner officers did); *Commonwealth v. A Juvenile (No. 2)*, 411 Mass. 157, 580 N.E.2d 1014 (1991) (police officers' entry on defendant's private driveway to inspect exterior of automobile suspected to be involved in hit-and-run accident did not violate defendant's expectation of privacy because driveway and automobile were clearly visible from public way, driveway was normal route by which to approach front door of residence, no intrusion into automobile was required, and defendant had taken no other steps to conceal parked automobile from public view).

In the instant case, the record does not reflect that Merrill's driveway was not visible from the public roadway or that Merrill had a gate, fence, or any other sort of obstruction that limited access to the driveway. Any member of the public could have entered upon Merrill's property in the same manner the officers did. Under these circumstances, the officers' original entry onto Merrill's driveway did not constitute a search for purposes of the Fourth Amendment because Merrill did not have a "legitimate expectation of privacy" in his driveway.

The area in Merrill's yard where the marijuana plants were growing was not enclosed or screened off from the driveway, and the plants were in plain view approximately 20 to 30 feet from the officers' position in the driveway. What a person knowingly exposes to the public is not a subject of Fourth Amendment protection. See *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). " '[T]here is no reason [a police officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen.' " *Commonwealth v. A Juvenile (No. 2)*, 411 Mass. at 160, 580 N.E.2d at 1016, quoting *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983). Objects' falling within the plain view of an officer, who has the right to be in the position to have such view, does not constitute a search. *State v. Romonto*, 190 Neb. 825, 212 N.W.2d 641 (1973); *State v. Smith*, 184 Neb. 363, 167 N.W.2d 568 (1969).

Because Merrill has not implicated an interest protected by the Fourth Amendment, the officers' subjective motives for their original entry onto Merrill's driveway do not invalidate their

objectively justifiable behavior. See *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Accordingly, the district court did not abuse its discretion in overruling Merrill's motion to suppress.

EXCESSIVE SENTENCES

Merrill next asserts that the district court erred in imposing excessive sentences. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Earl, ante* p. 127, 560 N.W.2d 491 (1997); *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Earl, supra*; *State v. Cook, supra.*

Count I, the unlawful manufacture of marijuana (see § 28-416(1)(a)), is a Class III felony, and counts II and III, possession of marijuana more than 1 pound (see § 28-416(12)) and possession of methamphetamine (see § 28-416(3)), are Class IV felonies. A Class III felony is punishable by a maximum term of 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1995). A Class IV felony is punishable by a maximum term of 5 years' imprisonment, a $10,000 fine, or both. *Id.*

The district court sentenced Merrill to concurrent sentences of 4 to 5 years' imprisonment on count I, 2 to 3 years' imprisonment on count II, and 4 to 5 years' imprisonment on count III. These sentences were all within statutory limits, were not untenable, and did not deprive Merrill of a substantial right or just result. Accordingly, Merrill's assertion that the district court abused its discretion by imposing excessive sentences is without merit.

CONCLUSION

We conclude that the district court did not err in overruling Merrill's motion to suppress and did not impose excessive sentences. As a result, we affirm.

AFFIRMED.

ALAN BAER, APPELLANT AND CROSS-APPELLEE, V. SOUTHROADS MALL LIMITED PARTNERSHIP AND SHOPPING CENTER PARTNERSHIP, APPELLEES AND CROSS-APPELLANTS.

566 N.W.2d 734

Filed May 23, 1997. No. S-95-153.

1. **Res Judicata: Appeal and Error.** To say that an appellate court does not decide an issue which is not presented is not to say that its presentation in a future action may not be barred by applicable legal principles.
2. **Judgments: Res Judicata.** A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every matter which might with propriety have been litigated and determined in that action.
3. **Actions: Parties.** Privity depends upon the relation of the parties to the subject matter and not their activity in a suit relating to it after the event.
4. **Res Judicata.** The general test to determine the identity of causes of action is whether the same evidence will sustain both the present and former actions.
5. ____. The scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and dismissed.

Tory M. Bishop and Michael K. Bydalek, of Kutak Rock, for appellant.

Robert A. Gust, of Gust & Zerin, and Julie L. Nicolas, of Mills, Watts & Nicolas, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, JJ., and SPETHMAN, D.J., and GRANT, J., Retired.

SPETHMAN, D.J.

In this action for the alleged conversion of rents, Alan Baer claims the district court erred in awarding him insufficient damages. Appellees and cross-appellants, Southroads Mall Limited Partnership (Southroads) and Shopping Center Partnership (SCP), claim, inter alia, that Baer's action is barred by res judicata.

ASSIGNMENTS OF ERROR

Baer claims the district court erred by not awarding him damages in the full amount of $316,000 as prayed for in his

petition. In response, Southroads and SCP contend that the district court erred by (1) awarding Baer any money that was collected prior to the date Baer perfected his interest in the rents at issue, (2) awarding net rents from the date payment was missed, as opposed to the date an "event of default" existed as defined by the deed of trust, and (3) finding conversion without any findings of the necessary elements.

On cross-appeal, Southroads claims that the court erred in declining to find that this matter was barred by res judicata. On cross-appeal, SCP claims, restated, that the court erred in finding that SCP is subject to jurisdiction in the State of Nebraska and in granting summary judgment without a finding of fact as to each element. SCP adopted all of the arguments of Southroads and addressed only the issues unique to personal jurisdiction.

FACTS

Underlying Case.

On or about April 1, 1984, Patrician Equities Corp. (Patrician) executed and delivered to Baer a valid deed of trust note (note) in the original principal amount of $3,385,487.02. To secure the payment of the note and performance of all other obligations, Patrician duly executed and delivered to Baer a deed of trust and security agreement (deed of trust). Through the deed of trust, Patrician granted Baer a lien upon, among other things, all of Patrician's right, title, and interest in and to all rents and profits (rents) from the property which is known as the Southroads Mall in Bellevue, Nebraska.

On or about June 12, 1992, Southroads succeeded to all Patrician's rights and obligations related to the property, including the note and deed of trust. In June 1992, the general partner of Southroads was Southroads Mall, Inc.

As of June 12, Shopco Management Corp. (Shopco) managed the property for Southroads and collected rents from the property for Southroads. Shopco hired Trammell Crow Realty Advisors (Trammell Crow) to be asset manager for Southroads. Shopco maintained a management account that was the property of Southroads and which account could be accessed by Shopco as the property manager. In the summer and into the fall

of 1992, Shopco possessed approximately $300,000 in rents and money derived from the normal operations of the property. As of July 1, 1992, Southroads, as successor-in-interest to Patrician, was in default under the terms and provisions of the note and deed of trust for failure to make the principal and interest payment in the amount of $29,710.07. Baer commenced an action to foreclose on the deed of trust on July 29, entitled "Alan Baer v. Patrician Equities Corp., Southroads Mall Limited Partnership, et al.," Sarpy County District Court, docket 9268, page 1043, hereinafter called the underlying case. The petition in the underlying case stated, inter alia, that on or about April 1, 1984, Patrician executed and delivered to Baer the note in the amount of $3,385,487.02; the deed of trust was issued to Baer to secure the payment of the note; and Patrician was in default as of July 1, 1992, for failure to make the principal and interest payment in the amount of $29,710.07. The petition prayed for the appointment of a receiver to take possession of the property and to collect the rents.

On August 25, 1992, the management account, containing a balance of $316,000, was transferred by Shopco to an account maintained by Trammell Crow.

On August 31, 1992, a receiver was appointed by the court. The order appointing the receiver stated that "[a]ny and all persons in possession of the Property, as such term is defined in the Petition . . . shall, upon request, immediately surrender the Property to the Receiver." After this date, Southroads turned over the property and did not receive any rents therefrom.

On September 2, 1992, Baer and the receiver demanded that Southroads turn over approximately $316,000 from its management account maintained by Trammell Crow. Baer alleged this account contained rents collected from the property to which he was entitled. According to Southroads, this amount represented money that accumulated prior to July 1, 1992, the date of default. Determining that the money belonged to it, Southroads refused to turn it over to Baer. Trammell Crow ultimately transferred the money to an account in the name of SCP, which is located in Hastings, Minnesota.

On June 25, 1993, a motion for order to show cause was filed in the underlying case. The motion stated that

> the Receiver believes that Defendant Southroads . . . has collected from some or all of the mall tenants rental income relating to the calendar months of July and August, 1992 ("July and August Rents").
>
> . . . Because the July and August Rents came due and (the Receiver believes) were collected by Defendant Southroads . . . after the occurrence of an event of default under the Deed of Trust, the July and August Rents are part of the "Property" the Court ordered surrendered to the Receiver pursuant to the Order Appointing Receiver.

In response, Southroads stated that the order appointing the receiver did not grant the receiver the right of possession or the rents accruing from the property prior to August 31, 1992. Further, it stated that Southroads complied with the order appointing the receiver and that, since the appointment of the receiver on August 31, 1992, it has not collected any rents from the property.

The motion was heard on October 4, 1993. At that time, the court stated that it had earlier explained to counsel that the hearing would include whether Southroads was "in contempt of Court and an accounting and specifically to submit proof of any monies received by said Defendant after the Receiver was appointed which was on August 31, 1992." (Emphasis in original.) The court issued the order on November 22, 1993, and found that Southroads did not receive funds from the tenants at the property after the appointment of the receiver on August 31, 1992, and was therefore not in contempt of court. Next, the court stated that "even prior to [the determination of whether an accounting was required] would be the legal issue of whether rents collected by said Defendant or others on behalf of said Defendant, prior to August 31, 1992, were required to be turned over to the Receiver." The court stated that it had reviewed the briefs of counsel and found that Southroads was not required to do so. Therefore, the court found that "unless said Defendant received rents after August 31, 1992, there is no accounting to be done. Again relying on counsel that said Defendant did not receive rents directly from tenants after August 31, 1992, the Court finds no account is due."

Instant Action.

In a new action, filed on April 7, 1994, Baer filed a petition against both Southroads and SCP for conversion. This petition stated, inter alia, that on or about April 1, 1984, Patrician executed and delivered to Baer the note in the amount of $3,385,487.02; the deed of trust was issued to Baer to secure the payment of the note; and Southroads was in default as of July 1, 1992, for failure to make the principal and interest payment in the amount of $29,710.07. The petition further alleged that on September 2, Baer demanded that Southroads, through Trammell Crow, turn over the rents held in its management account. The petition further alleged that Southroads wrongly transferred the rents to an SCP account. Baer alleged he is entitled to these rents under the note and deed of trust and prayed that the court award him rents in the amount of $316,000 plus interest.

SCP made a special appearance, objecting to personal jurisdiction. Southroads then filed a motion to dismiss Baer's petition because the issue of whether Baer was entitled to the rents had already been determined in the underlying case, thus barring this action based on the doctrine of res judicata. This motion was denied. On July 5, 1994, Southroads moved for summary judgment.

After a hearing on these issues, the court found a genuine issue of material fact existed as to Baer's rights prior to the appointment of the receiver on August 31, 1992, and therefore denied Southroads' motion for summary judgment. Additionally, the court stated that the issue before the court in the instant action was neither raised nor resolved and could not have been raised or resolved in the underlying case. The court referred to its order of November 22, 1993, wherein it specifically stated that it would consider only whether Southroads was in contempt of court for monies received by Southroads after the receiver was appointed. Further, the court stated that in the November 22 order it found that the *receiver* was not entitled to rents collected prior to its appointment and did not determine the issue of *Baer's* right to collect rents prior to the receiver's appointment. The court also found that personal jurisdiction could

properly be asserted by the Sarpy County District Court over SCP.

On November 30, 1994, Baer moved the court for summary judgment. On December 12, Southroads filed a cross-motion for summary judgment, requesting that the court grant summary judgment against Baer. These motions were heard on December 23. The court determined that there was no issue of fact and that Baer was entitled to judgment as a matter of law for the rents collected for July and August 1992. The court then awarded Baer $146,016.68. Baer appealed, claiming this award insufficient.

We conclude, for the reasons set forth hereinafter, that this case is barred by res judicata.

Baer argues that res judicata does not apply to bar the present suit. He argues that because the issue of his right to collect rents prior to August 31, 1992, was not litigated or adjudicated in the underlying case, that issue cannot be barred by res judicata in the instant action. In support of this argument, Baer relies on the district court's order issued November 22, 1993, which he states clearly indicates the court "was not addressing *Baer's* rights to rents collected prior to August 31, 1992." (Emphasis supplied.) Brief for appellant on cross-appeal at 27.

We specifically addressed the effect of res judicata on issues not decided in an earlier action in *Pflasterer v. Koliopoulos*, 213 Neb. 330, 328 N.W.2d 789 (1983). *Pflasterer* was the third case in a series of cases involving the estate of Theodore N. Ganaros. The second case in the series was *Omaha Nat. Bank v. Koliopoulos*, 204 Neb. 752, 285 N.W.2d 496 (1979), in which the court rejected the executor's effort to set aside the transfer by Ganaros of 255 shares of capital stock to his nephew, Sam Koliopoulos. In *Pflasterer*, Ganaros' daughter, Marian Pflasterer, sued Koliopoulos, seeking to impress a constructive trust on the 255 shares of capital stock. Pflasterer sought to avoid the application of res judicata by relying on the court's observation in *Omaha Nat. Bank* that " '[n]o issue being here presented as to any rights as between Pflasterer and Koliopoulos, none is decided.' " *Pflasterer*, 213 Neb. at 335, 328 N.W.2d at 792. We held Pflasterer's claim was barred by res judicata. In applying res judicata as a bar, we stated that "[t]o say we do not decide an issue which is not presented is not to say that its presenta-

tion in a future action may not be barred by applicable legal principles." *Id.*

The same rationale applies to Baer's argument that the district court did not decide the issue of his right to the rents. Simply because the issue was not specifically presented to the district court in the underlying case does not bar the application of res judicata to the instant action. It does not matter whether the court in the underlying case actually addressed Baer's right to the rents. It is well settled that

> "[a] judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action."

Midwest Franchise Corp. v. Wakin, 201 Neb. 450, 453-54, 268 N.W.2d 737, 739 (1978) (quoting 50 C.J.S. *Judgments* § 657 (1947)). See, also, *Pflasterer, supra*; *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959); *Webber v. City of Scottsbluff*, 155 Neb. 60, 50 N.W.2d 541 (1951).

It is clear from the record that the foreclosure action in the underlying case was on the merits and that the underlying case involved the same parties or their privies as the instant action. In the underlying case, Baer was the plaintiff, and Southroads was a defendant. Similarly, in the instant action, Baer is the plaintiff, and Southroads and SCP are the defendants. The addition of SCP as a defendant in the instant action does not render res judicata inapplicable, because SCP is in privity with Southroads by way of their relationship to the contested funds. Privity depends upon the relation of the parties to the subject matter and not their activity in a suit relating to it after the event. *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975). Both SCP and Southroads at one time held the funds to which Baer argues he is entitled. Therefore, it is evident that Southroads and SCP have the same relation to the subject matter.

Having determined that the judgment in the underlying case was on the merits and rendered in a former suit between the

same parties or their privies, it is necessary to determine if the judgment in the underlying case was on the same cause of action as is presented in the instant action. The general test to determine the identity of causes of action is "whether the same evidence will sustain both the present and former actions." *Pflasterer*, 213 Neb. at 333, 328 N.W.2d at 791 (citing *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976)). It is clear from the transcript that the same evidence will sustain both the underlying case and the instant action. The underlying case was brought by Baer to recover everything to which he was entitled under the deed of trust, specifically including the rents. Paragraph 34 of Baer's petition in the underlying case alleges: "The Deed of Trust provides that in the event of a default Baer may, either in person or by a court-appointed receiver, enter upon and take control of the Property and collect the Rents therefrom." The same cause of action is the source of the instant action, in which Baer seeks to recover rents he claims he is entitled to under the deed of trust. Paragraphs 8 and 9 of his petition state that his rights arise because "[t]hrough the Deed of Trust, Patrician assigned and conveyed to Baer all of Patrician's right, title and interest in and to all rents and profits ("Rents") from the Property [and] the Deed of Trust stipulates that Baer is entitled to possession and rents upon default of the Note . . . ." Even if the same issues had not been raised in both suits, Baer's claim in the instant action *could* have been raised in the underlying case. The scope of the res judicata bar "encompasses not only the issues actually litigated in the prior proceeding but also those issues which *could have been raised.*" (Emphasis supplied.) *Pflasterer v. Koliopoulos*, 213 Neb. 330, 333, 328 N.W.2d 789, 791 (1983) (citing *Brommer v. City of Hastings*, 212 Neb. 367, 322 N.W.2d 787 (1982)). The issue in the underlying case was to determine and grant Baer's rights under the deed of trust, and it is that very same request, based upon the very same facts, that Baer makes in the present case.

Finally, for res judicata to apply, we must determine whether the judgment entered in the underlying case was issued by a court of competent jurisdiction. This issue is undisputed.

The adjudication of the underlying case was a final judgment on the merits, rendered between the same parties or their priv-

ies, on the same cause of action, by a court of competent jurisdiction. These elements satisfied, res judicata operates as a bar to Baer's claim to the rents, a matter which might with propriety have been litigated and determined in the underlying case. See, *Pflasterer, supra*; *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959); *Webber v. City of Scottsbluff*, 155 Neb. 60, 50 N.W.2d 541 (1951). As such, the doctrine of res judicata bars the instant action. Having so determined, it is unnecessary to consider any other assignments of error. The judgment of the district court is, therefore, reversed, and the cause is ordered dismissed.

REVERSED AND DISMISSED.

KENNETH J. KRAMER, APPELLEE,
V. KATHLEEN J. KRAMER, APPELLANT.
KATHLEEN J. KRAMER, APPELLANT, V.
KENNETH J. KRAMER, APPELLEE.
567 N.W.2d 100

Filed May 23, 1997. Nos. S-95-728, S-96-629.

1. **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.
2. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
4. **Demurrer: Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
5. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.

6. **Federal Acts: Property Division: Armed Forces: Pensions.** Military retirement benefits cannot constitute divisible marital property except to the extent specifically permitted by the Uniformed Services Former Spouses' Protection Act.
7. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
8. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence was uncontroverted at trial. At that point, the burden of producing evidence demonstrating the existence of a genuine issue of material fact shifts to the party opposing the motion.
9. **Actions: Equity.** An action in assumpsit for money had and received may be brought where a party has received money which in equity and good conscience should be repaid to another.
10. ____: ____. Although founded on equitable principles, an action in assumpsit for money had and received is an action at law.
11. ____: ____. There must be a specific legal principle or situation which equity has established or recognized to bring a case within the scope of a cause of action in assumpsit for money had and received.
12. **Modification of Decree: Alimony: Good Cause: Words and Phrases.** Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case.
13. **Modification of Decree: Good Cause: Appeal and Error.** The determination of good cause necessary for modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
14. **Federal Acts: Modification of Decree: Alimony: Armed Forces: Pensions: Waiver.** While a court may not include service-connected disability benefits awarded to a military retiree as a part of a marital estate, it may consider such benefits and the corresponding waiver of retirement pension benefits required by federal law in determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Judgment in No. S-95-728 affirmed as modified. Judgment in No. S-96-629 reversed, and cause remanded for further proceedings.

Peter C. Bataillon and Kelly K. Brandon, of Sodoro, Daly & Sodoro, for appellant.

Robert J. Hovey, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

In a contested dissolution proceeding which was finally resolved by the Nebraska Court of Appeals in 1993, see *Kramer v. Kramer*, 1 Neb. App. 641, 510 N.W.2d 351 (1993) (*Kramer I*), Kathleen J. Kramer (wife) was awarded a 46-percent interest in the monthly military retirement pension of Kenneth J. Kramer (husband). In August 1994, the Department of Veterans Affairs awarded service-connected disability benefits to the husband, retroactive to August 1, 1992. Under federal law, receipt of disability benefits operates as a waiver of an equal amount of regular retirement benefits to which the veteran would otherwise be entitled. Both of these cases involve the effect of this waiver on the wife's interest in the military retirement pension.

In case No. S-95-728, the husband alleges that the wife was "unjustly enriched" by receipt of her 46-percent interest in the retirement pension during the retroactive period of the disability award. On May 17, 1995, the district court for Sarpy County granted his motion for summary judgment, denied her motion for summary judgment, and entered judgment in favor of the husband against the wife in the amount of $7,897.28.

Case No. S-96-629 involves an application filed by the wife requesting modification of the decree of dissolution on the ground that the judgment in favor of the husband and the reduced future value of her interest in the retirement pension which resulted from the disability award amounted to a material change in circumstances justifying an increase in alimony. The district court dismissed the application on October 16, 1995.

The wife perfected timely appeals from both orders to the Court of Appeals. Pursuant to our authority to regulate the caseloads of the Court of Appeals and this court, we removed the cases to our docket. We consolidated them for oral argument because they arise from the same facts.

We affirm the judgment of the district court in case No. S-95-728 as modified, and reverse, and remand case No. S-96-629 to the district for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

ORIGINAL DECREE

On January 11, 1991, the district court for Sarpy County entered a decree dissolving the 26-year marriage of Kenneth J. and Kathleen J. Kramer. The decree included the following provision:

> That the [husband] shall pay as alimony to the [wife] the sum of $750.00 per month commencing on the 1st day of June, 1990 and continuing in a like amount on the 1st day of each month thereafter until the death of the [wife] or the [husband], whichever shall occur first. That this award of alimony is not to terminate automatically upon the remarriage of the [wife]. This alimony may be modified upon a change of circumstances to be considered by the court at some future date, together with any other relevant circumstances in regard to the earning capacity of either of the parties.
>
> That in consideration of the provision, [the husband] is awarded all rights and entitlement to his United States Air Force Military Retirement Pension.

The record reflects that this alimony award was intended to constitute the wife's interest in the military retirement pension in accordance with our decision in *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982). The decree also required the husband to pay additional alimony in the amount of $1,200 per month for 1 year and $900 per month thereafter, continuing until the death of either party or the remarriage of the wife.

The husband appealed, contesting the amount and duration of alimony and the award of attorney fees. The wife cross-appealed, contending that the district court erred in the manner in which it awarded her interest in the military pension.

APPEAL AND MODIFIED DECREE

In *Kramer I*, the Court of Appeals affirmed the award of what it characterized as "traditional alimony," 1 Neb. App. at 642, 510 N.W.2d at 353, in the amount of $900 per month but found that the provision for termination only upon death or remarriage was unreasonable. It ordered a modification to provide that this alimony would terminate on June 1, 2005, if not previously

terminated by the death of one of the parties or the wife's remarriage.

Addressing what it characterized as the "*Pyke* alimony" challenged by the wife's cross-appeal, the Court of Appeals found that the "greatest accumulation of value" during the marriage was the military pension. *Id.* at 646, 510 N.W.2d at 355. The court further reasoned that under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1401 et seq. (1988 & Supp. II 1990) (USFSPA), and our holding in *Taylor v. Taylor*, 217 Neb. 409, 413, 348 N.W.2d 887, 889 (1984), "nondisability military pensions need no longer be treated differently than nonmilitary pensions" in the division of marital assets. In *Kramer I*, the Court of Appeals stated:

> In our view, the provision in the Nebraska statute, [Neb. Rev. Stat.] § 42-366 [(Reissue 1988)], that pensions be treated as property subject to division, coupled with the USFSPA, means that as a general proposition, a military pension must be viewed primarily as property to be divided. Thus, although *Pyke* alimony can be used, it should not be used in a manner which deprives the receiving spouse of the benefits which would ordinarily inure from the division of property. Typically, when marital property is divided, each party has the benefit of receiving a fixed amount or value which potentially can appreciate. Additionally, each party's share is not subject to being later reduced or taken away entirely because of circumstances which occur in the life of the former spouse.

1 Neb. App. at 646-47, 510 N.W.2d at 355.

The Court of Appeals noted that under the *Pyke* alimony award, the husband would receive the benefit of future increases in the retirement pension but the wife would not. The court held that a fixed percentage interest in the pension should be awarded to each party, stating:

> We believe that the intent of Nebraska law with respect to pensions is to treat them as marital property . . . and the fact that a pension is a military pension should be a fact of little consequence. *Pyke* alimony, as awarded by the trial court in this case, accords military pensions substantially different treatment, with potentially great adverse conse-

quences to Kathleen. We believe that in order to justify the abrogation of the typical benefits of property division (certainty of amount, the chance for future appreciation of one's share, and complete ownership) by utilizing *Pyke* alimony to divide a military pension, the record must establish a compelling need to do so. When there is no such showing, as is the case here, the ultimate test of reasonableness from *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984), is frustrated, as is the holding of *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984), that military and nonmilitary pensions are no longer to be treated differently when dividing marital assets. Furthermore, [Neb. Rev. Stat.] § 42-365 [(Reissue 1988)] tells us that when a court is dividing marital assets, property division and alimony "serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties."

For these reasons, we hold that the trial court abused its discretion in awarding Kathleen $750 per month in *Pyke* alimony in lieu of an outright interest in Kenneth's military pension, as Kathleen was deprived of a fair and equitable result with respect to the division of the military pension. Therefore, we reverse paragraph II, dealing with the military pension, of the decree of dissolution and remand this matter to the district court for Sarpy County with directions to award Kathleen 46 percent of Kenneth's military pension under § 1408, which award shall not be subject to modification.

1 Neb. App. at 647-48, 510 N.W.2d at 355-56. The court also ordered that the husband be ordered to maintain a Survivor Benefit Plan under § 1450(f)(4) naming the wife as beneficiary in order to provide security for her interest in the military pension.

Neither party sought further review of the decision of the Court of Appeals. Following remand, on October 21, 1993, the district court entered an order of modification of divorce decree, which contained the following provision:

That as of June 1, 1990 [the wife] is awarded 46% of [the husband's] military pension with the United States

> Air Force as provided by 10 U.S.C. § 1408 and which award shall not be subject to modification. [The husband] shall maintain his survivor benefit plan naming [the wife] as the beneficiary. [The husband] shall receive the remaining 54% of his military pension.

At the time of the order of modification, the monthly pension benefit was approximately $1,820, and the value of the 46-percent interest awarded to the wife was approximately $837 per month.

CASE NO. S-95-728:
HUSBAND'S UNJUST ENRICHMENT CLAIM

In August 1992, the husband filed an application for service-connected disability benefits. There is nothing in the record to indicate when the wife first became aware of this application.

On August 19, 1994, the Department of Veterans Affairs granted the husband service-connected disability benefits. The department made the benefits retroactive to August 1, 1992. The husband received the following disability benefits:

Dates	Monthly Benefits
August 1 to November 30, 1992	$614
December 1, 1992, to November 30, 1993	632
December 1, 1993, to July 31, 1994	648

On October 26, 1994, the husband filed an amended petition in the district court for Sarpy County praying for a judgment against the wife in the amount of $7,897.28, plus interest and court costs, under a theory of unjust enrichment. The husband alleged that he had made monthly payments to the wife from August 1, 1992, through November 30, 1994, in the amount of 46-percent of the full amount of the retirement pension. He further alleged that because this pension was, by operation of federal law, reduced by the amount of his disability benefits during this period, he had overpaid the wife by $7,897.28.

The wife filed an answer denying the allegations of unjust enrichment and alleging that at all relevant times there was an enforceable judgment which entitled her to receive 46 percent of the military pension. She also alleged that the husband "has not come into this court with clean hands." He filed a reply specifically denying this allegation.

On March 17, 1995, the husband filed a motion for summary judgment. The wife filed a motion for summary judgment on April 5. At the hearing on both motions on April 6, the husband's counsel asked the court to take judicial notice of "10 USC 1408 and Title 38 USC, . . . the [original] decree of dissolution of marriage dated January 11, 1991, and the order of modification dated October 21, 1994." The wife's counsel raised no objection. The husband then offered his own affidavit, which contained a statement that the allegations in his amended petition were true. That statement was followed by specific statements concerning the provisions of the original dissolution decree, the action taken by the Court of Appeals, and the amounts by which he claimed to have overpaid the wife as a result of the retroactive award of service-connected disability benefits. (The affidavit refers to a letter from the Department of Veterans Affairs supposedly attached as "Attachment A," but the letter does not appear in the bill of exceptions or in the copy of the affidavit contained in the transcript on appeal.)

The wife's attorney objected to the affidavit on the ground that "there are some factual matters in there which Mr. Kramer may have knowledge of, but there are other matters which are conclusions of law and are assumptions." The court received the affidavit in evidence, noting that it would not consider any "conclusions and assumptions."

The wife offered no evidence in opposition to the husband's motion. Her counsel specifically advised the court that counsel did not intend to offer any evidence in support of the wife's motion, stating:

> There is no need for any factual evidence. We have no affidavits or things of that nature. The portions you have taken notice of are the same ones I would be asking, and I just filed a motion for summary judgment so we can get the whole thing resolved without coming back here again.

On May 17, 1995, the district court entered an opinion and order granting the husband's motion for summary judgment, denying the wife's motion, and entering judgment in favor of the husband against the wife in the amount of $7,897.28, plus costs.

CASE NO. S-96-629:
WIFE'S APPLICATION FOR MODIFICATION

On August 25, 1995, the wife filed an amended application to modify decree. In this application, she alleged that at the time of the October 21, 1993, modification, the military retirement pension was approximately $1,820 per month and that her 46-percent entitlement had a monthly value of approximately $837.20. She alleged that she had not been aware of the husband's application for service-connected disability benefits in August 1992. She alleged the amounts by which the military retirement pension was decreased by the husband's service-connected disability benefits and further alleged her expectation that "the aforesaid service connected disability compensation will equal or exceed the amount of $648.00 for the period after October 1, 1994." She also alleged that the judgment entered against her in the unjust enrichment action "represents the retroactive portion of respondent's disability award which was paid to [the wife] pursuant to the Order of October 21, 1993, which modified the Decree herein." She alleged that the decreased value of her 46 percent of the nondisability pension together with the judgment entered against her in the unjust enrichment action constituted a material and substantial change of circumstances justifying an increase in the alimony she receives from the husband.

The husband filed a general demurrer, which was sustained by the district court on October 16, 1995. In its opinion and order filed on that date, the district court stated:

> While the Court is aware of the facts of this case, which clearly indicate that the financial positions between the parties have materially changed due to the [husband's] award of disability and corresponding reduction of his pension, the law in Nebraska is clear and does not support [the wife's] theory. As this Court stated in an Opinion and Order from the earlier litigation between these parties on [the husband's] unjust enrichment claim, the rule in this state is that disability compensation may not be considered by the courts in awarding alimony or support. In Taylor v. Taylor, 217 Neb. 409, 348 N.W.2d 887 (1984), the Nebraska Supreme Court held that only **nondisability**

> military pensions were to be treated as marital property. This rule has endured to the present date. Accordingly, if disability compensation is exempt from being subject to alimony or support, it is only reasonable to assume that a government award of disability compensation may not be relied upon as the material and substantial change in circumstances required to modify a decree.

The wife elected to stand on her amended application to modify, and the district court dismissed it on May 21, 1996.

ASSIGNMENTS OF ERROR

In case No. S-95-728, the wife contends that the district court erred in (1) determining that she was unjustly enriched, (2) not barring the husband's action on the basis of the unclean hands doctrine, and (3) failing to grant her motion for summary judgment.

In case No. S-96-629, the wife contends that the district court erred in sustaining the husband's demurrer and dismissing her application to modify the alimony provisions of the decree of dissolution based upon a material change in the financial circumstances of the parties.

STANDARD OF REVIEW

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. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538

(1997); *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996). A statement of facts sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996); *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995).

In addition, whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *State ex rel. Stenberg v. Moore*, 251 Neb. 598, 558 N.W.2d 794 (1997); *Sawyer v. State Surety Co.*, 251 Neb. 440, 558 N.W.2d 43 (1997).

ANALYSIS

These cases require us to determine the extent to which federal disability benefits payable to a military retiree may be distributed or otherwise taken into consideration by a state court in an action for dissolution of marriage. Before addressing the specific issues raised in these appeals, it is necessary to review the development of federal and state law in this area.

A starting point is the decision of the U.S. Supreme Court in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), in which the Court addressed the issue of whether nondisability benefits payable to a military retiree could be included as community property under California law and would therefore be subject to distribution in dissolution of marriage proceedings. The Court noted that the subject of domestic relations is generally within the purview of state law and that unless state law in this area would cause "'"major damage" to "clear and substantial" federal interests,'" it will not be superseded by the Supremacy Clause of the U.S. Constitution. 453 U.S. at 220. However, the Court concluded that California community property laws did pose such a risk to federal interests, because federal statutes clearly provided that military retirement benefits constituted the personal property of the veteran and created no entitlement for the veteran's spouse. The Court therefore found that federal law precluded California

courts from distributing any portion of a nondisability retirement pension to the former spouse of a military retiree. The Court recognized that its decision could harshly affect the ex-spouse of a military retiree but noted that this problem could only be resolved through new federal legislation.

Nebraska law requires that pension and retirement plans shall be included in the marital estate for purposes of division of property at the time of dissolution. Neb. Rev. Stat. § 42-366 (Reissue 1993). In *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982), decided a few months after *McCarty*, we recognized that *McCarty* prevented inclusion of military pensions within the marital estate. We then noted:

> However, a trial court, in determining what, if any, alimony should be awarded a spouse, may recognize that the spouse ordered to pay the alimony may have, by way of income for his own maintenance and support, a military pension or may have the proceeds of a military pension from which he may be able to make alimony payments, although the court cannot award an interest in the pension to the nonmilitary spouse.

212 Neb. at 121, 321 N.W.2d at 911.

In response to *McCarty*, Congress enacted the USFSPA, 10 U.S.C. § 1408 et seq., in 1982. The act provides in part:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a [former service] member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

§ 1408(c)(1). The statute defines " 'disposable retired pay' " as "the total monthly retired pay to which a member is entitled" (other than the retired pay of a member retired for disability under chapter 61 of this title), less certain other deductible amounts, including amounts which "are deducted from the retired pay of such member . . . as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38." § 1408(a)(4).

On our first occasion to consider the effect of the USFSPA on Nebraska law, we held in *Taylor v. Taylor*, 217 Neb. 409, 413,

348 N.W.2d 887, 889 (1984), that "nondisability military pensions need no longer be treated differently than nonmilitary pensions." Based upon our finding that the husband's military pension should have been taken into consideration in the division of marital assets, we modified the decree in *Taylor* by increasing the alimony award by $300 per month, representing the wife's interest in the military retirement pay.

McCarty, *Pyke*, and *Taylor* dealt with *nondisability* retirement benefits. Veterans who suffer a service-connected disability may also be awarded disability benefits calculated according to the seriousness of the disability and the degree to which it impairs the individual's earning capacity. 38 U.S.C. §§ 310, 314, and 331 (1988 & Supp. II 1990) and 355 (1988). In order to receive disability benefits, a military retiree must waive a corresponding amount of military retirement pay. 38 U.S.C. § 3105 (1988). It is to the veteran's advantage to waive retirement pay in order to receive a like amount in disability benefits, because such benefits are exempt from federal, state, and local taxation. 38 U.S.C. § 3101(a) (1988).

The issue of whether a state court may treat the amount of military retirement pay which a veteran waives in order to receive service-connected disability benefits as a part of the marital estate was directly addressed in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). The *Mansell* Court reasoned that after *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), military retirement benefits could not constitute divisible marital property except to the extent specifically permitted by the USFSPA. The *Mansell* Court held that the language of the statute was precise and limited, permitting state courts to treat only "disposable retired pay" as divisible marital property. Noting that § 1408(a)(4)(B) specifically excludes retirement pay waived in order to qualify for disability benefits from the definition of "disposable retired pay," the Court held that such waived pay could not be treated as divisible marital property under state law. The Court recognized that its interpretation of USFSPA "may inflict economic harm on many former spouses," but expressly declined "to misread the statute in order to reach a sympathetic result when such a reading requires us to do vio-

lence to the plain language of the statute and to ignore much of the legislative history." 490 U.S. at 594.

In language foreshadowing the wife's present circumstance, Justice O'Connor wrote in dissent:

> Today the Court holds that the federal Uniformed Services Former Spouses' Protection Act . . . denies state courts the power to order in a divorce decree the division of military retirement pay unilaterally waived by a retiree in order to receive veterans' disability benefits. The harsh reality of this holding is that former spouses . . . can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits.

490 U.S. at 595.

HUSBAND'S UNJUST ENRICHMENT CLAIM

We first address the wife's appeal from the order granting the husband's motion for summary judgment, denying her motion for summary judgment, and entering judgment for the husband in the amount of $7,897.28. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997). A party moving for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence was uncontroverted at trial. At that point, the burden of producing evidence demonstrating the existence of a genuine issue of material fact shifts to the party opposing the motion. *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996).

The only evidence offered by the husband in support of his motion for summary judgment was his own affidavit. We must accept the factual statements contained in the affidavit as true, because the wife offered no evidence in opposition. These state-

ments establish that the husband made monthly payments to the wife in the amount of 46 percent of the full military retirement pension for the period August 1, 1992, through July 31, 1994. As a result of the retroactive award of service-connected disability benefits and the corresponding waiver of a portion of the retirement pension for the retroactive period, the retirement pension was reduced by $614 per month for 4 months, $632 per month for 12 months, and $648 per month for 8 months, a total reduction of $15,224.

While the husband characterizes his claim as one for unjust enrichment, it is really an action in assumpsit for money had and received. Such an action may be brought where a party has received money which in equity and good conscience should be repaid to another. *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995). See *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987). In this circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment. See *Wrede, supra*. Although founded on equitable principles, an action in assumpsit for money had and received is an action at law. *Wrede, supra*; *Barker v. Wardens & Vestrymen of St. Barnabas Church*, 171 Neb. 574, 106 N.W.2d 858 (1961).

In *Wrede*, we held that there must be a specific legal principle or situation which equity has established or recognized to bring a case within the scope of assumpsit for money had and received. In this case, that legal principle is the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, which supersedes state law to the extent that it would cause major damage to significant federal interests. See, *In re Application of Burlington Northern RR. Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996); *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

Thus, the wife was actually overpaid by 46 percent of the waived amounts because of the retroactive award of service-connected disability benefits to the husband and his waiver of a like amount of retirement pension benefits as required by § 3105. To permit her to retain this overpayment would have the

effect of awarding her a percentage of the husband's disability benefits, which is prohibited by § 1408(a)(4)(B) and (c)(1).

The wife's defense of unclean hands is of no avail for two reasons. First, there is no evidence that the husband took any improper or unlawful action. No provision in the original decree or the modified decree prohibited him from exercising his right to apply for service-connected disability benefits or from waiving a corresponding amount of his retirement benefits if his application was approved. To the contrary, the decree awarded the husband "all rights and entitlement to his United States Air Force Military Pension" in consideration of his payment of *Pyke* alimony. Second, even if there were a factual basis for the equitable defense of unclean hands which might permit the wife to retain the overpayments under state law, it would be preempted by federal law for the reasons stated above.

For these reasons, we determine that the district court did not err in overruling the wife's motion for summary judgment and entering summary judgment in the husband's favor in case No. S-95-728. However, in reviewing the record, we note that the judgment in the amount of $7,897.28 represents 46 percent of overpayments made by the husband to the wife from August 1, 1992, through October 1, 1994, a total of 27 months. His affidavit establishes the period in which overpayments were made as August 1, 1992, through July 31, 1994, a period of 24 months. Based upon the affidavit, the total amount of the overpayment would be $7,003.04. Although neither party raised this point on appeal, under our power to address plain error, see, *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996), we order that the amount of the judgment entered in the husband's favor be reduced to $7,003.04, and affirm the judgment as modified.

WIFE'S APPLICATION FOR MODIFICATION OF ALIMONY

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of

the pleader. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996); *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, the demurrer should be overruled. *Talbot, supra.*

Neb. Rev. Stat. § 42-365 (Reissue 1993) provides that "[u]nless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown . . . ." Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case. *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985). The determination of good cause necessary for modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. See, *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995); *Chamberlin v. Chamberlin*, 206 Neb. 808, 295 N.W.2d 391 (1980).

The legal sufficiency of the wife's amended application to modify decree depends entirely upon whether the USFSPA as interpreted in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), precluded the district court from considering a former spouse's military disability benefits and corresponding waiver of retirement pension benefits in determining whether there had been a material change in circumstances justifying modification of the decree. We have not ruled directly on this question, but it has been addressed by other state courts.

Particularly instructive is the decision in *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), which both parties cite in their briefs. In that case, the veteran was awarded disability benefits 4 years after the decree of dissolution. The statutory waiver of a corresponding portion of his retirement pension resulted in the elimination of a monthly payment in the amount of $168 which the veteran's former spouse had been awarded as her share of the retirement pension. The former spouse filed an application seeking modification of the decree based upon a material change in circumstances, and the trial court granted the appli-

cation and required the veteran to pay his former spouse $168 per month retroactive to the date of the veteran's waiver. On appeal, the Supreme Court of Alaska observed:

> [E]quities clearly reside with [the former wife]. In reality, she is not even seeking to modify the divorce decree. [The former husband] did that, unilaterally and extrajudicially, when he decided to waive his retirement pension in order to collect disability benefits. [The former wife] is merely trying to reestablish the status quo through her motion [to modify the parties' divorce decree].

Id. at 1261.

After concluding that *Mansell* unequivocally prevented state courts from awarding a veteran's disability benefits received in place of waived retirement benefits to a former spouse, the *Clauson* court focused upon the issue of "whether federal law also precludes [state] courts from considering the economic impact that a waiver of military retirement pay and corresponding receipt of disability pay has on the parties to a divorce." 831 P.2d at 1262. Noting that such benefits would be relevant to the equitable division of marital property under Alaska law in the absence of federal preemption, the court examined cases articulating the scope of federal preemption of state domestic relations law and concluded that neither the USFSPA nor Supreme Court decisions, including *Mansell*, preempted state courts "from considering, when equitably allocating property upon divorce, the economic consequences of a decision to waive military retirement pay in order to receive disability pay." 831 P.2d at 1264. See, also, *In re Marriage of Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Wis. App. 1990).

Although the *Clauson* court found that the wife's loss of her interest in military retirement benefits was "not insignificant and likely justifies a redistribution of the parties' marital property," 831 P.2d at 1261, it imposed a significant limitation on that redistribution, stating:

> We are aware of the risk that our holding today might lead trial courts to simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side. This is unacceptable. In arriving at an equitable distribution of

> marital assets, courts should only consider a party's military disability benefits as they affect the financial circumstances of both parties. Disability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage.
>
> . . . The [lower] court was clearly trying to regain the status quo as if the *Mansell* decision did not exist. The effect of the order was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in *Mansell*. This simply cannot be done under the Supremacy Clause of the federal constitution.

831 P.2d at 1264. The court therefore vacated the lower court's order and remanded for further proceedings consistent with its opinion.

In *Torwich v. Torwich*, 282 N.J. Super. 524, 660 A.2d 1214 (1995), the former wife of a military retiree sought modification of the decree of dissolution when her fixed percentage share of the retirement pension decreased in value from $249 per month to $97 per month as a result of his waiver of retirement benefits in order to receive disability benefits. The court determined that this "had a substantial adverse impact on [the former wife's] equitable distribution." *Id.* at 529, 660 A.2d at 1216. The court specifically held that while *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), prohibits distribution of retirement pay waived by the veteran in order to receive disability benefits, that "does not mean that other adjustments to the judgment cannot be made when such disability payments commence and reduce one spouse's receipts from his or her share of the other spouse's pension or retirement benefits." 282 N.J. Super. at 529, 660 A.2d at 1216. Thus, the court ordered the dissolution judgment to be reconsidered "to perfect an equitable distribution." *Id.*

In *Vitko v. Vitko*, 524 N.W.2d 102 (N.D. 1994), a former husband challenged a lower court judgment distributing the marital estate, contending that he acquired much of his property with his military disability payments and that, therefore, the property should not be included in the marital estate subject to distribution. The trial court had expressly excluded the former hus-

band's disability benefits from the equitable property distribution. However, citing *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), the trial court considered the former husband's disability income "'so as to determine the financial circumstances of each party to the divorce.'" 524 N.W.2d at 104. On appeal, the North Dakota Supreme Court determined that "'when making property distributions or awarding alimony the trial court may consider military disability retirement pay as future income . . . relevant to a determination of the parties' ultimate economic circumstances.'" *Id.* at 103 (quoting *In re Marriage of Kraft*, 119 Wash. 2d 438, 832 P.2d 871 (1992)). Moreover, in discussing *Mansell*, the court concluded that "we need not give a broader preemptive effect to the *Mansell* holding than the *Mansell* court itself recognized in the 'precise and limited' language of a particular federal statute." *Id.* at 103-04. In the end, the North Dakota Supreme Court held that the trial court's distribution of the parties' marital property was not clearly erroneous.

The rationale that benefits exempt from distribution under federal law may nevertheless be taken into consideration in assessing the relative financial condition of the parties in a dissolution action was applied by this court in *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982), decided prior to enactment of the USFSPA. We held in that case that although military retirement pensions could not be included in the marital estate under the Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), the district court could nevertheless consider the fact that the retiree would have the pension as a source of income for his own maintenance and support in determining whether he should pay alimony to his former spouse and if so, the amount of such alimony. Similarly, in *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985), we observed that increases in a military retiree's pension and disability benefits could be considered by the district court in determining whether he was entitled to modification of an alimony award because of his loss of employment.

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. *Reichert v.*

Reichert, 246 Neb. 31, 516 N.W.2d 600 (1994). In this case, the relative economic circumstances of the husband and the wife have been altered significantly by the award of service-connected disability benefits to the husband. The wife's economic circumstances have deteriorated through no fault of her own, since the monthly amount which she receives from the retirement pension has been significantly decreased, and she now has the added economic burden of satisfying the judgment in the husband's favor, which we affirm today. The husband's economic circumstances have improved, since his income has remained stable and a portion of it is now exempt from taxation.

We hold that while a Nebraska court may not include service-connected disability benefits awarded to a military retiree as a part of a marital estate under *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), it may consider such benefits and the corresponding waiver of retirement pension benefits required by federal law in determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse who was previously awarded a fixed percentage of the retirement pension benefits. We, therefore, conclude that the district court erred in sustaining the husband's demurrer and dismissing the wife's amended application to modify decree.

We further conclude that there has been a substantial and material change in the relative economic circumstances of the parties which would justify an increase in the amount of alimony which the husband is obligated to pay the wife in the absence of evidence that her income from other sources has increased. However, we are unable to resolve the matter on appeal because the record before us does not contain evidence disclosing the current and projected future amounts of the husband's retirement pension and service-connected disability benefits, or other information which may be relevant to the current economic circumstances of the parties. We, therefore, remand case No. S-96-629 to the district court for further proceedings consistent with this opinion. On remand, we instruct the district court to consider the husband's military disability benefits only to the extent receipt of the benefits affect the relative financial circumstances of the parties. We note, as did the court in

Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992), that our holding does not permit the district court to treat service-connected disability benefits as divisible marital property in form or substance.

JUDGMENT IN NO. S-95-728 AFFIRMED AS MODIFIED. JUDGMENT IN NO. S-96-629 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

JAMES O. BOETTCHER ET AL., APPELLANTS, V. M. BERRI BALKA, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLEE.
567 N.W.2d 95

Filed May 23, 1997. No. S-95-736.

1. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Declaratory Judgments.** Declaratory judgment does not lie where another equally serviceable remedy is available.
3. ____. Where an exclusive statutory remedy is provided, the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 through 25-21,164 (Reissue 1995), does not provide an additional remedy.
4. ____. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy.
5. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.
6. ____: ____. Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, an appellate court will affirm.
7. **Injunction: Taxation.** Injunctive relief is available under Neb. Rev. Stat. § 77-1727 (Reissue 1996) only where the tax is void or levied for an illegal or unauthorized purpose.
8. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.
9. **Declaratory Judgments: Standing: Proof.** A plaintiff in a declaratory judgment action must establish standing to bring the action by establishing that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenged constitutional provision or statute.
10. **Declaratory Judgments: Pleadings: Justiciable Issues.** A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination.
11. **Declaratory Judgments: Standing: Justiciable Issues.** Standing is a key function in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Denise E. Frost and David A. Domina, of Domina & Copple, P.C., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In this declaratory judgment action against the appellee Tax Commissioner of the State of Nebraska, M. Berri Balka, the appellant taxpayers, James O. Boettcher, Stan Dobrovolny, and Jerold Stewart, seek an injunction against the collection of taxes pursuant to certain amendments to the Nebraska Constitution relating to revenue and taxation and legislation enacted pursuant thereto, a refund of taxes paid, and a declaration that said amendments and enactments are unconstitutional under certain other provisions of the Nebraska Constitution and certain provisions of the U.S. Constitution. The district court concluded that it lacked jurisdiction and dismissed the amended petition. The taxpayers successfully petitioned to bypass the Nebraska Court of Appeals and assert, in summary, that the district court erred in (1) ruling that it lacked jurisdiction and (2) failing to declare "the 1992 Amendments to Neb. Const. Art. VIII" to be unconstitutional. We affirm.

II. SCOPE OF REVIEW

The dispositive issues present 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. *Ethanair Corp. v. Thompson, ante* p. 245, 561 N.W.2d 225 (1997).

III. FACTS

The taxpayers are citizens and residents of Nebraska and own real property, including agricultural lands, together with intan-

gible and tangible personal property, including livestock and agricultural equipment, all subject to taxation as provided in Neb. Rev. Stat. § 77-201 et seq. (Reissue 1996).

In May 1992, the voters amended portions of Neb. Const. art. VIII, §§ 1 and 2. As amended, article VIII, § 1, reads, in relevant part:

> Notwithstanding Article I, section 16 [prohibiting enactment of ex post facto laws], Article III, section 18 [forbidding; with certain exceptions, special laws granting special or exclusive privileges or immunity], or Article VIII, section 4 [preventing, with certain exceptions, the discharge or commutation of taxes], of this Constitution or any other provision of this Constitution to the contrary: (1) Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution; [and] (2) tangible personal property, as defined by the Legislature, not exempted by this Constitution or by legislation, shall all be taxed at depreciated cost using the same depreciation method with reasonable class lives, as determined by the Legislature, or shall all be taxed by valuation uniformly and proportionately . . . .

As amended, article VIII, § 2, provides, in relevant part:

> Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: . . . (8) the Legislature may exempt inventory from taxation; [and] (9) the Legislature may define and classify personal property in such manner as it sees fit, whether by type, use, user, or owner, and may exempt any such class or classes of property from taxation if such exemption is reasonable or may exempt all personal property from taxation . . . .

The Nebraska Legislature subsequently implemented those constitutional changes by enacting 1992 Neb. Laws, L.B. 1, 2d Special Sess., and 1992 Neb. Laws, L.B. 1, 4th Special Sess.

IV. ANALYSIS

The taxpayers challenge the district court's determination that since they have an adequate statutory remedy under Neb.

Rev. Stat. §§ 77-27,127 and 77-27,128 (Reissue 1996), the court lacked jurisdiction to entertain this declaratory judgment action.

The district court was correct in noting that declaratory judgment does not lie where another equally serviceable remedy is available. *Hauserman v. Stadler*, 251 Neb. 106, 554 N.W.2d 798 (1996); *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). Moreover, where an exclusive statutory remedy is provided, the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 through 25-21,164 (Reissue 1995), does not provide an additional remedy. Furthermore, a declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy. *Rawson v. Harlan County*, 247 Neb. 944, 530 N.W.2d 923 (1995).

However, a reading of § 77-27,127, making appeal under the Administrative Procedure Act the exclusive method of challenging a final action of the commissioner, and § 77-27,128, providing that the appeal specified in § 77-27,127 is the exclusive remedy for challenging the assessment of a proposed deficiency, in the context of the other statutes of which they are a part, makes clear that they apply only to income, use, and sales taxes. See Neb. Rev. Stat. § 77-2701 (Reissue 1996) (enumerates sections composing Nebraska Revenue Act of 1967, which pertains to aforesaid taxes). As we are here concerned with real and personal property, the district court erred in determining that the taxpayers have an adequate statutory remedy under §§ 77-27,127 and 77-27,128.

Nonetheless, a proper result will not be reversed merely because it was reached for the wrong reasons. *Ochs v. Makousky*, 249 Neb. 960, 547 N.W.2d 136 (1996); *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997); *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996).

1. INJUNCTION AGAINST COLLECTION OF TAXES

The taxpayers ask that "[a]ny and all liens, garnishments or encumbrances of any kind imposed upon [their] assets by the [commissioner] be declared void and unenforceable, and terminated in every respect." Neb. Rev. Stat. § 77-1727 (Reissue 1996) provides:

> No injunction shall be granted by any court or judge in this state (1) to restrain the collection of any tax, or any part thereof, or (2) to restrain the sale of any property for the nonpayment of any such tax.
>
> No person shall be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax, except such tax or the part thereof enjoined in case of injunction, levied or assessed for illegal or unauthorized purpose.
>
> No injunction shall be granted or recovery by replevin shall be permitted unless the person has first successfully argued before a court of competent jurisdiction that the tax levied or collected was levied or assessed for illegal or unauthorized purpose.

In *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995), we interpreted that language in light of our prior decisions and held that injunctive relief is available under § 77-1727 only where the tax is void or levied for an illegal or unauthorized purpose. Although the taxpayers claim that the constitutional amendments and enactments provide for unconstitutional taxation, nothing in the bill of exceptions or the taxpayers' amended petition indicates that the commissioner has imposed any liens, garnishments, or encumbrances upon the taxpayers' assets.

However, the taxpayers further seek an injunction prohibiting the commissioner from enforcing article VIII, § 1, article VIII, § 2, and the enactments, or any of their provisions, "to the extent they unconstitutionally purport to grant or allow special privileges and immunities in taxation." But the commissioner is not charged with enforcing the challenged sections of the Nebraska Constitution, as there is nothing in the challenged constitutional amendments for him to enforce. Further, as the district court correctly noted, Neb. Rev. Stat. § 77-3908 (Reissue 1990) provides, in relevant part:

> No injunction or writ of mandamus or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state to enjoin the collection of any tax, fee, or any amount of tax required to be collected under any tax program administered by the Tax Commissioner.

The district court therefore did not err insofar as it determined that it lacked jurisdiction to consider the taxpayers' claim for an injunction preventing the collection of any tax.

2. Refund of Taxes Paid

The taxpayers also seek the refund of any and all taxes collected pursuant to the enactments.

Neb. Rev. Stat. § 77-1735 (Cum. Supp. 1994) provides, in relevant part:

> (1) Except as provided in subsection (2) of this section, if a person makes a payment to any county or other political subdivision of any property tax or any payment in lieu of tax with respect to property and claims the tax or any part thereof is illegal for any reason other than the valuation or equalization of the property, he or she may, at any time within thirty days after such payment, make a written claim for refund of the payment from the county treasurer to whom paid. . . . For purposes of this section, illegal shall mean a tax levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the taxing officials. A person shall not be entitled to a refund pursuant to this section of any property tax paid or any payment in lieu of tax unless the person has filed a claim with the county treasurer or prevailed in an action against the county.

The district court held that jurisdiction pursuant to § 77-1735 does not exist, since the taxpayers failed to comply with the foregoing filing requirements. Nothing in the record indicates that the taxpayers brought this action pursuant to § 77-1735, which provides the remedy to challenge a tax which has already been paid. As a declaratory judgment does not lie where another equally serviceable remedy is available, an action for declaratory judgment is an improper means for challenging a tax that has already been paid. *Rawson v. Harlan County*, 247 Neb. 944,

530 N.W.2d 923 (1995). Accordingly, the district court did not err insofar as it determined that it lacked jurisdiction to consider the taxpayers' claim for a tax refund.

3. Constitutional Claims

That brings us to the taxpayers' prayer for a declaration that the enactments and constitutional amendments which the enactments implemented are unconstitutional "inasmuch as they purport to create and allow special benefits and privilege for certain holders of tangible property . . . ."

Section 25-21,149 provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree. Any action or proceeding seeking a declaratory judgment that any tax, penalty, or part thereof is unconstitutional shall be brought in the tax year in which the tax or penalty was levied or assessed.

Section 25-21,150 reads:

> Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

(a) Enactments

It is clear under the language of § 25-21,150 that a declaratory judgment action may be used to determine one's rights, status, or other legal relations under a legislative enactment relating to revenue and taxation. See *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995).

However, while the taxpayers argue that each of the enactments set forth in part III above are unconstitutional, they did not assign as error the district court's refusal to declare uncon-

stitutional either of those enactments. Errors which are argued but not assigned will not be considered by an appellate court. *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996); *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995). Thus, we do not reach the constitutionality of either enactment.

(b) Amendments

Although the language of § 25-21,150 does not mention the Nebraska Constitution or the U.S. Constitution, we have nonetheless permitted constitutional challenges to be made via declaratory judgment actions. See, e.g., *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996) (constitutionality under U.S. Constitution of initiative amendment to Nebraska Constitution); *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986) (constitutionality under U.S. and Nebraska Constitutions of initiative amendment to Nebraska Constitution).

However, we have held, in the context of a challenge to a statute, that a plaintiff in a declaratory judgment action must establish standing to bring the action by establishing that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenged statute. *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). See *Duggan, supra*. The principle is no less viable when the challenge is to a constitutional provision.

As set forth in greater detail in part III above, article VIII, § 1, empowers the Legislature, if it so chooses, to tax personal property either at a depreciated cost or by valuation uniformly and proportionately. Article VIII, § 2, permits the Legislature, if it so elects, to exempt particular personal property from taxation. In short, these amendments in and of themselves do not impose any tax, create any classifications, or create any exemptions. Accordingly, only laws implementing said amendments could possibly affect the taxpayers' rights. As the amendments do not in and of themselves operate such as to affect any taxpayer's rights, status, or other legal relations, they do not confer upon the taxpayers the standing required by § 25-21,149. See, *Duggan, supra* (court should refuse declaratory judgment unless pleadings present justiciable controversy ripe for judicial

determination); *Mullendore, supra* (standing is key function in determining whether justiciable controversy exists, or whether litigant has sufficient interest in case to warrant declaratory relief).

V. JUDGMENT

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

WAYNE TREW, APPELLANT, V. ARLENE TREW, APPELLEE.

567 N.W.2d 284

Filed May 23, 1997. No. S-96-038.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Jurisdiction: Appeal and Error.** It not only is within the power but is the duty of an appellate court to determine on its own motion whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Garnishment.** A debt reduced to judgment is liable to garnishment when the process of garnishment issues from the same court, but not otherwise.
4. **Decedents' Estates: Garnishment: Courts.** An heir's distributive share of a decedent's estate, as decreed by the county court, in the hands of an administrator is not subject to garnishment under process from the district court.
5. **Jurisdiction: Appeal and Error.** When a lower court lacks jurisdiction to adjudicate the merits of a claim, issue, or question, the appellate court also lacks the power to determine the merits of a claim, issue, or question presented to the lower court.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the District Court for Custer County, RONALD D. OLBERDING, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Thomas A. Wagoner for appellant.

David C. Huston, of Huston & Higgins, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

In this garnishment proceeding instituted by the respondent-appellee former wife and alimony judgment creditor, Arlene Trew, the district court determined that notwithstanding the postgarnishment renunciation of the petitioner-appellant former husband and debtor, Wayne Trew, of his distributive share of the estate of Glenn D. Trew, deceased, the garnishee copersonal representatives of the estate, Larry D. Trew and Bernice Peterson, were to apply so much of Wayne Trew's share as was required to satisfy Arlene Trew's judgment. Wayne Trew thereupon appealed to the Nebraska Court of Appeals, which reversed the judgment of the district court. *Trew v. Trew*, 5 Neb. App. 255, 558 N.W.2d 314 (1996). Arlene Trew then successfully sought further review by this court, asserting, in summary, that the Court of Appeals erred in determining that the renunciation was effective. Inasmuch as the district court lacked subject matter jurisdiction, we now reverse the judgment of the Court of Appeals and remand the cause thereto with the direction that the cause be further remanded to the district court for dismissal.

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 Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997).

When their marriage was dissolved by the district court for Hall County in November 1975, Wayne Trew was ordered to pay Arlene Trew alimony in the sum of $400 per month until her remarriage or death. He failed to pay as ordered and as of August 31, 1995, was $100,725.69 in arrears, including interest accrued to that date.

The decedent, Wayne Trew's brother, died on August 4, 1995, and his will, which divided the decedent's residuary estate among his siblings, was filed for probate in the county court for Custer County.

On September 18, 1995, Arlene Trew transcribed her alimony judgment to the district court for Custer County. On the same day, she filed therein an affidavit and praecipe for summons in garnishment directed to the personal representatives,

alleging that they had property of, and were indebted to, Wayne Trew. The personal representatives answered that he had a one-eighth interest in the estate. Arlene Trew subsequently filed an application to determine the garnishees' liability, and on October 2, the district court for Custer County set the matter for trial on November 16. Prior to the scheduled trial, namely, on November 8, 1995, Wayne Trew filed a renunciation of his interest in the estate in the county court for Custer County.

Although jurisdiction has not been challenged by the parties or the courts below, it not only is within the power but is the duty of an appellate court to determine on its own motion whether it has jurisdiction over the matter before it. See, *State ex rel. Fick v. Miller, ante* p. 164, 560 N.W.2d 793 (1997); *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996); *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995).

For more than a century, it has been the rule of this state that a debt reduced to judgment is liable to garnishment when the process of garnishment issues from the same court, but not otherwise. We first formulated this rule in *Scott v. Rohman*, 43 Neb. 618, 62 N.W. 46 (1895), wherein a county court judgment creditor, by garnishment proceedings brought in that court, sought to reach the interest of the judgment debtor in money held by the district court. Acknowledging some conflict among the various jurisdictions, we adopted the above-stated rule, observing, among other things, that to allow a judgment to be garnished in a court other than the one in which it was rendered "would permit one court to interfere with the due execution of process in another tribunal." 43 Neb. at 631, 62 N.W. at 50.

We applied the rule 3½ decades later in *American State Bank of Springfield v. Phelps*, 120 Neb. 370, 232 N.W. 612 (1930). Therein, the plaintiff bank had recovered a judgment against the defendant in the district court. The bank later procured from the same court a process in garnishment directed to the garnishee administrator of a decedent's estate for the purpose of requiring the administrator to apply the defendant's distributive share on the bank's district court judgment.

The administrator answered that the defendant's distributive share, as decreed by the county court, being the court of original jurisdiction in the settlement of estates of deceased persons,

was subject to the order of the county court, and, consequently, the district court had no jurisdiction to garnish the money in his hands as administrator. The district court overruled the administrator's jurisdictional objection and ordered the administrator to pay the fund in controversy to the clerk of the district court to apply on the bank's judgment.

Relying on *Scott, supra*, we reversed the district court's garnishment judgment in favor of the bank and dismissed the garnishment proceedings for lack of jurisdiction. In so doing, we specifically rejected the bank's argument that *Scott* did not apply, as the defendant's interest had been definitively fixed by the final decree of the county court, leaving nothing further remaining to be done by that court, thereby eliminating any possibility of conflict of judicial authority. In that regard, we wrote:

> The county court in the exercise of original jurisdiction ordered the administrator to turn over to defendant as an heir the latter's distributive share of decedent's estate. The order was a judgment against the administrator. It adjudicated his indebtedness to defendant, an heir. There was no appeal. The judgment was unsatisfied when the process in garnishment was issued. At that time the county court had jurisdiction to enforce payment of its own judgment by execution against the administrator. . . . The orders in the different jurisdictions were conflicting. The county court ordered the administrator to pay the fund in controversy to defendant and the district court ordered him to pay the same fund to plaintiff.

120 Neb. at 373, 232 N.W. at 614.

We again referred to the rule four decades later. In *Steven v. Ford*, 187 Neb. 401, 191 N.W.2d 446 (1971), the alimony judgment creditor wife brought a district court action against the judgment debtor husband and the executrix of an estate, seeking application of the husband's distributive share in the estate to the satisfaction of her judgment. Another judgment creditor of the husband intervened, urging that by his unsuccessful effort to garnish the husband's share in the estate through the executrix, he had acquired a lien superior to that of the wife. In rejecting that argument and holding that the husband's share in the estate be applied to the wife's judgment, we, citing *Phelps*, wrote that

as the husband's distributive share in the estate was not subject to garnishment while it was in the hands of the executrix, the intervenor's garnishment attempt was ineffective for any purpose. See, also, *Fremont Farmers Union Cooperative Ass'n v. Markussen*, 136 Neb. 567, 286 N.W. 784 (1939) (approving use of creditors' equitable suit as means of impressing lien upon distributive share of judgment debtor in decedent's estate in process of administration).

Within the last decade, we again applied the rule in *Otoe Cty. Nat. Bank v. Froelich*, 234 Neb. 1, 448 N.W.2d 917 (1989). The judgment creditor bank therein instituted a district court garnishment action in an effort to reach assets in which the judgment debtor had an interest by virtue of a will pending probate in the county court. The summons in garnishment was served upon the presumed trustee of the testamentary trust set forth in the decedent's will. There being no evidence that the trust had ever been funded, the district court concluded that the assets sought to be garnished were held by the garnishee as personal representative of the estate and ruled against the bank. In affirming, we accepted the district court's factual findings as not being clearly wrong and, citing to *Phelps*, wrote that "an heir's distributive share of a decedent's estate, as decreed by the county court, in the hands of an administrator is not subject to garnishment under process from the district court." 234 Neb. at 4-5, 448 N.W.2d at 920.

Because the district court here lacked subject matter jurisdiction over the garnishment proceeding, the Court of Appeals lacked, and we lack, jurisdiction to adjudicate the merits of the issues presented by the proceeding. See *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996) (when lower court lacks jurisdiction to adjudicate merits of claim, issue, or question, appellate court also lacks power to determine merits of claim, issue, or question presented to lower court). See, also, *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996). We therefore do not determine whether the decision of the Court of Appeals on the merits is correct.

Accordingly, we hold as stated in the first paragraph of this opinion.

REVERSED AND REMANDED WITH DIRECTION.

DONALD H. REES AND JOAN M. REES, HUSBAND AND WIFE, APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

563 N.W.2d 359

Filed May 30, 1997. No. S-95-852.

1. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Jurors.** A party who unsuccessfully challenges the seating of a venireperson as a juror and who thereafter passes the panel of venirepersons for cause merely indicates thereby that, subject to the previously made cause objection, the party is ready to exercise his or her peremptory challenges.
3. ____. A party who passes for cause a panel of venirepersons selected from an array to which the party objected indicates only that the party, subject to his or her prior objection, is ready to exercise his or her peremptory challenges.
4. **Appeal and Error.** Absent prejudice of a party's substantial rights, an appellate court may disregard procedural errors.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Madison County, RICHARD P. GARDEN, Judge. Judgment of Court of Appeals affirmed.

Thomas E. Brogan, of Brogan & Stafford, P.C., for appellants.

Don Stenberg, Attorney General, and Jeffery T. Schroeder for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In this eminent domain action initiated by the defendant-appellee, the State of Nebraska through its Department of Roads, the district court entered judgment on the verdict in favor of the plaintiffs-appellants, Donald H. Rees and Joan M. Rees, husband and wife. Concluding that the judgment did not compensate them "for the losses they sustained," brief for appellants at 6, the Reeses appealed to the Nebraska Court of Appeals, which, in an unpublished memorandum opinion filed

December 2, 1996, affirmed the judgment of the district court. The Reeses thereafter successfully petitioned this court for further review, asserting, in summary, that the Court of Appeals erred in failing to rule that (1) the jury was improperly empaneled and (2) a certain exhibit was improperly submitted to the jury. We affirm.

II. SCOPE OF REVIEW

The dispositive issues present 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. *Ethanair Corp. v. Thompson, ante* p. 245, 561 N.W.2d 225 (1997).

III. FACTS

In order to improve a highway, the State condemned a portion of the Reeses' land, thereby bisecting it. Being dissatisfied with the award of the county court appraisers, the Reeses filed a petition on appeal in the district court.

Prior to the commencement of the district court trial of the Rees case, the State had been a party in another eminent domain action which involved the same highway. That case, Abler et al. v. State of Nebraska, Department of Roads, Madison County District Court, docket 26239G, was tried to a jury in the same court as the Rees action. See *Abler v. State*, 96 NCA No. 44, case No. A-95-814 (not designated for permanent publication).

Fearing that the members of the array of prospective jurors who had served as jurors in the Abler trial might be unduly influenced by what they had heard therein, the State, on the morning of the scheduled Rees trial, orally moved that such members of the array be excused from service. The Reeses objected on the grounds that the motion was neither relevant to those proceedings nor timely made, and that there was "no prejudice shown on the part of the nine jurors that would be excused." The district court overruled the Reeses' objections and sustained the State's motion. As a result, the Rees jury was selected from a panel of venirepersons culled from the 22 remaining members of the array.

IV. ANALYSIS

1. Empaneling of Jury

In the first assignment of error, the Reeses assert the Court of Appeals erred in failing to rule that the jury was improperly empaneled because the Court of Appeals (a) mistakenly concluded that the record was inadequate, (b) incorrectly reasoned that the district court's failure to adhere to the rules concerning the filing and noticing of motions did not prejudice them, and (c) wrongly ignored Neb. Rev. Stat. § 25-1631.03 (Reissue 1995), which the Reeses argue requires that a panel of venirepersons be selected from an array consisting of at least 24 members.

(a) Adequacy of Record

The Court of Appeals concluded that the Reeses failed to show they were prejudiced by the district court's ruling, since the bill of exceptions did not reveal whether the Reeses had passed the panel of venirepersons for cause. However, we have written that a party who unsuccessfully challenges the seating of a venireperson as a juror and who thereafter passes the panel of venirepersons for cause merely indicates thereby that, subject to the previously made cause objection, the party is ready to exercise his or her peremptory challenges. *Howard v. State Farm Mut. Auto. Ins. Co.*, 242 Neb. 624, 496 N.W.2d 862 (1993). In like fashion, a party who passes for cause a panel of venirepersons selected from an array to which the party objected indicates only that the party, subject to his or her prior objection, is ready to exercise his or her peremptory challenges. While in this instance the Reeses objected not to the array but to the State's motion to diminish it, the effect of the objection was to challenge the remaining makeup of the array. Thus, the failure of the bill of exceptions to contain the questioned information is of no significance, for even if the Reeses passed the venire for cause, they had objected to the makeup of the array from which the venire was selected.

(b) Adequacy of Notice

In claiming that they were given inadequate notice of the motion, the Reeses point, among other things, to the rule of the

district court providing that pretrial motions requiring a hearing be in writing and, unless waived, be filed at least 5 days prior thereto.

Since the State's motion was predicated on events which predated the commencement of the Rees trial, the motion fell within the ambit of the notice rule. While the record does not tell us precisely when the Abler trial ended, it does tell us that the Rees trial did not begin until Wednesday, May 24, 1995, and that the members of the array at issue served in the Abler case "a week ago." Therefore, even if the word "week" was not used in its technical sense and a period of less than 7 days elapsed between the end of the Abler trial and the commencement of the Rees trial, we know that some days elapsed between the two events. Consequently, even if there was not enough time for the State to comply with the 5-day requirement of the rule, there was at least time to give some prior notice. The obvious purpose of the notice requirement is to avoid trials by ambush by providing the opposing party an opportunity to study the subject of the motion and prepare to meet it. See *State ex rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982) (notice which is meet and fair in view of circumstances and conditions existent at time with reference to matter presented is element of due process).

(c) Lack of Prejudice

Consequently, the question becomes whether the State's improper failure to have given notice prejudiced the Reeses. See *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994) (absent prejudice of party's substantial rights, appellate court may disregard procedural errors). The objection made by the Reeses in the district court makes no claim that they were entitled to an array of 24 persons under the provisions of § 25-1631.03, which reads:

> The judge shall examine all jurors so selected who appear and if, after all excuses have been allowed more than twenty-four petit jurors for each judge sitting with a jury, who are qualified and not excluded by the terms of section 25-1601, shall remain, the court may excuse by lot such number in excess of twenty-four as the court may see

> fit. Those jurors who have been discharged in excess of twenty-four for each judge, but are qualified, shall not be discharged permanently, but shall remain subject to be resummoned for jury service upon the same panel and before a new key number is selected.

That failure, standing alone, might be excused on the ground that not having been given timely notice of the motion, the Reeses lacked time to research the issue.

However, even if it can be said that the issue falls within the reach of the Reeses' assignment in the Court of Appeals that the district court erroneously excluded "from the jury panel those jurors who had served in another case," a matter we need not and therefore do not decide, the Reeses presented no argument to the Court of Appeals specifically directed at the requirements of § 25-1631.03. Under that circumstance, we cannot determine that had the Reeses been given timely notice of the State's motion, they would have included a § 25-1631.03 ground in their district court objection. Accordingly, we must conclude that the State's failure to have given timely notice of its motion did not prejudice the Reeses. That being so, we need not and do not concern ourselves with the propriety of the district court's sustainment of the State's motion or the meaning of § 25-1631.03.

2. Submission of Exhibit

In the second and final assignment of error, the Reeses assert that the Court of Appeals erred in failing to rule that the district court improperly submitted to the jury as an exhibit a transcription of the motion for mistrial made by the State in the course of the condemnee's closing argument in the Abler case, of the arguments on that motion, and of the Abler trial court's comments in overruling the motion.

However, the bill of exceptions reflects that the exhibit was offered by the State in connection with its motion to excuse from the array those members who had sat as jurors in the Abler case. The bill of exceptions further recites that in overruling the Reeses' relevancy objection to the offer, the district court limited the receipt of the exhibit "for the purpose of this hearing only." There is nothing in the record which demonstrates that

the district court changed its mind and expanded the purpose for which it received the exhibit or that it inadvertently submitted the exhibit to the jury. In the absence of such a showing, we cannot conclude that the district court did other than what it said it was doing.

V. JUDGMENT

As the record fails to sustain the errors assigned to the Court of Appeals, its judgment is, as noted in part I above, affirmed.

AFFIRMED.

FUTURE MOTELS, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. CUSTER COUNTY BOARD OF EQUALIZATION, APPELLEE AND CROSS-APPELLANT.

563 N.W.2d 785

Filed May 30, 1997. No. S-95-882.

1. **Taxation: Valuation: Proof: Appeal and Error.** In a taxpayer's appeal from an action of a county board of equalization, the burden is on the taxpayer to prove that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
2. **Taxation: Valuation: Proof.** The taxpayer has the burden of proving that the value of the property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value.
3. **Taxation: Valuation.** A taxpayer may question the actual value of the taxpayer's property and the lack of proportionate and uniform valuation of the property in a proceeding before a board of equalization.
4. ____: ____. A taxpayer's property may be assessed at less than its actual value if such action is necessary in order that it be assessed uniformly and proportionately with other property within the county.
5. **Taxation: Valuation: Proof.** The burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuations placed on other similar property is grossly excessive.
6. **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.
7. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed.

Steven O. Stumpff and Cheryl C. Guggenmos, of Stumpff & Guggenmos, for appellant.

Tami K. Schendt, Custer County Attorney, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

Future Motels, Inc., appeals the judgment of the Custer County District Court which affirmed the decision of the Custer County Board of Equalization (Board). The district court found that the value of Future Motels' property had not been arbitrarily or unlawfully fixed by the Board in an amount greater than its actual value and that the value was fairly and proportionately equalized with all other property in Custer County.

FACTS

Future Motels is the owner of a Super 8 Motel in Broken Bow, Nebraska. The Custer County assessor valued Future Motels' property and improvements at $596,850 for 1992 tax purposes. Future Motels subsequently filed a written property valuation protest with the Board, requesting that its land and improvements be valued at $150,000. It claimed a number of grounds for revision of the claim, to wit: (1) The property was not valued properly with other assessed valuations of similar properties in Broken Bow; (2) the property was not valued properly in view of other Super 8 Motels located in western Nebraska; (3) the appraisal was done by an appraiser from Lincoln, rather than by a "western Nebraska appraiser"; and (4) the excess appraisal caused Future Motels to pay more than its proportionate share of taxes.

After a hearing on the protest, the Board reduced the valuation to $481,453. Future Motels appealed to the district court for relief from the Board's determination.

Despite the fact that a transcript of the proceedings held before the Board had not yet been filed in the district court, the court proceeded with a review of the Board's decision. After a trial on the appraisal, the district court affirmed the Board's decision in all respects. Future Motels then filed an appeal to

this court from the district court's order, and we dismissed the appeal because no transcript of the proceedings held before the Board had been filed with the district court. See *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 247 Neb. 436, 527 N.W.2d 861 (1995) (*Future Motels I*).

We held in *Future Motels I* that in the absence of a transcript of the proceedings held before the Board, the district court should not have held proceedings in this case. Following issuance of the mandate in *Future Motels I* and the filing of the transcript with the clerk of the district court, a second hearing was held in Custer County District Court on July 20, 1995. Future Motels offered the evidence from the first hearing and the transcript of the proceedings held before the Board.

The district court then entered judgment against Future Motels, finding that it had not met its burden of proof. The district court also found that the $481,453 valuation placed on the property by the Board was correct, and it affirmed the decision of the Board in all respects.

ASSIGNMENTS OF ERROR

Future Motels assigns the following errors to the district court: (1) The court erred in determining that Frank Frost was entitled to be paid expert witness fees and expenses at his deposition; (2) the court erred in sustaining the motions for protective orders filed by the other motels in Broken Bow; (3) the court erred in granting the motion in limine filed by the Board; (4) the court erred in denying Future Motels' motion requesting an order to the effect that the Board had lost the presumption that it had faithfully performed its official duties in making its 1992 tax assessment of Future Motels' property; (5) the court erred in admitting into evidence a formal appraisal prepared by Frost on or about March 19, 1993; (6) the court erred in failing to bar the Board from calling any witnesses or offering any exhibits into evidence at trial because the Board had failed to provide an exhibit and witness list to Future Motels prior to trial; (7) the court erred in not requiring the Board to produce financial statements, profit-and-loss statements, occupancy rates, income tax returns, and other financial information utilized by Frost in the assessment of all the motels and the one

hotel located in Broken Bow; (8) the court erred in finding that the value placed upon Future Motels' property was fairly and proportionately equalized with other commercial property in Custer County; and (9) the court erred in finding that the assessed valuation of $481,453 placed on Future Motels' property by the Board was correct.

In its cross-appeal, the Board alleges that the district court erred in determining that it had jurisdiction to hear the appeal.

ANALYSIS

At the time this action was filed, an appeal from an action by a county board of equalization was an equity action tried de novo in the district court. See Neb. Rev. Stat. § 77-1511 (Reissue 1990). On appeal from the district court to an appellate court in an equity case, factual issues were tried de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicted, the appellate court could give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *Helvey v. Dawson Cty. Bd. of Equal.*, 242 Neb. 379, 495 N.W.2d 261 (1993).

At trial, Patrick Keslar and Paul Lattin, stockholders in Future Motels, testified concerning properties in Custer County and other counties. Keslar stated that he believed the Board had overvalued the Super 8 Motel. Keslar's testimony was based on property records of county assessors throughout the state. Keslar did not testify as to why he believed the Super 8 Motel should have been valued at $150,000. Keslar also did not establish the market value of the property in question or the market value of any of the properties that he requested the court use as comparison properties. Likewise, although Lattin gave no testimony as to the value of the Super 8 Motel, he testified that he believed the valuation of the motel was "grossly excessive."

Frost, a real estate appraiser with nearly 38 years of experience, testified on behalf of the Board. Frost had appraised Future Motels' property in 1991, and he did a reappraisal of the property prior to this litigation. Frost stated that he used three traditional approaches in valuing the property: the cost

approach, the sales approach, and the income approach. Applying the cost approach, he used the "Marshall evaluation service" to estimate the reproduction cost of the property and arrived at a value of $608,000. In appraising the value of the property based upon the sales approach, Frost analyzed five sales of Super 8 Motels which were not located on an interstate highway. The range of the sales used was from $20,968 to $31,000 per unit. Using $21,000 per unit, which was at the low end of the range, the subject property indicated a value of $672,000. Using the income approach, he reached a value of $618,250. Based upon his experience and his examination of the property, Frost opined that the overall value of the property as of January 1992 was $608,250.

Frost also checked the records on the Arrow Hotel. He had previously done updates on other motels in Broken Bow, including Bosselman's and the Gateway Motel, and had done the appraisal on the Wagon Wheel Motel in 1990. Based upon his appraisals, his sales, and his education, Frost had no reason to believe that the hotels and motels in Custer County were not equalized as of January 1992.

In a taxpayer's appeal from an action of a county board of equalization, the burden is on the taxpayer to prove that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987); *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973). Similarly, the taxpayer has the burden of proving that the value of the property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value. See *id.*

Future Motels correctly points out that a taxpayer may question the actual value of the taxpayer's property and the lack of proportionate and uniform valuation of the property in a proceeding before a board of equalization. See *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). A taxpayer's property may also be assessed at less than its actual value if such action is necessary in order that it be assessed uniformly and proportionately with other property

within the county. *Id.* In support of its position, Future Motels offered the real estate assessments of 12 other Super 8 Motels located in other counties in western Nebraska.

However, there is no evidence in the record to establish that the property in question was not assessed at its actual value or that the property was not uniformly and proportionately assessed with other property in the county. Future Motels' evidence did not demonstrate that the property was overvalued, and there is no evidence in the record to show that the actual value of the property is $150,000, as alleged in Future Motels' petition. Future Motels failed to establish that the actual value of the property was $150,000 and offered no evidence that the property was not fairly and proportionately assessed with other property in Custer County.

The burden is on the taxpayer to show by clear and convincing evidence that the valuation placed upon the taxpayer's property when compared with valuations placed on other similar property is grossly excessive. See *Bumgarner v. County of Valley*, 208 Neb. 361, 303 N.W.2d 307 (1981). From our review of the record, we conclude that Future Motels has not sustained its burden to prove that the property valuation was arbitrarily or unlawfully fixed in an amount greater than its actual value or that the property was not fairly and proportionately equalized with other property in Custer County.

Future Motels also claims that the district court erred in sustaining the Board's motion in limine to prevent Future Motels from presenting evidence from six other motels and a hotel regarding cost per room, average daily room occupancy, and profit-and-loss statements. Each of the owners filed for a protective order on the grounds that such information was privileged. The district court granted the protective orders and the motion in limine.

Future Motels subpoenaed the owners of the other motels and hotel to bring federal income tax returns and all schedules, 1992 income tax returns if completed, all records necessary to complete such 1992 returns if not completed, and profit-and-loss statements. Pursuant to Neb. Ct. R. of Discovery 26(c) (rev. 1996), the district court may make any order which justice requires to protect a person, including an order that discovery

not be had. 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). From the record, we do not find that the district court abused its discretion.

Future Motels further contends that the district court erred in awarding expert witness fees and costs because Frost was not listed by the Board as a trial witness and should not have been permitted to testify. In overruling Future Motels' objection to Frost's testimony, the district court pointed out that Future Motels had taken Frost's deposition. The district court found that it was clear that the parties intended that Frost would testify. Rule 26(b)(4)(C) provides that

> (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery . . . and
>
> (ii) . . . shall require . . . the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

We conclude that the district court did not abuse its discretion in allowing the testimony and in awarding the fees and costs.

We also find no merit in Future Motels' claim that the district court erred in permitting the Board to introduce exhibits at trial. Future Motels' remaining assignments of error, which have not been argued, will not be considered.

Finally, we address the Board's cross-appeal. The Board claims that the district court erred in determining that it had jurisdiction to hear the appeal after the transcript of the proceedings held before the Board was filed in the district court—almost 3 years from the date that the original appeal was filed.

On February 24, 1995, we dismissed the first appeal in this case for the reason that no transcript of the proceedings held before the Board had been filed with the Custer County District Court. See *Future Motels I*. The transcript was subsequently filed in the district court on the day we dismissed the first appeal. On July 20, the second trial was held, and during this trial, all the testimony and evidence from the first trial were submitted for reconsideration. The Board objected to the second

trial on the basis of jurisdiction. Although the district court stated that it was unsure of whether it had jurisdiction, it accepted the evidence and again rendered a judgment in favor of the Board.

Neb. Rev. Stat. § 77-1510(2) (Cum. Supp. 1992), which governed the appeal procedure at the time of Future Motels' appeal to the district court, provided in part: "The appeal shall be deemed to be filed for purposes of granting jurisdiction with the filing of the petition and praecipe for summons in the district court and the filing of a request for a transcript with the county clerk." Section 77-1510(2) also stated that no proceedings were to be held on appeal until the transcript was actually filed in the district court.

We find that the district court acquired jurisdiction when Future Motels filed its petition and praecipe for summons in the district court and its request for a transcript with the county clerk, all of which were timely filed within the 45-day appeal period set forth in § 77-1510(1). Since § 77-1510(2) provided that no proceedings were to be held until a transcript of the proceedings held before the Board had been filed in the district court, the court was without authority to enter any decision in the first hearing. Therefore, there was no appealable order from which an appeal could be taken. In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. See *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995).

However, when the transcript of the proceedings held before the Board was filed on February 24, 1995, the district court had statutory authority to enter a disposition of the case before it. A final order having been obtained subsequent to the filing of the transcript, the matter is now properly on appeal to this court. Therefore, the Board's cross-appeal is without merit.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

IBP, INC., APPELLANT AND CROSS-APPELLEE, V. LISA SANDS, APPELLEE AND CROSS-APPELLANT.

563 N.W.2d 353

Filed May 30, 1997. No. S-95-968.

1. **Equal Opportunity Commission: Appeal and Error.** The standard of review to be applied in a case involving an appeal from the district court's review of a Nebraska Equal Opportunity Commission decision is a review for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Fair Employment Practices: Discrimination: Evidence: Proof.** In a discrimination suit brought under the provisions of the Nebraska Fair Employment Practice Act, the evidence presented on the issue of discrimination against a disabled person shall be as follows: (1) The complainant has the burden of proving a prima facie case of discrimination; (2) if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the employee's rejection or discharge from employment; and (3) should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.
4. **Fair Employment Practices: Discrimination: Proof.** A prima facie case of discrimination may be proved by showing (1) that the complainant is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1993); (2) that the complainant is qualified for the position of employment sought; (3) that the complainant applied for and was rejected or discharged from that position; and (4) that after the complainant was rejected or discharged, the job remained open.
5. **Fair Employment Practices: Discrimination.** Pursuant to Neb. Rev. Stat. § 48-1104 (Reissue 1988), the key inquiry in a discrimination case is whether the individual's condition inhibits her ability to perform her job safely and efficiently.
6. **Fair Employment Practices: Damages.** Unemployment compensation awards should be deducted from a backpay award under the Nebraska Fair Employment Practice Act.
7. **Prejudgment Interest.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Cum. Supp. 1996).

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Thomas F. Hoarty, Jr., and Christopher R. Hedican, of McGowan & Hoarty, for appellant.

Thomas F. Dowd, of Dowd, Dowd & Fahey, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This is an appeal from the order of the district court which affirmed the decision of the Nebraska Equal Opportunity Commission (NEOC). NEOC found that Lisa Sands was discharged from her job as a chemist with IBP, inc., for narcolepsy and that her discharge was discriminatory. We affirm.

BACKGROUND

Sands began experiencing symptoms of narcolepsy when she was 14 years old. Symptoms of narcolepsy include hypersomnia, sleep paralysis, hypnagogic hallucinations, and cataplexy. Sands' symptoms included tunnel vision and blackouts. On January 4, 1985, Sands was examined by Dr. Joel Cotton, who diagnosed Sands with narcolepsy and treated her by prescribing Ritalin, a medication used by narcoleptics. The Ritalin diminished her symptoms considerably.

In August 1985, during an office visit with Dr. Cotton, Sands explained that she would not take her Ritalin for 7 to 10 days, then would resume taking the medication when she felt sleepy. She also complained of delusions and hallucinations. Dr. Cotton continued to prescribe Ritalin through 1985.

In October 1986, Dr. Cotton questioned his diagnosis, deciding that Sands was not narcoleptic, but, rather, had a stress disorder, and took her off the Ritalin. From 1986 to approximately 1991, Sands was not taking any Ritalin other than what she had left over from her last prescription from Dr. Cotton. In this period, she finished college and received her degree.

Sands began working as a full-time chemist at IBP's Dakota City, Nebraska, facility in May 1987. At the beginning of her full-time employment, Sands told her immediate supervisor, Paul Skelton, that she had narcolepsy. Skelton stated that as long as she could function and was comfortable, there would be no problem. Sands did function acceptably from 1986 to 1989 and was promoted to chemist I with supervisory duties in April 1989. As a chemist, Sands was required to run experiments,

including the mixing of caustics and acids. She was exposed to perchloric acids, oxidizers, and other "shock sensitive" chemicals which would explode if allowed to dry at a high temperature. There were various carcinogens, irritants, and other reactive, flammable chemicals which presented a danger if not properly handled. Throughout the day, members of the lab personnel would be running experiments simultaneously.

During the time from 1986 to 1991 when Sands was not on Ritalin, there were no reports of any accidents attributable to Sands. In late 1989 and early 1990, Sands' narcolepsy became more pronounced. Sands appeared to have a problem with attention. She began to carry notes with her to remember how to carry out and complete experiments. She also told coworkers not to be alarmed if she needed to suddenly sit on the floor and did, on one occasion, do so. Once again, however, she functioned acceptably even without taking Ritalin. There was testimony that at some periods of time Sands' supervisor assigned other supervisors to watch Sands to make sure she did not make any mistakes or hurt herself. There was testimony by coworkers that after 1991 they were concerned about working with her.

In September 1990, Suzanne Shell became senior chemist I. At that time, Sands told her that Sands had problems with hallucinations because she could not take her medication while breast-feeding. Sands also explained to Shell that her predecessor had other supervisors watch over her and make sure nothing bad happened. Shell checked with Sands' old supervisor, who confirmed this information. Shell then assigned supervisors to monitor Sands.

Sands had work performance evaluations during this period which were above average with regard to the category of "safety." IBP's performance rating scale lists a 4.5 as below average, 5 as average, a 5.5 as above average, and a 6 as outstanding. In 1988, Sands' rating was a 6.3 overall and a 6 for safety. In 1989, Sands rated a 5.9 overall and a 5.8 for safety. In 1990, she rated a 5.3 with a safety rating of 5.5. In 1991, she rated a 4.7 overall and a 5 for safety.

Sands began to experience problems with her 1991 pregnancy; she would not take her Ritalin during pregnancy and was placed on medical leave in April 1991. Due to her inability to

take Ritalin during pregnancy and her concern about job security, Sands had a Norplant contraceptive implant to preclude further pregnancies prior to her return to work from her last pregnancy and so advised IBP. After Sands returned from medical leave in November 1991, some coworkers, who had talked to Shell, indicated that they had some fears about working with Sands. Shell became concerned about Sands' ability to work safely and took her concerns to David Soyk, IBP's medical case manager, and to Bruce George, IBP's manager of laboratories. Soyk interviewed Sands on October 23, 1991, to determine if she was capable of continuing work and found out at that time from Sands that she had narcolepsy. Sands reported both hallucinations and sleep attacks to Soyk.

Soyk and the others were concerned and decided they needed more information to determine if Sands could work safely, even though she had been doing so for 5 years. With Sands' permission, Soyk contacted Dr. Cotton initially to determine whether she could continue to work. Dr. Cotton responded that Sands could not continue to work safely in the lab at that time. Dr. Cotton had not seen Sands for almost 5 years. IBP then placed Sands on a medical leave of absence.

On December 27, 1991, Sands went to see Dr. Rodney Dean, a psychiatrist, on a referral from Dr. John Roberts, Sands' family physician, who was treating her for depression. Dr. Dean diagnosed Sands with narcolepsy and prescribed Ritalin for the condition. In December 1991, Dr. Dean, who was treating Sands at this time, thought that she had a substantial handicap and was unable to perform any task relating to her primary employment. Dr. Dean changed his opinion and medically cleared her to go back to work on January 30, 1992. Dr. Dean pointed out that even when Sands was most symptomatic, she had no incidents of spills or putting herself or other people in danger. Dr. Dean has remained Sands' treating physician for narcolepsy and examines her on the average of two times per year. Dr. Roberts asked for a second opinion and referred Sands to Dr. James Duggan, who also diagnosed Sands with narcolepsy.

Dr. Dean then referred Sands to Dr. Leonel Herrera, a neurologist, whom Sands saw on April 6, 1992. Dr. Herrera had a difference of opinion with Dr. Dean in that Dr. Herrera said that

the symptoms were not typical of narcolepsy. Dr. Dean agrees that they are not typical but, in his opinion, it is still narcolepsy. Dr. Roberts also concurs in the diagnosis of narcolepsy.

Soyk also contacted Drs. Roberts, Herrera, and Dean. Soyk and IBP's medical consultant, a Dr. John Kuhnlein, toured the lab, spoke with Sands, and examined Sands' job duties. Dr. Kuhnlein then reviewed Sands' file, which Soyk said contained medical and physician records. Dr. Kuhnlein was also of the medical opinion that Sands had narcolepsy. Based on this evaluation, Dr. Kuhnlein concluded on December 3, 1992, that Sands could not safely return to work as a chemist.

In January 1992, however, Dr. Dean indicated that Sands had been asymptomatic and that he had cleared her to return to work. Soyk requested a guarantee from Dr. Dean that Sands would never experience symptoms in the future, and Dr. Dean said that he could never guarantee anything medically. Dr. Dean also talked to Soyk about the work environment; he knew that Sands was dealing with acid and was very positive and felt that Sands could return to work as a chemist.

IBP repeatedly contacted Sands about discussing alternate employment positions and extended her 1-year leave of absence to a 2-year medical leave. Sands chose not to accept or bid on any of the positions which were discussed. IBP carried Sands on its records as an employee until December 30, 1992, when it officially terminated her from its employment.

On December 28, 1992, Sands filed a charge of disability discrimination against IBP pursuant to Neb. Rev. Stat. § 48-1104(1) and (2) (Reissue 1988) of the Nebraska Fair Employment Practice Act. The NEOC held a hearing on April 12, 1994. On September 14, the hearing examiner issued a recommended order and decision, and issued a supplement thereto dated September 21. This order found that (1) IBP discriminated against Sands because of her disability, (2) Sands was entitled to backpay, (3) IBP should pay reasonable attorney fees, (4) IBP should reinstate Sands to her former position, and (5) IBP should make reasonable accommodations for Sands' disability. On September 23, the NEOC entered the hearing examiner's recommended order and decision and supplement thereto as the final order of the commission.

Pursuant to Neb. Rev. Stat. § 48-1120 (Reissue 1993), IBP appealed this final order to the Lancaster County District Court. On August 3, 1995, the district court entered an order sustaining the final order of the NEOC. From this decision, IBP appeals, and Sands cross-appeals regarding the court's determination of backpay and unemployment compensation benefits.

STANDARD OF REVIEW

Section 48-1120 (Reissue 1984) formerly stated that a party aggrieved by the NEOC's decision and order and directly affected thereby could institute proceedings in the district court. We then stated the standard of review for appeals pursuant to this section as follows: On appeal of review by the district court of an order of the NEOC, the Supreme Court will not disturb the district court's findings if they are supported by substantial evidence. See *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

Section 48-1120 was amended in 1988, however, to state that appeals from the commission shall be in accordance with the Administrative Procedure Act. Neb. Rev. Stat. § 84-918 (Reissue 1994) of the act provides that when the petition instituting proceedings for review was filed in the district court before July 1, 1989, the appeal shall be heard de novo on the record. Section 84-918 of the act further states that when the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the appeal shall be reviewed for errors appearing on the record.

Therefore, the standard of review to be applied in a case involving an appeal from the district court's review of an NEOC decision is a review for errors appearing on the record. On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997); *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996); *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996).

ASSIGNMENTS OF ERROR

IBP assigns as error the district court's (1) conclusion that Sands was disabled within the meaning of Neb. Rev. Stat. § 48-1102(8) (Cum. Supp. 1992); (2) application to the evidence of the direct evidence standard of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), rather than the standard found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); (3) conclusion that Sands' employment was unlawfully terminated in violation of § 48-1104; and (4) failure to conclude that Sands had not met her burden of proof as a matter of law under the *McDonnell Douglas Corp.* standard.

In her cross-appeal, Sands assigns as error the district court's finding that unemployment compensation benefits should be deducted from any backpay award and that the backpay was not subject to prejudgment interest.

ANALYSIS

Section 48-1104 of the Nebraska Fair Employment Practice Act provided in relevant part that it "shall be an unlawful employment practice for an employer . . . to discharge any individual . . . with respect to . . . employment, because of such individual's . . . disability . . . ."

We first turn to IBP's assignment of error regarding the correct evidentiary standard to be applied in employment discrimination cases. We have held that in a discrimination suit brought under the provisions of the Nebraska Fair Employment Practice Act, the evidence presented on the issue of discrimination against a disabled person shall be as follows: (1) The complainant has the burden of proving a prima facie case of discrimination; (2) if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the employee's rejection or discharge from employment; and (3) should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination. See, *McCamish v. Douglas Cty. Hosp.*, 237 Neb. 484, 466

N.W.2d 521 (1991); *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984). See, also, *McDonnell Douglas Corp., supra.* Thus, the *McDonnell Douglas Corp.* standard is the correct evidentiary standard which should have been applied by the district court. Accordingly, we begin our review of the district court's decision regarding Sands' employment termination by utilizing this standard. The first question to be addressed, therefore, is whether the district court could have found that Sands proved a prima facie case of discrimination against a person with a disability pursuant to the Nebraska Fair Employment Practice Act. See, *McCamish, supra*; *Goerke, supra.* Sands may prove her prima facie case by showing

> "(1) that [s]he is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, §§ 48-1101 et seq.; (2) that [s]he is qualified for the position of employment sought; (3) that [s]he applied for and was rejected [or discharged from] that position; and (4) that after [s]he was rejected [or discharged] the job remained open."

Goerke, 224 Neb. at 737, 401 N.W.2d at 464. Accord *McCamish, supra.*

Section 48-1102(8) defined disability as "any physical or mental condition . . . as determined by a physician, but does not reasonably preclude a person's ability to engage in a particular occupation."

The record establishes that Sands has narcolepsy. Drs. Dean, Kuhnlein, Duggan, and Roberts all agree in this diagnosis. To be part of a protected class, however, Sands must also establish that her condition did not reasonably preclude her ability to engage in her occupation and did not adversely affect her carrying out her responsibilities as a chemist. Thus, the key inquiry is whether Sands' condition inhibits her ability to perform her job safely and efficiently. See *McCamish, supra.*

IBP argues that pursuant to the *Goerke* case, the question of whether the nature and extent of the individual's disability reasonably precludes adequate performance of the job turns on whether a risk is presented, not whether or not an episode has

actually occurred. IBP, however, has not presented evidence that a risk has been or will be presented. In the present case, unlike *Goerke*, Sands had performance evaluations in the area of safety which indicated an average or above rating. These evaluations directly contradict IBP's argument that it was concerned that a risk was presented. Sands' duties as a chemist involve handling caustics and acids, carcinogens, irritants, and other flammable chemicals. Sands handled these chemicals while other chemists were running other experiments. Sands' evidence is that her condition is under control and that even when she was symptomatic, no accidents occurred which were attributable to her. Further, her physician, Dr. Dean, testified that although he could not guarantee that she would not have further symptoms, she was capable of returning to work. Even Sands' performance evaluations indicated that her safety ratings ranged from average to outstanding. The district court could have found, based on this evidence, that Sands, although a narcoleptic, was able to perform the exact job from which she was discharged. Therefore, the district court could have found that Sands proved that she is a member of a protected class and, therefore, established a prima facie case of employment discrimination prohibited by the Nebraska Fair Employment Practice Act.

At first glance, this finding appears to be in conflict with *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987), in which we held that the employee's epilepsy was not unrelated to his ability to perform a job requiring transportation of children in motor vehicles despite the fact that his condition was well controlled with medication and that he had never experienced a seizure while operating a vehicle. In *Goerke*, we reviewed the district court's finding in favor of the employer de novo on the record. As noted above, the standard of review has been changed by statutory amendment since *Goerke*, and in this case, we must affirm the district court's factual findings in favor of Sands if they are supported by any competent evidence. For the reasons stated, we have determined that there is competent evidence in the record to support the district court's finding of unlawful employment discrimination.

Having determined that the district court could have found that Sands made her prima facie case of discrimination, we turn

to part 2 of the standard in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), which requires that IBP has the burden of articulating some legitimate, nondiscriminatory reason for Sands' termination. IBP has not met its burden by advancing any such reason. IBP argues that Sands' employment was terminated for safety reasons. Again, the record indicates no evidence of such a safety concern. IBP's own rating standards found Sands performing at average or above average in the safety category throughout her employment with the company. Again, because IBP articulated no legitimate, nondiscriminatory reason for Sands' employment termination, we find that the district court could have found that IBP discriminated against her in violation of the Nebraska Fair Employment Practice Act.

After determining that the district court did not err in its finding that IBP discriminated against Sands, we now turn to the issue of damages. The district court declined to award prejudgment interest, and instead awarded Sands backpay and reasonable attorney fees. The district court adopted the NEOC hearing officer's recommendation that benefits received by Sands as unemployment compensation should be deducted from any backpay award.

On cross-appeal, Sands argues that unemployment compensation benefits should not be deducted from any backpay award and that the backpay should be subject to prejudgment interest. These arguments are without merit. We have held that unemployment compensation awards should be deducted from a backpay award under the Nebraska Fair Employment Practice Act. See *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984). Prejudgment interest may be awarded only as provided under Neb. Rev. Stat. § 45-103.02 (Cum. Supp. 1996). Accordingly, Sands' unemployment compensation benefits should be deducted from any backpay award. Further, the backpay award is not subject to prejudgment interest.

CONCLUSION

We conclude that the district court did not err in its decision that Sands' narcolepsy did not reasonably preclude her ability to

engage in her occupation as a chemist and, thus, her discharge was discriminatory. We further conclude that the district court was correct in its determination that unemployment compensation benefits should be deducted from Sands' backpay award and that such award is not subject to prejudgment interest. We, therefore, affirm the order of the district court which affirmed the findings of the NEOC.

AFFIRMED.

TRUDY ZIMMERMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAL ZIMMERMAN, APPELLANT, V. DOUGLAS COUNTY HOSPITAL ET AL., APPELLEES.

563 N.W.2d 349

Filed May 30, 1997. No. S-95-1086.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
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. **Tort Claims Act.** For purposes of filing a claim against a mental health board or its members, the boards of mental health in Nebraska are state agencies within the meaning of the State Tort Claims Act. Neb. Rev. Stat. § 81-8,210(1) (Reissue 1994).

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

James E. Schaefer, of Gallup & Schaefer, for appellant.

James S. Jansen, Douglas County Attorney, and Christine A. Lustgarten for appellees.

Don Stenberg, Attorney General, and John R. Thompson for amicus curiae State of Nebraska.

Richard L. Boucher, of Boucher Law Firm, for amicus curiae Nebraska Association of County Officials.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

Trudy Zimmerman, personal representative of the estate of Hal Zimmerman, brought a wrongful death action against the Douglas County Hospital, the Douglas County Board of Mental Health, and Douglas County pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1994). Defendants Douglas County and Douglas County Hospital filed an answer and remain as parties in the underlying lawsuit. However, the district court sustained the Douglas County Board of Mental Health's demurrer and dismissed the cause of action as to the board on the ground that the board is a state entity and that, therefore, Zimmerman was required to comply with the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994). Zimmerman timely appealed. Because we determine that the board is a state agency as defined in § 81-8,210, we affirm the judgment of the district court.

FACTUAL BACKGROUND

Trudy Zimmerman, appellant, is the widow and personal representative of the estate of Hal Zimmerman. Zimmerman filed a wrongful death action against the Douglas County Hospital, the Douglas County Board of Mental Health, and Douglas County pursuant to the Political Subdivisions Tort Claims Act.

The petition alleged that on January 24, 1994, the Douglas County Board of Mental Health found by clear and convincing evidence that Hal Zimmerman was a mentally ill and dangerous person, ordered outpatient treatment at the Douglas County Hospital, and designated Dr. Robert Brown of the Douglas County Hospital to be responsible for supervising the preparation and implementation of a treatment plan.

On February 24, 1994, Hal Zimmerman took his own life. Zimmerman alleged that Hal Zimmerman's death was proximately caused by the defendants and that the defendants were negligent in failing to (1) abide by the order of the Douglas County Board of Mental Health, (2) provide medical and psychological care to Hal Zimmerman, (3) properly monitor the conduct of Hal Zimmerman, and (4) provide medicine to Hal Zimmerman.

The petition further alleged that on September 23, 1994, formal written demand and notice of the claim was given to Douglas County. Over 6 months elapsed without the county making a final disposition of the claim. Thus, Zimmerman withdrew the claim from consideration of Douglas County and filed a petition in the district court. There is no allegation in the petition that Zimmerman filed a claim with the State Claims Board in compliance with the State Tort Claims Act.

In response to Zimmerman's petition, the Douglas County Board of Mental Health filed a demurrer on the grounds that the district court lacked personal and subject matter jurisdiction and that the petition did not state sufficient facts to constitute a cause of action. The district court sustained the demurrer on August 23, 1995, finding that the Douglas County Board of Mental Health is a state agency. Because Zimmerman had not alleged compliance with the State Tort Claims Act, the district court determined that it did not have proper jurisdiction over the claim. Zimmerman was granted leave to amend her petition. She did not file an amended petition, and on September 8, the district court dismissed her cause with regard to the Douglas County Board of Mental Health. Zimmerman timely appealed, and we removed the matter to this court under our authority to regulate the dockets of the Nebraska Court of Appeals and this court.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hanigan v. Trumble, ante* p. 376, 562 N.W.2d 526 (1997); *D.K. Buskirk & Sons v. State, ante* p. 84, 560 N.W.2d 462 (1997).

ASSIGNMENT OF ERROR

Zimmerman's sole assignment of error is that the district court erred in finding that the Douglas County Board of Mental Health is a state entity.

ANALYSIS

In order to resolve this appeal, we must determine whether the Douglas County Board of Mental Health is a state agency within the meaning of § 81-8,210 or a political subdivision as defined by § 13-903. If the board is a political subdivision as defined by statute, then the Political Subdivisions Tort Claims Act applies, and Zimmerman's allegations that she (1) timely filed a formal notice of claim with Douglas County and (2) properly brought suit in district court following withdrawal of the claim would state sufficient facts to constitute a cause of action in the case at bar. Conversely, if the board is determined to be a state agency as defined by statute, then the State Tort Claims Act is applicable, and the district court would not have jurisdiction over Zimmerman's claim in the absence of an allegation that Zimmerman complied with the provisions of the act.

> The State Tort Claims Act defines "state agency" as including all departments, agencies, boards, bureaus, and commissions of the State of Nebraska . . . the primary function of which is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska but shall not include corporations that are essentially private corporations or entities created by local public agencies pursuant to the Interlocal Cooperation Act.

§ 81-8,210(1).

A political subdivision, as defined in the Political Subdivisions Tort Claims Act, includes "villages, cities of all classes, counties, school districts, public power districts, and all other units of local government, including entities created by local public agencies pursuant to the Interlocal Cooperation Act." § 13-903(1).

In determining whether the Douglas County Board of Mental Health is a state agency or political subdivision, in light of the statutory definitions, we first observe that boards of mental health were created to carry out the provisions of the Nebraska

Mental Health Commitment Act, Neb. Rev. Stat. § 83-1001 et seq. (Reissue 1994). Each judicial district must have at least one but not more than three mental health boards. § 83-1017. The Douglas County Board of Mental Health is officially termed the Board of Mental Health of the Fourth Judicial District of the State of Nebraska, County of Douglas. The members of each mental health board are appointed by the presiding judge of the district court in the district in which the board is located. § 83-1018(1). The presiding judge also sets the rate of compensation for the board members. Neb. Rev. Stat. § 83-337 (Reissue 1994).

The qualifications of the board members, the length of their terms, and training requirements are established by state statute. § 83-1018. The Department of Public Institutions was required to provide appropriate training for board members on a yearly basis at the time the action was brought. § 83-1018(4). Currently, the Department of Health and Human Services is required to provide such training. § 83-1018(4) (Cum. Supp. 1996). In addition, the clerk of the district court performs virtually all of the administrative tasks of the board. § 83-1016.

Although Zimmerman correctly points out that board members are paid out of the county treasury by the county board, § 83-337, and each board is required by statute to prepare and file an annual inventory statement with the county, Neb. Rev. Stat. § 83-321 (Reissue 1994), the board and its members are nevertheless clearly instrumentalities of the State, created by state governmental authority for the discharge of legally prescribed public duties, as part of the sovereign power of the State and for the public good. See *Sullivan v. Hajny*, 210 Neb. 481, 315 N.W.2d 443 (1982) (citing *State of Florida ex rel. Clyatt v. Hocker, Judge*, 39 Fla. 477, 22 So. 721 (1897)). The presiding state district judge, a state officer, has the power to appoint the members of the board, to regulate the rate of compensation paid to the board members, and to supervise the activities of the board. A state agency, the Department of Health and Human Services, is responsible for providing yearly training for the board members, and the clerk of the state district court is responsible for virtually all of the administrative activities asso-

ciated with the board. Thus, we hold, for purposes of filing a claim against a mental health board or its members, that the boards of mental health in Nebraska are state agencies within the meaning of the State Tort Claims Act. § 81-8,210(1).

Because we conclude that the Douglas County Board of Mental Health is a state agency for purposes of tort liability, the provisions of the State Tort Claims Act are applicable in the instant cause. The petition in this matter does not allege compliance with the notice and claim provisions of the State Tort Claims Act, and Zimmerman did not amend her petition to allege such compliance when given an opportunity to do so. Therefore, the district court did not err when it sustained the board's demurrer on August 23, 1995, and subsequently dismissed Zimmerman's cause of action against the board on September 8.

CONCLUSION

Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. BRIAN R. WATKINS, RESPONDENT.

563 N.W.2d 790

Filed May 30, 1997. No. S-97-537.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Brian R. Watkins was admitted to the practice of law in the State of Nebraska on February 28, 1972.

On May 19, 1997, Watkins entered a plea of guilty in the U.S. District Court for the District of Nebraska to "one count of the felony offense set forth at 26 U.S.C. 7206 (1)."

On May 20, 1997, Watkins voluntarily surrendered his license to practice law in the State of Nebraska. In so doing,

Watkins specifically admitted that his conduct as hereinbefore set forth violated Canon 1, DR 1-102(A)(3) and (4), of the Code of Professional Responsibility, as adopted by the Nebraska Supreme Court. Watkins waived his right to notice, appearance, or hearing prior to entry of this order.

We accept Watkins' surrender of his license to practice law in the State of Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

VERNA L. PISKA, APPELLANT, V.
NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLEE.
567 N.W.2d 544

Filed June 6, 1997. No. S-95-679.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **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.
4. **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.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed in part, and in part reversed.

Robert A. Ide, of Aten, Noble & Ide, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ENSZ, D.J., and BLUE, D.J., Retired.

GERRARD, J.

On August 2, 1994, the then Nebraska Department of Social Services found that Verna L. Piska was indebted to the department in the amount of $3,000 for child support which she had received during a period of time in which her minor daughter Jo Lee was in foster care in the custody of the department. The district court affirmed the findings and order of the department. This appeal followed. Because we find that there was no showing that application was made for aid to dependent children payments as required by Neb. Rev. Stat. § 43-512.07 (Cum. Supp. 1992), we now affirm in part, and in part reverse, the judgment of the district court.

FACTUAL BACKGROUND

On December 15, 1982, the district court entered an order dissolving the marriage of Piska and her husband, Joseph D. Piska. By agreement of the parties, Piska retained custody of Jo Lee and a second minor child and the husband retained custody of their third minor child. The husband was ordered to pay Piska $500 per month as child support and property settlement.

In May 1991, the department began making foster care payments on behalf of Jo Lee. The State filed a motion for support in the county court for Phelps County. On July 3, the county court, sitting as a juvenile court, ordered Piska to pay $100 per month toward the support of Jo Lee, with the first payment to be due on August 1. On November 18, 1992, the county court found that Jo Lee was no longer a ward of the department and ordered support suspended as of November 1, 1992. Piska has satisfied this obligation.

The department made foster care payments on behalf of Jo Lee of approximately $18,311.89, including payments made in August, October, and December 1991 and in January through November 1992. The department's records show that Piska received $500 child support payments in the months of August, September, and November 1991 and in January through May 1992. The department intercepted the $500 monthly child support payments from Phelps County from June through November 1992. The department credited back to Piska the $500 payment that was erroneously intercepted in November

1992 when Jo Lee was no longer in the custody of the department. The department claims that Piska is obligated to pay to the department the amount of child support she received during the period that Jo Lee was in foster care.

On March 29, 1994, the department notified Piska that she owed the department $3,500 in child support. Piska appealed this determination, and a hearing was held before a department hearing officer on June 21. Piska claimed that she had never applied for aid to dependent children or any other support and had never made an assignment of her child support benefits to the department. She asserted that to her knowledge there had not been a hearing regarding modification of support, modification of the payee of the support, assignment of her support rights, or any other kind of intervention.

In its August 2, 1994, findings and order, the department found that there had been an assignment by operation of law of the child support payments pursuant to § 43-512.07. Because the department found that the revised statute did not go into effect until September 1991, it found that Piska did not owe the $500 paid to her in August 1991. Accordingly, the department found that Piska was obligated to pay the sum of $3,000 to the department. The department also found that Piska had not timely raised the issue of the assignment of payments which were intercepted from June through November 1992.

Piska appealed the decision of the department to the district court. The district court affirmed the findings and order of the department, and this appeal followed. We removed the matter to this court under our authority to regulate the dockets of the Nebraska Court of Appeals and this court.

STANDARD OF REVIEW

A 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. *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is

neither arbitrary, capricious, nor unreasonable. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996).

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. *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997).

ASSIGNMENTS OF ERROR

Summarized and restated, Piska assigns that the district court erred in (1) finding that the record contained sufficient facts to support the finding of the department that a valid assignment was made, (2) affirming the decision of the department that she is not claiming the $3,000 intercepted by the department, (3) failing to find that the department's actions deprived her of property without due process, and (4) failing to find that the department was collaterally estopped from pursuing the collection of further funds.

ANALYSIS

It was the department's position in district court that § 43-512.07 provides for the assignment by operation of law of Piska's child support payments to the department for the period that Jo Lee was in foster care. The version of § 43-512.07 that was in place at the time of the events in the instant case provided, in relevant part, as follows:

> (1) The application for and acceptance of an aid to dependent children payment by a parent, another relative, or a custodian shall constitute an assignment by operation of law to the Department of Social Services of any right to spousal or medical support when ordered by the court and to child support whether or not ordered by the court which the recipient may have in his or her own behalf or on behalf of any other person for whom the applicant receives such assistance, including any accrued arrearages as of the time of the assignment. The department shall be entitled to retain such support up to the amount of aid to dependent children paid to the recipient. For purposes of this section, the right to receive current and past-due child support shall

belong to the child and the assignment shall be effective as to any such support even if the payee of aid to dependent children is not the same as the payee of court-ordered support.

SUFFICIENCY OF EVIDENCE

Piska first contends that the evidence was insufficient to support the decision of the department that a valid assignment was made. She asserts that there is insufficient evidence in the record to demonstrate that the department made "aid to dependent children payments" on behalf of Jo Lee. Section 43-512.07 refers to "application for and acceptance of an *aid to dependent children payment*" as triggering an assignment by operation of law. (Emphasis supplied.) Piska maintains that because there is no showing that aid to dependent children payments were made on Jo Lee's behalf, no assignment arose. We agree.

The department correctly notes that while the phrase "aid to dependent children payments" is not defined, Neb. Rev. Stat. § 43-504(1) (Reissue 1988) defines "dependent children" to include some foster children. Under § 43-504(1), a "dependent child" includes

> a child under the age of eighteen years . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or partial or total unemployment of the supporting parent, and who is living with his or her father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his, her, or their own home, *or who has been removed from the home of such relative as a result of judicial determination to the effect that continuation therein would be contrary to the welfare of such child with placement of such child in a foster family home* or child care institution as a result of such determination when the state, any court having jurisdiction of such child, or the county welfare agency is responsible for the care and placement of such child *and one of the following conditions exists: (a) Such child received aid*

> *from the state in or for the month in which court proceedings leading to such determination were initiated; (b) such child would have received assistance in or for such month if application had been made therefor; or (c) such child had been living with such a relative specified above at any time within six months prior to the month in which such proceedings were initiated and would have received such aid in or for the month that such proceedings were initiated if in such month the child had been living with, and removed from the home of, such a relative and application had been made therefor.*

(Emphasis supplied.) This definition of "dependent children" is broader than that provided by federal statute, see 42 U.S.C. § 606(a) (1994), in that it includes children who have been removed from the home and are not living with one of the specified relatives. However, the issue we must decide is whether Jo Lee was a "dependent child" as defined by § 43-504(1).

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. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997).

The record does not support a finding that Jo Lee was a dependent child as defined by § 43-504(1). The record reveals that foster care payments were made on behalf of Jo Lee beginning in May 1991. In July 1991, Piska was ordered to pay $100 per month for the support of Jo Lee. However, there was no evidence adduced at the department hearing that Jo Lee was removed from the home of one of the specified relatives pursuant to a judicial determination. Moreover, even if such a determination had been made, the record does not establish in what month such court proceedings either were initiated or occurred. Consequently, there was no showing that Jo Lee received or could have received aid "in or for the month in which court proceedings . . . were initiated." Accordingly, the record does not support a finding that Jo Lee was a dependent child as defined by § 43-504(1) and, therefore, does not support a finding that "aid to dependent children payments" were made on her behalf.

Because there was no showing that Jo Lee was a dependent child and, thus, no showing that "aid to dependent children payments" were made on her behalf, we conclude that the department's determination that an assignment arose by operation of law, pursuant to § 43-512.07, was not supported by competent evidence. Accordingly, we reverse that part of the judgment of the district court which had affirmed the department's order for Piska to pay to the department the sum of $3,000 for payments during the months of September 1991 through May 1992.

INTERCEPTED PAYMENTS

Piska also claims that the district court erred in affirming the department's determination that she had not timely raised the issue of the $3,000 that had been intercepted by the department for the months of June through November 1992.

The department decided that because Piska's response to the department's letter of March 29, 1994, did not specifically mention the amounts already intercepted, she did not properly raise the issue for determination at the administrative hearing. Neb. Rev. Stat. § 84-913 (Reissue 1994) provides in part:

> In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, *and issues involved*, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. Opportunity shall be afforded all parties to present evidence and argument with respect thereto.

(Emphasis supplied.)

There is no dispute that Piska's attorney did not raise the issue of the intercepted payments until the time of the hearing. The record does not reveal a reason why it would not have been practicable for Piska to raise the issue of the intercepted payments sometime prior to the hearing pursuant to § 84-913. After a review of the record, we cannot say that the district court's order affirming the department's determination to not consider the issue of the intercepted payments was arbitrary, capricious, or unreasonable; this part of the order conforms to the law and is supported by competent evidence.

In light of our prior determination, it is unnecessary to consider Piska's other assignments of error.

CONCLUSION

For the foregoing reasons, we reverse that part of the judgment affirming the department's order for Piska to pay to the department the sum of $3,000, and in all other respects, we affirm the judgment of the district court.

AFFIRMED IN PART, AND IN PART REVERSED.

RONALD DAHLKE, DOING BUSINESS AS PIONEER COATING, APPELLANT, V. JOHN F. ZIMMER INSURANCE AGENCY, INC., DOING BUSINESS AS ZIMMER-BLANC INSURANCE AGENCY, INC., AND GALE WILLIAMS, APPELLEES.

567 N.W.2d 548

Filed June 6, 1997. No. S-95-688.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.
4. **Insurance: Contracts.** When an insurance contract can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.
5. **Insurance: Contracts: Agents: Liability.** If a policy provision is clear and unambiguous, then the insured's failure to read the policy provision will insulate the agent from liability for failure to explain that provision.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Elaine A. Waggoner, of Waggoner Law Office, for appellant.

Randall L. Goyette and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ.

WHITE, C.J.

Ronald Dahlke appeals the trial court's grant of summary judgment in favor of John F. Zimmer Insurance Agency, Inc., doing business as Zimmer-Blanc Insurance Agency, Inc. (Agency), and its agent, Gale Williams. We affirm.

Dahlke owns and operates Pioneer Coating, a roofing, construction, and waterproofing business. One of the hazards of Dahlke's business is "overspray"—a condition which occurs when coating sprayed on a roof drifts to other property and causes damages.

Since 1980, Dahlke has obtained overspray insurance from Agency through Williams. Generally, Dahlke would obtain this insurance by informing Williams of his needs as well as his preference of a particular dollar amount for the deductible, and Williams would then procure the insurance. When Dahlke received the insurance policy, he typically filed the policy without reading it.

In 1984, the insurance policy in effect had a per-occurrence deductible, requiring Dahlke to pay one deductible for each overspray incident, regardless of how many claims were made as a result of a single incident. In 1988, Dahlke procured a policy from Agency which stated, "The deductible amount applies . . . to all property damage sustained by one person or organization, as the result of any one occurrence." This language is referred to as a per-claim deductible and required Dahlke to pay a deductible for each claim which resulted from a single incident. In procuring the 1988 insurance, Dahlke asked Williams for a policy with a $1,000 deductible; the record is clear that no discussion occurred on either Williams' or Dahlke's part about the meaning of the deductible provision in the policy.

Dahlke had received the insurance certificate, but not a copy of the 1988 policy, when an overspray incident occurred. After settling multiple claims, the insurance company billed Dahlke $10,835.47 for the deductibles. Dahlke sued Williams and Agency, arguing that Williams negligently failed to obtain the proper insurance and that Williams failed to advise Dahlke that his policy contained a per-claim deductible.

Williams and Agency filed a motion for summary judgment, which was granted by the trial court and reversed by this court in *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994) (*Dahlke I*). In *Dahlke I*, we held that "[w]hen an agent knows that a provision of the insured's policy has been invoked, the agent has a duty to explain any changes to that provision appearing in a subsequent policy." 245 Neb. at 806, 515 N.W.2d at 771-72. However, we also stated that "absent a reason for the insured's failure to read the policy, if a policy provision is clear and unambiguous, then the insured's failure to read the policy provision will insulate the agent from liability for failure to explain that provision." *Id.* at 806, 515 N.W.2d at 772. We reversed, and remanded, stating that while Dahlke could not have read the 1988 policy because it was not yet in his possession at the time of the 1988 overspray incident, we recognized that Dahlke's earlier policies might have contained the per-claim deductible language. In so doing, we stated, "If those [per-claim] provisions [in earlier policies] are clear and unambiguous, then Williams and [Agency] are insulated from liability; if those provisions are *not* clear and unambiguous, then Williams and [Agency] are *not* insulated from liability." (Emphasis in original.) *Id.* at 808, 515 N.W.2d at 772-73.

On remand, Williams and Agency filed another motion for summary judgment and included copies of Dahlke's 1986 and 1987 insurance policies procured through Williams and Agency. Both the 1986 and 1987 policies contained the following language: "The deductible amount applies . . . to all property damage sustained by one person or organization, as the result of any one occurrence." Dahlke admitted that the 1988 policy was similar to his 1986 and 1987 policies in that all three contained the per-claim language; however, Dahlke stated that he did not understand the difference between the per-claim and the per-occurrence language. The trial court granted the second motion for summary judgment, finding that the provisions in the 1986 and 1987 policies were clear and unambiguous.

On appeal, Dahlke argues that the trial court erred in finding that the deductible provisions in the contracts of insurance were clear and unambiguous.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Kime v. Hobbs, ante* p. 407, 562 N.W.2d 705 (1997); *Robertson v. School Dist. No. 17, ante* p. 103, 560 N.W.2d 469 (1997). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Kime, supra; Robertson, supra.*

In his sole assignment of error, Dahlke alleges that the trial court incorrectly found that the terms regarding deductibles in the 1986 and 1987 policies were clear and unambiguous. We disagree.

Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995). See, also, *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997). When an insurance contract can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Kast, supra.* Interpretation of an unambiguous term or provision of an insurance policy also presents a question of law. *Id.*

The 1986 and 1987 policies at issue in this case stated, "The deductible amount applies . . . to all property damage sustained by one person or organization, as the result of any one occurrence." This language clearly provides that the deductible will be assessed for each person or organization who made a claim in any one overspray incident and is identical to the deductible language found in the 1988 policy. We hold that because this language cannot be fairly interpreted in more than one way, it is therefore clear and unambiguous, and the trial court did not err in so finding.

We recognize that Dahlke could not have read the deductible provision in his 1988 policy because he did not have a copy of that policy at the time of the overspray incident. However,

Dahlke certainly could have read the deductible provisions in his 1986 and 1987 policies and, by his own admission, simply failed to do so. As we stated in *Dahlke I*, "[I]f a policy provision is clear and unambiguous, then the insured's failure to read the policy provision will insulate the agent from liability for failure to explain that provision." 245 Neb. at 806, 515 N.W.2d at 772. Thus, the trial court correctly granted Williams and Agency's motion for summary judgment.

Because we find that the deductible provisions in Dahlke's 1986 and 1987 insurance policies were clear and unambiguous and that Dahlke's failure to read the policy provisions insulates the insurance agent from liability, we affirm the trial court's grant of Williams and Agency's motion for summary judgment.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM D. KINSER, JR., APPELLANT.
567 N.W.2d 287

June 6, 1997. No. S-95-922.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
3. **Self-Defense.** To successfully assert the claim of self-defense, one must have a both reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances.
4. **Jury Instructions: Evidence.** A trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed; however, it is not the province of the trial court to decide factual issues even when it considers the evidence produced in support of one party's claim to be weak or doubtful. It is only when the evidence is so doubtful in character and lacking in probative value so as to constitute a failure of proof that a trial court may properly refuse to instruct a jury on a defendant's theory of defense.

5. **Witnesses: Testimony: Juries.** The credibility of a witness and the weight to be given to that witness' testimony are issues for the jury to resolve.
6. **Self-Defense: Jury Instructions.** A trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense.
7. **Self-Defense.** Justifications for the use of force are statutorily defined affirmative defenses.
8. **Trial: Evidence: Proof.** The nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense. When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove.
9. **Self-Defense: Trial: Evidence: Proof.** The evidence necessary to raise an affirmative defense may be adduced either by the defendant's witnesses or in the State's case in chief without the necessity of the defendant's presenting evidence. Such defendant need only adduce a slight amount of evidence to satisfy the initial burden of raising the issue of self-defense.
10. **Self-Defense: Pleadings: Notice.** A defendant is not required to plead and give notice of an affirmative defense of justification or self-defense.
11. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of the 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.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the District Court for Box Butte County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed.

Robin W. Hadfield, of Nebraska Commission on Public Advocacy, and, on briefs, Jon Placke, Assistant Box Butte County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and QUIST, D.J.

GERRARD, J.

Appellant, William D. Kinser, Jr., was convicted by a jury of first degree assault, second degree assault, and use of a weapon in the commission of a felony. In an unpublished memorandum

opinion, the Nebraska Court of Appeals reversed the judgment and remanded the cause for a new trial because of the trial court's refusal to instruct the jury as to self-defense. See *State v. Kinser*, 4 Neb. App. xxi (case No. A-95-922, June 5, 1996). It is from this decision that the State has successfully sought further review in this court. For the reasons that follow, we affirm the judgment of the Court of Appeals.

FACTUAL BACKGROUND

The events involved in this case occurred on January 20, 1995, at the Bowl Mor Lounge in Alliance, Nebraska. The circumstances surrounding the alleged assault are in dispute. The testimony of two witnesses, the victim, James Covalt, and Penny Overshiner, a woman who accompanied Kinser to the Bowl Mor Lounge that evening and who was the only eyewitness other than the victim, is of particular importance with respect to the issues on appeal.

Covalt testified that around 8:30 p.m. on January 20, he was sitting at the bar in the Bowl Mor Lounge having a couple of beers. After Covalt had been in the bar for about 20 minutes, Kinser approached Covalt to talk to him. Covalt testified that they talked briefly, and then Kinser left the bar but returned a short time later. Covalt said that when Kinser returned, he did not see him enter the lounge with anybody else. When asked what he and Kinser talked about, Covalt said that he could not remember. However, Covalt could remember that on that evening, Kinser was loud and obnoxious, appeared to be intoxicated, and in general was pestering him. Covalt testified that he repeatedly told Kinser to leave him alone and go back to his table.

Covalt said that when Kinser turned as if to leave, Covalt turned away from Kinser and faced the bar. According to Covalt, the next thing he heard was the sound of breaking glass when he was suddenly struck by Kinser and knocked off his barstool onto the floor. Covalt received severe cuts across his nose and lip, as well as several smaller cuts on his forehead. Covalt thought Kinser had struck him with a beer bottle. In fact, Kinser had struck him with a drinking glass.

Kinser did not testify at trial. However, Overshiner testified on his behalf. Overshiner testified that she observed the entire

event. Overshiner said she was standing at the bar watching Kinser talk to Covalt but could not hear their conversation. She testified that it appeared as though the two men were arguing. Overshiner said that after about 5 minutes, Covalt made "an aggressive provocative move" upward toward Kinser's throat with the beer bottle he was holding in his hand. In response, Kinser punched Covalt with his right hand, in which he was holding a drinking glass. Overshiner testified that Kinser did not try to push the glass into Covalt's face, but instead was just holding the glass when he hit Covalt. She said it appeared that Kinser simply reacted and attempted to block Covalt's movement when Covalt brought his arm up with the beer bottle. At trial, Kinser tendered an instruction concerning self-defense, which the trial court refused. A jury convicted Kinser of first degree assault, second degree assault, and use of a weapon in the commission of a felony, and Kinser timely appealed his convictions to the Court of Appeals.

The Court of Appeals reversed Kinser's convictions, concluding that Kinser was due a jury instruction concerning self-defense if there was *any* evidence to support such a theory of defense. The Court of Appeals determined that if a jury were to believe Overshiner's testimony regarding the incident, then it could conclude that Kinser acted in self-defense in attempting to block Covalt's aggressive and provocative move with a beer bottle. Moreover, the Court of Appeals concluded that the failure of the trial court to give such an instruction left the jury without any authority to consider the issue of self-defense and, therefore, with no choice but to find Kinser guilty of the assault charges.

ASSIGNMENTS OF ERROR

The State contends that the Court of Appeals erred when it (1) concluded that Kinser was due a jury instruction on self-defense if there was *any* evidence adduced to support such a defense, without regard to whether the evidence adduced was sufficient as a matter of law to prove self-defense, and (2) reversed the judgment and remanded this matter for a new trial, because the trial court correctly determined that a self-defense instruction was not warranted by the evidence at trial.

STANDARD OF REVIEW

Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Nissen, ante* p. 51, 560 N.W.2d 157 (1997); *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996).

ANALYSIS

Kinser asserts that the trial court erred in refusing to instruct the jury on his theory of defense, i.e., self-defense. Kinser timely objected to the jury instructions and tendered and requested an instruction on self-defense. The trial court not only rejected Kinser's instruction, but flatly refused to instruct the jury regarding the issue of self-defense.

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. *Kent v. Crocker, ante* p. 462, 562 N.W.2d 833 (1997); *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997).

The jury instruction offered by Kinser substantially complied with Neb. Rev. Stat. § 28-1409(1) (Reissue 1995) and was a correct statement of the law. See *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990). Thus, at issue in this appeal is whether the tendered instruction was warranted by the evidence and whether Kinser was prejudiced by the trial court's refusal to so instruct.

In this regard, the State argues that a defendant does not merit a jury instruction concerning self-defense when there is merely *any* evidence to support such a theory, but, instead, the trial court is required to instruct a jury as to the defendant's theory of defense only if there is evidence sufficient as a matter of law to support such a theory. Citing *State v. Stewart*, 205 Neb. 626, 288 N.W.2d 751 (1980), the State argues that sufficient evidence means sufficient competent evidence rather than evidence which is weak or doubtful.

Kinser, on the other hand, argues that the Court of Appeals was correct in concluding that a defendant is entitled to a jury instruction on self-defense when there is *any* evidence to support such a theory. Kinser relies on *State v. Graham, supra.*

Because both parties seek clarification on the quality and quantity of evidence that is necessary to warrant a self-defense instruction, we granted further review. A review of our cases reflects that a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. To successfully assert the claim of self-defense, one must have a both reasonable and good faith belief in the necessity of using force. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996). In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Graham, supra.*

In *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978), we held that the trial court correctly refused to instruct the jury on the issue of self-defense because, although the evidence produced would allow the jury to conclude that the defendant's belief in the need to use force in his own defense was subjectively held, the defendant failed to produce evidence that this subjective belief was also objectively reasonable.

In *State v. Graham*, 201 Neb. 659, 271 N.W.2d 456 (1978), we held that where the evidence presented did not indicate that the defendant feared an imminent threat of harm to himself, the trial court correctly refused to instruct the jury concerning the justification issues of self-defense and choice of evils. In *State v. Canby*, 217 Neb. 461, 348 N.W.2d 900 (1984), we held that the defendant did not produce a legally cognizable self-defense claim where the evidence adduced at trial indicated that the defendant's claim was that she accidentally and unintentionally stabbed her uncle, not that the stabbing was justified.

In *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986), we held that the trial court did not err by not instructing the jury in regard to self-defense because the evidence demonstrated that the defendant was reckless or negligent in bringing about the harm occasioned. In *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990), we held that under the evidence in the case, self-defense was not applicable to a charge of first degree sex-

ual assault. We also found incredible the necessary premise that forcibly subjecting one to sexual penetration could ever be immediately necessary for the purpose of protecting oneself against the use of unlawful force.

In contrast, in *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990), we held that the trial court erred in refusing to instruct the jury on the issue of self-defense. The facts of *Graham* are quite similar to the facts of the instant case. In *Graham*, the defendant was charged with third degree assault stemming from a barroom fight. Witnesses testified that Graham struck the victim twice with his fist in self-defense when the victim attempted to strike Graham with either his fist or a beer bottle. Other evidence indicated that Graham used excessive force on the victim by driving the victim's head into a pool table and causing the victim to suffer a broken neck.

The trial court refused to give a self-defense instruction because it thought that a defendant had to testify to establish the necessary element of a good faith belief that force was necessary. Although Graham did not testify, his statement given to police approximately 3 hours after the incident was part of the evidence before the jury. We determined:

> If the jury that tried Graham believed the defendant's version of the facts and his state of mind as related in the testimony of the police sergeant, that [the victim] intended to hit Graham with his hand, that [the victim] had picked up a beer bottle and was attempting to hit Graham with it, and that it appeared to bystanders that Graham was defending himself when he hit [the victim], then the jury could have reasonably found that Graham's use of force against [the victim] was justified. Since there was evidence supporting a self-protection defense, the trial court should have instructed the jury accordingly.

Id. at 279, 450 N.W.2d at 676.

It is true that a trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed. *State v. Brown, supra.* However, it is not the province of the trial court to decide factual issues when it considers the evidence produced in support of one party's claim to be weak or doubtful. It is only when the evidence does not support a legally

cognizable claim of self-defense or the evidence is so lacking in probative value, so as to constitute a failure of proof, that a trial court may properly refuse to instruct a jury on a defendant's theory of self-defense. See, *State v. Brown, supra*; *State v. Canby, supra*; *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

The credibility of a witness and the weight to be given that witness' testimony are issues for the jury to resolve. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). Accordingly, we hold that a trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense.

Having so held, the inquiry now turns to whether there has been any evidence adduced in support of a legally cognizable theory of self-defense in the instant case.

Justifications for the use of force are statutorily defined affirmative defenses. See Neb. Rev. Stat. § 28-1416(1) (Reissue 1995). The nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense. When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove. See *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

The evidence necessary to raise an affirmative defense may be adduced either by the defendant's witnesses or in the State's case in chief without the necessity of the defendant's presenting evidence. Such defendant need only adduce a slight amount of evidence to satisfy this initial burden of raising the issue of self-defense, see *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992), although, as a practical matter, a slight amount of evidence may not be enough to ultimately *prevail* on the defense of self-defense. A defendant is not required to plead and give notice of an affirmative defense of justification or self-defense. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986).

In pertinent part, § 28-1409, Nebraska's use of force in self-protection statute, provides:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is

> immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death [or] serious bodily harm . . . nor is it justifiable if:
>
> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . .
>
> (5) . . . [A] person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating . . . .

Neb. Rev. Stat. § 28-1406(3) (Reissue 1995) defines "deadly force" as "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm."

Furthermore, although not a statutory requisite, we have long held that to successfully assert the claim of self-defense, one must have a both reasonable and good faith belief in the necessity of using force. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996); *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

The State asserts that Kinser did not produce evidence of a legally sufficient theory of self-defense because it was not reasonable for him to think the use of force was necessary, his use of force was not immediately necessary for his protection, and the force used under the circumstances was not justified. In addition, the State argues that because Kinser caused serious bodily injury to Covalt, Kinser's use of force was that of deadly force within the meaning of the statutes. In order to avail himself of this defense, Kinser cannot be the actor that provoked the use of force against himself in the first instance and must attempt to retreat if possible before employing deadly force in self-defense.

Instead of persuading us that Kinser failed to produce any evidence so as to constitute a legally cognizable claim of self-defense, the State's argument only points out the many questions of fact raised by the evidence adduced, in particular the testimony of the eyewitness, Overshiner, in regard to the use of force by Kinser. A defendant's claim of self-defense is a question of fact for the jury. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). As such, a jury, and not the trial court, must resolve these many fact questions concerning whether Kinser acted in self-defense within the meaning of the law.

In this regard, if the jury believed Overshiner's testimony, it could reasonably conclude that Covalt and Kinser were engaged in an argument which was not provoked by Kinser for the purpose of causing Covalt's injuries and that Covalt's aggressive and provocative move with a beer bottle toward Kinser's throat caused Kinser to defend himself by blocking Covalt's movement and punching Covalt while still holding a glass in his hand. Because there was evidence which would have supported Kinser's theory of self-defense, the trial court should have instructed the jury accordingly.

It is the duty of the 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. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995).

The effect of the trial court's refusal to instruct the jury concerning Kinser's claim of self-defense was to withdraw from the jury consideration of an essential issue in the case, that being the State's burden to prove that Kinser did not act in self-defense.

The Court of Appeals correctly determined that there was prejudice to Kinser as a result of the trial court's failure to properly instruct the jury. Without being properly instructed on self-defense, the jury was not able to consider that defense. Kinser did not dispute that he punched and injured Covalt, but, rather, he asserted that such actions were justified in self-defense. Without authority to consider self-defense, the jury was left with no choice but to find Kinser guilty of the assault charges.

See *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990). As a result, the Court of Appeals correctly concluded that Kinser's convictions must be reversed and that the cause must be remanded for a new trial.

Because this matter is being remanded for a new trial, we do not address whether a deadly force (see, e.g., NJI2d Crim. 7.2) or a nondeadly force (see, e.g., NJI2d Crim. 7.1) type of self-defense instruction is warranted by the evidence, nor do we address the merits of any other errors that Kinser assigned in the Court of Appeals.

CONCLUSION

The Court of Appeals correctly concluded that the trial court committed prejudicial error by failing to properly instruct the jury on self-defense, and it properly reversed Kinser's convictions and remanded the cause for a new trial. Thus, we affirm the judgment of the Court of Appeals.

AFFIRMED.

IN RE ESTATE OF MEINRAD NUESCH, DECEASED. VERA HEITHOFF AND GERTRUDE PETERSEN, APPELLEES, V. WILLIAM DEFOREST, PERSONAL REPRESENTATIVE OF THE ESTATE OF MEINRAD NUESCH, DECEASED, APPELLANT.

567 N.W.2d 113

Filed June 6, 1997. No. S-95-1017.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion.
2. **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.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Reversed.

Dennis J. Moynihan, of Johnson and Mock, for appellant.

Larry R. Demerath, of Demerath Law Offices, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

On August 29, 1994, an application for informal probate of will and informal appointment of personal representative in the matter of the estate of Meinrad Nuesch was filed in the county court for Dodge County (application). The application nominated William DeForest as personal representative of the estate. An acceptance of appointment was filed by DeForest, and he was subsequently appointed as personal representative on August 31.

Vera Heithoff and Gertrude Petersen (appellees) filed a petition on November 9, 1994, opposing the probate of Nuesch's will. The matter was originally scheduled to be heard on December 12; however, several continuances were ordered, postponing the date of the hearing to August 7, 1995.

On July 11, 1995, DeForest filed a praecipe and notice of transfer to transfer the proceeding to the district court for Dodge County. Appellees filed an objection to such transfer. On August 21, the county court entered an order sustaining appellees' objection to transferring the will contest to the district court. DeForest subsequently filed an appeal on September 18. Pursuant to our power to regulate the caseloads of this court and the Nebraska Court of Appeals, we on our own motion removed this case to our docket.

DeForest contends on appeal that the county court erred in finding that the notice of transfer was untimely filed pursuant to Neb. Rev. Stat. § 30-2429.01 (Reissue 1995). We agree.

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion. *In re Estate of Muchemore, ante* p. 119, 560 N.W.2d 477 (1997).

Section 30-2429.01(1) provides as follows:

> If there is an objection to probate of a will . . . the county court shall continue the originally scheduled hearing for at least fourteen days from the date of the hearing. At any time prior to the continued hearing date any party may transfer the proceeding to determine whether the decedent

> left a valid will to the district court by filing with the county court a notice of transfer . . . .

DeForest filed the praecipe and notice of transfer on July 11, 1995. Such a filing occurred subsequent to the first continuance of the hearing regarding appellees' petition, but prior to the final continuance of such hearing. The parties differ as to what the statute requires with regard to when a request for transfer of a probate matter must be filed. Appellees argue that § 30-2429.01(1) requires the movant to request a transfer prior to the *first* continuance. DeForest, to the contrary, argues that § 30-2429.01(1) requires the movant to request a transfer prior to the *final* scheduled continuance.

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. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997). A plain reading of the statute clearly indicates that a request for transfer may properly have been made by DeForest at any time prior to the hearing set for August 7. Since DeForest filed the notice of transfer on July 11, the request was timely made and the county court erred in sustaining appellees' objection.

REVERSED.

COUNTY OF SHERMAN, NEBRASKA, APPELLEE, V. MELVIN L. EVANS ET AL., APPELLEES, AND DONALD D. GLINSMANN AND RACHEL A. GLINSMANN, APPELLANTS.

564 N.W.2d 256

Filed June 13, 1997. No. S-95-529.

1. **Actions: Jurisdiction.** The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
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. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

4. **Actions: Foreclosure: Real Estate: Tax Sale: Time.** Failure to file an action to enforce a tax sale certificate within the period of time prescribed by Neb. Rev. Stat. § 77-1902 (Reissue 1996) renders a tax sale certificate void and wholly extinguished.

Appeal from the District Court for Sherman County: RONALD D. OLBERDING, Judge. Reversed and remanded.

John S. Mingus, of Mingus & Mingus, for appellants.

Mark L. Eurek, Sherman County Attorney, for appellee County of Sherman.

Rodney M. Wetovick, of Wroblewski Law Office, for Robin A. Bochart.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

On March 31, 1983, two tax sale certificates, Nos. 1991 and 1992, were issued to the County of Sherman (appellee) by its treasurer. Pursuant to each certificate and in compliance with Nebraska law, the period of redemption of the affected real estate terminated on March 31, 1986. Tax sale certificate No. 1991 pertained to property described as the northwest quarter of Section 9, Township 14 North, Range 13 West of the 6th P.M., in Sherman County, Nebraska, and owned by Donald D. Glinsmann and Rachel A. Glinsmann (appellants). Tax sale certificate No. 1992 pertained to property described as the southwest quarter of Section 9, Township 14 North, Range 13 West of the 6th P.M., in Sherman County, Nebraska, and owned by Donald Glinsmann.

On September 16, 1991, appellee filed a petition for foreclosure in the district court for Sherman County. The petition consisted of five causes of action. The fourth cause of action alleged that appellants owned the northwest quarter and that they owed $29,562.87 in taxes on the real estate. The fifth cause of action alleged that appellant Donald Glinsmann owned the southwest quarter and that he owed $30,928.89 in taxes.

In January 1993, appellants' property was sold. The northwest quarter and southwest quarter were sold for $87,700 and

$67,900 respectively. The district court entered a conditional order on April 2, which provided that the sale would be confirmed if the property was not redeemed by the buyer by April 5, 1993.

Appellants moved for a new trial, which was overruled on April 16, 1993. Appellants then appealed the court orders of April 2 and April 16.

The Nebraska Supreme Court dismissed appellants' appeal. See *County of Sherman v. Evans*, 247 Neb. 288, 526 N.W.2d 232 (1995). The court concluded that the order was conditional and thus void, providing no final, appealable order of confirmation.

On February 17, 1995, appellants filed an "Application for Hearing on Confirmation, Rents and Profits and Fixing Amount of Supersedeas Bond." The successful bidder, Robin A. Bochart, subsequently filed a motion for confirmation. Appellants' "Motion to Deny Confirmation of Sale of Real Estate Described in Fifth Cause of Action" was then filed. Appellants also submitted a paupers affidavit.

A hearing was held on March 24, 1995, and an order to confirm sale was subsequently entered. The district court confirmed the sales of appellants' property and determined that it would not use its discretion to allow the surplus proceeds from the sale of real estate foreclosed in the fourth cause of action to be applied to pay taxes on the parcel foreclosed in the fifth cause of action. The court then addressed Bochart's request for protection under Neb. Rev. Stat. § 25-1541 (Reissue 1995). The court held that he was protected from divestment under § 25-1541, and further found that he was not required to make an accounting to appellants for any rents or profits or any other income during the term where he had been in possession of said property. With regard to appellants' paupers affidavit, the court continued the matter because no appeal had yet been filed.

On April 3, 1995, appellants filed a motion for new trial, which was overruled. An order of distribution was entered by the court on April 14. Appellants timely appealed on May 15. Pursuant to our power to regulate the caseloads of the Nebraska Court of Appeals and this court, we on our own motion removed this case to our docket.

The assignments of error argued by appellants can be summarized as follows: (1) The district court erred in issuing its order to confirm sale, (2) the record discloses plain error in that the tax certificates had ceased to be valid, (3) the record discloses plain error in that it was not disclosed whether appellee had requested an order of sale, (4) the district court erred in issuing its order of distribution, and (5) the district court erred in failing to rule on appellants' paupers affidavit.

The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). See *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995).

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 Estate of Muchemore*, *ante* p. 119, 560 N.W.2d 477 (1997).

Appellants contend on appeal that tax certificates Nos. 1991 and 1992, which were foreclosed approximately 8½ years after they were issued, must be considered void and that therefore the district court, and subsequently this court, lacks jurisdiction to hear this case. We agree and accordingly dismiss this action for lack of subject matter jurisdiction.

Pursuant to Neb. Rev. Stat. § 77-1856 (Reissue 1990):

> If the owner of any tax sale certificate shall fail or neglect . . . to commence an action for the foreclosure of the same within the time specified in section . . . 77-1902, *such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold.*

(Emphasis supplied.) Further, Neb. Rev. Stat. § 77-1902 (Reissue 1986) provides in part: "[Foreclosure of a lien for taxes represented by a tax sale certificate] shall only be brought within ninety days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based."

We recognize that appellants did not raise objections to the certificates' validity until appeal. Such objections can only be entertained by this court if we determine that the certificates are indeed void, preventing any district court and appellate court from exercising subject matter jurisdiction in this tax foreclosure case.

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. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997). The term "void" is defined by Black's Law Dictionary 1573 (6th ed. 1990) as "having no legal force or binding effect." A plain reading of the aforementioned statutes indicates that a tax sale certificate, which is not foreclosed within the 90-day period following the expiration of the certificate, will cease to be valid, will be of no force or, in other words, will be void.

This court, in *Fairley v. Kemper*, 174 Neb. 565, 118 N.W.2d 754 (1962), interpreted § 77-1856 (1943) to require that an action to foreclose a tax sale certificate be commenced, as opposed to be completed, within 5 years of the date of the certificate. In analyzing this issue, the court referred to the case of *Alexander v. Shaffer*, 38 Neb. 812, 57 N.W. 541 (1894). In *Alexander*, the court reviewed "[s]ection 180 of the revenue law," which provided that " 'if the owner of [a tax sale certificate] shall fail . . . to commence an action for the foreclosure of the same . . . within five years from the date thereof, the same shall cease to be valid or of any force whatever . . ' " 38 Neb. at 815-16, 57 N.W. at 542.

According to the court, "the limitation fixed in the revenue law is . . . a limitation upon the duration of the lien itself, and that upon the expiration of the period it is not merely the remedy to enforce the lien which expired, but the lien itself is extinguished absolutely." *Id.* at 816, 57 N.W. at 542. See, also, *Gibson v. Peterson*, 118 Neb. 218, 224 N.W. 272 (1929); *Osgood v. Westover*, 2 Neb. (Unoff.) 668, 89 N.W. 746 (1902).

Because the language of the statute analyzed in *Alexander* is substantially similar to the language used in § 77-1856, we conclude that noncompliance with the period prescribed by

§ 77-1902 renders a tax sale certificate void and wholly extinguished.

In the instant case, tax certificates Nos. 1991 and 1992 were issued on March 31, 1983, and expired on March 31, 1986. Thus, foreclosure actions would have had to be brought within 90 days of March 31, 1986. To the contrary, foreclosure actions were not brought with regard to these tax certificates until September 16, 1991, almost 8½ years after the date of expiration.

Since the foreclosure actions were not brought within the 90-day period as prescribed by § 77-1902, § 77-1856 dictates that tax certificates Nos. 1991 and 1992 were extinguished absolutely. Therefore, the district court lacked jurisdiction to consider appellee's request in 1991 to foreclose these certificates, and the fourth and fifth causes of action should have been dismissed.

Appellee alleges that the delay in the foreclosure of tax certificates Nos. 1991 and 1992 was due to appellants' filing a petition in bankruptcy and the existence of the automatic stay. Since the face of the tax certificates demonstrate that they were void as of September 1983, appellee would have an obligation to submit evidence of the bankruptcy. However, the only evidence relevant to this issue can be found in paragraph 11 of appellees' petition filed on September 16, 1991:

> That with regard to the Fourth and Fifth Causes of Action, the Plaintiff has been granted a relief from automatic stay from the United States Bankruptcy Court For the District of Nebraska, to foreclose its liens on any and all real estate located within Sherman County, Nebraska by Order entered July 24, 1991 in Chapter 11 Proceedings, Bk 84-1523.

We conclude that such evidence insufficiently demonstrates that appellee should have been excused from complying with the time period as prescribed by § 77-1902.

Because tax certificates Nos. 1991 and 1992 must be considered void, the district court, as well as this court, lack jurisdiction to consider this case.

REVERSED AND REMANDED.

GERRARD, J., concurring.

I concur. However, I write separately to further address the effect of the filing of a petition in bankruptcy and the existence of an automatic stay on the tax sale certificates in the instant case.

The majority correctly notes that Neb. Rev. Stat. §§ 77-1856 (Reissue 1990) and 77-1902 (Reissue 1986) provide that a tax sale certificate which is not foreclosed within 90 days of the certificate's expiration ceases to be valid. Appellee contends, however, that this limitation period was tolled by an automatic stay in bankruptcy. Thus, we are confronted with the question of whether an automatic stay extends the statutory time period within which a tax sale certificate must be foreclosed.

The Federal Bankruptcy Code protects claimants from having potential claims expire during the pendency of a bankruptcy stay. 11 U.S.C. § 108(c) (1994) provides, in relevant part, as follows:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

Section 108(c) evidences the basic principle that valid claims against the debtor that exist at the time bankruptcy proceedings are commenced will be preserved. See, *In re Coan*, 96 B.R. 828 (Bankr. N.D. Ill. 1989); *Diamond Hill Inv. Co. v. Shelden*, 767 P.2d 1005 (Wyo. 1989).

Section 77-1856 is not a statute of limitation which merely limits the period during which the remedy to enforce the lien may be exercised, but is a limitation on the underlying substantive right itself. We have held that upon the expiration of the

statutory period, the lien itself is extinguished absolutely. See *Alexander v. Shaffer*, 38 Neb. 812, 57 N.W. 541 (1894).

However, the application of § 108(c) is not limited to statutes of limitation. The statute, by its plain language, applies not only to statutes of limitation, but to any "applicable nonbankruptcy law." § 108(c). Other jurisdictions have considered the application of § 108(c) to lien enforcement periods and have concluded that § 108(c) does apply to the time period during which a creditor must bring an action to enforce a lien. See, e.g., *In re Hunters Run Ltd. Partnership*, 875 F.2d 1425 (9th Cir. 1989) (mechanic's lien); *In re Decker*, 199 B.R. 684 (B.A.P. 9th Cir. 1996) (tax lien). See, also, 2 Collier on Bankruptcy ¶ 108.04[1] (Lawrence P. King ed., rev. 15th ed. 1997). I agree and would similarly hold that § 108(c) applies to tax sale certificates under §§ 77-1856 and 77-1902. To hold otherwise would be to permit debtors to "unilaterally shorten limitations periods by the strategic filing of a bankruptcy petition." *In re Decker*, 199 B.R. at 688.

The effect of § 108(c) is not to toll the applicable limitations period. Rather, "[i]f the limitations period expires while the bankruptcy stay is in effect, then section 108(c) provides creditors with an extra thirty days to pursue a claim once the creditor receives notice that the bankruptcy stay has been lifted." *Thurman v. Tafoya*, 895 P.2d 1050, 1055 (Colo. 1995).

However, I agree with the majority that the record in the instant case does not sufficiently demonstrate that appellee timely foreclosed the tax sale certificates. First, there is no evidence of when the bankruptcy petition was filed. If the 90-day period following the expiration of the certificates had passed prior to the filing of the bankruptcy petition and the imposition of the automatic stay, then § 108(c) does not extend the time available. By its terms, § 108(c) applies only when "such period has not expired before the date of the filing of the petition." Second, even if the stay had been in place prior to the expiration of the period for foreclosure, the foreclosure action was not brought within 30 days after the lifting of the stay. Appellee's petition alleges that relief from stay was entered on July 24, 1991. However, the petition for foreclosure was not filed until

September 16, 1991. This filing is outside the extended period provided by § 108(c), and, thus, the action was not timely filed.

For these reasons, this court, as did the district court, lacks jurisdiction to consider the instant cause, and I concur in the result reached by the majority.

WRIGHT and STEPHAN, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. DAVID J. TURNER, ALSO KNOWN AS DAVID JOSE TURNER, APPELLANT.

564 N.W.2d 231

Filed June 13, 1997. No. S-96-354.

1. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.
2. **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.
3. **Constitutional Law: Effectiveness of Counsel: Proof.** 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 and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
4. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
5. ____. An accused cannot generally take advantage of a delay in being brought to trial where he is responsible for the delay by either action or inaction.
6. **Constitutional Law: Statutes: Speedy Trial.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
7. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.
8. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal.

9. ___: ___. Where continuances are granted at the request of a defendant, the defendant cannot later complain that the court violated Neb. Rev. Stat. §§ 29-1206 and 25-1148 (Reissue 1995) in granting his or her request.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

David A. Domina, Timothy G. Himes, Sr., and Denise E. Frost, of Domina & Copple, P.C., for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

David J. Turner was convicted of two counts of robbery, one count of first degree forcible sexual assault, and three counts of use of a firearm to commit a felony. Turner appeals his convictions, alleging that his right to a speedy trial was violated and that he received ineffective assistance of counsel.

I. SCOPE OF REVIEW

To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial. *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

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. See *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992).

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 and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such defi-

cient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

II. FACTS

As a man and his wife were leaving the Nifty Bar and Grill around 1 a.m. on April 14, 1994, they were accosted by two men, one of whom was carrying a rifle. The men were attempting to gain access to the bar, which had a security lock preventing anyone from entering from the outside. After being ordered to get the men access to the bar, the woman knocked on the door, and once the door was open, the two men rushed inside and began ransacking the bar.

The men forced everyone to lie on the floor, began robbing the patrons, and made unsuccessful attempts to open the safe. During the course of the robbery, which lasted approximately 45 minutes, the woman was led to a back room, where the men sexually assaulted her.

An information was filed by the State against Turner on July 15, 1994, charging him with two counts of robbery, one count of first degree forcible sexual assault, and three counts of use of a firearm to commit a felony. Arraignment was scheduled for July 21, but Turner's counsel failed to appear, and arraignment was postponed for 1 week. On July 28, counsel appeared with Turner, and arraignment proceeded. At that time, mutual and reciprocal statutory discovery was ordered.

On September 26, 1994, Turner filed four discovery motions. The first motion was a request that the prosecution turn over all evidentiary samples such as firearms, fingerprints, semen, blood, and other stains so that the defense could make its independent examination of these items. The second requested that the prosecution produce any statements made by Turner and furnish the name of every eyewitness who had identified Turner in a lineup. The third motion was to compel the endorsement of witnesses, and the final motion was for discovery and inspection of documents. The motions were noticed for hearing on October 5, but no hearing was held on that date.

On January 5, 1995, the State moved for a continuance on the grounds that the Federal Bureau of Investigation (FBI) had not completed its DNA analysis of sperm samples taken from the victim. Turner opposed the motion, but the trial court granted the continuance, finding that under § 29-1207(4)(c)(i), there was a legitimate pursuit of evidence which had not yet been obtained through no fault of the prosecution. Trial was set for the March 1995 jury panel.

On February 8, 1995, Turner moved to dismiss for the reason that a trial had not been held as guaranteed by "the Constitution of the United States and the Constitution of the State of Nebraska, Article I, Section 2 within six (6) months pursuant to Section 29-1207 . . . ." Turner also moved to sever his trial from that of his then codefendant, James Coleman. Each motion was accompanied by a notice of hearing on February 14, but the motions were not heard on that date.

On March 3, 1995, Turner made two more motions: (1) a motion for employment of an expert witness for DNA testing at the county's expense and (2) a motion for a private investigator. Each motion was accompanied by a notice stating that Turner intended to call the motions for hearing on March 7. There is no docket entry for that date.

Trial did not begin during the March 1995 jury panel, as previously scheduled, and there are no docket entries for that month. On May 11, 1995, Turner moved for a continuance in order to independently test and analyze the DNA samples. The State responded that it was ready for trial and did not intend to introduce DNA evidence because the test results were inconclusive. Defense counsel, however, insisted on the continuance, arguing that he might make use of the DNA evidence in Turner's defense.

At this hearing, the trial court addressed the motions filed by Turner on September 26, 1994, and February 8 and March 3, 1995. Turner withdrew the March 3 motion to hire a private investigator and the September 26 motion compelling endorsement of witnesses. Regarding the September 26 motion for discovery and inspection of documents, Turner's counsel explained that it had been discussed in chambers previously and that the prosecution had agreed to provide the requested docu-

ments and information at that time. Turner's counsel therefore recommended that the trial court overrule the motion. Turner similarly recommended that the trial court overrule his September 26 motion to produce.

Turner's September 26, 1994, motion for discovery of scientific tests was sustained, but the trial court overruled the February 8, 1995, motion to sever as moot because Coleman had pled guilty and was no longer going to trial. The March 3, 1995, motion for employment of an expert witness was sustained, and Turner's counsel was to name an expert witness that would pursue the DNA issues by May 18. Turner's motion to dismiss was overruled, the trial court reiterating that it found under § 29-1207(4)(c)(i) that the continuance was for a legitimate pursuit of the DNA test results.

The trial court granted Turner's motion for a continuance and set a new trial date for July 17, 1995. On July 11, Turner again moved for a continuance, informing the trial court that the reason for the continuance was that the University of Nebraska Medical Center expert who had been retained to look at the DNA issue would not have results ready for 6 weeks. The State responded that it would forgo its use of the DNA evidence if the case were to be tried in July as previously scheduled. The trial court granted Turner's request, pending the completion of the DNA testing, and reset the trial for a special setting on November 13, 1995.

A September 15, 1995, docket entry recites that by agreement of the parties, the cause was set for trial on September 26. There is, however, no docket entry for that date, and trial began on November 13. The record is silent as to what transpired on or after September 26 until the trial began on November 13.

At trial, Coleman, who had previously pled guilty to charges regarding the robbery and sexual assault at the Nifty Bar and Grill on April 14, 1994, testified that Turner had committed these crimes with him. One of the bar patrons was able to positively identify Turner as one of the men who perpetrated the robbery. The bartender also positively identified Turner.

During the trial, two stipulations were read into the record, with the written versions received into evidence. The first stipulation stated that a DNA comparison between the semen col-

lected from vaginal swabs of the victim and blood samples from Turner was inconclusive. The second stipulation informed the jury that a six-photo array, which contained a photo of Turner, had been displayed to the bartender and the other witness on June 18, 1994, and that neither could make a positive identification from the array.

Turner's alibi was that he was not at the scene of the crime on April 14, 1994, but was with his girl friend and another couple until around 12:30 a.m. His girl friend testified that upon leaving the other couple, she and Turner went home, and that Turner went to sleep while she stayed up watching television until at least 2 a.m.

On November 16, 1995, a jury found Turner guilty of two counts of robbery, one count of first degree forcible sexual assault, and three counts of use of a firearm to commit a felony.

III. ASSIGNMENTS OF ERROR

Turner makes the following assignments of error: (1) The trial court erred in failing to bring Turner to trial within a reasonable time, in violation of the state and federal Constitutions; (2) the trial court erred in failing to bring Turner to trial within 6 months, in violation of Neb. Rev. Stat. § 29-1205 et seq. (Reissue 1995); (3) the trial court repeatedly erred by continuing the trial date and by failing either to advise Turner of his right to a speedy trial and the effect of his consent to a period of delay or to ascertain on the record whether Turner waived his right to a speedy trial; (4) the trial court erred in granting multiple oral motions for continuance without making specific findings of good cause, or any finding that the continuance was only for so long as necessary or that the new trial date was the earliest available, in violation of § 29-1206 and Neb. Rev. Stat. § 25-1148 (Reissue 1995); and (5) Turner was denied effective assistance of trial counsel.

IV. ANALYSIS

1. Statutory Right to Speedy Trial

We first address whether Turner's statutory right to a speedy trial under § 29-1207 has been violated. Section 29-1207 requires discharge of a defendant whose case has not been tried

within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. See, *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987); *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982). The information against Turner was filed on July 15, 1994. Therefore, absent any excluded period of time, the last day for commencement of Turner's trial was January 16, 1995 (January 15 being a Sunday). See *State v. Lafler, supra.* Trial was commenced on November 13, 1995, 301 days beyond the 6-month period. We thus consider whether at least 301 days are properly excluded under § 29-1207 from the speedy trial calculation.

Turner's motion to dismiss on speedy trial grounds was filed on February 8, 1995, and was admittedly directed toward only the State's motion for continuance to allow the FBI to complete its DNA testing. Turner's counsel admits that once the DNA test results were obtained, he was no longer ready for trial.

The February 8, 1995, motion to dismiss was the only time that Turner objected to any delay in his trial. Therefore, the State claims that only the period until February 8 should be considered in the context of Turner's statutory right to a speedy trial. The State relies upon the proposition that an issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. See *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

During oral argument, the State also raised a question regarding whether this court has jurisdiction of the statutory speedy trial issue, because Turner did not timely appeal from the overruling of his motion for discharge filed on May 11, 1995. The State contends that the denial of a motion for discharge on speedy trial grounds is a final order and, thus, must be appealed within 30 days in order for an appellate court to have jurisdiction. See, e.g., § 29-1208; *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996).

We note that in *Lafler*, the defendant's motion for discharge on speedy trial grounds was overruled on April 22, 1986. Trial commenced May 22, and the defendant appealed from his subsequent conviction with a notice of appeal filed August 19. On appeal, we considered the speedy trial issue, even though the

notice of appeal was filed more than 30 days after the motion for discharge was overruled.

Despite the State's arguments, we will assume without deciding that we have jurisdiction in the instant case because Turner has also raised an allegation of ineffective assistance of counsel for failing to raise or properly preserve his rights. We have jurisdiction to consider Turner's constitutional speedy trial claims and his claims of ineffective assistance of counsel, and we will therefore consider all the issues, since they are interrelated.

Considering the period from July 15, 1994, to November 13, 1995, we must determine what, if any, periods of time are properly excluded from the 6-month computation. Section 29-1207(4) states that the following periods shall be excluded in computing the time for trial:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant, 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;
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> (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;
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> (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;

. . . .

(f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

(a) Turner's Pretrial Motions

Under § 29-1207(4)(a), the time from filing until final disposition of pretrial motions by the defendant is excluded in computing the time for trial. On September 26, 1994, Turner made four motions, which were scheduled to be heard on October 5. On February 8, 1995, Turner made two motions which were scheduled for hearing on February 14. On March 3, Turner made the motions described above for DNA testing and a private investigator, which were accompanied by a notice stating that they would be called up by Turner for hearing on March 7. None of the motions were heard on their allegedly scheduled dates, but were instead all heard on May 11.

Turner argues that only those periods during which the motions were reasonably pending, which he contends is that period between the initial filing and the first scheduled hearing, should be excluded. According to Turner, this would amount to 19 days. He contends that although criminal defendants must accept reasonable delays as a consequence of making pretrial motions, judicial delay, absent a showing of good cause, does not suspend the right to a speedy trial.

In *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), we held that a defendant was denied his right to a speedy trial where a motion to suppress filed by the defendant was not heard until 1 year 7 months 24 days after it was filed. The motion was set for hearing a little over 1 month after it was filed. However, the motion was not heard at that time because the judge recused himself. Thereafter, the record indicated no action in the case for 1 year 4 months 26 days, until finally the substituted judge received the transcript and 16 days later ruled on the motion. We concluded that the defendant's rights under § 29-1207 had been violated. In addressing the time period after the substituted judge had been assigned to the case, we stated that a court cannot table a motion and thereby suspend the defendant's rights where judicial delay without a showing of good cause under § 29-1207(4)(f) would otherwise warrant discharge.

In *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), we clarified *Wilcox* by pointing out that where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay. In *Lafler*, the information was filed on September 16, 1985, and a plea in abatement was filed on September 24. On October 8, Lafler's attorney appeared regarding the plea and offered an exhibit. No further docket entries appeared until January 21, 1986, when the court, on its own motion, set arguments for February 4 and then overruled the plea on February 11. The time from the filing of the plea to the court's ruling was 141 days.

Lafler claimed that he was responsible for only the period from the filing of the plea to its first hearing and the period during which the court actually had the plea under advisement. He argued that the remaining time should be charged to the State on account of inordinate and unreasonable judicial delay. In rejecting that proposition, we distinguished *Wilcox* because the delay in *Wilcox* was not based on one of the specifically enumerated or described periods of delay which are excluded under § 29-1207(4)(a). Instead, *Wilcox* involved consideration of whether the delay fell under § 29-1207(4)(f), wherein other periods of delay not specifically enumerated are excludable, "but only if the court finds that they are for good cause."

We pointed out in *Lafler* that, unlike the requirement in § 29-1207(4)(f) that any delay be for "good cause," conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of the time which may be charged to the defendant as a result of the defendant's motions. Rather, the plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. We noted that in this respect, § 29-1207(4)(a) was similar to a provision in the federal Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq. (1982), and that the U.S. Supreme Court in *Henderson v. United States*, 476 U.S. 321, 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986), considered this provision and stated that the plain terms of the act excluded all time between the filing of and the hearing on a motion whether or not the hearing

had been promptly held. Thus, the Court concluded that the period of delay was not required to be reasonable.

We noted that the Nebraska Legislature could have drafted the statute so as to apply a "reasonable time" requirement to the situation described in § 29-1207(4)(a), but that it did not. We likewise declined to do so. We held that

> any delay caused by the defendant's act or conduct, namely, those pretrial situations or matters described or characterized in § 29-1207(4)(a), is automatically excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act. Any period of delay resulting from a defendant's act or conduct specifically mentioned in reference to the pretrial matters or situations described or characterized in § 29-1207(4)(a) is computed without consideration whether such delay was reasonably necessary. However, a period of delay resulting from other than the defendant's act or conduct described or characterized in § 29-1207(4)(a) may be excluded in computing the time for commencement of a defendant's trial, if such delay occurred on account of "good cause," as provided in § 29-1207(4)(f).

State v. Lafler, 225 Neb. 362, 373, 405 N.W.2d 576, 584 (1987).

In the case at bar, the evidence does not establish that the delay in hearing Turner's motions was attributable to judicial neglect. To the contrary, the hearing on May 11, 1995, indicates that the reason for the delay was Turner's counsel's failure to adequately pursue the motions. It is not the State's or the court's burden to pursue the defendant's motions. Such motions are the primary responsibility of the party that brings them, and it will be presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise. The record does not establish Turner's reasons for not pursuing the motions sooner. If Turner had decided not to pursue the motions, they could have been withdrawn and the trial court contacted so the case could have proceeded. Turner cannot take advantage of the delay in being brought to trial where by his own inactions he is responsible for the delay.

See *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983) (under § 29-1207(4)(a), entire period of time in which portion of defendant's pretrial motion for discovery lay dormant was properly chargeable against defendant). " 'An accused cannot generally take advantage of a delay in being brought to trial, where he is responsible for the delay either by action or inaction.' " *Lafler*, 225 Neb. at 370, 405 N.W.2d at 582, quoting *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

Accordingly, we find that the entire period from the filing of Turner's first motions on September 26, 1994, to their final disposition on May 11, 1995, is properly excluded under § 29-1207(4)(a). This is a total of 227 days.

(b) State's Motion for Continuance

While Turner's pretrial motions were pending, on January 5, 1995, the State moved for continuance on the grounds that the DNA analysis of sperm samples taken from the victim had not been completed. Turner opposed the motion, wanting to go to trial without any DNA test results. The trial court, however, granted the continuance and specifically found that there was a legitimate pursuit of evidence and that the delay in obtaining it was through no fault of the prosecution.

Section 29-1207(4)(c)(i) provides that the period of delay resulting from a continuance granted at the request of the prosecuting attorney is excluded in computing the time for trial if 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 a later date. Turner concedes that this period attributable to the State's continuance is properly excluded, and we agree. The court rescheduled the trial for March 20, 1995. Therefore, there are 74 days that are excluded from the 6-month period because of the State's continuance. However, the State's continuance occurred during the time that Turner's pretrial motions were still pending. Thus, the 74 days are already included in the 227 days excluded due to Turner's pretrial motions.

(c) Turner's Motions for Continuance

On May 11, 1995, Turner's counsel requested a continuance to conduct an independent analysis of the DNA samples. Subsequently, on July 11, Turner moved for another continuance, indicating that he was not ready for trial because the DNA analysis was not complete. Accordingly, the trial court reset the trial for a special setting on November 13, at which time the trial did in fact commence. Section 29-1207(4)(b) provides that a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel is excluded from the speedy trial calculation. Turner agrees that his motions for continuance should be excluded under this provision. However, pointing to a docket entry which scheduled the trial for September 26, Turner argues that only the period up to September 26 should be excluded. We disagree.

At the time of the second continuance, Turner's counsel agreed to reset the trial for a special setting on November 13, 1995, and this date was a result of Turner's motion for continuance. Therefore, the entire period from the date of the first motion for continuance (May 11) until the time of trial (November 13) is properly excluded. This totals 186 days.

(d) Determination

Trial commenced November 13, 1995, which was 301 days beyond the 6-month period. The delays excluded due to Turner's motions amount to 413 days and are excluded from the 6-month calculation. We therefore find that Turner's statutory right to a speedy trial has not been violated.

2. Constitutional Right to Speedy Trial

The constitutional right to a speedy trial is found in U.S. Const. amend. VI and Neb. Const. art. I, § 11. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992). 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) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) preju-

dice to the defendant. *Id.* None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Since we have previously found that the delay in bringing Turner to trial was a result of either a good faith pursuit of DNA test results by the State or delays attributed to Turner, it cannot be said that Turner's constitutional right to a speedy trial has been violated. Therefore, we find this assignment of error to be without merit.

3. Failure to Waive Right to Speedy Trial

Turner generally argues that the trial court erred by continuing the trial date, failing to advise Turner of his right to a speedy trial, and failing to ascertain on the record whether Turner waived his right to a speedy trial. We find this argument to be without merit. Having already determined that Turner was not denied his right to a speedy trial, we conclude that there was nothing for Turner to waive and that it was not error for the trial court to fail to advise Turner of his right and ascertain on the record whether Turner had waived it. Turner made numerous pretrial motions within the 6-month period, which extended the trial date.

4. Specific Findings of Good Cause

Turner claims that the trial court committed reversible error by granting motions for continuance in violation of §§ 29-1206 and 25-1148. Section 29-1206 states:

> Applications for continuances shall be made in accordance with section 25-1148, but in criminal cases in the district court the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case.

Section 25-1148 sets forth the procedure to be followed when one applies for a continuance, which includes a requirement that the application be in writing and supported by an affidavit.

Turner argues that the trial court erred because it failed to make any specific findings of good cause or any finding that the continuances were only for so long as necessary. In addition, Turner alleges that the trial court granted at least three oral continuances which are not evidenced by the record. We address only those continuances that are evidenced by the record: two continuances granted at the request of Turner's counsel and one continuance granted at the request of the prosecution.

We note that §§ 29-1206 and 25-1148 do not define whether a defendant's right to a speedy trial has been violated. Rather, they guide the court and the parties in the proper standard and procedure for continuances in light of not only the parties' interests but also the public interest in a reasonably prompt disposition of the case. A motion for continuance is addressed to the discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal. *Korte v. Betzer*, 193 Neb. 15, 225 N.W.2d 30 (1975).

With regard to Turner's motions for continuance, we hold that where continuances are granted at the request of the defendant, the defendant cannot later complain that the court violated §§ 29-1206 and 25-1148 in granting his or her request. With regard to the continuance granted at the request of the prosecution, we reiterate that the trial court specifically found that the continuance was justified under § 29-1207(4)(c)(i). Such a finding inherently includes a showing of good cause, and we note that the trial court properly rescheduled the trial in accordance with the expected date of the arrival of the DNA test results.

As previously discussed, the period attributable to this continuance was properly excluded from the speedy trial calculation, and we can find no basis to conclude that the trial court abused its discretion in granting the continuance. Accordingly, we find Turner's argument that the trial court erred in granting motions for continuance in violation of §§ 29-1206 and 25-1148 to be without merit.

5. Effective Assistance of Counsel

Turner argues that he was denied effective assistance of counsel. 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 and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995). See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Turner alleges that his trial counsel was ineffective by failing to insist that all hearings be conducted on the record, by failing to insist on compliance with the procedures mandated by § 29-1205 et seq., and by failing to renew the speedy trial dismissal motion. Turner also asserts that trial counsel was ineffective by failing to affirmatively advise Turner of his right to a speedy trial and the consequences of waiving that right and by failing to insist that the trial court apprise Turner of that right and obtain a knowing, voluntary waiver of it on the record. We have previously held that Turner's right to a speedy trial was not infringed. Therefore, these arguments are without merit.

Turner also argues that trial counsel was ineffective for stipulating to the evidence regarding the DNA testing. The parties stipulated to the effect that the results of the comparison were inconclusive, but the laboratory could not exclude Turner as the source of the semen. Turner argues that the introduction of such evidence via the stipulation deprived him of the opportunity to vigorously cross-examine the State's expert witness regarding DNA tests, protocol, and the expert's conclusion, and deprived the jury of guidance regarding the weight merited by the DNA evidence. Turner has failed to show that trial counsel was ineffective or that he was prejudiced in this regard. Turner's counsel could reasonably have believed that the fact that the DNA evidence was inconclusive was a fact favorable to Turner's case, which fact trial counsel may have wanted presented to the jury.

Finally, Turner alleges that his trial counsel was ineffective in failing to appear to counsel him at an identification lineup following his arrest and in failing to appear at his first scheduled arraignment.

The identification lineup was conducted prior to the filing of an information against Turner. Turner acknowledges that a suspect in an identification lineup does not have a per se right to counsel until after adversary proceedings have been attached through the filing of an information or indictment. See *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990). Still, Turner claims that counsel's absence was significant and disabling because no other witness positively identified him in the photo array and that the witness' identification was arguably tainted by improper suggestiveness. Upon our review of the record, we find no showing of prejudice in this regard.

With regard to the failure of Turner's counsel to appear at the first scheduled arraignment, we conclude that this failure to appear was inconsequential because the arraignment was properly rescheduled. The delay due to the need to reschedule the arraignment was not charged against Turner in our speedy trial analysis.

Turner has failed to show that his constitutional right to effective assistance of counsel has been violated.

6. Arguments Not Assigned as Error

Turner argues that the trial court committed prejudicial reversible error by excluding him from the multiple hearings conducted by the court on the motions for continuance. This issue has not been assigned as error, and we do not address it. Turner further argues that trial counsel was ineffective by participating in off-the-record hearings outside Turner's presence. This issue was also not assigned as error, and therefore, we do not address it.

V. CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

STATE OF NEBRASKA, APPELLEE, V. THOMAS A. WILSON, APPELLANT.

564 N.W.2d 241

Filed June 13, 1997. No. S-96-525.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Constitutional Law: Criminal Law: Right to Counsel.** An accused has a state and federal constitutional right to be represented by an attorney in all critical stages of a criminal prosecution which can lead to a sentence of confinement. The same constitutional provisions also guarantee the right of an accused to represent himself or herself.
3. **Trial: Right to Counsel.** A defendant's right to self-representation plainly encompasses certain specific rights to have his or her voice heard. The pro se defendant must be allowed to control the organization and content of his or her own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.
4. **Right to Counsel: Waiver.** In order to exercise the right of self-representation, a defendant must first make a knowing and intelligent waiver of the right to counsel.
5. **Constitutional Law: Right to Counsel: Waiver.** An effective waiver of the federal constitutional right to counsel is sufficient to waive the right to counsel under our state Constitution.
6. **Constitutional Law: Right to Counsel: Waiver: Proof.** The State has the burden of establishing a knowing and intelligent waiver of a defendant's constitutional right to counsel.
7. **Criminal Law: Right to Counsel: Waiver.** A knowing and intelligent waiver of the right to counsel can be inferred from conduct. Consideration may also be given to a defendant's familiarity with the criminal justice system.
8. **Right to Counsel: Waiver.** At a minimum, the determination of whether a waiver is knowing and intelligent requires that the accused be made sufficiently aware of the right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel.
9. **Right to Counsel.** A trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but the warning is not required.
10. ____. A defendant may not use his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.
11. ____. The district court may, in its discretion, allow a pro se defendant to act as cocounsel with appointed counsel but is not required to do so.
12. ____. The appointment of standby counsel for a pro se defendant is within the discretion of the trial court.
13. **Trial: Prosecuting Attorneys: Evidence.** A prosecutor's closing argument must be based on evidence received during the trial.

14. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
15. **Appeal and Error.** An appellate court reserves the right to address plain error of such a nature that it would result in a miscarriage of justice or damage to the integrity, reputation, or fairness of the judicial process if not corrected.
16. **Criminal Law: Due Process: Trial: Convictions: Sentences.** Imposing a harsher sentence on the retrial of a criminal charge would violate due process of law if motivated by vindictiveness toward a defendant for having effectively attacked his or her first conviction.
17. **Trial: Judges: Sentences: Records.** A judge imposing a more severe sentence on a defendant after a second trial must make an affirmative statement on the record of his or her reasons for doing so.
18. **Constitutional Law: Trial: Judges: Sentences.** A trial judge is not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or from other sources.
19. **Constitutional Law: Due Process: Sentences.** Due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights.
20. **Judges: Sentences.** A judge or other sentencing authority is to be accorded wide discretion in determining an appropriate sentence and should be permitted to consider any and all information that might reasonably bear on the proper sentence for the particular defendant, given the crime committed.
21. ____: ____. A sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.
22. ____: ____. 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.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Michael J. Tasset, of Johnson and Mock, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

In 1986, a jury convicted Thomas A. Wilson of second degree murder and use of a firearm in the commission of a felony in connection with the shooting death of his son, Robert Paul Wilson, on August 31, 1983. He received consecutive sentences of 35 years' imprisonment on the second degree murder charge and 6 to 20 years' imprisonment on the firearm charge. We affirmed the convictions in *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987). After successfully petitioning for postconviction relief, Wilson was retried and convicted of both charges in the district court for Douglas County in April 1996. He was sentenced to 50 to 60 years' imprisonment on the second degree murder charge and 6 to 20 years' imprisonment on the firearm charge, with the sentences to run consecutively and credit for time served. Wilson now appeals those convictions and sentences. Finding no prejudicial error, we affirm.

FACTS

The circumstances pertaining to the August 31, 1983, shooting are summarized in *Wilson, supra*, and will not be repeated here except to the extent pertinent to the issues raised in this appeal.

Wilson appeared at his arraignment on August 4, 1995, with Clarence Mock, an attorney who had been appointed by the court on July 28, 1995, to represent him. At the arraignment, the prosecutor asked whether several pending motions which Wilson had filed on his own behalf would be withdrawn because Wilson had an appointed counsel. Wilson replied, "I've asked for counsel, if you've noticed, to assist me, not to be appointed to defend me, but to assist me. In other words, where we can work together." The court stated that the issue of representation would be taken up at a future hearing and that Wilson would be advised regarding his Fifth and Sixth Amendment rights if he decided to represent himself with an appointed legal advisor. The court suggested Wilson discuss these issues with Mock before the next hearing.

At a status hearing on August 10, 1995, the district court stated it wanted to schedule a hearing regarding Wilson's request to represent himself. The court advised Wilson that it

wanted to give him additional time to get acquainted with Mock and that perhaps, Wilson would change his mind about wanting to appear pro se because "the statistics on people representing themselves especially in serious cases is not very good." The court then scheduled a hearing to deal with this issue on September 13.

Wilson appeared with Mock at the hearing on September 13 and informed the court that he was "going to cooperate with the attorney by working together." The court again asked if he was going to act as his own counsel. Wilson replied, "I'm going to participate." The court told Wilson that he had not answered the question, and Wilson stated, "I'm not waiving my right to an attorney, if that's what you're asking me." Thereafter, the court stated, "All right. So you would like to have counsel?" Wilson did not respond. Mock then requested a few minutes to speak with Wilson, and the court ordered a short recess. When the parties returned, the court stated on the record:

> Mr. Wilson, maybe it would help if I talked a little bit about what a lawyer does in a criminal proceeding. As a defendant in a criminal action, you always have the right to direct your own defense whether you have a lawyer or not. And I don't want you to think that if you have counsel represent you in your trial, that you're turning over control of your case to someone else. You still have a right to make all of the crucial decisions that are going to go into the trial of this case from your perspective. But I need to know whether or not you want to have a lawyer represent you in this proceeding. If you do, I would designate counsel to represent you.
>
> And the difference between having someone represent you in the trial and having someone assist you is that if you have counsel representing you in the trial, that person is assuming professional responsibility for your defense. If you do not have a lawyer, but if you simply have an assistant at trial, there would be someone there for you to utilize as a legal resource. But that person would have no responsibility for representing you in the trial and would be a passive resource for you if you wanted advice. There's a big difference between having a lawyer repre-

> sent you and having an assistant there to go to when you have a question.

Wilson told the court that he had represented himself in previous prosecutions and that he understood the responsibility it put on him. He then stated that "now you're telling me that I have a right to make the decisions . . . . And under them circumstances, certainly, I would love to have a lawyer." The court again asked Wilson if he wished to be represented by counsel, and Wilson answered affirmatively. Mock therefore continued as counsel of record for Wilson.

On December 11, 1995, Wilson appeared with Mock at a bond hearing. During the hearing, Wilson discussed his first trial in which he was represented by a deputy public defender. Wilson also complained that he had recently been unable to have documents copied in jail because he was represented by an attorney. He then stated, "I say, I'm still pro se. I have an attorney to assist me. But everybody in the world, from the beginning to the end, even up to this point, has done everything in the world to deter me from trying to go on and bring out the truth." The court interrupted Wilson, stating:

> I've had a chance to read through some of the appellate opinions in the Federal Courts involving former prosecutions and you. And I know that you have always attempted to insinuate yourself into the proceeding, even when you've been represented by counsel, and that you have participated personally in other prosecutions. And so I know that what we're dealing with here is a process that's not unfamiliar to you.

During a hearing on pending motions held on January 8, 1996, Wilson appeared with Mock but attempted to address the court. When the court instructed him to let Mock speak on his behalf, Wilson stated, "Well, I'm representing myself." The court reminded Wilson that he was represented by counsel, but Wilson insisted, "I want to represent myself." The court then advised Wilson that if he wished to represent himself, Mock would no longer serve as his attorney of record but would remain in the case as his legal advisor. The court further explained that under this arrangement, Wilson would be acting as his own lawyer and that Mock would not actively participate

in the trial but would be available to advise Wilson. Wilson responded, "Very well."

The district court then expressed its belief that Wilson understood the difference between representation by counsel and self-representation from his prior criminal prosecutions. The court nevertheless explained the charges against him, the nature of the State's burden of proof, his right to a trial by jury, the presumption of innocence, and his privilege against self-incrimination. The court also explained the difference between an advocate and a witness, and the necessity of maintaining that distinction when acting as one's own attorney. The court further ascertained that Wilson was not under a doctor's care or taking any prescription medication and that he had not consumed any alcohol, drugs, or mood-altering substances within the previous 24 hours. The court asked Wilson if anyone had threatened, coerced, or promised him anything in exchange for having him act as his own lawyer. Wilson replied that he had been "challenged" to defend himself and that he was going to do it because he was not able to reach the lawyer. Wilson again went into a detailed description of his first trial and his goals for the current litigation. During this hearing, the court made a finding that Wilson had freely, knowingly, and voluntarily waived his right to counsel, and it authorized Mock to withdraw as defense counsel but remain in the case as an advisor to Wilson.

Four days later, during a hearing on January 12, Wilson complained of the court's finding that he had waived his right to counsel, stating:

> I continuously asked and know that I am at an overwhelming disadvantage without counsel to assist me. But I asked for counsel — for effective assistance of counsel. I didn't ask for counsel to represent me, so I could participate in my trial. I'm not trying to say I don't need an attorney because I know I certainly will be at an awful disadvantage without an attorney professionally and truly assisting and guiding and helping me, see. But I mean—
>
> And then I would just like the record to know that I did not ask for not to have counsel or freely waive any right to counsel. I certainly pleaded and begged for counsel all

> over the country. I've sent letters out all over the country looking for assistance of counsel.

The court reiterated that it had released Mock as defense counsel at Wilson's request and that Mock would act as Wilson's legal advisor. The court also informed Wilson that if he wanted Mock to appear as his attorney in the future, the relationship could be adjusted.

At a hearing on February 8, 1996, Wilson stated:

> [A]fter a certain time, after I feel that I've been allowed to have my input, I will turn it over to my very trustworthy counsel and let him do his professional job as counsel. And I will shut up until I'm put on the witness stand, and I want the jury to know I will be on the witness stand, and I will answer any questions that is put to me by anybody.

The court announced that it intended to authorize a psychiatrist, Dr. Beverly Mead, to evaluate Wilson's ability to represent himself at trial.

Dr. Mead examined Wilson on February 14, 1996. In his report, Dr. Mead described Wilson as cooperative, eager, and willing to offer more information than necessary when asked a question. Dr. Mead informed Wilson of the purpose of the interview and recorded that Wilson

> explain[ed] quite clearly but with much emotion that he had chosen to represent himself but was still asking for guidance and advice. He named an attorney, Clarence Mok, [sic] whom he said he respected and who could advise him, but he did not want him to represent him. He was told that the court should have no objection to this but he then explained that in order to have the "effective assistance of counsel" which he says the law allows, he feels it would be necessary for Mr. Mok [sic] to be allowed to speak in the court rather than just advising him in practice. This examiner explained that he did not know if this could be allowed unless Mr. Mok [sic] was actually serving as his attorney by taking action in his behalf. Mr. Wilson continued to argue that this was what he had already been told but he found nothing in the law to actually confirm this. He intended to made a point in the courtroom challenging this issue.

Dr. Mead concluded that Wilson did not suffer a disorder significant enough to consider him incompetent to stand trial in this case.

At a March 11, 1996, hearing, Wilson represented himself with one of Mock's associates appearing as his "court appointed legal advisor." Near the close of the hearing, the district court again brought up the subject of Wilson's representation, stating:

> I know you've done this before in other criminal prosecutions, and this won't be the first time that you've represented yourself.
>
> But just so the record will be complete that we have visited about this question, I want to be sure that you understand that if you were to have counsel represent you at trial and not just act as your advisors as they are now, that you would have the option to make what choices, strategy choices you choose, including testifying yourself. So if your choice to represent yourself in this proceeding is based upon your belief that that's the only way that you'll be permitted to testify in your own defense, you don't have to do that. Okay.

The following dialog then occurred:

> THE COURT: Okay. What I'm suggesting to you is that in this trial if you have Mr. Mock and his associates represent you, you'll still be able to make those strategic choices whether —
>
> THE DEFENDANT: Oh, I will?
>
> THE COURT: Sure.
>
> THE DEFENDANT: Beautiful. I would love to have them represent me.
>
> THE COURT: But you need to understand that if they're going to represent you at trial, they will represent you. I will not —
>
> THE DEFENDANT: Allow me to —
>
> THE COURT: I will not permit a situation to occur where they ask questions for a while and then you ask questions for a while.
>
> THE DEFENDANT: Yeah. I understand.
>
> THE COURT: Then they ask question for a while.
>
> THE DEFENDANT: Right.

The court determined that it would not "switch gears" that day but wanted Wilson to understand his options and that the question of Wilson's waiver of a right to counsel would be taken up again before trial commenced.

The first day of trial was April 2, 1996. On that date, Wilson appeared with Mock acting as his court-appointed legal advisor. Before the trial began, the court stated it understood Wilson would be representing himself and inquired of Wilson if that understanding was correct. Wilson responded that it was. The court again informed Wilson of the possible consequences of self-representation and explained Mock's role if he acted as an advisor. The court also explained, in detail, the process of jury selection, the charges against Wilson, and his rights as a defendant. The following dialog then occurred:

> THE COURT: . . . And throughout this process, you're entitled to counsel. I understand that you have and you continue to insist that you wish to represent yourself. Is that accurate?
>
> THE DEFENDANT: I wish to speak — yes, and represent myself with the effective assistance of counsel.
>
> THE COURT: . . . you are entitled to reasonably effective assistance of counsel to ensure that a trial is fair. You have chosen, however, to forego that right.
>
> THE DEFENDANT: No. No. Definitely I have not done that.
>
> THE COURT: I'm not asking you to agree with me, and I'm not asking you to accept this. I am telling you that is what you've done. You have voluntarily agreed to forego your right to effective counsel and the ability that effective counsel have to ensure that the trial process is fair. What you have in place of that is a lawyer who will advise you of this if you take questions to him, he will do his best to answer those questions as the trial progresses.

Wilson represented himself during voir dire and in the initial days of trial, with Mock present as his legal advisor. On the third day of trial, before the jury was brought in, Wilson informed the court that Mock told him he was "totally getting walked over" because he was not recognizing and objecting to improper questions by the prosecutor. Wilson then stated:

> You know, so I wanted to turn the case over to him to question witnesses because he's trained in that — in law and the proper way of doing that. And I agreed with him. So I said, okay, but I want it understood that I take the stand. And he said, well I understand that. I said, you know, so if I turn the case over to you, that don't mean I got to do as you see fit and not take the stand. I don't want to go through that again, see. And then you says that I can't do that. I can't switch in midstream. So I said, okay. So I — then I keep reading law. And it says here, however, the right of a party who has appeared in pro se — it says another word — subsequently to associate himself with an attorney in conduction of the case has been recognized. And a party who elects to employ counsel at any stage — any stage of the proceedings may not be deprived of counsel's service for the reason that he has therefor appeared in person.

The court explained that it had not understood that Wilson wished to withdraw his waiver of his constitutional right to counsel and asked him if that was, in fact, what he was doing. Wilson did not answer directly, and the court then stated:

> [W]e're either going to do it one way, or we'll do it the other way. I want you to be your own lawyer, or I want Mr. Mock to represent you, but I don't want to do both of them. I told you the other day, we can't split up duties, have you do some things, have Mr. Mock do some things, and then have you do some more things. You can be your lawyer, represent yourself through the rest of this trial, or we can ask Mr. Mock whether he'd be willing to resume your defense with your commitment that he would act as your lawyer through the rest of the proceeding, understanding that you have the right to make your own choice with regard to testifying in your own defense.

After further discussion, the court recessed to permit Wilson to confer privately with Mock. When the court reconvened, the judge asked if Wilson had a chance to visit with Mock. Wilson said that he had. Wilson then stated:

> Well, Mr. Mock says that he can't do it my way. And he wouldn't subpoena the people that I feel that could or

> would help in my defense, and he can't help me get them records of the proceedings that went on before this that I wanted to — in order to prepare my defense.

Further discussion ensued, and the court asked Wilson, "So at this point you're going to continue representing yourself?" Wilson replied, "Right."

During trial, Wilson argued that the fatal shot was fired while he was struggling with his son in an attempt to take the gun away from him. A prosecution witness testified that she observed Wilson holding the gun some distance away from his son and moving toward him immediately after the fatal shot was fired.

Omaha police Capt. Anthony Infantino testified as a witness for the State. During cross-examination conducted by Wilson, Infantino testified that he observed what appeared to be a "close contact wound from a firearm" on the body of Wilson's son when he examined it at the hospital. He testified that such a wound would result from the firearm being held "right up against the person's body" at the time the shot was fired. This testimony was consistent with Wilson's contention that the gun was fired at very close range.

In his closing argument, the prosecutor attempted to discredit Infantino's characterization of the wound by arguing that Infantino was not a homicide detective and that he had only attended approximately 12 autopsies, which was supported by the record. The prosecutor then stated:

> This is the same Captain Infantino . . . who several weeks ago told the community that a police officer had shot another police officer in executing a search warrant. And then a few days later after the experts looked at it said, wait a minute. It wasn't a police officer shooting.

Wilson immediately objected, and the district court sustained the objection, stating in the presence of the jury that "[t]he prior observations about Captain Infantino are not a matter of record in this case." Wilson did not move for a mistrial.

On April 12, 1996, the jury found Wilson guilty of murder in the second degree and of use of a firearm in the commission of a felony. After ordering a presentence investigation, the court sentenced Wilson on April 23 to 50 to 60 years' imprisonment

for second degree murder and 6 to 20 years' imprisonment for use of a firearm to commit a felony, with the sentences to be served consecutively. Wilson was given credit for 3,758 days served since his original convictions.

ASSIGNMENTS OF ERROR

Wilson claims the trial court erred in (1) finding that he intelligently and voluntarily, with knowledge of his right to counsel, waived his right to counsel; (2) failing to order a mistrial following prejudicial remarks made by the State in its closing; and (3) subjecting Wilson to harsher sentences than he had received as a result of his convictions in an earlier trial on the same charges.

STANDARD OF REVIEW

A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege; therefore, the key inquiry is whether one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997); *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997).

ANALYSIS

Waiver of Right to Counsel

In his first assignment of error, Wilson claims the district court erred in finding that he "intelligently and voluntarily, with knowledge of his right to counsel, waived his right to counsel under the Sixth and Fourteenth Amendments [to] the Constitution of the United States and Article I, § 11 of the Constitution of the State of Nebraska."

An accused has a state and federal constitutional right to be represented by an attorney in all critical stages of a criminal prosecution which can lead to a sentence of confinement. See,

U.S. Const. amend. VI and XIV; Neb. Const. art. I, § 11; *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Dean, supra*. The same constitutional provisions also guarantee the right of an accused to represent himself or herself. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991).

> A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial.

McKaskle v. Wiggins, 465 U.S. 168, 174, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

In order to exercise the right of self-representation, a defendant must first make a knowing and intelligent waiver of the right to counsel. *Faretta, supra*; *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996); *Green, supra*; *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985). A defendant contemplating self-representation "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. at 835, quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942). An effective waiver of the federal constitutional right to counsel is sufficient to waive the right to counsel under our state Constitution. *Dean, supra*. The State has the burden of establishing a knowing and intelligent waiver of a defendant's constitutional right to counsel. *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); *Green, supra*.

In determining whether there has been a knowing and voluntary waiver of the right to counsel, the key inquiry is whether the defendant was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel. See *Dean, supra*. A knowing and intelligent waiver can be inferred from conduct. Consideration may also be

given to a defendant's familiarity with the criminal justice system. *Meyer v. Sargent*, 854 F.2d 1110 (8th Cir. 1988); *Green, supra*. The waiver of constitutional rights must be done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). At a minimum, the determination of whether a waiver is knowing and intelligent requires that the accused be made sufficiently aware of the right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel. *Green, supra*. We have held that a "trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but that the warning is not required." *Id.* at 335, 470 N.W.2d at 744.

Viewing the record in its entirety, we conclude that Wilson knowingly and intelligently waived his Sixth Amendment right to counsel in order to exercise his *Faretta* right to self-representation. Wilson had personal experience upon which to evaluate his options. He had been represented by counsel in his first trial on the charges of second degree murder and use of a firearm in the commission of a felony. Previously, he had represented himself with an appointed legal advisor in a federal prosecution for receiving stolen goods. *United States v. Wilson*, 523 F.2d 828 (1975).

Although not required to do so under *Green*, the district court repeatedly advised Wilson of the potential dangers of self-representation. The court also urged Wilson to discuss the matter with his appointed counsel before making any final decisions to represent himself.

Wilson contends that his waiver of counsel on the first day of trial was not *knowing and voluntary* because he had previously been misinformed by the district court about the degree of control which he could personally exert over his defense if he chose to exercise his right to counsel. We disagree. Although the district court did inform Wilson on several occasions that he would retain certain *control* over his defense if he exercised his right to counsel, it is clear from the context of these remarks that the court was simply advising Wilson that if he were represented by an attorney, he would have input with respect to strategic and tactical decisions made by the defense counsel, but would not

be permitted to personally conduct the defense. Wilson clearly understood that he could personally control and present his case only if he proceeded pro se; this is precisely why he insisted on representing himself.

Wilson's understanding of the distinction between representation by counsel and self-representation is evident from his own words to the jury during his opening statement. After introducing Mock to the jury as "my dependable, trustworthy, and helpful advisor," Wilson stated:

> I stand here before you talking because the trial tactics and strategy and duty is — is the duty of the one charged with representation of the defendant's presentation of the case. And if the defendant represents him or herself, then and only then can they make those decisions, those rough decisions concerning tactics and strategy. . . .
>
> . . . .
>
> Am I doing the right thing trying to be heard in my own words? I've been told by everybody that all you people are going to get mad at me for trying to explain it the way I am. I went the first time with the lawyer. I was told I couldn't do this; I couldn't do that. So this time I worked very hard, over ten years to learn something about how to present something to you people to bring forth the truth and bring forth what's going on here.

Wilson added later in his opening statement, "And please, please, don't hold it against me for being here and not allowing Mr. Mock to do this."

A defendant may not use "his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice." *State v. Green*, 238 Neb. 328, 336, 470 N.W.2d 736, 745 (1991). Accord *State v. Denbeck*, 219 Neb. 672, 365 N.W.2d 469 (1985). The record reflects that Wilson attempted to do just that by repeatedly insisting that he was not waiving his right to counsel because he was "representing [him]self with the effective assistance of counsel." In essence, Wilson insisted on appearing pro se as cocounsel with his appointed attorney. The district court repeatedly advised Wilson that this would not be permitted. Wilson's

comments to Dr. Mead reflect that he understood what the court was telling him but disagreed with it.

While we have not ruled on the precise issue of whether a pro se defendant has a right to serve as cocounsel with an attorney appointed to represent him, the Nebraska Court of Appeals has recently held that this type of "hybrid representation" is not a matter of right but is left to the discretion of the trial court. *State v. Frear*, 5 Neb. App. 578, 561 N.W.2d 591 (1997). See, also, *U.S. v. Stevens*, 83 F.3d 60 (2d Cir. 1996) (holding that trial court did not abuse its discretion in refusing to allow defendant to serve as cocounsel); *U.S. v. Olano*, 62 F.3d 1180 (9th Cir. 1995) (holding that there is no constitutional right to hybrid representation); *People v. Kirkpatrick*, 7 Cal. 4th 988, 874 P.2d 248, 30 Cal. Rptr. 2d 818 (1994) (holding that defendant cannot be represented by counsel and proceed pro se at same time); *Lock v. State*, 273 Ind. 315, 403 N.E.2d 1360 (1980) (holding that it is within trial court's discretion to allow defendant to act as cocounsel). We agree with the analysis of the Court of Appeals in *Frear* and hold that the district court may, in its discretion, allow a pro se defendant to act as cocounsel with appointed counsel but is not required to do so.

In this case, the district court made it clear that it would not permit Wilson to have a cocounsel relationship with his appointed counsel but would designate counsel as a "legal advisor" if Wilson insisted on conducting his own defense. We have held that the appointment of standby counsel for a pro se defendant is within the discretion of the trial court. *Green, supra*. This holding is consistent with the rights outlined by the U.S. Supreme Court. In *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984), the defendant was pro se and had standby counsel. The Court stated that while *Faretta* gave a defendant the right to proceed without counsel, it did not require a court to permit the hybrid representation that Wiggins was granted. In this case, after the court determined that Wilson knowingly and intelligently waived his right to counsel and asserted his *Faretta* right to self-representation, it properly exercised its discretion to designate Wilson's former appointed counsel as a "legal advisor" to Wilson. As we have noted, the fact that Wilson had the advice of counsel throughout his pros-

ecution is further indication that his waiver of counsel and election to represent himself was knowing and voluntary.

This is not a case where the accused exercised his or her right to counsel because the accused was misinformed about the degree of control he or she could exercise over his or her defense if represented. To the contrary, Wilson waived his right to counsel and exercised his right of self-representation with full knowledge and understanding that this was the only way in which he could personally control and present his own defense by conducting voir dire, addressing the jury directly during opening statement and closing argument, and personally cross-examining the State's witnesses. A waiver of counsel need not be prudent, just knowing and intelligent. *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). The record clearly demonstrates that Wilson knowingly and intelligently waived his right to counsel, and his first assignment of error is therefore without merit.

PROSECUTORIAL MISCONDUCT

Wilson next contends that the district court erred in not ordering a mistrial following the remarks made by the prosecutor concerning Captain Infantino in his closing argument. A prosecutor's closing argument must be based on evidence received during the trial. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). The prosecutor's reference to Infantino's mistaken comments about an unrelated shooting violated this rule, since there was no evidence in Wilson's trial concerning those comments. Wilson made a timely and proper objection to the prosecutor's remark, and his objection was sustained. However, Wilson did not move for a mistrial.

A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. See, *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994); *State v. Parker*, 180 Neb. 707, 144 N.W.2d 525 (1966). Wilson admits that he made a tactical decision not to move for a mistrial because he did not want to remain incarcerated while waiting for a retrial and believed that the jury would "recognize and remember the State's strategy for the

improper tactic it was." Brief for appellant at 20. By not moving for a mistrial, Wilson failed to preserve any error created by the prosecutor's misconduct. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991).

An appellate court reserves the right to address plain error of such a nature that it would result in a miscarriage of justice or damage to the integrity, reputation, or fairness of the judicial process if not corrected. *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). The prosecutor's argument based upon facts which he knew were not in the record was unquestionably improper and troublesome to this court. However, we cannot conclude from the record that this single remark to which an objection was sustained was so prejudicial to Wilson or injurious to the integrity of the legal process as to justify reversal on appeal under the plain error doctrine. Thus, Wilson's second assignment of error is without merit.

SENTENCING

In his final assignment of error, Wilson argues that the court erred in imposing a harsher sentence for the charge of second degree murder than he had received in the first trial on the same charge, without articulating aspects of Wilson's conduct subsequent to the first sentencing which justified the harsher sentence. In resolving this issue, we start with the decision of the U.S. Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *rev'd on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), which held that imposing a harsher sentence on the retrial of a criminal charge would violate due process of law if motivated by vindictiveness toward a defendant for having effectively attacked his or her first conviction. The Court concluded that in order to assure the absence of such a motivation, a judge imposing a more severe sentence on a defendant after a second trial must make an affirmative statement of his or her reasons for doing so, that 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," and that the factual basis establishing such conduct must be included in the record. 395 U.S. at 726.

In *Pearce*, the Court recognized that the Constitution does not impose an

> absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams v. New York*, 337 U.S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources.

395 U.S. at 723.

Two cases decided by the U.S. Supreme Court subsequent to *Pearce* further define the Court's holding in *Pearce*. In *Wasman v. United States*, 468 U.S. 559, 568, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984), the Court clarified its holding in *Pearce* by stating that "due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by *actual vindictiveness* toward the defendant for having exercised guaranteed rights." The Court recognized that a judge or other sentencing authority "is to be accorded very wide discretion in determining an appropriate sentence" and should be permitted to consider "any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." 468 U.S. at 563. The Court noted that *Pearce* had been interpreted to hold that whenever a sentence on reconviction was more severe than the original sentence, there was a presumption of vindictiveness which could be rebutted by the sentencing court placing factual information on the record to justify the second sentence and to show that it was not motivated by vindictiveness. In holding that an unrelated criminal conviction after the imposition of the first sentence was a proper basis for enhancement even though the conduct which led to the conviction occurred prior to the first sentence, the Court concluded that "a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct *or events* that occurred subsequent to the original sentencing proceedings." (Emphasis supplied.) 468 U.S. at 572.

In *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986), the Supreme Court held that a harsher sentence following the retrial of a murder case was justifiable on the basis of new evidence about the murder which came out for the first time in the second trial. The Court found that the "presumption of vindictiveness" was inapplicable, 475 U.S. at 138, because the second trial occurred on the court's own motion and different sentences assessed the first and second sentences. However, the Court stated, "Even if the *Pearce* presumption were to apply here, we hold that the findings of the trial judge overcome that presumption. Nothing in *Pearce* is to be read as precluding a rebuttal of intimations of vindictiveness." 475 U.S. at 141.

In *State v. Golden*, 230 Neb. 284, 286, 430 N.W.2d 900, 901 (1988), we interpreted *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *rev'd on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), as permitting a harsher sentence following retrial "where events subsequent to the first trial had shed new light on the defendant's character and where the reasons for imposing a heavier sentence appeared in the record." However, in that case, we held that a harsher sentence was not justified because the record contained no evidence of a material change in circumstances since the first sentencing. See, also, *State v. McArthur*, 230 Neb. 653, 655, 432 N.W.2d 839, 841 (1988) (holding that sentence void because "the record is devoid of any explanation for the increase in the minimum sentences"); *State v. Lopez*, 217 Neb. 719, 721, 350 N.W.2d 563, 565 (1984) (holding that no new or additional information "concerning either the facts of the offenses or adverse information concerning other past offensive conduct was presented").

However, prior to *Golden*, we upheld the imposition of a harsher sentence following retrial in *State v. Beach*, 215 Neb. 213, 337 N.W.2d 772 (1983), where the sentencing judge noted on the record that the retrial changed his perception of the defendant. The judge was convinced that the conduct for which the defendant had been convicted was far more serious than had appeared at the time the guilty plea led to the first conviction, for which the defendant had been placed on probation. Because

of this, the judge felt that imprisonment was essential following the second conviction.

We have held that 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. Orduna*, 250 Neb. 602, 612-13, 550 N.W.2d 356, 363 (1996).

In this case, the district court noted certain "differences" between Wilson's first and second trials. The court observed that Wilson had changed his theory of defense from accident or suicide in the first trial to self-defense in the retrial. Additionally, at the first trial, a trip Wilson took to Florida was alluded to but was left largely unexplained. In the 1996 trial, it was discovered that the goal of the Florida trip was to rob a drug dealer for an associate of Wilson. Also in the first trial, there was sparse evidence of Wilson's personal life. In contrast, the 1996 trial revealed that Wilson had a background as a thief and a robber. The court also considered the fact that Wilson did not testify in the first trial but did in the 1996 trial and that his testimony was discredited by the jury. The court then stated that its primary objective was public safety and that it considered Wilson an "unrepentant murderer," who, in the interest of public safety, should be kept "in a very secure place for a long time." 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. The district court, therefore, did not err in imposing a harsher sentence on Wilson following his reconviction for second degree murder.

We, therefore, affirm the judgment of the district court in its entirety.

AFFIRMED.

ALLEN KINDRED, APPELLANT, V. CITY OF OMAHA EMPLOYEES' RETIREMENT SYSTEM, APPELLEE.

564 N.W.2d 590

Filed June 20, 1997. No. S-95-787.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Attorney Fees: Contracts.** The common fund doctrine is an exception to the general rule that the right of an attorney to be compensated for his services depends upon an express or implied contract of engagement.
3. **Attorney Fees: Equity.** An attorney who renders services in recovering or preserving a fund in which a number of persons are interested may in equity be allowed his compensation out of the whole fund only where his services are rendered on behalf of, and are a benefit to, the common fund.
4. **Attorney Fees.** The common fund doctrine presupposes the existence of a fund.
5. ____. A common fund must be an immediate fund from which attorney fees may be awarded at trial.
6. ____. In the absence of a fund within the control of the court, an attorney is not entitled to recover fees under the common fund doctrine merely because his actions conferred a benefit on members of a class.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas F. Dowd, of Dowd & Dowd, for appellant.

Kent N. Whinnery, Deputy Omaha City Attorney, and Jo A. Cavel for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Allen Kindred brought this action against City of Omaha Employees' Retirement System (Retirement System) for reimbursement of attorney fees which he paid in connection with his workers' compensation action against the city of Omaha (City), his former employer. Pursuant to a city ordinance, the monthly disability benefits which Kindred receives from Retirement System are reduced by the amount of his workers' compensation benefits. Kindred alleged that since he paid his attorney one-third of the workers' compensation benefits pursuant to a contingent fee agreement, he was entitled to recover these fees

from Retirement System under the common fund doctrine. Following a bench trial, the district court for Douglas County concluded that the common fund doctrine was inapplicable and entered judgment in favor of Retirement System. We affirm that judgment.

FACTS

On September 17, 1991, Kindred sustained a work-related injury to his back in the course of his employment with the City. Shortly thereafter, Kindred began receiving temporary total disability and medical benefits from the City.

After completing a "work hardening" program, Kindred began working part time in a temporary job with the City in August 1992. By October of that year, Kindred was working 6 hours a day in another temporary position with the City. At that time, the City discontinued his workers' compensation benefits.

Kindred was not represented by an attorney with respect to his workers' compensation claim until November 11, 1992, when he retained counsel and entered into a contingent fee agreement which required him to pay his attorney one-third of all workers' compensation benefits received after that date.

On January 21, 1993, the City authorized permanent partial disability payments to Kindred retroactive to October 24, 1992. On January 27, 1993, Kindred submitted an application to Retirement System for a service-connected disability retirement due to his 1991 back injury. On February 17, 1993, Retirement System's board of trustees granted Kindred a $1,219.92-per-month disability retirement pension, effective February 18, pursuant to Omaha Mun. Code, ch. 22, § 22-35 (1989). Section 22-35 states, in relevant part:

> Any member of the system who has at least five (5) years of service credit and has sustained and/or shall sustain injuries or sickness, which immediately or after a lapse of time permanently unfit such member for active duty, shall receive a monthly disability pension as long as he or she remains unfit for active duty or until he or she reaches age sixty-five (65), whichever event occurs first. Such monthly disability pension in combination with workers' compensation and social security shall not exceed sixty (60) per

> cent of such member's base compensation for the last full month prior to disability.

The parties agree that the language of § 22-35 allows Retirement System to offset 100 percent of Kindred's workers' compensation award against a retirement pension.

On July 20, 1993, Kindred filed a petition in the Nebraska Workers' Compensation Court, seeking permanent disability and vocational rehabilitation benefits for the September 17, 1991, injury.

Following a trial, the Workers' Compensation Court entered an award on March 14, 1994, in which it found that Kindred was not permanently and totally disabled, but that he had suffered a decrease in earning power and was, therefore, entitled to (1) weekly benefits of $159.35 per week for 251⅞ weeks for a 50 percent loss of earning power, (2) $265 per week for 48⅝ weeks for temporary total disability, and (3) participation in an approved vocation rehabilitation plan at Metropolitan Community College. The Workers' Compensation Court did not award attorney fees.

On May 18, 1994, Kindred's attorney appeared before Retirement System's board of trustees and requested that one-third of the amount of workers' compensation benefits which were applied as an offset against Kindred's disability retirement pension be returned to Kindred to reimburse him for the attorney fees he incurred in the workers' compensation case. The board of trustees agreed to reimburse Kindred for attorney fees and costs with respect to some of his permanent partial disability benefits in the total amount of $5,991, but denied Kindred's claim for reimbursement of other attorney fees.

On July 11, 1994, Kindred commenced this action in the district court for Douglas County, contending that Retirement System had benefited from offsetting 100 percent of Kindred's workers' compensation benefits against his service-connected disability pension entitlement and should, therefore, be required, under the common fund doctrine, to reimburse Kindred in the full amount of attorney fees which Kindred paid with respect to those benefits. After a bench trial on March 21, 1995, the district court entered judgment for Retirement System on June 23. The court concluded that the attorney's efforts had

not created a common fund but instead had resulted in workers' compensation benefits which were offset against Kindred's disability retirement pension by operation of the ordinance. The district court found that Kindred was receiving all of the workers' compensation and disability retirement benefits to which he was entitled and that it would be unfair to require Retirement System to pay the fee which he contracted to pay his attorney in the workers' compensation case in the absence of language in the ordinance creating such an obligation.

Kindred filed a motion for a new trial, which the district court overruled on July 14, 1995. On July 19, Kindred filed this appeal. We removed the case to this court's docket pursuant to the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) to regulate the dockets of the Nebraska Court of Appeals and this court.

ASSIGNMENTS OF ERROR

Restated and summarized, Kindred's assignments of error contend that the district court erred in concluding that the common fund doctrine did not provide a basis for his claim for reimbursement of attorney fees incurred to procure an increase in workers' compensation benefits.

STANDARD OF REVIEW

This case presents a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997); *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997).

ANALYSIS

The only issue presented in this appeal is whether the common fund doctrine obligates Retirement System to reimburse Kindred for the fee which he agreed to pay his attorney in the workers' compensation action. The common fund doctrine is an exception to the general rule that the right of an attorney to be compensated for his services depends upon an express or implied contract of engagement. *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961). We recognized and applied the doctrine in *Hills*, stating:

> "An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund."

172 Neb. at 132, 109 N.W.2d at 177. In *Hills*, we held that an attorney who had negotiated a tort settlement on behalf of his client had a right to receive compensation from an insurance company which held a subrogation claim paid out of the settlement, despite the fact that he had no express or implied contract of engagement with that company. In that case, the common fund consisted of settlement proceeds obtained through negotiation. See, also, *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), *modified* 184 Neb. 638, 170 N.W.2d 882 (concluding that attorney who was retained by insured automobile collision victim to represent victim in action against tort-feasor's insurance carrier was entitled to recover reasonable fee for services rendered in connection with his negotiations to collect subrogation claim).

In this action, Kindred relies heavily on our decision in *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994), and the decision of the Nebraska Court of Appeals in *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992). In *Kaiman*, an attorney who had obtained a favorable award for his client in a workers' compensation action filed an action against a health maintenance organization (HMO) which had received reimbursement from the award for medical expenses which it had paid on behalf of the injured worker. The attorney brought an action against the HMO in which he sought a percentage fee on the amount of the reimbursement under the common fund doctrine. The district court sustained a demurrer and dismissed the action. The Court of Appeals reversed, holding that the common fund doctrine permitted an injured worker "to shift an appropriate share of the cost of the litigation to a health care insurer *who directly and substantially benefits by the litigation through reimbursement*." (Emphasis supplied.) 1 Neb. App. at 162, 491 N.W.2d at 363.

In *Bloomquist*, decided 2 years 5 months after *Kaiman*, we held that the holder of a hospital lien which sought payment from the proceeds of a personal injury settlement was liable for its pro rata share of legal expenses and costs incurred in obtaining the settlement. In determining that the common fund doctrine was not limited to subrogation claims, we stated that the ultimate question was not whether the hospitals were lienholders or subrogors, "but whether the hospitals have been so benefited by the patients' attorneys who rendered services in obtaining settlements *that the attorneys should in equity be allowed their compensation out of the whole fund.*" (Emphasis supplied.) 246 Neb. at 724, 523 N.W.2d at 359.

In each of these cases, the party held responsible for paying attorney fees under the common fund doctrine had received a cash disbursement from a specific fund created by the efforts of the attorney seeking the fee. In *Dennis v. State*, 234 Neb. 427, 445, 451 N.W.2d 676, 687 (1990), *rev'd on other grounds, Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991), we held that the common fund doctrine "presupposes the existence of a fund." In *Dennis*, we cited with approval authority from other jurisdictions holding that " '[a] common fund must be an immediate fund from which attorney's fees may be awarded at trial . . . ,' " 234 Neb. at 446, 451 N.W.2d at 687 (quoting *United Nursing Homes v. McNutt*, 35 Wash. App. 632, 669 P.2d 476 (1983)), and that in the absence of a fund within the control of the court, an attorney was not entitled to recover fees under the common fund doctrine merely because his actions conferred a benefit on members of a class, *Hamer v. Kirk*, 64 Ill. 2d 434, 356 N.E.2d 524 (1976). See, also, *Fitzgerald v. City of Philadelphia*, 87 Pa. Commw. 482, 487 A.2d 485 (1985); *Van Emmerik v. Montana Dakota Utilities Co.*, 332 N.W.2d 279 (S.D. 1983), *cert. denied* 464 U.S. 915, 104 S. Ct. 278, 78 L. Ed. 2d 257; *Von Holt v. Izumo Taisha Mission*, 44 Haw. 147, 355 P.2d 40 (1960), *aff'd on rehearing* 44 Haw. 365, 355 P.2d 40. Based upon these authorities, we held in *Dennis* that an attorney whose efforts resulted in a finding that a taxation statute was unconstitutional could not recover a fee payable out of all tax refunds which were due as a result of the ruling, because no "common fund" existed.

The district court correctly found that there was no "common fund" upon which application of the common fund doctrine could be predicated in this case. Kindred received his workers' compensation benefits and paid his attorney in full pursuant to their contract. Retirement System did not claim or receive a disbursement of money from any source, and there was no fund within the jurisdiction of the district court from which it could have ordered disbursements.

Retirement System simply calculated Kindred's disability retirement pension benefits in the manner prescribed by Omaha city ordinance § 22-35, deducting the full amount of workers' compensation benefits paid to Kindred from his monthly disability retirement entitlement. It is undisputed that this is exactly what the ordinance required. The Omaha ordinance defining disability retirement pension benefits contains no permissive language similar to Neb. Rev. Stat. § 48-118 (Reissue 1993), which provides that attorney fees incurred in obtaining a recovery from a third party can be prorated between an injured employee and the subrogated employer or workers' compensation insurer. The Omaha ordinance does not provide for the workers' compensation offset to be reduced by attorney fees expended in securing those benefits, and the district court correctly found that the common fund doctrine affords no basis for judicial imposition of such a requirement.

We, therefore, affirm the judgment of the district court.

AFFIRMED.

McCORMACK, J., dissenting.

I respectfully dissent. The majority states that in an absence of a fund within the control of the court, an attorney is not entitled to recover fees under the common fund doctrine merely because his actions conferred a benefit on members of a class. I disagree.

Weiss v. Bruno, 83 Wash. 2d 911, 523 P.2d 915 (1974), holds that there does not necessarily have to be a monetary fund created or preserved by a litigant as long as the litigant confers some other substantial nonmonetary benefit on an ascertainable class. See, also, *Mills v. Electric Auto-Lite*, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970). In *Weiss*, the plaintiffs were allowed to recover attorney fees after instituting a successful

suit challenging the expenditure of public funds made pursuant to unconstitutional legislative and administrative actions after a refusal by the appropriate agencies and officials to maintain such a challenge. Under the principle set out in *Weiss*, a court, using equitable discretion, may award attorney fees where a litigant obtains a decision which confers a substantial benefit on the members of an ascertainable class.

Similarly, in *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994), we addressed the issue of whether a hospital, with a perfected statutory lien in regard to treatment rendered to a patient unable to pay for such medical services, is obligated to share pro rata in the patient's reasonable costs of recovery from the third-party tort-feasor who caused the patient's injuries. We concluded that "the ultimate question is not whether the hospitals are lienholders or subrogors, but whether the hospitals have been so benefited by the patients' attorneys who rendered services in obtaining settlements that the attorneys should in equity be allowed their compensation out of the whole fund." *Id.* at 723-24, 523 N.W.2d at 359.

The majority distinguishes the instant case from *Bloomquist* by stating that no common fund was created under the jurisdiction of the district court by the efforts of Kindred's attorney. While it is true that Kindred's attorney did not create a "pile of money" from which a court could make equitable distributions to all who claimed an interest, Kindred's attorney did create a certain and ascertainable pecuniary benefit for his client in the form of a workers' compensation award, and that this benefit inured in its entirety, by operation of city ordinance, to the advantage of the Retirement System. The Retirement System received a substantial nonmonetary benefit from the setoff of Kindred's workers' compensation benefits against his service-connected disability pension as a result of the actions of plaintiff's attorney. To preclude application of the common fund doctrine because the common fund is not within the jurisdiction of the district court defies the equitable principle of unjust enrichment which lies at the heart of the doctrine. Further, to hold that the workers' compensation award is not a common fund against which the Retirement System exercises its right by ordinance to

set off any disability retirement pension payment to be made to Kindred exalts form over substance. The proceeds of the workers' compensation award obtained by Kindred's attorney clearly operate as a fund, without which the Retirement System would have nothing to set off against the pension benefits it owes to Kindred. Additionally, Kindred, not the Retirement System, paid for the service. It would be fundamentally unfair to make Kindred, rather than the Retirement System, pay for the attorney's services when those services conferred a benefit on the Retirement System. The Retirement System should therefore be obligated to reimburse Kindred for the fees he paid to his attorney.

WHITE, C.J., and GERRARD, J., join in this dissent.

THE CITY OF ELKHORN, NEBRASKA, A MUNICIPAL CORPORATION, AND PHILLIP E. KLEIN, MAYOR OF THE CITY OF ELKHORN, NEBRASKA, APPELLANTS, AND MELISSA A. ROSACKER, AN INDIVIDUAL, AND COURTNEY CAMPBELL, AN INDIVIDUAL, APPELLEES, V. BILLY D. DUNCAN, AN INDIVIDUAL AND TRUSTEE OF SANITARY AND IMPROVEMENT DISTRICT NO. 57 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

565 N.W.2d 726

Filed June 20, 1997. No. S-95-866.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Actions: Taxation: Governmental Subdivisions: Standing.** In an action involving the illegal expenditure of public funds or an increase in the burden of taxation, the plaintiff must be a taxpayer of the governmental body.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Malcolm D. Young and Jeff C. Miller, of Young & White, for appellants.

Thomas C. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, for appellees Duncan et al.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

During 1984, 1993, and 1994, the council of the City of Elkhorn (City) approved several ordinances extending the City's corporate limits to include territories in Sanitary and Improvement District No. 57 (Chapel Hill) and Sanitary and Improvement District No. 157 (Skyline Ranches). The trustees of Chapel Hill, Billy D. Duncan, Timothy Grove, Gary Demmel, and Bruce Shubert (trustees), filed three separate actions to enjoin the annexations of Chapel Hill and Skyline Ranches. The actions were heard by the district court for Douglas County and subsequently appealed to the Nebraska Supreme Court. A rendition of the procedural and substantive facts regarding the annexations and challenges to the annexations can be found at *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995).

In April 1994, while the preceding cases were pending in district court, the City and its mayor, Phillip E. Klein, and Chapel Hill residents Melissa A. Rosacker and Courtney Campbell (all hereinafter plaintiffs) filed suit against the trustees, alleging that the trustees did not have the power to expend Chapel Hill funds to contest the annexation attempts of the City. The plaintiffs sought declaratory and injunctive relief and also sought recovery of all moneys that had been paid to resist the annexations. The petition was later amended in March 1995.

The trustees demurred to the amended petition, asserting, in part, that the City and its mayor had no standing to challenge the expenditure of Chapel Hill funds. The district court for Douglas County sustained that portion of the demurrer and dismissed the City and its mayor from the case. From this order, the City and mayor appealed. Pursuant to our power to regulate the caseloads of this court and the Nebraska Court of Appeals, we, on our own motion, removed this case to our docket.

The City and its mayor contend on appeal that the district court erred in dismissing them from the case and sustaining the trustees' demurrer.

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together

with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997).

We have previously held that in an action involving the illegal expenditure of public funds or an increase in the burden of taxation, the plaintiff must be a taxpayer of the governmental body. *SID No. 57 v. City of Elkhorn, supra*; *Rexroad, Inc. v. SID No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986). In the instant case, the City and its mayor are challenging the expenditure of funds belonging to the governmental body referred to as Chapel Hill. It is clear from the face of the pleadings that neither the City nor its mayor are residents and taxpayers of Chapel Hill; therefore, they lack standing to pursue their lawsuit against the trustees. The district court properly dismissed them from this action.

For the foregoing reasons, we affirm the district court's decision.

AFFIRMED.

MICKEY J. LARSON, A MINOR CHILD, BY AND THROUGH HIS NATURAL PARENTS, JODY M. LARSON AND STEVEN LARSON, AS NEXT FRIENDS AND NATURAL GUARDIANS, ET AL., APPELLANTS, V. DAVID F. DEMUTH, M.D., ET AL., APPELLEES.

564 N.W.2d 606

Filed June 20, 1997. No. S-95-1039.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Actions.** Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief.
3. ____. The fact that there may be some overlap between the relevant facts does not change the conclusion that the various causes of action are based on separate and distinct factual occurrences.

4. **Actions: Pleadings: Parties: Joinder.** Causes of action involving different defendants cannot be joined unless each cause affects all defendants and they have a joint or common liability or interest.
5. **Venue: Appeal and Error.** Where a record does not show abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal.
6. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, the court must grant leave to amend unless it is clear that no reasonable possibility exists that an amendment will correct the defect.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Daniel B. Cullan and Paul W. Madgett, of Cullan & Cullan, for appellants.

James A. Snowden and, on brief, Samantha B. Trimble, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellees Demuth; Steven Thomas, M.D.; and York Medical Clinic, P.C.

William M. Lamson, Jr., and William R. Settles, of Kennedy, Holland, DeLacy & Svoboda, for appellee Laurence Bausch, M.D.

Mark A. Christensen and Gregory S. Heier, of Cline, Williams, Wright, Johnson & Oldfather, for appellee St. Elizabeth Community Health Center.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, and MCCORMACK, JJ., and BOSLAUGH, J., Retired.

MCCORMACK, J.

This is an appeal from a demurrer sustained by the district court for Lancaster County, finding that "the causes of action . . . do not affect all the parties and do not involve a common liability or interest."

FACTS

The operative petition alleges the following: The appellant Mickey J. Larson is a minor child and therefore brings this action by and through his parents, natural guardians, and next friends, appellants Steven Larson and Jody M. Larson. Mickey was born on July 2, 1992, at York General Hospital (York General) in York, Nebraska. Upon noting the abnormally slow

labor, the fetal distress, and the failure of the baby to enter the pelvis during delivery, David F. Demuth, M.D., requested that Steven Thomas, M.D., assist in the delivery. Both Demuth and Thomas were employed by York Medical Clinic, P.C. (York Medical). Thomas delivered the baby through the pelvis with the use of forceps, although Thomas and Demuth knew that a forceps delivery could create a serious risk of traumatic brain damage to the baby. Thomas did not make a report of the forceps operation. Allegedly as a result of the forceps delivery, Mickey sustained permanent and severe brain injuries, including hypoxic ischemic encephalopathy, a tentorial subdural hematoma, and associated seizures. Demuth and Thomas allegedly failed to treat the injured brain to prevent further injury and did not obtain a consultation from a pediatric neurologist. This failure allegedly caused progressive brain swelling and brain damage.

Mickey was then transferred to St. Elizabeth Community Health Center, Inc. (St. Elizabeth), in Lincoln, Nebraska, a medical facility which held itself out as one which could care for and treat babies with severe neurological difficulties and one which invited other medical providers to transfer such patients to its facility for treatment and care. At St. Elizabeth, Mickey was placed under the care of Lawrence Bausch, M.D. St. Elizabeth and Bausch created and furnished to referral health care providers a newborn transfer record to be completed upon transfer. Demuth was not trained to fill out this record.

Demuth, Thomas, York Medical, and York General allegedly failed to provide complete and accurate records to Bausch and St. Elizabeth concerning the traumatic delivery. Bausch and St. Elizabeth allegedly failed to take appropriate measures to obtain complete and accurate records. Prior to Mickey's transfer to St. Elizabeth, St. Elizabeth and Bausch failed to request brain films at York General to determine the nature of Mickey's subdural hematoma. Demuth, Thomas, and York General also failed to obtain brain films for this determination. Mickey was transferred in an unstable condition. As a result of Demuth, Thomas, York Medical, and York General's alleged failure to provide this information, and Bausch and St. Elizabeth's failure to obtain this information, Bausch's evaluation and testing was

centered on genetic causes for Mickey's injuries instead of on the birth trauma.

The petition further alleged that St. Elizabeth allegedly failed to properly monitor Mickey for seizures, examine him for birth trauma, diagnose his birth trauma, treat his seizure disorder, and ensure that timely antiseizure medication be administered. On July 21, 1994, Bausch and St. Elizabeth released Mickey to the care of his parents without arranging to monitor his condition or to refer him to other pediatric specialists.

The suit asserts several causes of action against Demuth, Thomas, York Medical, and York General (York appellees). The suit also asserts several causes of action against Bausch and St. Elizabeth (Lincoln appellees). Appellants' action for medical malpractice asserts that the appellee physicians and hospitals were negligent and deviated from the standard of care in the medical treatment rendered to Mickey during his birth and for the first critical month of his life.

Appellants filed their third amended petition in the district court for Lancaster County on April 18, 1995, joining the York and Lincoln appellees pursuant to Neb. Rev. Stat. § 25-701 (Reissue 1995). Appellees specially demurred, claiming that the several causes of action were improperly joined. The district court sustained the demurrers, ordering appellants to file either (1) an amended petition striking all reference to the York appellees, (2) an amended petition striking all reference to the York appellees and a separately docketed action against the York appellees, or (3) a notice of appellants' intention to stand on the present petition. Appellants elected to stand on their third amended petition. Thereafter, the district court dismissed the third amended petition, and appellants filed this appeal.

ASSIGNMENTS OF ERROR

Appellants assign as error the trial court's (1) finding that the causes of action did not involve a common liability or interest and did not affect all the parties, (2) requirement that all appellees have a "common liability or interest" in order for the causes of action to be properly joined, (3) finding that appellants had more than one cause of action in their third amended petition, (4) granting of appellees' special demurrer based on

misjoinder of causes of action, (5) finding that a separately docketed action against the York appellees would not be properly venued in Lancaster County, (6) finding that the action against the York appellees would be transferable as a matter of right to York County upon the motion of any York appellee, (7) granting of the York appellees' motions to transfer, and (8) dismissal of appellants' third amended petition.

STANDARD OF REVIEW

In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996); *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996); *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

ANALYSIS

We turn now to the special demurrers and motions to transfer granted by the trial court. Neb. Rev. Stat. § 25-806 (Reissue 1995) provides that a petition is properly demurrable if it misjoins causes of action. Section 25-701 provides that a plaintiff may "unite several causes of action in the same petition" when they involve "[t]he same transaction or transactions connected with the same subject of action." Neb. Rev. Stat. § 25-702 (Reissue 1995), however, limits the actions which may be joined by providing that "the causes of action so united must affect all the parties to the action, and not require different places of trial."

Therefore, the threshold inquiry is whether more than one cause of action is stated in appellants' petition. Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would

bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief. *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989); *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943).

It is clear from the petition that appellants have stated more than one cause of action under the above tests. The several rights and subjects of controversy alleged in the petition include whether the forceps delivery was negligent, whether the York treatment was negligent, whether the Lincoln treatment was negligent, whether Mickey's parents suffered emotional distress, and whether recovery is allowable for loss of companionship. It is also clear that separate actions could be maintained for separate relief against both the York and the Lincoln appellees. Further, the facts alleged in appellants' petition with regard to the first five causes of action against the York appellees are separate and distinct from the facts alleged in the remaining three causes of action against the Lincoln appellees. The fact that there may be some overlap between the relevant facts does not change the conclusion that the various causes of action are based on separate and distinct factual occurrences. *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). Thus, we conclude that appellants have stated multiple causes of action.

We have held that causes of action involving different defendants cannot be joined unless each cause affects all defendants and they have a joint or common liability or interest. *Gould v. Orr*, 244 Neb. 163, 506 N.W.2d 349 (1993); *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991); *S.I.D. No. 272 v. Marquardt, supra*; *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 391 N.W.2d 557 (1986).

Appellants have misjoined the York appellees and Lincoln appellees in the third amended petition, because the eight causes of action pled neither affect all of the parties nor involve common liability or interest. There is nothing in the operative petition which would support imposing liability on the Lincoln appellees for Mickey's delivery in York, the medical bills

incurred in York, or the emotional distress of Mickey's parents for events in York. Similarly, the petition does not support imposing liability on the York appellees for emotional distress suffered by Mickey's parents for events in Lincoln.

Having determined that appellants misjoined the York and Lincoln appellees, we now turn to appellants' assignments of error regarding transfer of the action. Neb. Rev. Stat. § 25-410 (Reissue 1995) provides that "[f]or the convenience of the parties and witnesses or in the interest of justice, a district court of any county may transfer any civil action to the district court of any other county in this state." We have held that where a record does not show abuse of discretion, a ruling on a motion to transfer venue will not be disturbed on appeal. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *Everlasting Golden Rule Ch. v. Dakota Title*, 230 Neb. 590, 432 N.W.2d 803 (1988); *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987); *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973). It is clear that parties and witnesses to the York action are located in York, Nebraska. It is also clear that both York and Lincoln witnesses would have to testify regardless of whether the case was tried in York or Lincoln. In this case, we find no abuse of discretion by the trial court.

Finally, we turn to appellants' assignment of error with regard to the dismissal of his petition. When a demurrer to a petition is sustained, the court must grant leave to amend unless it is clear that no reasonable possibility exists that an amendment will correct the defect. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). In the present case, appellants were given an opportunity to amend their petition, but chose instead to stand on the petition. Having determined that the causes of action in appellants' petition did not affect all parties and did not involve a common liability or interest, we hold that the district court properly dismissed the petition.

As we find that more than one cause of action was pled in that petition and that all causes of action did not affect all parties nor involve a common liability or interest, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. MARTIN L. ANDERSON, APPELLANT.

564 N.W.2d 581

Filed June 20, 1997. No. S-96-546.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
2. **Jury Misconduct: Verdicts.** In order for a verdict to be set aside because of the prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant.
3. **Jury Misconduct: Proof: Case Overruled.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. To the extent that *State v. Owen*, 2 Neb. App. 195, 508 N.W.2d 299 (1993), announced a heightened evidentiary standard for proving *prejudice* in criminal jury misconduct cases, it is overruled.
4. **Jury Misconduct: Verdicts.** Extraneous information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous information affected the verdict to the detriment of the defendant.
5. **Homicide: Sentences.** A criminal defendant convicted of first or second degree murder and sentenced to life imprisonment is not entitled to credit for time spent in custodial detention pending trial and sentence. However, when the defendant receives a sentence consecutive to the life sentence which carries a maximum and minimum term, the defendant is entitled to receive credit for the time served against the consecutive sentence.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Andrei G. Howze for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

A jury convicted appellant, Martin L. Anderson, of second degree murder and use of a firearm in the commission of a felony. It is from this conviction that Anderson appeals, claiming prejudicial jury misconduct. Anderson also appeals from the

court's sentence, claiming error due to the court's failure to give him credit for time served. Finding no prejudicial error, we affirm.

FACTUAL BACKGROUND

In 1988, Anderson pled guilty to an amended information charging him with second degree murder in connection with the shooting death of Steven Rody. On August 25, 1995, the district court granted Anderson's petition for postconviction relief based on the failure of the State to include the element of malice in the charging information. The original information charging Anderson with first degree murder was reinstated. Trial of this cause began on January 29, 1996.

On January 31, during presentation of the State's case in chief, the Omaha World-Herald published an article in regard to Anderson's retrial. It came to the attention of Anderson's counsel that this newspaper article was in the jury room. The headline of the newspaper article read, "Witnesses Recall 1988 Parking-Lot Slaying." A subhead below the headline further informed the reader, "1st-Degree Murder Charged in Retrial." The article itself began with a short description of the crime, including the identities of the victim and the defendant. The fifth and sixth paragraphs of the article then recited:

> Anderson received a life sentence in 1988 for second-degree murder. He was granted new court proceedings under a 1994 decision by the Nebraska Supreme Court.
>
> The Supreme Court has ruled that the definition of second-degree murder must include malice. Individuals convicted of a second-degree murder charge that did not include malice can request retrials and resentencings.

The remainder of the article summarized the in-court testimony of four witnesses for the State.

Anderson's counsel asked the trial judge to inquire of the jurors whether they had been exposed to the article and, if so, to question the jurors individually to determine the extent of any prejudice to Anderson. The judge agreed to question the jurors as a whole and to question individually those who had knowledge of the article. During the course of the individual questioning, the trial judge agreed to Anderson's request to question all 12 jurors and the 2 alternates.

The trial judge initially asked the jurors as a group whether they had been exposed to media publicity concerning the trial. Only two jurors raised their hands. The judge then asked whether they had heard of or talked to anyone concerning a newspaper article. Two more jurors raised their hands. After further inquiry, two more jurors admitted knowing something of the article. Thus, when questioned as a group, only six jurors admitted having knowledge of the newspaper account.

Individual questioning of the jurors by the trial court and both counsel disclosed the following: Eight jurors had either heard a conversation about the newspaper article or engaged in a conversation about the newspaper article. One juror claimed to have heard a rumor about jurors reading a newspaper article concerning the trial. Five jurors told the court that they did not hear anyone talk about the newspaper article and knew nothing about the substance of the article itself.

Juror Thomas R. testified that he went to his place of employment before appearing for jury duty that morning. While at work, he saw the newspaper headline concerning Anderson's trial. Thomas R. said that he remembered the court's admonition; thus, he did not read the article itself. As for the headline, Thomas R. testified that he could recall only that it reported something about the year 1988. When Thomas R. was specifically asked whether he mentioned the article in the jury room, he replied that he glanced through the paper and "didn't say nothing. I just kind of pointed out the '88 there." Thomas R. said that no other jurors made any comments about the article and that he did not hear anyone say that they had read the paper that morning.

Thomas R.'s testimony was contradicted by several of the jurors with knowledge of the article. Juror Todd N. admitted bringing the newspaper to the jury room. He admitted reading the headline but not the substance of the article. When asked whether he told anybody else in the jury room about the article, Todd N. replied, "There were comments in the jury room that there was an article in the paper." Todd N. testified that the substance of the article was never read. Todd N. said that two or three jurors made comments about the article. Specifically, he said that he and Thomas R. made comments and that there may

have been one other comment by a juror, but that he did not know who that juror was.

Juror Carol L. testified that she did not read or even look at the article, but knew something of its content because Thomas R. had held the newspaper up and read part of the headline out loud. She said that the portion Thomas R. read indicated that the current trial was a retrial. Carol L. said that she told Thomas R. and the others that they should not be reading any newspaper article concerning the case. Carol L. said that after Thomas R.'s display of the newspaper, the conversation then turned to a discussion concerning who in the courtroom was a reporter.

Carol L. testified that the jurors who were talking about the article appeared to know that the article pertained to the case on which they were sitting. Carol L. could not recall all of the jurors who were involved in the discussion concerning the article, but did say that Thomas R. was involved as well as two elderly men. Carol L. did not know the names of these elderly men, but said that one was the juror questioned by the court just before her. That juror was Ralph S. Ralph S. had testified that he did not read about the case in the newspaper but that there was some talk about a newspaper article in the jury room that morning. Ralph S. claimed to not know which jurors were talking about the article and contended that he was not paying attention.

Juror George D. testified that he read the headline of the article and that someone was showing the article to the jurors as a group. George D. said that the headline informed the jurors that the case was a retrial. According to George D., some jurors became suspicious about what was going on and wondered if this was a second trial.

Juror Michelle M. testified that she did not read the newspaper article but that she overheard a conversation in which she thought that Thomas R. said to Todd N. something to the effect that Thomas R. had started to read the article but did not finish it. However, Michelle M. was not sure whether this comment was even in reference to the article about Anderson's trial.

After the court and both counsel concluded the individual questioning of the jurors, Anderson's counsel moved for a mistrial. The court overruled the motion, reasoning that no juror had,

in fact, read the newspaper article and that the mere mention of the fact that the instant trial was a retrial was not prejudicial to Anderson's right to receive a fair trial. Anderson then moved the court to sequester the jury for the remainder of the trial. The court agreed to sequester the jury commencing with their deliberations and agreed to specifically admonish the jury in regard to media coverage. Anderson also made a motion to strike jurors Thomas R. and Todd N., which the trial court overruled.

The State went on to present the remainder of its case. Anderson then presented his case. Anderson's counsel did not submit to the court a specific instruction concerning the newspaper article. Of the jury instructions given by the court, instruction No. 2 in pertinent part told the jurors that "[t]he following things are not evidence: . . . 4. Anything you may have seen or heard about this case outside the courtroom."

The jury convicted Anderson of second degree murder and use of a firearm in the commission of a felony. The court sentenced Anderson to a term of life imprisonment in regard to the second degree murder charge and 10 years' imprisonment in regard to the use of a weapon charge. The court gave Anderson credit for the 8 years he has already served following his first conviction in regard to the use of a weapon charge, but did not give Anderson credit for time served with regard to the life sentence for second degree murder.

STANDARD OF REVIEW

The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994).

ASSIGNMENTS OF ERROR

Anderson contends that the trial court erred in (1) overruling his motion for mistrial and (2) not giving him credit for time served in regard to his second degree murder conviction.

ANALYSIS

Jury Misconduct.

We are guided by the rule that in order for a verdict to be set aside because of the prejudicial effect of newspaper accounts on

jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant. See *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975). We have held that in order for jury misconduct to be the basis for a new trial, the misconduct must not only occur but it must be prejudicial to the defendant. *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984).

Anderson asserts that misconduct and prejudice are established on the record before this court. The State, on the other hand, contends that it was Anderson's burden to show "by clear and convincing evidence that he was prejudiced" by the juror's misconduct. Brief for appellee at 6, citing *State v. Owen*, 2 Neb. App. 195, 508 N.W.2d 299 (1993).

We must first address the proper evidentiary standard that a party need satisfy when a trial court considers a motion for mistrial or a motion for new trial in regard to a claim of jury misconduct in a criminal case. In *State v. Steinmark*, 201 Neb. 200, 204-05, 266 N.W.2d 751, 754 (1978), we first mapped out the procedure due a defendant claiming prejudice in a criminal case:

> 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.

After *Steinmark*, in *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988), the defendant alleged jury misconduct in regard to a discussion of the case between two jurors seated in the courtroom while the judge and counsel for both parties were occupied in chambers. This discussion was overheard by defense counsel's wife. We reiterated the rule that, in a criminal case, where the jury misconduct involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *Id.*

In *State v. Owen, supra*, a case involving jury misconduct in regard to media influence during the jury's deliberations, the

Nebraska Court of Appeals stated that the party claiming jury misconduct must "show by clear and convincing evidence that prejudice has occurred." *Id.* at 202, 508 N.W.2d at 303. However, the *Owen* court relied on *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992), a civil case which cited *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983), for the proposition that a party claiming jury misconduct must show by clear and convincing evidence that *prejudice* has occurred.

In *Ellis v. Far-Mar-Co, supra*, a juror, after the first day of deliberations, telephoned a witness who had testified at trial and asked him some questions concerning the case. We stated that "[w]hen a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the *evidence of misconduct* is clear and convincing." (Emphasis supplied.) *Id.* at 744, 340 N.W.2d at 427. Thus, evidence of jury misconduct, not of prejudice, must be established by clear and convincing evidence in a civil case.

We find no constitutionally persuasive argument or authority for the proposition that a criminal defendant must satisfy a heightened evidentiary standard, such as clear and convincing evidence, to show either (1) the existence of jury misconduct or (2) that *prejudice* has occurred in cases involving jury misconduct among only the jurors. We therefore hold that a criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. Insofar as the Court of Appeals, in *State v. Owen, supra*, announced a heightened evidentiary standard for proving *prejudice* in criminal jury misconduct cases, it is overruled.

That being so, we review the trial court's findings, mindful that its ruling on Anderson's motion for mistrial will be upheld on appeal absent a showing of abuse of discretion. See *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996). We do not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognize the trial court as the finder of fact and take into consideration that it observed the jurors when they testified. With regard to whether jury misconduct occurred and, if so,

whether the misconduct was prejudicial to the defendant, the trial court stated in its oral findings:

> I think the first threshold question is did they read [the article], and my understanding of the record is that no one read the article except for the headline or headlines. But I think we have two by my count . . . that said — heard the term or read the term, heard the term "re-trial."
>
> So, I feel that the threshold question, and I appreciate it's a question of credibility of the jurors, but it was my impression that they were taking their situation seriously and it's my opinion that they were being honest in what they were saying. And so I think technically on that one, based on the *West* case . . . that we have not reached that. So, on that alone I feel the motion should be overruled. But also as to the question of prejudicial [sic], if we take the headline, which certainly was read at least by one or two and maybe heard by more than that, I don't think that that reaches the point of prejudice, either, because certainly it's the . . . heart of the article that would be considered to be prejudicial to the defendant.
>
> So on that basis I'm going to overrule the motion for a mistrial.

To the extent that the trial court's findings can be construed to mean that no jury misconduct occurred, such a finding is untenable and constitutes an abuse of discretion. Three jurors admitted reading at least the headline or subhead and discussing the contents of the headline or subhead with other jurors in the jury room. Five other jurors stated that they were informed to some extent of the content of the headline or subhead by other jurors. Insofar as certain jurors read at least a headline or subhead regarding the instant case and then discussed this matter with other jurors prior to hearing all evidence and being instructed on the law, such conduct clearly violated the specific admonition of the court and constitutes jury misconduct. However, our inquiry does not end here.

We must next determine whether that portion of the article which was in fact read by the jurors prejudiced Anderson's right to a fair trial. The trial court found that at least the headline or subhead of the offending newspaper article was read by some of

the jurors. However, the court found that no juror had read the body of the article itself, and the record supports such a finding. No juror testified that he or she read any more than the headline or subhead. Only Michelle M. testified that she thought that Thomas R. may have said that he started to read the article but did not finish it. However, Michelle M. also stated that she was not sure whether Thomas R.'s comment was even in reference to the newspaper account of Anderson's trial. Thus, having determined that the record supports the trial court's finding that no juror had read the body of the article, the inquiry now shifts to whether the newspaper headline or subhead read by the jurors was prejudicial to Anderson's right to a fair and impartial jury.

We are mindful that extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the litigant's detriment. *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Even when we examine Anderson's appeal in terms of inferentially established prejudice, it is clear that not every instance of a publication made available and read by jurors warrants a new trial. See, *Byrd v. Com.*, 825 S.W.2d 272 (Ky. 1992); *People v. Lampson*, 6 Ill. App. 3d 1099, 286 N.E.2d 358 (1972).

In the case at bar, the Omaha World-Herald headline read, "Witnesses Recall 1988 Parking-Lot Slaying," and the subhead read, "1st-Degree Murder Charged in Retrial." While there is no question that the fact of Anderson's prior conviction contained in the fifth paragraph of the article is inadmissible in evidence and highly prejudicial, the trial court made a factual finding that none of the jurors read the article except for the headline or subhead.

In such situations, it is clear that the determination whether to grant a mistrial rests not only on what the jurors say on interrogation, but also upon the nature of the published material, together with all other facts and circumstances in the record. The determination to be made by the trial court calls for the exercise of judicial discretion under the circumstances.

The examination of the jurors in this cause by the trial court and both counsel failed to disclose either directly or inferentially that any of the jurors had been prejudiced by their exposure to the headline or subhead in question. Even though three of the jurors acknowledged that the subhead stated that the instant cause was a retrial, none of the jurors exhibited any knowledge as to the circumstances of the retrial or whether the first trial was terminated prior to its conclusion or was reversed on appeal. The mere use of the word retrial, without further explanation, does not automatically connote that a defendant was convicted of particular crimes in a prior trial, nor does it necessarily mean that a prior trial had reached its completion. Simply put, none of the jurors testified that they had any knowledge regarding a prior conviction or as to why Anderson was being granted a new trial.

At the conclusion of the interrogation of the jurors, they were admonished by the trial court that they were to consider only evidence adduced in the case and not listen to any conversations about the case, including watching television or reading media reports about the case.

It has long been the theory of our system of justice that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. See *Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879 (1907). We conclude, after thoroughly reviewing the record and the testimony of the jurors, that the trial court did not err in determining that Anderson's right to a fair and impartial jury was not prejudiced due to the exposure of some jurors to the subject newspaper headline or subhead.

Therefore, Anderson's first assignment of error is without merit, since we determine that the trial court did not abuse its discretion in refusing to grant a mistrial under the circumstances.

Credit for Prior Sentence.

Anderson asserts that Neb. Rev. Stat. § 83-1,106(2) (Reissue 1994) mandates that the sentencing court give him credit against his current life sentence for all time served in regard to

his prior life sentence, based on the same conduct. Section 83-1,106(2) provides in part: "Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody under a prior sentence if he or she is later reprosecuted and resentenced for the same offense or for another offense based on the same conduct."

We rejected this same argument in *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995). Therein, we quoted our reasoning in *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983).

> The purpose of credit under § 83-1,106 "is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense. . . . By its very nature [a life] sentence is indefinite. . . . In the case of a life sentence, it is impossible to impose punishment exceeding the term prescribed by statute."

State v. Rust, 247 Neb. at 515-16, 528 N.W.2d at 328.

Anderson has not forwarded an argument which would give us cause to reexamine our reasoning in *State v. Rust*. A criminal defendant convicted of first or second degree murder and sentenced to life imprisonment is not entitled to credit for time spent in custodial detention pending trial and sentence. However, when the defendant receives a sentence consecutive to the life sentence which carries a maximum and minimum term, the defendant is entitled to receive credit for the time served against the consecutive sentence. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995).

Accordingly, the district court properly credited Anderson for time served in regard to his conviction for the use of a firearm in the commission of a felony and properly rejected crediting Anderson for time served against the life sentence in regard to his conviction for second degree murder.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., concurring.

Although I consider suspect the district court's finding that no juror read beyond the headline and subhead of the article, I cannot on the record presented conclude that it is clearly wrong. Thus, I accept that this case must be decided on the basis that no juror read the portions of the article revealing that the defendant, Martin L. Anderson, had previously been convicted of and received a life sentence for second degree murder on account of the events in question and that the only information imparted by the article to the jury is that it was sitting in judgment of a "retrial."

The common definition of retrial is simply that it is a second trial. Webster's Third New International Dictionary, Unabridged 1940 (1993). See, also, Black's Law Dictionary 1317 (6th ed. 1990), defining the word as a "new trial of an action which has already been once tried." Thus, in the absence of Anderson's establishing that the word meant something else to any juror, such as that he had previously been convicted, he failed to sustain his burden of proving that he was prejudiced by the misconduct of any juror. See *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988) (where jury misconduct involves juror behavior only, burden to establish prejudice rests on party claiming misconduct). See, also, *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984).

Nevertheless, I cannot help but wonder where the bailiff was while the jury was assembling and how the newspaper made its way into the jury room. The fact that prejudice was not demonstrated in this instance does not mean that under similar circumstances none will be demonstrated in a future case.

IN RE INTEREST OF TABATHA R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. RONDA R., APPELLANT, RONALD D., APPELLEE AND CROSS-APPELLANT, AND NEBRASKA DEPARTMENT OF SOCIAL SERVICES, INTERESTED PARTY, APPELLEE.

564 N.W.2d 598

Filed June 20, 1997. No. S-96-552.

1. **Juvenile Courts: Appeal and Error.** Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 1993, Cum. Supp. 1994 & Supp. 1995), are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. ____: ____. In reviewing questions of law, an appellate court in proceedings under the Nebraska Juvenile Code reaches a conclusion independent of the lower court's ruling.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by rule, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
4. **Juvenile Courts: Evidence: Appeal and Error.** The improper admission of evidence in a juvenile proceeding does not, in and of itself, constitute reversible error, for as long as proper objection was made at trial, an appellate court, in its review, ignores information which was improperly received.
5. **Health Care Providers: Words and Phrases.** Removing one from life support systems or refusing to resuscitate one constitutes "medical services," as the words are used in Neb. Rev. Stat. § 43-285(1) (Reissue 1993).
6. **Juvenile Courts: Parental Rights: Due Process: Health Care Providers.** Where a proceeding to obtain the juvenile court's assent to the medical services determined by the Department of Social Services under Neb. Rev. Stat. § 43-285(1) (Reissue 1993) results in the functional equivalent of a proceeding to terminate parental rights, the same due process must be afforded in the assent proceeding as is required in a proceeding to terminate parental rights.
7. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded for further proceedings.

A. Michael Bianchi for appellant.

Regina T. Makaitis for appellee State.

Dean M. Johnson for appellee Ronald D.

Don Stenberg, Attorney General, Royce N. Harper, and Douglas D Dexter, Special Assistant Attorney General, for appellee Nebraska Department of Social Services.

Thomas M. Kenney, Douglas County Public Defender, and Ann C. Holtz, guardian ad litem for Tabatha R.

V. Gene Summerlin, of Gelt, Fleishman, Sterling & Ogborn, P.C., and James Bopp, Jr., Thomas J. Marzen, Daniel Avila, and Jane E.T. Brockmann, of National Legal Center for the Medically Dependent and Disabled, Inc., for amicus curiae Scholl Institute of Bioethics.

Carr E. Heaney, Jr., of Kennedy, Holland, DeLacy & Svoboda, for amicus curiae Creighton-Saint Joseph Regional Healthcare System, L.L.C., doing business as Saint Joseph Hospital.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Claiming, among other things, that the juvenile court erred in assenting to the determination of the then Nebraska Department of Social Services to withdraw life support measures from their infant girl, Tabatha R., and to not resuscitate her, the infant's mother, Ronda R., filed an appeal, and the infant's father, Ronald D., cross-appealed, taking the same positions as did the mother. Since the parents present a question of first impression and challenge the constitutional validity of so assenting in the absence of a termination of parental rights, the matter was docketed in this court rather than in the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106 (Reissue 1995). We reverse, and remand for further proceedings.

SCOPE OF REVIEW

Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 1993, Cum. Supp.

1994 & Supp. 1995), are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996). Nonetheless, in reviewing questions of law, an appellate court in proceedings under the Nebraska Juvenile Code reaches a conclusion independent of the lower court's ruling. See *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996).

EVENTS LEADING TO INFANT'S CONDITION

The infant was born on December 29, 1995, and shortly thereafter was diagnosed as suffering from respiratory syncytial viral disease. According to statements made by the mother to a department investigator, the apartment in which the family lived became extremely cold on January 18, 1996; on January 20, the mother took the infant to St. Joseph Hospital because she was concerned about the infant's breathing and congestion. The physician recommended the use of a home squeegee procedure; however, the infant continued to be congested.

On January 21, 1996, the mother went to bed close to midnight. The infant awoke at 3 a.m., January 22, and the mother performed the squeegee procedure and fed the infant at 3 and again at 5 a.m. After that, the infant slept through most of the day, only to awake for occasional feedings. The mother prepared lunch for her other children at 3 p.m., during which time the infant stayed in the bedroom with the father. Although the mother was in the kitchen, she could hear the infant crying in the bedroom. Because the mother could not stand to hear the crying and the father was not getting up to care for the infant, the mother took her and placed her in a swing. The infant continued to cry, so the mother prepared a bottle, took both the infant and the bottle to the father, and asked him to feed the infant. The mother later returned to the bedroom in order to burp the infant and again left her with the father.

Between 3 and 3:30 p.m., after feeding her other children, the mother lay down in the bedroom to take a nap while the father

went into the living room to watch television. Around 5 or 5:30 p.m., the father went into the bedroom, awakened the mother, and told her to get up and fix supper. The father then mentioned that the infant's lips were purple, whereupon the mother began blowing in the infant's mouth in an attempt to remove congestion from the infant's nose. Since the infant did not resume breathing, the mother put the infant on her back, pulled the infant's arms back and forth, gently shook her, and told the father to call for an ambulance.

The father's account of the events was consistent with the mother's, and he recalled that the mother was very exhausted when she went to take her afternoon nap. As the family had no telephone, he went downstairs to a neighbor to place the call.

A stranger then arrived and performed cardiopulmonary resuscitation on the infant, apparently using his entire hand on the infant's chest. There is evidence that the proper method of resuscitating an infant is through the use of two fingers pressing down approximately ½ inch on the chest. When the ambulance arrived, the infant was still not breathing and blood was coming out of her nose.

One of the paramedics arriving at the scene at 5:51 p.m. noted that the infant was pale and bluish, indicating a lack of oxygen, and that she had no pulse. He began cardiopulmonary resuscitation, using two fingers for compression, as he reached the bottom of the stairs on the way to the rescue squad ambulance. When they entered the ambulance, the paramedic continued his efforts while his partner unsuccessfully attempted to administer oxygen by a tube inserted into the infant's lungs through her mouth. The paramedic then used an oxygen mask, and they proceeded directly to St. Joseph Hospital, arriving at 5:55 p.m. Cardiopulmonary resuscitation was continued after the infant was carried into the trauma room, at which point she was still in full cardiac and pulmonary arrest.

PROCEEDINGS BELOW

The juvenile court on January 26, 1996, entered an emergency ex parte order placing temporary custody of the infant in and with the department. Following a detention hearing, the court thereafter, on February 6, without resistance from the par-

ents, continued temporary custody in and with the department and authorized it to consent to any medical, surgical, or psychiatric treatment which in the opinion of a licensed and practicing physician "may be necessary and in the best interest of" the infant.

DEPARTMENT'S DETERMINATION

The department subsequently, on March 12, 1996, filed with the juvenile court a so-called "Notification of Informed Consent," which advised the parents that it intended to direct St. Joseph Hospital, effective March 14, to remove the infant from the "mechanical ventilator and all extraordinary life support" systems and to "not resuscitate" her. On March 15, the mother filed with the juvenile court a motion seeking an order staying the department from giving such instruction. Following a hearing on March 19, at which both parents were represented, the court entered a stay order, pending further hearing.

JUVENILE COURT'S ASSENT

On April 29, an adjudication hearing was had, resulting in the filing of an order on May 3 in which the court concluded that the evidence establishes, by a preponderance of the evidence, the standard of proof set out in § 43-279.01(3), that the infant comes within its jurisdiction; concluded that the evidence further establishes, by clear and convincing evidence, that it is in the infant's best interests that life support be discontinued and that she not be resuscitated; and assented to the department's determination.

Unfortunately, our review is complicated by the irregular sequence in which the matter was presented to and considered by the juvenile court. While we have had occasion to express concern with the department's delays, see, e.g., *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 457 N.W.2d 274 (1990), here, the department acted with uncharacteristic and untoward haste, seeking the assent of the juvenile court to the department's determination upon only 2 days' notice to the parents and before the juvenile court had adjudged the infant to be subject to its jurisdiction. As a consequence, much of the evidence relating to the department's determination was developed on the

parents' motion to stay its implementation, again before the infant had been adjudged to be within the court's jurisdiction. Nonetheless, as the juvenile court did not assent to the department's determination until the court had asserted jurisdiction over the infant, the irregular procedural sequence did not prejudice the parents.

Review of Evidential Rulings

However, because of the irregular sequence, we, in conducting our de novo review, treat the evidence adduced on the parents' motion and the State's petition to have been adduced as part of the adjudication hearing, and thus apply to both hearings the "customary rules of evidence," as required in adjudication hearings by § 43-279(1). See, also, *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990). Accordingly, the juvenile court's evidential rulings must be tested in accordance with the rule that in proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by rule, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. See, *State v. Thieszen, ante* p. 208, 560 N.W.2d 800 (1997); *State v. Earl, ante* p. 127, 560 N.W.2d 491 (1997); *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995).

The parents assert the juvenile court erroneously excluded a booklet entitled "Charter for Health Care Workers," written by the Pontifical Council for Pastoral Assistance to Health Care Workers, and the opinion of a physician as to whether persons without a cortex can be kept alive outside of a hospital setting. However, neither items of evidence were relevant, and, thus, the juvenile court did not err in excluding them. While evidence as to the bioethical considerations followed by a certain religious group may be relevant in cases in which the policy of a particular health care provider is at issue, see, e.g., *Taylor v. St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975), there is no such issue here. Neither was the excluded opinion relevant, for whether the infant is capable of being kept alive in whatever setting is not an issue.

The parents also assert that the juvenile court erred in admitting certain evidence concerning the bioethical considerations

employed, the medical condition of the infant and the cause thereof, and the parents' role therein. As noted earlier, the bioethical evidence is irrelevant. Although the hospital records are inadmissible hearsay, there is, contrary to the parents' assertion, adequate foundation for the medical testimony received on the issue of the infant's condition and its cause. However, the department investigator's recitation of how the mother's 4-year-old daughter described the relationship between the mother and father is inadmissible hearsay. But the improper admission of evidence in a juvenile proceeding does not, in and of itself, constitute reversible error, for as long as proper objection was made at trial, an appellate court, in its review, ignores information which was improperly received. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

INFANT'S CONDITION

Although there is some conflict in the admissible medical evidence, we independently find, on de novo review of the record, that under any civil standard of proof, the record establishes that the infant is irreversibly comatose and in a persistent vegetative state.

We further find that because of the daily nutrition, hydration, and hormone treatments she receives, the infant has grown. Nonetheless, although the infant has an independent heartbeat, she has not taken a breath on her own since her admission to the hospital, has shown no ability to breathe on her own, and is dependent upon a mechanical ventilator.

Moreover, we find that the infant has lost all functioning that originates from the cerebral hemispheres of her brain and has only limited brain stem functions, resulting in reflexive sucking movements, response to loud sounds, random movements, decerebrate posturing, and partial corneal responses.

We also find that because the thinking part of her brain is gone, she has no meaningful interaction with her environment or with others. As brain tissue does not regenerate, treatment will not improve her condition, and she will never breathe on her own, turn over, sit up, crawl, walk, speak, think independently, or solve problems. She can feel nothing, do nothing, and will do nothing for the rest of her life.

Nevertheless, we find that the presence of the independent heartbeat and the existence of some brain stem activity mean that the infant is alive, for only one who has sustained either "irreversible cessation of circulatory and respiratory functions, or . . . irreversible cessation of all functions of the entire brain, including the brain stem, is dead." Neb. Rev. Stat. § 71-7202 (Reissue 1996). See, also, *State v. Meints*, 212 Neb. 410, 322 N.W.2d 809 (1982).

CAUSE OF CONDITION

Although the admissible evidence is not without conflict, we independently find, on de novo review of the record, that under any civil standard of proof, the record establishes that the infant's condition is the result of her having sustained severe brain injury as the consequence of having been vigorously shaken, not, as the parents suggest, as the result of respiratory syncytial viral disease, the method in which she was resuscitated, or any other cause.

As the infant's attending physician explained:

> the baby's head accelerates and decelerates as it moves back and forth. And it's the force from that acceleration/deceleration-type injury that leads to the bleeding. . . . Young infants who have not developed head control, who don't have good strength of the neck muscles to help support their head during that movement are at risk for this particular problem.

AUTHORITY TO DIRECT TREATMENT

Having independently made those factual findings, we turn our attention to the legal question as to whether the department had authority to determine as it did.

Section 43-285(1) reads, in relevant part:

> When the court awards a juvenile to the care of the [department] . . . the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department . . . . [T]he department shall have authority, by and with the assent of the court, to determine the . . . medical services . . . on behalf of each juvenile committed to it.

Deciding whether to remove one from life support measures and whether to resuscitate one requires the exercise of medical judgment; therefore, such acts constitute medical services. Having acquired temporary custody of the infant, the department was initially empowered by § 43-285(1) to determine as it did.

VALIDITY OF ASSENT

However, under the language of § 43-285(1), at least where the department's initial determination is questioned, it can become effective only if specifically assented to by the juvenile court. *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992) (judicial authority may not be delegated). Accord, *State v. Lee*, 237 Neb. 724, 467 N.W.2d 661 (1991); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988). The dispositive legal issue therefore becomes whether the juvenile court validly assented. The parents urge not, asserting, in effect, that the assent serves as the functional equivalent of a judgment terminating their parental rights and violates their constitutionally protected liberty interest in their relationship with the infant.

Although in making their argument the parents rely upon provisions of both the U.S. Constitution and article I, § 3, of the Nebraska Constitution, declaring that no person shall be deprived " 'of . . . liberty . . . without due process of law,' " brief for appellant at 22, we analyze and decide the matter under the Nebraska Constitution, and do not reach any federal constitutional question. While in making our analysis of the parents' rights under the Nebraska Constitution, we cite to a U.S. Supreme Court case and to a Nebraska case which refers to that U.S. Supreme Court case, we do so only for the purpose of guidance in interpreting the Nebraska Constitution, not because we consider any U.S. Supreme Court case to compel the result we reach.

We agree that since the implementation of the department's determination is likely to result in the infant's death and thereby sever the relationship between the infant and the parents, the juvenile court's assent is the functional equivalent of a judgment terminating parental rights. We therefore hold that where a proceeding to obtain the juvenile court's assent to the medical services determined by the department under § 43-285(1)

results in the functional equivalent of a proceeding to terminate parental rights, the same due process must be afforded in the assent proceeding as is required in a proceeding to terminate parental rights. In so holding, we are not unmindful of the ruling in *Lovato v. Dist. Ct.*, 198 Colo. 419, 601 P.2d 1072 (1979), that ordering the withdrawing of life support did not terminate parental rights; however, *Lovato* is inapposite, for there the child was dead when the withdrawal order was entered.

Although parental rights are not absolute or inalienable, *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979), such rights do not

> evaporate simply because [the parents] have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

Before parental rights may be terminated, Neb. Const. art. I, § 3, requires that the evidence clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests. See, § 43-292; *In re Interest of J.B. and A.P.*, 235 Neb. 74, 453 N.W.2d 477 (1990); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

We recognize that in deciding to assent to the department's determination, the juvenile court found the evidence to clearly and convincingly establish that so doing was in the infant's best interests. However, the fact remains that the juvenile court initially asserted jurisdiction over the relationship between the infant and the parents on the basis of a preponderance of the evidence standard. Its later finding with respect to the department's determination is not the equivalent of a finding that the evidence clearly and convincingly establishes that the relation-

ship between the infant and each of the parents should be terminated.

CONCLUSION

For the foregoing reasons, the judgment of the juvenile court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., concurring.

I concur in the result, but I write separately to point out the procedure that I believe is required by the Department of Social Services (DSS).

The issue presented is whether DSS, which has temporary custody of the minor, can request that life support be withdrawn from the minor and that the minor not be resuscitated. Such a request necessarily requires as a first prerequisite that all rights of the parents to the child be terminated.

Neb. Rev. Stat. § 43-292 (Reissue 1993) provides that the court may terminate all parental rights between the parents and the juvenile when the court finds such action to be in the best interests of the juvenile and one or more of the following conditions exist: "(2) The parents have substantially and continuously or repeatedly neglected the juvenile . . . (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination . . . ."

In my opinion, there are factual situations in which only one act by a parent is sufficient to provide the basis for termination under § 43-292. Parental conduct which results in serious and permanent injury to the juvenile does not have to be continuous or repeated under § 43-292(2), nor would efforts to correct the condition be required under § 43-292(6) before the court could proceed with termination. An act by the parent or parents which causes severe and permanent injury to the juvenile is enough to permit the court to terminate all parental rights between the parents and the juvenile under § 43-292.

In appeals from the termination of parental rights in a county court sitting as a juvenile court, an appellate court reviews such

cases de novo on the record. See *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). An order terminating parental rights must be based upon clear and convincing evidence and should be issued as a last resort when no reasonable alternative exists. DSS' request will have a permanent result, and until parental rights have been terminated, DSS does not have the right to request a court order which would permit medical support personnel to withdraw life support and medical treatment being given to the minor child in question.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RICHARD E. SCOTT, RESPONDENT.

564 N.W.2d 588

Filed June 20, 1997. No. S-96-852.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
2. ____. Any violation of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Paul E. Galter, of Butler, Galter, & O'Brien Law Firm, for respondent.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

On May 16, 1996, the Committee on Inquiry of the First Disciplinary District of the Nebraska State Bar Association (Bar Association) recommended that formal charges be filed against Richard E. Scott for violating his oath of office as an attorney and violating the following provisions of the Code of Professional Responsibility:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . . .

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

. . . .

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

. . . .

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

. . . .

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him or her.

. . . .

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

. . . .

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he or she may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

. . . .

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his or her representation of a client, a lawyer shall not:

. . . .

(5) Knowingly make a false statement of law or fact.

. . . .

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

The Disciplinary Review Board (board) for the Bar Association subsequently determined that with regard to the

allegations contained in the formal charges, there were reasonable grounds for discipline, and that a reprimand by the board would not be an appropriate remedy. The board accordingly submitted the formal charges to the Clerk of the Nebraska Supreme Court in August 1996. Scott filed a general denial to the formal charges.

On January 7, 1997, a referee appointed by this court conducted a formal hearing. The referee found that the following facts were established by clear and convincing evidence:

Scott was admitted to the practice of law in the State of Nebraska in February 1972. At all times relevant to this case, he was engaged in private practice in Lincoln, Nebraska.

On March 17, 1994, Scott was retained by Daniel Wheeler to represent Wheeler in a claim before the Nebraska Workers' Compensation Court against Wheeler's former employer, Lincoln Regional Center, and the State of Nebraska (defendants). Scott filed a petition on behalf of Wheeler in the Workers' Compensation Court on March 22, but at no time during the duration of the case did Scott provide defendants with mandatory disclosure statements. Defendants filed an answer and served Scott with interrogatories and two sets of mandatory disclosure statements. Wheeler was later deposed by defendants' attorney, Jill Schroeder, on May 23, 1994. In his answers to interrogatories and questions asked during his deposition, Wheeler identified Dr. T.J. Tegt as his physician who would testify on his behalf at trial. Further, Wheeler identified the Veterans' Administration as having relevant medical records regarding his injuries which were the subject of his case.

The trial was set for July 27, and notice was sent to Scott. On July 7, Scott filed a motion for continuance, alleging that "the Plaintiff is in the State of Alaska for until [sic] the first week in August and will be unable to attend the hearing." The motion was sustained and the trial date was continued to August 8, a day certain. Notice of said continuance was mailed to Scott.

On August 8, Scott failed to attend the trial because he was attending a hearing in Kearney, Nebraska, and instead sent attorney Brian Watkins to represent Wheeler. Watkins was neither Scott's partner nor his employee. Moreover, Wheeler had

never been informed that Scott would not be attending the trial or that Watkins would be appearing in Scott's place.

During the hearing, Watkins requested that the court continue the trial to a date in October 1994 for the reason that Wheeler was "in the State of Alaska until the first week of October 1994 and will not be able to attend any hearings in the State of Nebraska until said date." Watkins' request was denied. In denying the request, the court noted that a previous request for continuance had stated that Wheeler would be available during August and took judicial notice of the fact that Scott had not filed any of the mandatory disclosures on behalf of his client. On August 12, the court entered an order of dismissal, dismissing the case with prejudice. Scott was sent a copy of the order.

In October 1994, Scott met with Wheeler to discuss a separate claim which was pending with the Social Security Administration. Wheeler had signed a retainer agreement to retain Scott's services in the Social Security case.

On October 31, Scott received correspondence from Ronald Olds of the Department of Veterans Affairs (Veterans Affairs). According to the letter, Veterans Affairs was claiming a subrogation interest in Wheeler's workers' compensation claim. Included with the letter were Wheeler's medical records from the Veterans' Administration hospital in Lincoln, Nebraska.

By letter dated November 7, 1994, Scott informed Wheeler of the subrogation claim and stated that he "will try and go forward with your case however, I'm certainly not making any guarantees because of the lateness of the delivery of these items from the Veteran's [sic] Administration."

In December 1994, Wheeler wrote to Scott asking for information regarding his workers' compensation case. Responding to Wheeler's inquiry by letter dated December 28, 1994, Scott stated that "because of the lateness of the information from the Veteran's [sic] Administration, we are having a very difficult time with your case." There was no indication in the letter that the case had been dismissed.

Scott received a request from Veterans Affairs in January 1995 to provide an update on Wheeler's workers' compensation claim. In a letter dated February 5, 1995, Scott stated that the

court had dismissed the claim but that he was still working on the claim.

Scott received another request in April 1995 to provide an update on the workers' compensation claim. Scott responded shortly thereafter. In his response, Scott stated that "Mr. Wheeler's matter has been submitted to the Worker's [sic] Compensation Court. To date, we have not received a result as yet, but will keep you informed as to the status of this claim." As of the time of the letter, no new evidence had been submitted to the court, nor was anything pending before the court.

In July 1995, a representative from Veterans Affairs again asked Scott to provide an update with regard to Wheeler's workers' compensation claim. According to Scott, in a letter dated July 19, 1995, "This is to inform you that Mr. Wheeler's Social Security case is still pending and to date we have not heard anything concerning this matter." Wheeler's workers' compensation claim was never addressed.

Scott received a fourth request from Veterans Affairs seeking an update of the workers' compensation claim on October 2. Scott stated in a letter dated October 5, 1995, "Please be advised that the Workers' Compensation matter relating to Mr. Wheeler is going to be dismissed but, the Social Security matter is still ongoing."

On December 26, Wheeler notified Scott that he was terminating Scott's representation and asked Scott for a copy of all of his file materials. A copy of such file materials was provided by Scott on December 29.

Wheeler filed a complaint against Scott with the Counsel for Discipline for the Nebraska State Bar Association on January 17, 1996. Counsel forwarded said complaint to Scott, who replied by letter dated January 23, 1996, stating,

> The Workers' Compensation case was scheduled and continued twice because of [Wheeler's] request. The final time the matter was set, Mr. Wheeler did not show up, which was in August of 1994 and the matter was dismissed at that time. We would have had a very difficult time of proving our case, since we had no doctor tieing [sic] the injury to a work related accident and without his testimony I felt that there would be no need to go further.

Pursuant to the findings of the referee, Scott's response to the complaint was not factually correct or was misleading in the following respects: (1) Wheeler never requested a continuance of his case; (2) Wheeler did not show up at the trial because he was never given notice of the trial date; and (3) the workers' compensation case was dismissed because the judge would not grant the request for continuance made at the time the trial was scheduled to begin, Watkins was not prepared for trial, and Scott failed to provide defendants with the mandatory disclosure statements.

In a section of the referee's report designated as "Additional Findings of Fact," the following findings were made: (1) Scott entered into an attorney-client relationship with Wheeler to pursue a workers' compensation claim, (2) the case was initially filed to protect against the possibility of missing an impending statute of limitations, (3) there was no evidence demonstrating that Wheeler's injury was caused by his employment, (4) Scott could not have filed mandatory disclosures which would have supported the claim, (5) either the case should have been dismissed with the client's consent or Scott should have withdrawn, (6) nothing Scott had done or failed to do in the Workers' Compensation Court resulted in injury to Wheeler, (7) Scott misrepresented that Wheeler would be returning to Lincoln on a certain date, (8) Scott had no basis for stating a date upon which Wheeler would return and had a weak basis for concluding that Wheeler was in Alaska, and (9) Scott made a series of misrepresentations to representatives of Veterans Affairs with regard to the status of the workers' compensation case.

At the conclusion of the referee's statement of facts, the referee held that the Bar Association had established by clear and convincing evidence that Scott violated DR 7-102(A)(4), (5), and (8) by deliberately misrepresenting to the Workers' Compensation Court that Wheeler was "in the State of Alaska for until [sic] the first week in August." The Bar Association also established by clear and convincing evidence that Scott violated DR 7-102(A)(4), (5), and (8) by deliberately misrepresenting the status of the workers' compensation matter to a representative of Veterans Affairs.

The referee recommended that Scott be suspended from the practice of law for a period of 30 days for such violations. In

reaching its recommendation, the referee considered that the misrepresentation was made to a court. He found mitigating that Scott did not receive any fee for work done for Wheeler and that the misrepresentations appeared to have been done with poor judgment in an effort to help maintain the viability of Wheeler's workers' compensation claim at no benefit to Scott. Finally, the referee was particularly troubled by the fact that Wheeler threatened to go to the Bar Association if Scott charged him a fee.

Neither party filed exceptions to the referee's report. Consequently, the parties were ordered by this court on February 19, 1997, to file simultaneous briefs regarding the discipline to be imposed based upon the referee's findings.

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997). Further, any violation of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment. *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997).

In the present case, we recognize that mitigating circumstances certainly exist: (1) Scott's actions were done in an effort to help maintain the viability of Wheeler's workers' compensation claim and not to benefit himself, (2) at no time did Scott receive a fee for representing Wheeler in the compensation matter, and (3) Scott's conduct did not result in injury to Wheeler. However, these mitigating factors fail to overcome the fact that Scott deliberately lied to a court and to Veterans Affairs. Although we encourage all attorneys to zealously represent their clients, such advice cannot be construed to permit attorneys to deceive a court of law or other interested entities.

Considering the gravity of Scott's actions, we hereby suspend Scott from the practice of law for a period of 1 year, effective immediately.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLANT, V.
MICHAEL J. WIECZOREK, APPELLEE.
565 N.W.2d 481

Filed June 20, 1997. No. S-96-961.

1. **Jurisdiction: Appeal and Error.** It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Criminal Law: Judgments: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) grants the State the right to seek Supreme Court review of adverse criminal rulings and specifies the special procedure by which to obtain such review.
3. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity.
4. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
5. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.
6. **Criminal Law: Final Orders: Case Overruled.** An order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. To the extent that *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974), is inconsistent with this holding, it is overruled.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Appeal dismissed.

Robert J. Cashoili, Deputy Hall County Attorney, for appellant.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

Pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), the State appeals from the ruling of the trial court which sustained the motion for directed verdict by appellee, Michael J. Wieczorek, in regard to three counts of a four-count criminal information. We conclude that this court is without jurisdiction in this matter and, accordingly, dismiss the State's appeal.

FACTUAL BACKGROUND

The State charged Wieczorek in a four-count amended information with second degree assault, use of an explosive to commit a felony, second degree unlawful possession of explosive material, and use of explosives without a permit. A jury trial was held on August 5 and 6, 1996. Proof was adduced at trial that on or about July 8, 1995, Wieczorek constructed an explosive device by placing tissue paper and an M-70 firecracker inside a piece of plastic pipe and sealing the ends of the pipe with a caulking material. While Wieczorek and three friends drove down South Locust Street in Grand Island, Wieczorek lit the fuse and threw his "pipe bomb" out the window of the car. The bomb landed either in a ditch or on the surface of the parking lot adjacent to the ditch. A group of around 20 individuals was congregated in the parking lot at this time, and one individual claimed to have suffered hearing loss as a consequence of the resulting explosion.

At the close of the State's evidence and, again, at the close of all evidence, Wieczorek moved for a directed verdict on all counts. After both parties rested, the trial court did, in fact, direct a verdict in favor of Wieczorek as to count II, use of an explosive to commit a felony, on the basis of insufficiency of the evidence; count III, second degree unlawful possession of explosive material, on the basis of insufficiency of the evidence; and count IV, use of explosives without a permit, on the alternative grounds that Neb. Rev. Stat. § 28-1218 (Reissue 1995) is unconstitutional or, that in any event, the evidence adduced by the State was insufficient for submission of the issue to the jury. The case was submitted to the jury solely on the charge of second degree assault. The jury convicted Wieczorek of the lesser-included offense of third degree assault on August 6, 1996, and

on October 30, he was sentenced to a term of 12 months' probation which included confinement in the county jail for 45 days. In the interim, on August 20, the State filed an application for leave to docket an appeal with reference to the court's directing a verdict in Wieczorek's favor on counts III and IV. Wieczorek did not file a motion for new trial in this matter, and he did not file an appeal after sentence was pronounced on October 30.

ASSIGNMENT OF ERROR

The State contends that the trial court erred when it found that § 28-1218 violated the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution by placing a burden of proof upon the defendant in a criminal case.

ANALYSIS

Given the obvious issue presented by the timing of the State's application for leave to docket an appeal, it must first be determined whether we have jurisdiction to decide the issue presented in the instant case. It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Trew v. Trew, ante* p. 555, 567 N.W.2d 284 (1997); *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995).

In the absence of a specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991). "[Section 29-2315.01] thus grants the State the right to seek Supreme Court review of adverse criminal rulings such as those involved in this case, and specifies the special procedure by which to obtain such review." *State v. Baird*, 238 Neb. at 725-26, 472 N.W.2d at 205.

Section 29-2315.01 provides, in pertinent part:

> The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. Such application

> shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the county attorney as to the part of the record he or she proposes to present to the appellant court. *Such application shall be presented to the trial court within twenty days after the final order is entered in the cause*, and upon presentation, if the trial court finds it is in conformity with the truth, the judge of the trial court shall sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the county attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. *The county attorney shall then present such application to the appellate court within thirty days from the date of the final order.*

(Emphasis supplied.)

Timeliness of an appeal is a jurisdictional necessity. *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996). When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. *Id.*

In this case, the trial court sustained Wieczorek's motions for directed verdict on August 6, 1996, and on that same day, the jury found Wieczorek guilty of third degree assault and the court accepted the jury's verdict. Wieczorek did not file a motion for new trial, and he was sentenced on October 30. However, the State had filed its application for leave to docket an appeal on August 20. Thus, we are confronted with the question whether a *final order* had been entered prior to the date on which the State filed its application for leave to docket an appeal.

In *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974), the State filed an application to docket error proceedings after the defendant had been convicted, but prior to sentencing and prior to the trial court's ruling on the defendant's motion for new trial. The defendant moved for dismissal of the error proceeding on the grounds that it was brought prematurely. In our analysis, we recognized that " '[t]his court has held repeatedly that an order is final only when no further action is required to dispose of the cause pending and that when the cause is retained for . . . further action to dispose of it, the order is interlocutory and not final.' " *State v. Weidner*, 192 Neb. at 163, 219 N.W.2d

at 743 (quoting *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965)). Nevertheless, in *State v. Weidner*, 192 Neb. at 163, 219 N.W.2d at 744, we concluded that

> [t]he proper practice would be to institute error proceedings after sentence is imposed or the motion for new trial is overruled, whichever is later. *However, since our decision here will not affect the defendant and will govern only pending or future similar cases, the motion to dismiss is overruled.*

(Emphasis supplied.)

In *State v. Weidner, supra*, we improvidently relied on *State v. Hutter*, 145 Neb. 312, 16 N.W.2d 176 (1944), wherein the issue presented was whether Comp. Stat. §§ 29-2314 through 29-2316 (1929), the predecessor statutes to § 29-2315.01, required a final order to be entered in the proceeding below before jurisdiction could be perfected in this court. The *Hutter* court concluded that although a final order was not an express statutory requirement, nevertheless, a final order was necessary to perfect appellate court jurisdiction.

> Under the special proceedings provided by these statutes (sections 29-2314, 29-2315 and 29-2316, Comp. St. 1929) it would appear to be the better rule that generally this court require that a final order or judgment completely disposing of the case shall have been entered below before we will decide any questions therein presented, *unless it is clearly shown by the record that the decision can in no manner reverse or affect the case in which the bill was taken.*

(Emphasis supplied.) *State v. Hutter*, 145 Neb. at 315, 16 N.W.2d at 177.

However, in contrast to the *Hutter* court, we now have an express statutory directive that an application for leave to docket an appeal shall only be presented by the county attorney to the trial court within 20 days *after the final order is entered* in a cause. See § 29-2315.01. Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). The Legislature fixed a time for filing an application for leave to docket an appeal in

§ 29-2315.01, and this court has no power to extend that time directly or indirectly. See *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996).

Our reliance in *State v. Weidner, supra*, on *State v. Hutter, supra*, for the conclusion that there is appellate court jurisdiction to consider a premature application to docket error proceedings pursuant to § 29-2315.01 when a decision in the appellate court will not affect the defendant and governs only pending or future similar cases was improvident. This is so because unlike § 29-2315.01, its predecessor statutes did not specify a time within which the State must first submit its application to the trial court and then to this court. Thus, we hold that an order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. The language of § 29-2315.01 and our holding are consistent with the longstanding principle of avoiding piecemeal appeals arising out of one operative set of facts. To the extent that *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974), is inconsistent with this holding, it is overruled.

In the instant case, the State had filed its application for leave to docket an appeal on August 20, 1996, during a time in which further action, i.e., sentencing, was necessary to completely dispose of the cause pending in the trial court. Accordingly, the State's application was premature. Because the State failed to comply with the jurisdictional requirements of § 29-2315.01, its appeal must be dismissed.

APPEAL DISMISSED.

WHITE, C.J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. GARY D. MELLOR, RESPONDENT.

565 N.W.2d 727

Filed June 20, 1997. No. S-96-1290.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Gary D. Mellor was admitted to the practice of law in the State of Nebraska on September 18, 1989.

On September 25, 1996, Mellor was indicted in the U.S. District Court for the District of Kansas. On October 16, he entered a plea of guilty to the charge of knowingly and intentionally receiving or distributing a visual depiction of a minor engaging in sexually explicit conduct that was mailed, shipped, or transported by computer in interstate commerce, in violation of 18 U.S.C. §§ 2 and 2252(a)(2). On January 6, 1997, the U.S. District Court entered judgment on the plea and sentenced Mellor to a prison term of 366 days.

On June 2, 1997, Mellor voluntarily surrendered his license to practice law in the State of Nebraska. In so doing, Mellor specifically admitted that his conduct as hereinbefore set forth violated Canon 1, DR 1-102(A)(1), (3), and (6), of the Code of Professional Responsibility, as adopted by the Nebraska Supreme Court. Mellor waived his right to notice, appearance, or hearing prior to entry of this order.

We accept Mellor's surrender of his license to practice law in the State of Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES B. JAKSICH, RESPONDENT.

564 N.W.2d 611

Filed June 20, 1997. No. S-97-568.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Charles B. Jaksich was admitted to the practice of law in the State of Nebraska on April 16, 1990.

On May 30, 1997, Jaksich voluntarily surrendered his license to practice law in the State of Nebraska. In so doing, Jaksich specifically admitted that he had failed to place client funds in a client trust account, in violation of Canon 9, DR 9-102, of the Code of Professional Responsibility, as adopted by the Nebraska Supreme Court. Jaksich also admitted that he had neglected legal matters entrusted to him by various clients and failed to carry out contracts of employment entered into with the various clients for his professional services and that by such neglect, he had prejudiced the administration of justice, in violation of Canon 1, DR 1-102(A)(1) and (5); Canon 6, DR 6-101(A)(3); and Canon 7, DR 7-101(A)(2), of the Code of Professional Responsibility. Jaksich waived his right to notice, appearance, or hearing prior to entry of this order.

We accept Jaksich's surrender of his license to practice law in the State of Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

DANIEL KOEHLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF TRACY L. KOEHLER, DECEASED, APPELLEE, V. FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, APPELLANT.

566 N.W.2d 750

Filed June 27, 1997. No. S-94-1160.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion.
3. **Attorney Fees.** The amount of attorney fees awarded pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1993) is a matter within the discretion of the trial court.
4. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
5. **Courts: Expert Witnesses: Hearsay.** It is incumbent upon a trial court to exercise its discretion in determining whether to admit evidence offered to demonstrate the

basis for an expert's testimony to ensure that such offer is not being used as a vehicle for introducing otherwise inadmissible hearsay into evidence.

6. **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 evidence admitted or excluded.
7. **Testimony: Evidence: Appeal and Error.** Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error.
8. **Attorney Fees: Presumptions.** To determine the proper amount of attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 1993), it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. There is no presumption of reasonableness placed on the amount offered by the party requesting fees.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Affirmed as modified.

Michael A. England and Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Eugene L. Hillman and Patricia McCormack, of McCormack, Cooney, Hillman & Elder, for appellee.

CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ROWLANDS, D.J.

WRIGHT, J.

Daniel Koehler (Koehler), as the personal representative of the estate of his daughter, Tracy L. Koehler (Tracy), sought benefits under the uninsured motorist provision in his automobile insurance policy with Farmers Alliance Mutual Insurance Company (Farmers). Following trial, the jury awarded Koehler $25,000, and the district court awarded him attorney fees. The district court overruled Farmers' motion for new trial, and Farmers appealed.

SCOPE OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. See, *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555

N.W.2d 32 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996).

The amount of attorney fees awarded pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1993) is a matter within the discretion of the trial court. *Adams Bank & Trust v. Empire Fire & Marine Ins. Co.*, 244 Neb. 262, 506 N.W.2d 52 (1993).

On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993).

FACTS

On May 10, 1990, Tracy left her parents' home near Lewiston, Nebraska, sometime before 9 p.m. and drove west on a gravel road. At that time, Jacqueline Murphy was driving east on the same road. As Murphy crested the top of a hill, she saw Tracy's vehicle and applied her brakes, which subsequently locked. The front driver's side of Tracy's vehicle collided with the front driver's side of Murphy's vehicle. The force of the impact spun Tracy's vehicle into a ditch on the north side of the road and Murphy's vehicle into a ditch on the south side of the road. Tracy died as a result of this accident.

Koehler, as the personal representative of Tracy's estate, brought suit against Murphy in the district court for Pawnee County in May 1992, alleging that Murphy was negligent in the operation of her vehicle. The vehicle driven by Tracy was owned by Koehler, and Koehler's insurer, Farmers, filed a motion for leave to intervene as an interested party because Koehler's insurance policy included uninsured motorist coverage. Farmers was permitted to intervene, and it moved to bifurcate the trial. Murphy was subsequently dismissed from the action. A jury trial was held in September 1994.

At trial, Koehler called George Lynch, an accident reconstruction expert. Lynch testified that in forming his opinion he relied upon materials that were of the type normally relied upon

by accident reconstructionists to formulate opinions as to the cause of an accident. He stated that he had relied on copies of accident reports from the Pawnee County Sheriff's Department and the Nebraska State Patrol. Using those reports, Lynch prepared exhibit 4, which reflects the position of the two vehicles after the collision and the measurements contained in the police reports. Exhibit 4 was admitted over Farmers' objections that it lacked foundation and was hearsay. Neither party requested a limiting instruction with respect to exhibit 4.

The jury returned a verdict for Koehler in the amount of $25,000. Following the verdict, Koehler filed a motion and application for attorney fees under § 44-359, which allows the court to award attorney fees in cases brought upon an insurance policy where a judgment is rendered against the insurance company. The trial court found that Farmers did not meet its burden of showing that the requested amount was unreasonable and approved the payment of $29,511.41 in attorney fees. Farmers filed a motion for new trial, which was overruled. Farmers timely appealed.

ASSIGNMENTS OF ERROR

On appeal, Farmers alleges that the trial court (1) erred in overruling Farmers' objection to the introduction of the investigating law enforcement officers' measurements through the admission of an exhibit prepared by Koehler's expert witness, (2) erred in overruling Farmers' motion for new trial, and (3) abused its discretion in awarding excessive attorney fees.

ANALYSIS

ADMISSION OF EXHIBIT 4

Lynch testified that he had been provided copies of the Pawnee County sheriff's report and the supplemental reports made by Nebraska State Patrol Trooper Stanley Funkey and a Trooper King, which contained diagrams, measurements, and photographs of the accident scene. Lynch stated that based on these reports, he prepared a drawing of the scene of the accident (exhibit 4) which incorporated numerous measurements taken from the reports and depicted the position of the two vehicles after the collision. Lynch explained that these reports were of

the type normally relied upon by experts in his field in reaching their opinions and that reference to exhibit 4 would be helpful to him in explaining his testimony to the jury.

Koehler offered exhibit 4, and Farmers objected based on foundation and hearsay. The trial court overruled the objection and admitted exhibit 4. Lynch then testified that Murphy's vehicle was 2 feet over the centerline when the skid marks appeared on the roadway and that Tracy's vehicle was 3 to 4 inches to the right of the center of the roadway at the point of impact.

Farmers alleges that the trial court erred in overruling its objection to the introduction of exhibit 4. Farmers contends that exhibit 4 should not have been admitted because it included measurements taken from the investigating law enforcement officers' reports and, therefore, contained hearsay.

Koehler argues that exhibit 4 was introduced to provide the basis for Lynch's testimony and was not offered to prove the truth of the matter asserted. Thus, Koehler argues, exhibit 4 was admissible as nonhearsay, even though it may have contained hearsay that was otherwise inadmissible.

In all proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. See, *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

We have emphasized that a testifying expert may not merely act as a conduit for hearsay, and if the trial court in its discretion determines that the introduction of the basis for the expert's testimony will advance such a purpose, the trial court has discretion to refuse to admit such evidence. See *Stang-Starr v. Byington*, 248 Neb. 103, 532 N.W.2d 26 (1995).

In *Stang-Starr*, the plaintiff's expert testified regarding the standard of care with respect to a particular gynecological procedure. The expert testified that his opinion was grounded upon the basis of his knowledge obtained from medical textbooks, medical literature, and personal experience. The plaintiff then attempted to offer a medical bulletin, along with material found in a number of medical textbooks concerning gynecology, upon

which the expert relied. In an offer of proof, the plaintiff's counsel stated that if permitted to testify, the expert would identify each text as authority in his field, identify each text as a basis of his opinion, and identify and read specific passages of material upon which he relied in testifying. The defendant objected on the grounds of hearsay, and the objection was sustained.

On appeal, we affirmed the trial court's sustaining of the objection to the offer of the medical texts and literature on the basis that they were hearsay. We noted that when the plaintiff attempted to offer the medical texts and literature into evidence as the basis of the expert's testimony, the plaintiff was in fact attempting to use the expert as a vehicle for introducing hearsay into the record. We affirmed the trial court's discretion in rejecting such a technique:

> Nor does the fact that the out-of-court statements contained in the authorities were offered in the guise of forming the bases for the testifying experts' opinions alchemically transmute them from inadmissible hearsay into admissible nonhearsay. When Stang-Starr attempted to elicit testimony from her witness concerning what a particular authority has reported about an issue, she was attempting to use her witness to recite the opinion of each authority cited instead of eliciting her witness' expert opinion derived from the witness' own knowledge and experience. The witness was merely seeking to act as a conduit for inadmissible hearsay. The recitation of a passage by a nontestifying authority, even if such is in conformity with the opinion of the testifying expert, is hearsay.

Stang-Starr, 248 Neb. at 110-11, 532 N.W.2d at 31. See *State v. Lundstrom*, 161 Ariz. 141, 776 P.2d 1067 (1989) (when testifying expert merely recites another nontestifying expert's opinion, expert opinion relied upon is hearsay and inadmissible). See, also, *Matter of James Wilson Associates*, 965 F.2d 160 (7th Cir. 1992) (requiring trial courts to exercise discretion to ensure that expert is not being used as vehicle for circumventing rules of evidence); *U.S. v. Scrima*, 819 F.2d 996 (11th Cir. 1987) (recognizing that Fed. R. Evid. 703 is not open door to introduction of inadmissible evidence disguised as expert opinion). Thus, it is incumbent upon the trial court to exercise its discretion in

determining whether to admit evidence offered to demonstrate the basis for an expert's testimony to ensure that such offer is not being used as a vehicle for introducing otherwise inadmissible hearsay into evidence.

Lynch testified that exhibit 4 was drawn by using the measurements of the postaccident scene, which he took from the accident reports. Lynch stated that in order to draw exhibit 4, he was not required to make any conclusions from the accident reports. Rather, the content of exhibit 4 was limited to measurements taken from the accident reports.

At the time Koehler offered exhibit 4, the measurements had not been admitted into evidence. However, any error by the trial court in receiving exhibit 4 was harmless because the measurements were subsequently admitted into evidence without objection. Farmers' witness, Funkey, testified to every measurement contained in exhibit 4 that pertains to an issue in dispute. The few measurements contained in exhibit 4 that were not covered in Funkey's testimony relate to matters which are undisputed and, therefore, could not have prejudiced Farmers.

To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997). Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994). Farmers cannot argue that it was prejudiced by the admission of exhibit 4. Therefore, this assignment of error is without merit.

Motion for New Trial

Farmers' motion for new trial alleged the following: There was irregularity in the proceedings, excessive damages were given under the influence of passion or prejudice, the verdict was not sustained by sufficient evidence, and errors of law occurred and were excepted to by Farmers. We find that the trial court did not abuse its discretion in overruling Farmers' motion for new trial, and its assignment of error in this regard is without merit.

ATTORNEY FEES

Following trial, Koehler moved for attorney fees, pursuant to § 44-359, which states:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy . . . against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

During argument on the motion for attorney fees, the trial court stated that the party opposing attorney fees has the burden to rebut the "presumption" that the proponent's offered amount of fees is reasonable. The proper test to be applied in determining attorney fees under § 44-359 was outlined in *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993). In that case, we stated that § 44-359 entitles the prevailing party to reasonable attorney fees. To determine the proper fees, it is necessary to consider

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

National Am. Ins. Co., 243 Neb. at 778, 502 N.W.2d at 825. To determine what fees are reasonable, the court evaluates the aforementioned factors. There is no presumption of reasonableness placed on the amount offered by the party requesting fees.

The determination of attorney fees awarded pursuant to § 44-359 is a matter within the discretion of the trial court. See *Adams Bank & Trust v. Empire Fire & Marine Ins. Co.*, 244 Neb. 262, 506 N.W.2d 52 (1993). The trial court's use of a nonexistent presumption as to the reasonableness of the amount offered by Koehler was an abuse of discretion.

After evaluation of the factors to be considered in determining attorney fees, we modify the trial court's award of attorney fees to $17,134.59. In addition, Koehler has requested attorney

fees on appeal to this court, and they are awarded in the amount of $2,520.

CONCLUSION

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

WHITE, C.J., participating on briefs.

WHITE, C.J., concurring.

Although I concur with the result in this case, my disagreement with the majority's inference that the trial court erred in initially admitting exhibit 4 necessitates that I write separately.

Neb. Rev. Stat. § 27-703 (Reissue 1995) (Rule 703) states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 703 clearly states that an expert may rely on data which include otherwise inadmissible data in reaching an opinion. This court has stated that otherwise inadmissible data upon which an expert relies may be admitted on direct examination if the opponent fails to object or if the evidence is offered not to prove the truth of the matter asserted, but simply to demonstrate the basis for the expert's testimony. See, *State v. Hayden*, 237 Neb. 286, 466 N.W.2d 66 (1991) (excluding reports from evidence as inadmissible hearsay because they were offered to prove truth of matter asserted); *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990) (finding that expert's reference to outside literature and research, not offered to prove truth of contents, was not error when literature was not offered as independent evidence of its truth); *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989) (allowing reports into evidence and finding that said reports were not hearsay because they were admitted for purpose of explaining basis of expert's direct testimony); *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985) (finding prejudicial error in admission of copy of director's order containing unidentified

expert's opinion at prior hearing in part because order was hearsay in that it was offered to prove truth of matter asserted). For a detailed discourse on Nebraska case law interpretation of Rule 703, see R. Collin Mangrum, *Opinion and Expert Testimony in Nebraska*, 27 Creighton L. Rev. 85 (1993), and The Honorable F.A. Gossett III, Judge Gossett's Nebraska Evidence Handbook (1995).

In the instant case, the trial court did not err in admitting exhibit 4, the drawing of the scene prepared by Koehler's expert witness using the reports, maps, diagrams, and measurements obtained from law enforcement reports. Rule 703 permits experts to rely on facts or data that might otherwise be inadmissible if the facts or data are of the type reasonably relied on by experts in the particular field in forming opinions. The expert testified that the reports provided to him contained the type of information on which an accident reconstructionist would normally rely in forming conclusions and opinions. Even if we accept Farmers' characterization of exhibit 4 as a recreation of the actual law enforcement reports, our case law would support its admission on direct examination in this case because it was composed of the type of information reasonably relied on by accident reconstruction experts in reaching their opinions and was not offered to prove the truth of the matter asserted, and because Koehler's expert testified that he created exhibit 4 solely to explain to the jury the underlying basis of his opinion.

The majority relies heavily on *Stang-Starr v. Byington*, 248 Neb. 103, 532 N.W.2d 26 (1995), to support its position that exhibit 4 was inadmissible. However, *Stang-Starr* is clearly distinguishable from the instant case. In *Stang-Starr*, the plaintiff attempted to have her witness read portions of a medical treatise into evidence such that she tried to use "her witness to recite the opinion of each authority cited instead of eliciting her witness' expert opinion derived from the witness' own knowledge and experience." *Id.* at 110, 532 N.W.2d at 31. We differentiated that situation from situations such as the one presented in the instant case by stating,

> "When, however, the witness has gone to many sources—although some or all be hearsay in nature—and rather than introducing mere summaries of each source he uses them

> all, along with his own professional experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as an attempt to introduce hearsay in disguise."

Id. at 111, 532 N.W.2d at 31, quoting *United States v. Williams*, 431 F.2d 1168 (5th Cir. 1970), *aff'd en banc* 447 F.2d 1285 (5th Cir. 1971), *cert. denied* 405 U.S. 954, 92 S. Ct. 1168, 31 L. Ed. 2d 231 (1972).

None of the concerns present in *Stang-Starr* were present in this case. As the majority noted, "Lynch stated that in order to draw exhibit 4, he was not required to make any conclusions from the accident reports. Rather, the content of exhibit 4 was limited to measurements taken from the accident reports." Lynch used the measurements taken from the reports along with his own professional experience to arrive at his opinion, and he created exhibit 4 to explain the basis of that opinion to the jury. Thus, I would find that the trial court, in initially admitting exhibit 4, committed no error requiring a cure through the adoptive admission analysis employed by the majority in reaching its conclusion.

GERRARD, J., joins in this concurrence.

SHARON MOLLER, CONSERVATOR OF RHIANNON MOLLER, A MINOR, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

566 N.W.2d 382

Filed June 27, 1997. No. S-95-905.

1. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
2. **Insurance: Contracts.** Whether an insurance contract is ambiguous and therefore in need of construction is a question of law.
3. **Contracts.** In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous.
4. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
5. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.

6. **Contracts: Intent.** When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law.
7. **Insurance: Contracts.** When the terms of an insurance policy are clear and unambiguous, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Thomas A. Gleason for appellant.

Wayne J. Mark and James A. Mullen, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

Sharon Moller, conservator of Rhiannon Moller, sued State Farm Mutual Automobile Insurance Company (State Farm), claiming that Rhiannon was an insured under the terms of an underinsured motorist provision in an insurance policy issued to Gary Moller, Rhiannon's father. State Farm had denied coverage for personal injuries sustained by Rhiannon in an automobile accident. The district court entered judgment in favor of State Farm, and Sharon appeals.

SCOPE OF REVIEW

The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Luedke v. United Fire & Cas. Co., ante* p. 182, 561 N.W.2d 206 (1997); *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997).

Whether an insurance contract is ambiguous and therefore in need of construction is a question of law. *Kast, supra*; *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995).

FACTS

On January 8, 1993, Rhiannon was a passenger in a motor vehicle which was involved in a collision. The sole and proxi-

mate cause of the collision was the negligence of the operator of the vehicle. The parties stipulated that as a direct and proximate result of the collision, Rhiannon sustained serious physical injuries and that the value of Rhiannon's claim for injuries and damages exceeded $141,666.

Sharon and the representatives of the two other passengers in the vehicle exhausted the coverage of the underinsured driver's liability insurance policy, each collecting one-third of the $50,000 maximum coverage. Sharon carried $25,000 in underinsured motorist coverage on her State Farm automobile insurance policy, which State Farm paid.

Gary had a separate automobile insurance policy issued by State Farm which provided for $100,000 in underinsured motorist coverage. The parties stipulated that the provisions of this policy were in full force and effect at the time of the accident on January 8, 1993, and that the only issue to be decided in this case is whether or not Rhiannon qualifies as an insured under Gary's policy.

Section III of Gary's policy provided:

> **UNDERINSURED MOTOR VEHICLE - COVERAGE W**
>
> . . . .
>
> **Who Is an Insured - Coverages U and W**
>
> ***Insured*** - means the ***person*** or ***persons*** covered by uninsured motor vehicle or underinsured motor vehicle coverages.
>
> This is:
>
> 1. the first ***person*** named in the declarations;
> 2. his or her ***spouse***;
> 3. their ***relatives*** . . . .

According to the definitions section of the policy, "***[r]elative*** - means a ***person*** related to ***you*** or ***your spouse*** by blood, marriage or adoption who lives with ***you***. It includes ***your*** unmarried and unemancipated child away at school."

Gary and Sharon had divorced on January 3, 1984. The divorce decree provided that Sharon had physical custody of Rhiannon and her brother, but that Gary was entitled to visitation every other weekend from 6 p.m. on Friday to 6 p.m. on Sunday and one evening per week from 4 to 9 p.m. Gary was

also entitled to have the children with him on alternate holidays and birthdays.

Gary and Sharon reconciled 8 months after the divorce. They lived together as a family unit from August 1984 until June 1992, except for one separation from November 1989 until August 1990. At the time Gary's policy was issued, he was living with the family.

In June 1992, Gary and Sharon separated for the final time. Sharon and the children moved into a residence located about a mile away. Gary remained at the previous home, and when the children visited overnight, they stayed in the rooms they had before the separation. Gary remained at this home until his marriage to his present wife in February 1994.

The parties stipulated that after the final separation, Gary maintained a relationship with Rhiannon and her brother, the nature and extent of which is described in the depositions offered into evidence. The depositions reflect that Gary's job as a railroad engineer prevented him from following the exact terms of the divorce decree, but he continued visitation with Rhiannon on a regular basis. His job required him to be on call 24 hours per day, and because Gary and Sharon agreed that the children should not spend the night alone when Gary was called to work, there were occasions when he returned Rhiannon to Sharon's home. Thus, Rhiannon actually spent the night at Gary's house approximately once every 2 weeks.

More often, Rhiannon would visit Gary's home without intending to stay overnight. Gary's home was located four to five blocks from Rhiannon's school, and a couple of times per week, Rhiannon stopped by the house with her friends or brother to have a bite to eat. These visits averaged twice per week, but sometimes varied. Some weeks Rhiannon stopped every night, sometimes only once or twice per week, and some weeks not at all.

Rhiannon kept some clothes and toiletries at Gary's house. Gary provided Rhiannon with spending money when she visited, routinely paid for the purchase of her clothes and personal possessions, and took her out to eat. Gary claimed Rhiannon as a dependent on his tax returns since 1984, and he maintained health insurance for her since the date of the divorce decree.

ASSIGNMENTS OF ERROR

Sharon assigns as error that the district court erroneously held that the phrase "lives with" is clear and unambiguous and that applying the plain meaning of "lives with," Rhiannon "lived with" Sharon and did not "live with" Gary.

ANALYSIS

The issue presented is whether, under the terms of the underinsured motorist provision in the policy issued to Gary, Rhiannon qualified as a "relative," so as to be insured under the policy. The policy defines a relative as "a ***person*** related to ***you*** or ***your spouse*** by blood, marriage or adoption who lives with ***you***. It includes ***your*** unmarried and unemancipated child away at school." It is undisputed that Rhiannon is the natural child of Gary and that she was not away at school at the time of the accident. Thus, the issue is whether Rhiannon "lived with" Gary. The policy itself does not provide a definition of the phrase "lives with."

In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous. *Krzycki v. Genoa Nat. Bank*, 242 Neb. 819, 496 N.W.2d 916 (1993). Whether a contract is ambiguous is a question of law. *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997); *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994).

An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996); *Krzycki, supra*; *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). "The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous." *Knox*, 233 Neb. at 391, 446 N.W.2d at 4.

Sharon argues that the phrase "lives with" is ambiguous, or, alternatively, that the phrase clearly includes Rhiannon's relationship with Gary. State Farm claims that the phrase "lives with" is not ambiguous and that Rhiannon does not "live with" Gary. We have not previously interpreted the phrase "lives

with" as it defines an insured in a policy of insurance, and therefore, this case presents a matter of first impression.

The parties stipulated to many of the facts, and the remaining facts set forth in the depositions of the parties are not in dispute. Therefore, since there are no material issues of fact in dispute, our interpretation of the terms and conditions of the insurance policy is a question of law. When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. *Don J. McMurray Co. v. Wiesman*, 199 Neb. 494, 260 N.W.2d 196 (1977); *Nebraska Im-Pruv-All, Inc. v. Sass*, 197 Neb. 261, 247 N.W.2d 924 (1976).

The cases from other jurisdictions are split on whether the phrase "lives with" is ambiguous. In *Casolari v. Pipkins*, 253 Ill. App. 3d 265, 624 N.E.2d 429 (1993), the court held that the phrase "lives with" used in the definition of a "relative" in an uninsured motorist policy provision was ambiguous. The court concluded that a minor daughter who was killed in a car accident had lived with her father despite the fact that she was normally present at her father's residence on alternating 3-day weekends only. The court noted that on at least two occasions, the daughter spent a few weeks with her father. She kept clothes and toys at one of her father's residences, and when she stayed with her father, she was subject to his care and custody.

Similarly, in *Davis v. State Farm Mut. Auto. Ins. Co.*, 583 So. 2d 225 (Ala. 1991), the court determined that the phrase "lives with" was ambiguous and that a person can live at more than one place at the same time. Earlier, in *Withers v. State Farm Mut. Auto. Ins.*, 580 So. 2d 582 (Ala. 1991), the court had held that a child "lived with" both his mother and his father despite the fact that the father was the primary custodial parent, the child received his mail at his father's address, the child listed that address on his learner's permit, the child spent the vast majority of free time at his father's address, and the child's brother stated that they referred to their father's home as their home. The court noted that the child also spent a considerable amount of time at his mother's house.

In contrast, in *Stoner v. State Farm Mut. Auto. Ins. Co.*, 780 F.2d 1414 (8th Cir. 1986), the court, in applying South Dakota

law, concluded that the phrase "lives with you" was unambiguous. The court found that unlike legal residence or domicile, which have specific legal meanings apart from their ordinary usage, the phrase "lives with you" was susceptible of only one interpretation, that is, actually living in fact. Thus, the court determined that the insured's 21-year-old daughter who was enlisted in the Navy and stationed away from her father's residence did not "live with" her father.

In *State Farm Mutual Auto. Ins. Co. v. Taussig*, 227 Ill. App. 3d 913, 592 N.E.2d 332 (1992), the court addressed whether a person was a "relative" under an automobile liability policy. In *Taussig*, the insured's son sought coverage as a relative even though he had recently moved into his own apartment where he slept and ate most of his meals. Although the son was financially assisted by his father, the son had a full-time job. The court held that the phrase "lives with" was unambiguous and went on to conclude that the son did not "live with" his father. Despite the fact that the son had left a number of personal items at his father's home, considered that home to be his permanent address, and visited the home at least once a week, the court concluded that the evidence was not sufficient to meet the "living with" standard for purposes of that insurance policy.

In *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 807 P.2d 531 (Ariz. App. 1990), the court held that the phrase "lives with" was not ambiguous and that the insured's 16-year-old daughter, who had moved out of her parents' home and into an apartment with her boyfriend in hopes that they would marry, did not "live with" her parents. The court noted that with the exception of one 10-day period, the daughter lived continuously in the apartment. In holding for the insurer, the court relied upon six factors: (1) presence in or absence from the parents' home, (2) reasons or circumstances relating to presence or absence, (3) the relationship of the child with the parents, (4) the child's living arrangement in earlier time periods, (5) the child's subjective or declared intent with respect to place of residence on the day of the accident, and (6) whether the child had a second place of lodging on the day of the accident.

In the case at bar, the district court found that the phrase "lives with" was clear and unambiguous. Applying the rules of

construction set forth above, we also find as a matter of law that the phrase is not ambiguous. Interpretation of an unambiguous term or provision in an insurance policy presents a question of law. *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997). Thus, when the terms of the policy are clear and unambiguous, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Id.*; *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996).

In ascertaining the plain meaning of the phrase "lives with," we find particularly instructive *Tokley v. State Farm Ins. Companies*, 782 F. Supp. 1375 (D.S.D. 1992). In *Tokley*, the question was whether an unemancipated child of divorced parents could be an insured relative of the noncustodial parent. The policy provisions were essentially identical to those of the policy in the present case. The court concluded that where the extent of the relationship and the contacts between the child and the noncustodial parent were of the duration and regularity presented, it would adopt the generally accepted view that the child lived with both parents.

In *Tokley*, the child stayed overnight at his father's house two or three weekends per month and had his own room at his father's house, decorated to his own taste, with personal belongings kept there. The child would often stop by his father's home after school for visits. The record reflected that the child spent a significant amount of time in both households and felt at home in either place.

The court in *Tokley* concluded that the policy language was not ambiguous. In determining that under the unambiguous terms of the policy, the child "lived with" his father, the court in *Tokley* reasoned that the policy provisions and corresponding definitions were terms that defined persons to whom coverage was extended and were therefore inclusionary clauses. See, also, *Row v. United Services Auto. Ass'n*, 474 So. 2d 348 (Fla. App. 1985). The court in *Tokley* quoted *Novak v. State Farm Mut. Auto. Ins. Co.*, 293 N.W.2d 452 (S.D. 1980), for the proposition that " '[w]here the policy provision under examination relates to the inclusion of persons other than the named insured

within the protection afforded, a broad and liberal view is taken of the coverage extended.' " *Tokley*, 782 F. Supp. at 1379. The court in *Tokley* further reasoned: "[T]he phrase 'lives with you' should reflect the contemporary realities of family living and should not be narrow and strait-jacketed to apply only to idealized notions of a pristine family unit, harmonious and integrated." *Id.*

Regardless of whether we construe the policy as of the date of the agreement or as of the time of the accident, when we consider the plain meaning of the phrase as the ordinary reasonable person would understand it, we conclude that Rhiannon is afforded coverage under the terms of the policy.

We note that the relevant definition of "live" in Webster's Third New International Dictionary, Unabridged 1323 (1993) provides that to live is "to occupy a home: DWELL, RESIDE." The terms "dwell" and "occupy" both refer to "reside." See *id.* at 706, 1561. Under "reside," Webster's explains that "LIVE is the more general word for indicating that one has one's home in a place." *Id.* at 1931.

The term "home" is defined, among other ways, as "the family environment to which one is emotionally attached." *Id.* at 1082. Combining the various definitions of "home" with common usage, we agree with the court in *Nationwide Mut. Ins. Co. v. Budd-Baldwin*, 947 F.2d 1098, 1102 (3d Cir. 1991), that the word "home"

> connotes a place where one belongs and can always go with the certainty that he will be taken in. It connotes not only a physical place, i.e. the place where one eats meals, sleeps, socializes and generally spends time when not "otherwise engaged with the activities of life," but a sense of belonging.

Given the contemporary realities of family living noted by the court in *Tokley*, we determine that the average, reasonable person would broadly construe the phrase "lives with" to include an unemancipated child's relationship with both parents where that child reasonably feels that he or she "belongs" at either home.

We note that in the coverage provision in question, State Farm did not qualify or limit the phrase "lives with." Moreover,

as was the case in *Tokley*, the phrase "lives with" is contained in a provision of inclusion rather than exclusion. Limitation of the phrase "lives with" to include only one residence or other similar limitations may be written into the policy by an insurer if it elects to do so. See *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995).

At the time of the accident, Rhiannon was unmarried and unemancipated, and she was related to Gary as his daughter. Because the relevant facts are undisputed, we find as a matter of law that at this time, Rhiannon "lived with" Gary. As such, Rhiannon was an insured "relative" under Gary's policy.

CONCLUSION

The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment in favor of Sharon, Rhiannon's conservator, in the amount of $75,000 in accordance with the written stipulation of the parties.

REVERSED AND REMANDED WITH DIRECTIONS.

SANITARY AND IMPROVEMENT DISTRICT NO. 2 OF STANTON COUNTY, NEBRASKA, APPELLANT, V. COUNTY OF STANTON, NEBRASKA, APPELLEE.

567 N.W.2d 115

Filed June 27, 1997. No. S-95-1106.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to that question.
2. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
3. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
4. **Counties: Sanitary and Improvement Districts: Highways.** Neb. Rev. Stat. §§ 39-1402 and 31-740 (Reissue 1993) authorize concurrent authority in a county and a sanitary and improvement district to maintain and improve public roads within the boundaries of the sanitary and improvement district.

5. **Counties: Highways.** In the absence of abandonment, vacation, or relinquishment of the roads, the county retains the statutory authority to supervise, control, improve, and maintain the roads within its boundary.

Appeal from the District Court for Stanton County: ROBERT B. ENSZ, Judge. Affirmed.

Mark D. Fitzgerald, of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellant.

W. Bert Lammli, Stanton County Attorney, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

Sanitary and Improvement District No. 2 of Stanton County, Nebraska (SID No. 2), brought this action for declaratory judgment and injunction against Stanton County, claiming exclusive jurisdiction and authority over certain roads. The district court entered judgment in favor of the county and denied SID No. 2's application for a temporary and permanent injunction. Because we find that the county has statutory authority over the roads at issue and that this authority has not been divested, we affirm the judgment of the district court.

FACTUAL BACKGROUND

This cause was tried in the district court on stipulated facts. Two segments of county roads are at issue in the instant case. The first is generally described as 3 miles of rural road running west from Highway 15 in southern Stanton County. The county and the Nebraska Department of Roads designate this east-west road as a "collector road" within the meaning of Neb. Rev. Stat. § 39-2103(6) (Reissue 1993). The second contested road segment intersects the east-west road approximately 2 miles west of Highway 15 and extends 1 mile to the south.

Prior to May 1995, Stanton County maintained these roads similarly to other rural county roads within the county. In 1993, the county entered into an agreement with the Northeast Nebraska Solid Waste Coalition. In relation to this agreement, the county authorized a private contractor to conduct surveying

operations, including the surveying of the roads at issue in the instant case.

On February 9, 1994, the board of trustees of SID No. 2 adopted a resolution stating that it would be advisable to amend their articles of association to state that "one of the purposes of the SID is to exercise all authority permitted by the law of the State of Nebraska over the county or access roads" located within certain parameters. At a hearing on March 9, the board of trustees adopted the amendment by majority vote. The clerk of SID No. 2 filed a certificate with the county clerk of Stanton County and with the Nebraska Secretary of State certifying the amendment to the articles.

In this action, SID No. 2 claims the exclusive right, power, and authority to maintain and improve the roads at issue. SID No. 2 also claims to have the power to pass all necessary ordinances, orders, rules, and regulations for the necessary conduct of its business concerning the roads and to carry into effect the objects for which SID No. 2 passed the resolution. SID No. 2 requested a declaratory judgment and an injunction concerning the roads at issue.

The district court held that only the county could divest itself of its authority to maintain the roads and that the county had not done so. Accordingly, the district court entered judgment in favor of the county, declaring that the county has the power and authority to maintain the roads at issue, and denied SID No. 2's application for a temporary and permanent injunction.

SCOPE OF REVIEW

When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to that question. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996).

ASSIGNMENT OF ERROR

Summarized and restated, SID No. 2's assignment of error claims that the district court erred in finding that the county had authority to maintain and improve the contested roads.

ANALYSIS

SID No. 2 claims that the district court erred in finding that the county has authority to improve the roads at issue. SID No. 2 contends that it, rather than the county, has authority to improve the specified roads. Conversely, the county claims that it has the general power and authority to control the roads and that it may proceed with improvements to the roads. Thus, the issue we must address is whether the county continues to have the authority to maintain and improve the contested roads.

Neb. Rev. Stat. § 39-1402 (Reissue 1993) provides that the "[g]eneral supervision and control of the public roads of each county is vested in the county board. The board shall have the power and authority of establishment, improvement, maintenance and abandonment of public roads of the county and of enforcement of the laws in relation thereto . . . ." Public roads are "all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years . . . ." Neb. Rev. Stat. § 39-1401(2) (Reissue 1993). Accordingly, the county has been given a general statutory grant of authority to supervise, control, and improve the public roads within it.

Statutory provisions exist by which a county may vacate, abandon, or relinquish a public road. Neb. Rev. Stat. §§ 39-1722 through 39-1731 (Reissue 1993). There is no evidence in the record that any of these procedures have been invoked. Consequently, the county has not, by these procedures, vacated, abandoned, or relinquished its control over the roads at issue.

Sanitary and improvement districts are also granted authority for improving roads within the district. Neb. Rev. Stat. § 31-740 (Reissue 1993) provides as follows:

> The board of trustees or the administrator of any district organized under sections 31-727 to 31-762 shall have power to provide for establishing, maintaining, and constructing . . . public roads, streets, and highways, including grading, changing grade, paving, repaving, graveling, regraveling, widening, or narrowing roads, resurfacing or relaying existing pavement, or otherwise improving any road, street, or highway within the district . . . .

In *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995), and in *SID No. 1 v. County of Adams*, 209 Neb. 108, 306 N.W.2d 584 (1981), we addressed the issue of whether a county was responsible for maintaining roads within a sanitary and improvement district. We concluded that article 7 of chapter 31 was a special, independent legislative act which created an exception to the general statute dealing with the responsibility of counties to provide for construction, improvement, and maintenance of roads within a district organized for those purposes. *SID No. 1 v. County of Adams, supra.* Accordingly, we held that the legislative act imposed an affirmative duty on the sanitary and improvement district for the maintenance and improvement of the roads within its boundaries and that § 39-1402 was insufficient to impose a ministerial duty to maintain the roads on the county. *State ex rel. Scherer v. Madison Cty. Comrs., supra*; *SID No. 1 v. County of Adams, supra.*

In both *State ex rel. Scherer v. Madison Cty. Comrs., supra*, and *SID No. 1 v. County of Adams, supra*, we considered the issue of whether a county could be *required* to exercise control over the maintenance and improvement of roads within a sanitary and improvement district. The instant case is distinguishable from these cases because the issue is not whether the county can be *required* to improve the roads but whether it has the *authority* to improve the roads.

To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995). Thus, if the statutory provisions granting authority to a county and to a sanitary and improvement district to maintain and improve the roads are found to conflict, the specific statute controls over the general statute. We have held that the statutes governing sanitary and improvement districts are specific in nature as compared to the general statute vesting authority over public roads in the county. *SID No. 1 v. County of Adams, supra.*

However, the grants of authority in §§ 39-1402 and 31-740 are not in conflict and may be read to be consistent. The components of a series or collection of statutes pertaining to a cer-

tain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997); *In re Interest of Aaron K.*, 250 Neb. 489, 550 N.W.2d 13 (1996). With this principle in mind, a sensible reading of these statutory provisions clearly authorizes concurrent authority in the county and SID No. 2 over the public roads within the district.

Consequently, the district court did not err in finding that the county has authority to maintain and improve the roads in question. The county is authorized to generally supervise, control, and improve the roads under § 39-1402, and the county has not abandoned or vacated that authority. See § 39-1725. We hold that in the absence of abandonment, vacation, or relinquishment of the roads, the county retains the statutory authority to supervise, control, improve, and maintain the roads at issue in this case.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GRETTA MERRILL, APPELLANT.
566 N.W.2d 742

Filed June 27, 1997. No. S-96-844.

1. **Trial: Evidence: Juries.** A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury; it is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence; rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.
2. **Trial: Evidence.** When a court overrules a motion in limine, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered.
3. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question

for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial.

4. **Rules of Evidence.** Where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by rule, not by judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
5. **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.
6. **Evidence: Words and Phrases.** Only relevant evidence is admissible; relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
7. ____: ____. There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is in issue, that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. Probative value is a relative concept; the probative value of a piece of evidence 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.
8. **Trial: Evidence: Appeal and Error.** It is not error to overrule an objection which is in part valid and in part invalid; an objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible.
9. **Convictions: Appeal and Error.** As distinguished from structural errors, not all trial errors, even trial errors of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result; only prejudicial trial error, that is, trial error that cannot be said to be harmless beyond a reasonable doubt, requires that a conviction be set aside.
10. **Trial: Evidence: Juries: Appeal and Error.** In determining whether the erroneous admission of evidence was harmless, the question is whether on the basis of the entire record the erroneously admitted evidence materially influenced the jury.
11. **Trial: Evidence: Convictions: Appeal and Error.** The erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt when the defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Jerry D. Anderson, of Heinisch Law Office, for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to verdict, the district court adjudged the defendant-appellant, Gretta Merrill, hereafter referred to as Merrill, guilty of the unlawful manufacture of marijuana, a controlled substance, in violation of Neb. Rev. Stat. §§ 28-405(c)(10) [Schedule I] and 28-416(1)(a) (Reissue 1995); the possession of more than 1 pound of that substance, in violation of §§ 28-405(c)(10) [Schedule I] and 28-416(12); and the possession of methamphetamine, a controlled substance, in violation of §§ 28-405(c)(3) [Schedule II] and 28-416(3). She then appealed to the Nebraska Court of Appeals, assigning a number of errors to the district court, but arguing only, in summary, that it wrongly overruled (1) her motions to suppress certain evidence and (2) her objections to the admission of certain evidence. The plaintiff-appellee, State of Nebraska, thereafter successfully petitioned this court to bypass the Court of Appeals. We affirm.

II. FACTS

Deputy Sheriff Steven Gene Roemmich received information that there were marijuana plants growing on a farmstead occupied by Merrill and her husband, Ronald Merrill. On September 25, 1995, Sheriff William L. Burgess and Roemmich drove to the farmstead in a marked sheriff's vehicle. When they arrived, the officers saw Merrill and her husband standing in the yard and drove in to talk with them. The officers did so by driving into the driveway, turning around, heading back out of the driveway, and stopping in the area of the back porch of the house. Neither officer exited the vehicle. As Burgess talked to the Merrills regarding a separate nonrelated case concerning a stolen check, Roemmich noticed some bushes that he recognized as marijuana plants. The two officers then left.

The same day, the officers prepared an affidavit to secure a search warrant, which included the information regarding the marijuana plants seen in the Merrill yard, and a warrant was

issued for a search of the farmstead. Later that same day, Roemmich, Burgess, and State Patrol Trooper Tom Hayes served the warrant on the husband at the farmstead. Merrill was either home when the officers arrived and was allowed to leave to pick up her son from school or was not home when they arrived, but returned before they left the residence. The husband also voluntarily gave written permission to search the house.

During the search, the officers found and took possession of a number of items, including: a small amount of marijuana on a coffee table; a brown shave kit containing two spoons, numerous syringes, a blue Ziploc bag, and a small bottle of adrenaline solution; a wooden box with suspected marijuana seeds; a photograph album; a marijuana plant poster; a letter addressed to the Merrills; a balance scale; a weights and measures poster; records of transactions; maps of Fillmore, Gage, and Saline Counties; and a blanket with some suspected marijuana seeds clinging to it. After seeing a garden hose leading to the plants and noticing that the ground underneath the plants had no weeds, the officers also took possession of two marijuana bushes growing outside the house.

The officers then arrested the husband and, while searching him, found on his person a small marijuana pipe. During the next 2 days, a warrant was issued for Merrill and she was arrested as well.

III. ANALYSIS

We do not ignore that in addition to the two summarized assignments of errors set forth in part I above, Merrill also assigns in her brief that the district court erred in overruling her motions for a directed verdict and for a new trial or judgment notwithstanding the verdict, and in sentencing her to concurrent terms of imprisonment for a period of not less than 18 nor more than 19 months on each of the crimes. However, as she failed to argue any of those assignments of error in her brief, we do not consider them. See *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996) (absent plain error, errors assigned but not discussed in brief will not be addressed); Neb. Ct. R. of Prac. 9D(1)d (rev. 1996).

1. Motion to Suppress

We thus turn our attention to the first assignment of error argued by Merrill, which asserts that the district court erred by

overruling her motion to suppress the items taken during the search on September 25, 1995. This assignment of error involves the same evidence, issues, and contentions as were presented in the husband's case decided on May 16, 1997, *State v. Merrill, ante* p. 510, 563 N.W.2d 340 (1997). Indeed, a single combined hearing was held in the district court on Merrill's and the husband's motions to suppress. That being the case, there is no need to detail the analysis here, and we conclude that the district court did not abuse its discretion in overruling Merrill's suppression motions.

2. Admission of Evidence

That brings us to the second argued assignment of error, which asserts the district court improperly received certain evidence. We are not unmindful that with respect to some evidence, Merrill also contends that the district court wrongly overruled her motion in limine.

However, a motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury; it is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence; rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). As a consequence, when a court overrules a motion in limine, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered. *Id.* Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial. *Id.* We therefore concern ourselves only with evidence received over objection made during the trial.

(a) Scope of Review

The review of this assignment of error is controlled by the rule that where the Nebraska Evidence Rules apply, the admis-

sibility of evidence is controlled by rule, not by judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Thieszen, ante* p. 208, 560 N.W.2d 800 (1997); *State v. Allen, ante* p. 187, 560 N.W.2d 829 (1997); *State v. Earl, ante* p. 127, 560 N.W.2d 491 (1997).

(b) Application of Law to Facts

Under the objections made at trial, we must review the admissibility of the (i) photograph album, (ii) marijuana plants poster, (iii) letter addressed to the Merrills, (iv) balance scale, and (v) weights and measures poster. The questions with respect to each item of evidence are whether a proper foundation exists for its admission, whether it is relevant, and whether it suggests a decision on an improper basis such as to be excludable under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), as the result of presenting a danger of unfair prejudice outweighing its probative value.

(i) Photograph Album

The photograph album, offered and received as a single exhibit, contains 32 individual Polaroid photographs. Eight of them depict a female identified as Merrill; 11 depict a male identified as the husband; and 25 depict vegetation identified as marijuana, 5 of which include Merrill. One portrays a motorcycle.

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. See, Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995) (relevant evidence defined); *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992); *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992); *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Stephenson*, 199 Neb. 362, 258 N.W.2d 824 (1977).

Of the five photographs depicting Merrill and the vegetation, three contain written legends reading, "Gretta's first 3-way! 9/94," "This was a nice patch we had at an abandoned farm house," and "To everyone who hasn't fucked in the middle of a pot patch."

The fact that the officers obtained possession of the album prior to Merrill's arrest establishes that the photographs were

developed at a time pertinent to the inquiry, that is, at a time prior to when Merrill was charged with knowingly and intentionally possessing marijuana. The fact that Merrill and the marijuana could be identified establishes that the photographs accurately portrayed those subjects. Thus, the record establishes an adequate foundation for those five photographs.

The next question is whether the five photographs were relevant, for only relevant evidence is admissible. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Newman,* 250 Neb. 226, 548 N.W.2d 739 (1996); *Lee, supra.*

There are two components to relevant evidence: materiality and probative value. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is "in issue," that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. *Fahlk, supra.* Probative value is a relative concept; the probative value of a piece of evidence 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. *Newman, supra; State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995).

Given Merrill's defense that she did not know what marijuana looked like in plant form and therefore could not have knowingly or intentionally possessed it, we must conclude that the five photographs raised an inference that having been photographed with marijuana in plant form, she knew how marijuana appeared in such form. The photographs were thus relevant and cannot be said to have suggested a decision on an improper basis.

However, the record contains no foundation for the legends which accompanied three of the five photographs; while the record reveals that the husband wrote them, it does not tell us

when they were written, the purpose for which they were written, or even whether Merrill knew of their existence. Thus, only the two photographs not accompanied by legends depicting Merrill and the vegetation were properly admissible in evidence.

But although Merrill objected to some questions relating to some photographs, she did not object to the admission of any single photograph; rather, she objected to the admission of the photograph album as a whole. It is not error to overrule an objection which is in part valid and in part invalid. *Lee, supra.* Thus, an objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible. *Id.* Two of the 32 photographs being admissible, the district court did not err in overruling the objections to the album as a whole.

(ii) Marijuana Poster

The marijuana poster depicts a marijuana bed which the record establishes came from a magazine which caters to marijuana smokers. The record further establishes that the poster was found in a bedroom of the Merrill farmstead and that it is in the same condition as when found. Thus, an adequate foundation for its admission was laid, and given Merrill's defense, the poster is relevant to the issue of her knowledge concerning the appearance of marijuana in plant form and cannot be said to suggest a decision on an improper basis. The district court therefore properly admitted the marijuana poster.

(iii) Letter

The undated letter in question is directed to "Ron & Gretta" at a rural route box at Ohiowa, Nebraska, and refers to Phoenix, Arizona, as the writer's residence and is signed "Tim." It recites that "[t]here is no speed to be found no where [sic], & there's only a hand full of people that have descent [sic] shit bro!! EVERYONE else is either ripping each other off or selling bullshit, and I mean bullshit." It further describes how the writer "got burnt on the last 3 batches until now," admonishes the Merrills to "be thankful because I could have sent you some of that good-old 'Bullshit,' " and advises that "[t]his is the best thats [sic] going around so I hope you enjoy it!!" The letter further reveals that the writer has only "9 quarters left so if you want more—send money quick," and promises to put "2 or 3 off

to the side for a week & wait for your response." The letter also inquires, "So, when is it harvesting time?"

In holding a letter given to the police by the defendant's mother inadmissible, we wrote in *State v. Timmerman*, 240 Neb. 74, 88, 480 N.W.2d 411, 420 (1992):

> In order to be admitted into evidence, documents must be identified or authenticated. See Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 1989). Such authentication may be provided by testimony. See rule 901(2)(a). However, Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 1989), requires that a witness may not testify to something of which the witness has no personal knowledge. The officer on whose testimony the letter was admitted could testify only that the defendant's mother gave him the letter. Such testimony does not authenticate the letter. We still do not know who wrote the letter, where the mother found the letter, whether the defendant had read the letter, or whether the defendant had ever been in possession of the letter. Without knowledge of at least some of these facts, we cannot even begin to determine whether the letter was possibly relevant.

Here, the record establishes that Burgess retrieved the letter from a desk in a bedroom of the Merrill house, that it is in substantially the same condition as when Burgess retrieved it, that the writer was a friend of the husband, and that Merrill socialized with the writer's wife. Under those circumstances, it was for the jury to determine whether Merrill had read the document. Thus, there was an adequate foundation laid for its admission. Moreover, given the nature of Merrill's defense and the reference in the letter to the time for harvesting, the letter was relevant to the issue of her knowledge and because of that fact did not suggest a decision on an improper basis. The district court therefore did not err in receiving the letter in evidence.

(iv) Balance Scale

The record establishes that the balance scale at issue was found on a shelf in a cabinet of a bedroom of the Merrill residence and that it is of a type which is commonly used to weigh drugs, particularly marijuana. Although the counter balancing

trays were missing, there was evidence that the scale nevertheless was usable by placing a substance into a plastic bag and then placing the bag on the scale. There was therefore an adequate foundation for its admission. However, Merrill was charged with manufacturing and possessing marijuana and with possessing methamphetamine. The record does not explain how the scale was used in the commission of any of those crimes. We can understand that a scale would be a useful tool in packaging a substance for distribution, but not how it could be a tool in manufacturing a substance which is grown, be it marijuana or oregano. Neither do we understand how a scale could be a tool required to possess either marijuana or methamphetamine. Accordingly, the scale is not relevant and suggests a decision on an improper basis, namely, that Merrill lived in an environment from which drugs were distributed. The district court therefore erred in receiving the scale in evidence.

(v) Weights and Measures Poster

The weights and measures poster is inadmissible for the same reasons that the scale is inadmissible, and the district court thus erred in receiving that poster into evidence.

(c) Resolution

However, our analysis cannot end with a determination that the district court erred in receiving the scale and weights and measures poster in evidence. As distinguished from structural errors, not all trial errors, even trial errors of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result; only prejudicial trial error, that is, trial error that cannot be said to be harmless beyond a reasonable doubt, requires that a conviction be set aside. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). See, *Johnson v. U.S.*, ___ U.S. ___, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996).

In the context of the erroneous admission of evidence, the question is whether on the basis of the entire record the erro-

neously admitted evidence materially influenced the jury. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995); *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994). More specifically, the erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt when the defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993); *State v. Salamon,* 241 Neb. 878, 491 N.W.2d 690 (1992).

The properly admitted evidence overwhelmingly supports findings that Merrill manufactured and possessed marijuana. As there is no challenge to the sufficiency of the evidence concerning her possession of methamphetamine, we must conclude that there is no merit to this assignment of error.

IV. JUDGMENT

We therefore, as first noted in part I, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GEORGE G. SCHULTZ, APPELLANT.
566 N.W.2d 739

Filed June 27, 1997. No. S-96-1029.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Statutes: Judgments: 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 decision made by the courts below.
3. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
4. **Drunk Driving: Sentences.** The proper determination of punishment for fourth-offense DUI is governed by Neb. Rev. Stat. § 28-106(1) (Reissue 1995), and not Neb. Rev. Stat. § 28-107(3) (Reissue 1995).

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Samuel J. Bethune, Platte County Public Defender, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The case before us presents a question of whether the punishment for driving while under the influence of alcohol (DUI), fourth or subsequent offense, is controlled by Neb. Rev. Stat. § 28-106(1) or § 28-107(3) (Reissue 1995). We conclude that because § 28-106(1) is specifically concerned with punishment for DUI, fourth or subsequent offense, it, and not § 28-107(3), sets forth the appropriate punishment limitations for the offense.

FACTS

Pursuant to a plea agreement, George G. Schultz pled no contest to the crime of fourth-offense DUI. The district court for Platte County sentenced Schultz to an indefinite period of not less than 2 nor more than 3 years' imprisonment, with credit for 2 days served. In addition, Schultz was fined $500 and had his driver's license revoked for a period of 15 years. Because Schultz pled no contest to the charge against him, his appeal of the sentence imposed was submitted without argument pursuant to Neb. Ct. R. of Prac. 11E(5) (rev. 1996).

ASSIGNMENT OF ERROR

Schultz contends the district court erred in sentencing him to imprisonment for more than 1 year.

STANDARD OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Merrill, ante* p. 510, 563 N.W.2d 340 (1997); *State v. Earl, ante* p. 127, 560 N.W.2d 491 (1997).

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 decision made by the court below. *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997). See *State v. Thieszen, ante* p. 208, 560 N.W.2d 800 (1997).

ANALYSIS

Schultz asserts that the maximum term of imprisonment that can be imposed on one found guilty of fourth-offense DUI is 1 year. The basis of his argument is § 28-107(3), which provides:

> A misdemeanor defined by a statute outside this code, the sentence for which exceeds the sentence authorized in this code for a Class I misdemeanor, shall constitute for sentencing purposes a Class I misdemeanor. A person adjudged guilty under such law is deemed to be convicted of a Class I misdemeanor and shall be sentenced for a Class I misdemeanor in accordance with this code.

As Schultz correctly points out, the crime of driving under the influence is defined at Neb. Rev. Stat. § 60-6,196 (Reissue 1993), obviously outside the Criminal Code. As such, Schultz contends his sentence is excessive because the maximum punishment one can receive for being adjudged guilty of driving under the influence is equivalent to that imposed for a Class I misdemeanor: not more than 1 year's imprisonment, a $1,000 fine, or both. See § 28-106(1).

Although the crime of DUI is defined outside the Criminal Code, the Legislature has seen fit to prescribe a specific punishment for the crime, known as a Class W misdemeanor, which is set forth at § 28-106(1). This statute specifically sets forth the punishment for fourth- or subsequent-offense DUI to be a maximum of 5 years' imprisonment and a $10,000 fine, with a mandatory minimum of 1 year's imprisonment and a $500 fine. The State asserts that the district court did not abuse its discretion in sentencing Schultz within the confines of § 28-106(1), considering his past DUI offenses. Moreover, the State contends that § 28-107(3) does not apply in this particular case insofar as § 28-106(1) is more specific.

We have held that to the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *SID No. 2 v. County of Stanton, ante* p. 731, 567 N.W.2d 115 (1997); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). While § 28-107 may, at first glance, appear to set the punishment for DUI, a crime defined outside the Criminal Code, we cannot overlook the clear intention the Legislature set forth at § 28-106(1). The fact that a spe-

cific punishment for the crime of fourth-offense DUI is set forth in the Criminal Code at § 28-106(1) distinguishes the need to rely on the more general § 28-107(3), which concerns all misdemeanors defined outside the code. We therefore hold that the proper determination of punishment for fourth-offense DUI is governed by § 28-106(1), and not § 28-107(3). Thus, Schultz' assignment of error is without merit.

CONCLUSION

Because Schultz' conviction for DUI was his fourth, the limitation of the district court's sentencing ability is set forth at § 28-106(1). From our review of the record, we conclude that the district court did not abuse its discretion in sentencing Schultz to an indefinite period of not less than 2 nor more than 3 years' imprisonment. We therefore affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RICHARD E. SCOTT, RESPONDENT.

566 N.W.2d 741

Filed June 27, 1997. No. S-97-584.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Richard E. Scott was admitted to the practice of law in the State of Nebraska on February 28, 1972.

On May 19, 1997, Scott entered a plea of guilty in the U.S. District Court for the District of Nebraska to one count of the felony offense set forth at "26 U.S.C. §7206 (1)."

On June 2, 1997, Scott voluntarily surrendered his license to practice law in the State of Nebraska. In so doing, Scott specifically admitted that his conduct as hereinbefore set forth violated Canon 1, DR 1-102(A)(3) and (4), of the Code of Pro-

fessional Responsibility, as adopted by the Nebraska Supreme Court. Scott waived his right to notice, appearance, or hearing prior to entry of this order.

We accept Scott's surrender of his license to practice law in the State of Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

BLAKE R. SPENCER, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, SANDRA SPENCER, APPELLEE AND CROSS-APPELLANT, V. OMAHA PUBLIC SCHOOL DISTRICT ET AL., APPELLANTS AND CROSS-APPELLEES.

566 N.W.2d 757

Filed July 3, 1997. No. S-95-119.

1. **Administrative Law: Schools and School Districts: Appeal and Error.** Appeals from the district court under the Student Discipline Act are governed by the Administrative Procedure Act.
2. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Schools and School Districts: Statutes: Legislature.** School boards are creatures of statute, and their powers are limited. They can bind the district only within the limits fixed by the Legislature.
5. **Schools and School Districts: Legislature.** Any action taken by a school board must be through either an express or an implied power conferred by legislative grant.
6. **Administrative Law: Statutes.** An administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
7. **Schools and School Districts: Legislature: Courts: Jurisdiction: Appeal and Error.** If a school board has acted within the power conferred upon it by the Legislature, the courts cannot question the manner in which the board has exercised its discretion in regard to a subject matter over which the board has jurisdiction, unless the action is so unreasonable and arbitrary as to amount to an abuse of discretion.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

David M. Pedersen and David J. Kramer, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

Lee R. Terry and Suzanne M. Shehan, of Terry & Kratville, for appellee.

Don Stenberg, Attorney General, and Lauren L. Hill for amicus curiae Attorney General of the State of Nebraska.

WRIGHT, CONNOLLY, and GERRARD, JJ., and FLOWERS, D.J., and BOSLAUGH, J., Retired.

WRIGHT, J.

The Omaha Public School District (OPS), the board of education for the city of Omaha, the principal of McMillan Junior High School, and the director of student personnel services for OPS (collectively referred to as the "school district") appeal the decision of the district court that reduced the expulsion of Blake R. Spencer from two semesters to one semester.

SCOPE OF REVIEW

Appeals from the district court under the Student Discipline Act are governed by the Administrative Procedure Act. *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997).

On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996).

FACTS

On Friday, September 23, 1994, Spencer, a student at McMillan Junior High School in Omaha, Nebraska, rode home in a school van. In his possession, he had a metal fork which he had obtained from the cafeteria earlier that day. During the ride,

Spencer bent the metal fork back and forth. He then placed the fork against the neck of the student sitting in front of him, Michael Keefer.

On Monday, September 26, 1994, the school nurse examined Keefer. The nurse noted a ¼-inch red mark on the back of his neck. Based on the nurse's observation of the red mark, the assistant principal opined that Spencer was in violation of § 1(b)(2) of the OPS Student Code of Conduct and recommended a one-semester expulsion. Subsequently, the assistant principal amended the allegation to a § 1(b)(1) violation of the Student Code of Conduct, intentionally or knowingly causing personal injury to another student, which mandates expulsion for the remainder of the semester and the following semester.

Spencer's parents requested a review of the assistant principal's decision, and on October 5, 1994, Spencer and his parents met with a hearing officer, Carol Grossman. Upon review of the allegations by Keefer, the school nurse's observations, and Spencer's admission that he did in fact touch the fork handle to Keefer's neck, the hearing officer upheld the assistant principal's decision to expel Spencer.

Spencer appealed the hearing officer's determination regarding the expulsion to the school board pursuant to the Student Discipline Act, Neb. Rev. Stat. §§ 79-4,169 to 79-4,205.02 (Reissue 1994) (now codified at Neb. Rev. Stat. §§ 79-254 to 79-294 (Reissue 1996)). The school board made no findings of fact, but voted to uphold the assistant principal's decision to expel Spencer.

Spencer appealed the school board's action to the district court for Douglas County, claiming, inter alia, that § 1(b)(1) of the Student Code of Conduct exceeded the authority granted to OPS under the Student Discipline Act, that there was insufficient evidence to support a two-semester expulsion, and that the punishment so grossly outweighed the offense as to violate Spencer's substantive due process rights.

The district court found that the Student Code of Conduct did not violate or exceed state law, but that the school board's decision to expel Spencer for the remainder of the school year was excessive and violated his constitutional right to substantive due process. The district court reduced Spencer's expulsion to one

semester. The school district has appealed from the district court's decision, and Spencer has cross-appealed.

ASSIGNMENTS OF ERROR

The school district assigns as error that (1) the district court erred when it ruled that the expulsion of Spencer for two semesters for knowingly and intentionally causing personal injury to another student was in violation of constitutional provisions and (2) the district court erred when it ruled that the expulsion of Spencer for two semesters for knowingly and intentionally injuring another student was not supported by the evidence.

Spencer assigns as error on cross-appeal that (1) the district court erred in finding that OPS, through the Student Code of Conduct, did not exceed its authority set forth in the Student Discipline Act; (2) the district court erred in failing to rule as a matter of law that the school system's action in expelling Spencer for a full school year was arbitrary or capricious; and (3) the district court erred in failing to rule as a matter of law that the Student Code of Conduct was based on an illegal standard.

ANALYSIS

Because it is decisive of this case, we address only whether the school board acted within the power conferred upon it by the Legislature, an issue presented in Spencer's cross-appeal. This issue presents a question of law; thus, we reach our conclusion independent of the lower court's ruling. See, *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996).

School boards are creatures of statute, and their powers are limited. They can bind the district only within the limits fixed by the Legislature. *School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993). Any action taken by a school board must be through either an express or an implied power conferred by legislative grant. *Id.* As the school board is a creature of statute, its actions beyond such limitations are void. See *id.* An administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985).

However, if a school board has acted within the power conferred upon it by the Legislature, the courts cannot question the manner in which the board has exercised its discretion in regard to a subject matter over which the board has jurisdiction, unless the action is so unreasonable and arbitrary as to amount to an abuse of discretion. *School Dist. of Waterloo v. Hutchinson, supra.*

Section 1(b) of the Student Code of Conduct, which was adopted by OPS for the 1994-95 school year, provides:

> 1. VIOLATIONS AGAINST PERSONS
>
> . . . .
>
> **b. Assault - Student (Involving Injury)**
>
> 1. Intentionally or knowingly causing personal injury
>
> **First Offense: Expulsion. Remainder of the semester and the following semester or the remainder of the semester, summer school and the first semester of the following year. Police will be contacted.**
>
> 2. Recklessly causing personal injury
>
> **First Offense: Expulsion. Remainder of the semester. Police will be contacted.**
>
> It is not a defense to a charge of assault where someone is hurt that the student did not intend to hurt anyone as long as the student intended to engage in the conduct which caused the harm.

Spencer alleges that the action of the school board in upholding his two-semester expulsion exceeded the board's statutory authority. In particular, Spencer claims the school board exceeded the statutory authority set forth in § 79-4,176, which mandates that the board act in accordance with § 79-4,180, and § 79-4,196(3)(a). The Student Discipline Act permits a school board to amplify, supplement, or extend the procedures provided in the act "if such actions are not inconsistent with the act." See § 79-4,175.

Section 79-4,196 addresses periods of expulsion. It states that if a student is expelled for "(a) the knowing and intentional use of force in causing or attempting to cause personal injury . . . except as provided in subdivision (3) of section 79-4,180," then the expulsion "shall be for a period not to exceed the remainder of the school year . . . if the misconduct occurs during the first semester." See § 79-4,196(3).

Section 79-4,180 provides:

> The following student conduct shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment . . . :
>
> . . . .
>
> (3) Causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student. Personal injury caused by accident, self-defense, or other action undertaken on the reasonable belief that it was necessary to protect some other person shall not constitute a violation of this subdivision.

Section 79-4,180 therefore specifically recognizes that personal injury caused "by accident" shall not constitute grounds for expulsion.

Section 1(b)(1) of the Student Code of Conduct mandates expulsion for "[i]ntentionally or knowingly causing personal injury" to another student. Section 1(b) further provides that "[i]t is not a defense to a charge of assault where someone is hurt that the student did not intend to hurt anyone as long as the student intended to engage in the conduct which caused the harm." We thus consider the meaning of the phrase "injury caused by accident" in order to determine whether the Student Code of Conduct's provision is inconsistent with the Student Discipline Act.

Under its usual meaning, an injury which is caused "by accident" is one which is caused accidentally, unintentionally, or unexpectedly. See *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973). Section 79-4,180(3) is to be construed so that an ordinary person reading it would get from it the usual, accepted meaning. See *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983). We point out that § 79-4,180(3) does not provide that the injury is caused "by an accident"; rather, it states "by accident."

In *City of Kimball v. St. Paul Fire & Marine Ins. Co., supra*, we addressed the meaning of the phrase "injury to or destruction of property . . . caused by accident" in the context of an insurance policy. We concluded that it was not possible to give the word "accident" a precise legal definition but that the element of an unforeseen or unexpected damage or consequence was the dominant issue in describing causation by accident.

In *Bennett v. Travelers Protective Ass'n*, 123 Neb. 31, 241 N.W. 781 (1932), we referred to *Lewis v. Ocean Acc. & G. Corp.*, 224 N.Y. 18, 120 N.E. 56 (1918), where it appeared that the insured intentionally pricked a pimple which spread Staphylococcus aureus into the underlying tissues of his face, eventually causing death. In considering whether the infection was accidental, Justice Cardozo explained that our point of view must be that of the average man. The issue is whether the average man "would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident." *Id.* at 21, 120 N.E. at 57.

We apply this rationale to the present case. The Student Code of Conduct does not permit the defense that the act caused a result that was unforeseen, unexpected, or accidental. For example, a pat on the back could cause one to choke on a piece of gum or candy, which could lead to a tragic result. Under the Student Code of Conduct, the lack of intent to cause such harm cannot be considered as a defense as long as the student intended to pat the injured student on the back. Therefore, the provision in the Student Code of Conduct stating that it is not a defense that the student did not intend to hurt anyone contradicts the exception found in § 79-4,180(3).

Section 79-4,175(2) provides that "[a]ny action taken by the school board or . . . its employees or agents in a material violation of the act shall be considered null, void, and of no effect." Pursuant to § 79-4,204, the district court may reverse or modify a decision if the substantial rights of the petitioner may have been prejudiced because the school board's decision was "(b) [i]n excess of the statutory authority or jurisdiction of the board . . . ."

Spencer claims he did not intend or foresee the potential harm in placing the fork on the back of the fellow student's neck. It may very well be, as the school board contends, that Spencer intended some harmful result and that his statement to the contrary is self-serving and not credible. However, we conclude that the school board exceeded its statutory authority when it adopted the following provision in § 1(b) of the Student Code of Conduct: "It is not a defense to a charge of assault

where someone is hurt that the student did not intend to hurt anyone as long as the student intended to engage in the conduct which caused the harm." We expressly do not pass upon the validity of any of the other provisions in the Student Code of Conduct.

We find that the school board's expulsion of Spencer is void. Therefore, we reverse the judgment of the district court and remand the cause with directions to vacate the expulsion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C.J., participating on briefs.

CAPORALE, J., not participating.

GERRARD, J., dissenting.

I must respectfully dissent. I disagree with the majority's holding that the school board exceeded its authority when it adopted the provision in § 1(b) of the OPS Student Code of Conduct which states that "[i]t is not a defense to a charge of assault where someone is hurt that the student did not intend to hurt anyone as long as the student intended to engage in the conduct which caused the harm."

Under § 1(b), a student who intends conduct which causes personal injury to another student may be found to have violated the Student Code of Conduct even if the consequences of that intended conduct are more severe than intended. The majority holds that this provision contradicts the statutory grant of authority to school districts provided in the school law statutes. Neb. Rev. Stat. § 79-4,180 (Reissue 1994) provides, in relevant part, that "[p]ersonal injury caused by accident . . . shall not constitute a violation of this subdivision . . . ." The majority concludes that § 1(b) of the Student Code of Conduct does not permit the defense that an act caused a result that was unforeseen, unexpected, or accidental and that this is not consistent with the requirements of § 79-4,180.

The majority misses the mark in relying on authority regarding the construction of liability insurance policies in order to determine the meaning of the phrase "by accident." More analogous to the provisions at issue in the instant case is our law defining the intent required for an assault that causes personal injury in the criminal law context, i.e., a general intent statute.

In this context, we have held that the intent required for an assault relates to the act which produces the injury, not to the consequences or injuries which result from the assault. See, *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993); *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). In *State v. Hoffman*, 227 Neb. at 139, 416 N.W.2d at 237, we stated:

> When one deliberately does an act which proximately causes and directly produces a result which the criminal law is designed to prevent, the actor is legally and criminally responsible for all the natural or necessary consequences of the unlawful act, although a particular result of the act was not intended or desired.

See, also, *State v. Cebuhar, post* p. 796, 567 N.W.2d 129 (1997). In this same context, an "accident" occurs where there is a "lack of intent to do the act at all." See, e.g., *Fields v. State*, 167 Ga. App. 816, 818, 307 S.E.2d 712, 714 (1983). The code provision at issue in the instant case is, clearly, in keeping with this reasoning.

Thus, an accident as to the conduct itself remains a viable defense under the Student Code of Conduct, and a student who demonstrates that he or she did not intend to engage in the conduct which injures another student will not be held to have violated § 1(b). For example, a student who trips and runs into another student, causing injury, will not be held to have violated the Student Code of Conduct, because the injury was caused by accident. Conversely, a student who intentionally trips or pushes another student, causing injury, may be held to have violated the Student Code of Conduct. The fact that an intentional act has resulted in an unintended (i.e., more severe) harm does not constitute a defense to the charge of assault under either § 1(b) of the Student Code of Conduct or under § 79-4,180.

A student who purposely trips or pushes another student, intending for that student to stumble but not be injured, may be held accountable for the resulting personal injuries to that student, even though the particular injuries (i.e., more severe) were not intended. Because the act was intentional, it cannot be termed an "accident." Therefore, § 1(b) is consistent with § 79-4,180, and I would hold that the school board did not exceed its authority in adopting § 1(b).

However, such a conclusion does not completely resolve this appeal. The district court determined that the school board's decision to expel Spencer for the remainder of the school year was excessive and violated his constitutional right to substantive due process; thus, it reduced Spencer's expulsion to one semester. We recently considered a similar substantive due process argument in a case in which a student was expelled from eighth grade for the remainder of a school year (i.e., two-semester expulsion) for the possession of a weapon at school. *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997). Having determined that expulsion is a rationally related means of protecting students and staff from violence, we held that a two-semester expulsion for the possession of a weapon at school did not violate the student's rights under the Nebraska or federal Constitution. *Id.*

Likewise, the Omaha Public School District has determined within statutory guidelines, as a matter of policy, that any student who intentionally or knowingly causes personal injury to another student merits a mandatory two-semester expulsion because such conduct has the potential to seriously affect the health, safety, or welfare of other students or staff members, or to otherwise seriously interfere with the educational process. Under the rational basis test, so long as the official action is directed to a legitimate purpose and is rationally related to achieving that purpose, it is not unconstitutional. *Id.*

Applying the rational basis test, as we did in *Kolesnick v. Omaha Pub. Sch. Dist., supra*, I would conclude that Spencer's expulsion was rationally related to the board's interest in protecting students and staff from another student who would intentionally or knowingly cause personal injury to others. Spencer admitted that he knew he was heating up the fork and that he intended to touch the other student with it. Moreover, there is evidence in the record to suggest that Spencer actually knew that the heat from the fork would cause a burn on the other student. The record is replete with evidence that Spencer knew exactly what he was doing and intended to do it—this is not an "accident" case.

Accordingly, Spencer's two-semester expulsion did not violate his rights under the Nebraska or federal Constitution. It is

not the province of the courts to question the wisdom or manner in which the board has exercised its discretion in regard to subject matter over which the board has jurisdiction, so long as it acts within the power conferred upon it by the Legislature. See *id.* The Omaha Public School District acted within the express authority conferred upon it by the Legislature, and the board's decision was supported by competent, material, and substantial evidence. Therefore, the district court's judgment reducing Spencer's expulsion to one semester should have been reversed.

VIRGIL J. KAMINSKI, APPELLANT, V. EVELYN BASS, APPELLEE.
567 N.W.2d 118

Filed July 3, 1997. No. S-95-757.

1. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** The determination of an appropriate sanction under Neb. Ct. R. of Discovery 37 (rev. 1996) rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition to a judicial system.
3. **Rules of the Supreme Court: Pretrial Procedure: Proof.** Once a party making a motion for sanctions pursuant to Neb. Ct. R. of Discovery 37(c) (rev. 1996) proves the truth of a matter previously denied and that reasonable expenses were incurred in doing so, the burden then shifts to the nonmoving party to prove, by a preponderance of the evidence, one of the four exceptions enumerated in rule 37(c).
4. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** A hearing on a motion for expenses pursuant to Neb. Ct. R. of Discovery 37(c) (rev. 1996) is a legal proceeding entirely separate from the underlying trial or proceedings concerning the merits of the case. It therefore follows that an appellate court reviewing a decision on a motion for expenses is to concern itself solely with the evidence established and produced at that hearing.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the District Court for Sherman County, RONALD D. OLBERDING, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Allan J. Eurek, P.C., for appellant.

Dorothy A. Schinzel for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

In this appeal, we are asked to decide two interrelated issues: Which party carries the burden of proof in a motion for sanctions pursuant to Neb. Ct. R. of Discovery 37(c) (rev. 1996) and what record is required to be made in such proceedings for purposes of appellate review.

Virgil J. Kaminski obtained a $2,000 verdict against Evelyn Bass for slander and invasion of privacy. Pursuant to rule 37(c), Kaminski filed a motion to compel Bass to pay his expenses incurred in proving a statement she had denied making during discovery. After a hearing on the motion in which Bass introduced no evidence, the trial court overruled Kaminski's motion. The Nebraska Court of Appeals affirmed, concluding that Kaminski failed to provide an adequate record for appellate review. *Kaminski v. Bass*, 97 NCA No. 5, case No. A-95-757 (not designated for permanent publication).

We granted Kaminski's petition for further review and conclude that a motion for sanctions pursuant to rule 37(c) is a separate and independent proceeding, thereby limiting appellate review to the evidence introduced at that hearing on the motion. We therefore reverse the decision of the Court of Appeals, because the uncontradicted evidence offered by Kaminski at the hearing on the motion established that he proved Bass did, in fact, make the statement she denied having made and that he incurred reasonable expenses in doing so. As such, Kaminski's rule 37(c) motion should not have been overruled.

FACTS

Kaminski brought an action for slander and invasion of privacy against Bass in March 1995. In proving his claim, Kaminski was required to prove that Bass made the statement, " 'Our former Sheriff is known to be one of the drug dealers, Sheriff Kaminski.' " The jury found in favor of Kaminski and

awarded him $2,000. The court, in accordance with the jury verdict, entered judgment against Bass in the amount of $2,000, plus costs. No appeal was taken.

On April 13, 1995, Kaminski filed a motion to compel Bass to pay expenses incurred in proving facts Bass refused to admit in her answers to requests for admissions as provided by rule 37(c). In particular, Kaminski sought to recover attorney fees and costs incurred in taking the depositions of Bass, Tracey Overstreet, and Shaun Schleif. The record indicates that on October 6, 1993, Kaminski served a request for admissions and interrogatories on Bass, asking her to admit that she made the statement that Kaminski was "known to be" a drug dealer. On October 27, Bass denied having made the statement.

A hearing on Kaminski's motion was had on May 26, 1995. At this hearing, Kaminski offered a copy of the requests for admissions served on Bass along with her responses. Kaminski also offered his affidavit, which we read as his attestation to the expenses incurred in proving that Bass made the statement at issue and that it was untrue. Attached to Kaminski's affidavit was an invoice showing $1,600 paid for an expert witness. In addition, Kaminski offered two deposition certificates showing the costs of taking the depositions of Bass, Overstreet, and Schleif to be $783. The trial court overruled Kaminski's motion for attorney fees and costs on July 21.

On appeal to the Court of Appeals, Kaminski argued the trial court abused its discretion in not awarding attorney fees and deposition costs. A majority of the Court of Appeals' panel held that Kaminski was not entitled to attorney fees under rule 37(c). In reaching this conclusion, the majority held that the evidence Kaminski offered at the May 26, 1995, hearing established that he was entitled to attorney fees. The majority further held that the burden then shifted to Bass to prove that her failure to admit the statement was justified due to one of the four exceptions enumerated in rule 37(c). The court recognized that Bass offered no evidence at the hearing to rebut Kaminski's claim but nevertheless affirmed the trial court's denial of Kaminski's motion, noting that the same trial judge presided over both the underlying trial and the motion hearing. As such, it was determined that the court's general denial of the motion may have

been predicated on information and evidence that he gleaned from the trial. Since Kaminski did not offer the bill of exceptions for that trial, the majority concluded that without the record of the underlying trial before it, the court was incapable of determining whether the trial court abused its discretion in failing to grant Kaminski's motion. The majority also concluded that Kaminski was entitled to recover deposition costs pursuant to Neb. Rev. Stat. § 25-1708 (Reissue 1995).

The dissent concluded that Kaminski was not responsible for supplying the court with a copy of the proceedings for the underlying trial because his rule 37(c) motion was a special proceeding. As such, the dissent concluded that Kaminski was only required to present a record before the appeals court on the actual motion and not the underlying trial. Because Kaminski provided evidence at the May 26, 1995, hearing that he incurred expenses in proving that Bass made the statement and Bass provided no opposing evidence, the dissent determined that Kaminski was entitled to attorney fees under rule 37(c).

We granted Kaminski's petition for further review concerning only the Court of Appeals' determination of his motion for attorney fees pursuant to rule 37(c). Because no petition for further appeal was filed concerning the Court of Appeals' determination regarding recovery of deposition costs, we do not address that issue.

ASSIGNMENTS OF ERROR

Kaminski asserts the Court of Appeals erred in (1) not concluding that the trial court abused its discretion in failing to award attorney fees pursuant to rule 37(c), (2) not concluding that a motion for sanctions under rule 37(c) constitutes a special proceeding, (3) determining that Kaminski carried the burden of including the entire record of the underlying libel trial in order to present a proper record on appeal, (4) failing to conclude that the trial court abused its discretion when it failed to identify what portions of the underlying trial it was relying on in denying Kaminski's motion, and (5) failing to award Kaminski attorney fees and expenses incurred in his appeal.

STANDARD OF REVIEW

The determination of an appropriate sanction under rule 37 rests within the discretion of the trial court and will not be dis-

turbed on appeal absent an abuse of discretion. See *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition to a judicial system. *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997); *Postma v. B & R Stores*, 250 Neb. 466, 550 N.W.2d 34 (1996).

ANALYSIS

Burden of Proof

The determination of the issues before us require that we examine the precise scope of rule 37(c). Reproduced in its entirety, rule 37(c) provides:

> Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he or she may apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that:
>
> (1) The request was held objectionable pursuant to Rule 36(a), or
>
> (2) The admission sought was of no substantial importance, or
>
> (3) The party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4) There was other good reason for the failure to admit.

We have not previously addressed the question of which party bears what burden in determining whether sanctions should be awarded in a rule 37(c) motion. As noted above, the Court of Appeals concluded that the moving party in a rule 37(c) motion carries the burden of proving the truth of a matter previously denied by the nonmoving party and that reasonable expenses

were incurred in doing so. Once such a showing is made, the court held, the burden of proof then shifts to the nonmoving party to prove one of the four exceptions to recovery of expenses enumerated in rule 37(c). We agree with this conclusion.

The specific wording of rule 37(c) states that if a party incurs expenses in proving a statement that was initially denied, a court *shall* award expenses, including attorney fees, *unless* one of the four exceptions is proven. Requesting Bass to admit she made the drug dealer statement was not objectionable and was of substantial importance to the case. As such, only the remaining two exceptions (i.e., Bass had reasonable ground to believe she would prevail at trial or there was some "other good reason" for her failure to admit she made the statement) are at issue. We agree with the Court of Appeals' determination that Bass alone decided whether to admit or to deny the request. Therefore, logic compels the holding that the burden of proof is Bass' to establish the basis for avoiding fees and expenses incurred by Kaminski in proving what she refused to admit. To hold otherwise would make it virtually impossible for a party to recover expenses under rule 37(c), essentially requiring the moving party to prove the nonmoving party's state of mind at the time the denial was made. In other words, placing the burden on Kaminski would require him to prove a negative, or, more specifically, prove that Bass did not have reasonable grounds to believe she would prevail at trial or that she did not have some "other good reason" to deny the request. For this reason, we hold, as have other courts addressing the same issue, that once the party making a motion for sanctions pursuant to rule 37(c) proves the truth of a matter previously denied and that reasonable expenses were incurred in doing so, the burden then shifts to the nonmoving party to prove, by a preponderance of the evidence, one of the four enumerated exceptions. See, *Youssef v. Jones*, 77 Ohio App. 3d 500, 602 N.E.2d 1176 (1991); *Northwestern Life Ins. Co. v. Rogers*, 61 Ohio App. 3d 506, 573 N.E.2d 159 (1989); *Itskin v. Restaurant Food Supply*, 7 Ohio App. 3d 127, 454 N.E.2d 583 (1982).

Record Required for Appellate Review

Having determined that Bass carried the burden of proving that one of the four exceptions to rule 37(c) existed, we must

now address the Court of Appeals' holding that Kaminski nevertheless failed to present a proper record on his appeal to support his assigned errors. The majority noted that the same judge sat at both the underlying trial and at the hearing on the motion and therefore concluded that the judge may have based his decision to deny Kaminski's motion on evidence he heard at the underlying trial. Because Kaminski did not offer the bill of exceptions of the underlying trial into evidence at his motion for expenses, the majority held that it was incapable of determining whether the trial court abused its discretion, and the majority therefore affirmed the district court's decision.

Kaminski contends this holding is erroneous, arguing that a motion for expenses pursuant to rule 37(c) is a special proceeding, thereby constraining appellate review to the record made at the hearing on the motion. Implicit in this proposition is the idea that the proceedings on Kaminski's motion for expenses is independent and separate from the proceedings of the underlying trial. This position was espoused by the U.S. Supreme Court in a slightly different context in *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982). The plaintiff in *White* brought a successful 42 U.S.C. § 1983 action against the defendant. Approximately 4½ months after judgment was entered, the plaintiff sought attorney fees under 42 U.S.C. § 1988. The district court awarded fees, but the court of appeals for the First Circuit reversed, holding that the motion for fees constituted a motion to alter or amend the judgment which must be brought within 10 days of the entry of judgment pursuant to Fed. R. Civ. P. 59(e). The Supreme Court disagreed, holding that the motion for fees was a collateral and independent action separate from the trial on the merits. According to the Court:

> Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements. Unlike other judicial

> relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.

455 U.S. at 451-52.

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990), the Supreme Court held that a motion for sanctions under Fed. R. Civ. P. 11 could be brought after the underlying suit was voluntarily dismissed without prejudiced. The Court specifically rejected the petitioner's contention that the dismissal deprived the district court of jurisdiction to grant a rule 11 motion and impose sanctions, writing:

> It is well established that a federal court may consider collateral issues after an action is no longer pending. . . . This Court has indicated that motions for costs or attorney's fees are "independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939). Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, n. 13 (1982). . . . Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

496 U.S. at 395-96. As the Court succinctly stated in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988), "As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action." See, also, *Stachurski v. Moore*, 610 N.E.2d 272 (Ind. App. 1993) (motion filed pursuant to rule 37(c) is collateral matter separate from merits of underlying case).

As the above excerpts make clear, a motion for attorney fees has routinely been held to be a collateral and independent request from the underlying merits of the case between the parties. We conclude that the same holds true for a motion for expenses under rule 37(c), for such a motion does not bring into question the underlying decision, it simply seeks what is due because of that decision. In other words, a hearing on a motion for expenses pursuant to rule 37(c) is a legal proceeding entirely separate from the underlying trial or proceedings concerning the merits of the case. It therefore follows that the appellate court reviewing a decision on a motion for expenses is to concern itself solely with the evidence established and produced *at that hearing*. See *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991) (reviewing court considers only evidence that appears in record). We note, however, that our determination in no way prevents a party from introducing portions of the underlying trial.

Applying the foregoing analysis to the instant case, we conclude that the Court of Appeals erred in affirming the trial court's denial of Kaminski's rule 37(c) motion. As noted previously, rule 37(c) states that a district court *shall* award expenses incurred in proving a statement previously denied *unless* one of four exceptions are proven. At the hearing on Kaminski's motion, he introduced evidence establishing that Bass was asked to admit that she made the statement that Kaminski was "known to be" a drug dealer but denied it and that Kaminski incurred expenses in proving she made the statement. The burden then shifted to Bass to prove one of the four enumerated exceptions in rule 37(c). Offering no evidence whatsoever at the hearing, Bass failed to meet this burden. As such, the district court was required to award expenses to Kaminski pursuant to rule 37(c), thereby making the court's overruling of Kaminski's motion an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision affirming the district court's overruling of Kaminski's motion for expenses is reversed, and this matter is remanded with directions to award Kaminski expenses incurred in proving the state-

ment Bass denied having made. In addition, Kaminski filed a motion for attorney fees incurred in this appeal pursuant to Neb. Ct. R. of Prac. 9F (rev. 1996). We grant this motion and award Kaminski attorney fees in the amount of $1,600.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
STEVEN M. CHAMPOUX, APPELLANT.
566 N.W.2d 763

Filed July 3, 1997. No. S-95-958.

1. **Constitutional Law: Statutes: Ordinances.** The constitutionality of a statute or an ordinance is a question of law.
2. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the validity of a zoning ordinance that does not affect a fundamental right or a suspect classification, a litigant must prove that the conditions imposed by the city in adopting the ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance.
4. **Constitutional Law: Due Process: Statutes.** In cases involving due process challenges under the Nebraska Constitution, when a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest.
5. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** When passing on the constitutionality of an ordinance, an appellate court begins with a presumption of validity. The burden of demonstrating a constitutional defect rests with the challenger.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of Court of Appeals affirmed.

Peter W. Katt and Lisa K. Piscitelli, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

Lisa M. Line, of Brodkey, Cuddigan & Peebles, for amicus curiae James D. Severa, M.D.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

Steven M. Champoux petitioned this court for further review of the Nebraska Court of Appeals' affirmance of his conviction for violating Lincoln Mun. Code § 27.03.220 (1994) by renting a residence located in an area zoned for single-family and two-family dwellings to more than three unrelated people. We affirm.

On February 7, 1994, a criminal complaint was filed in the county court for Lancaster County alleging that Champoux unlawfully "allow[ed] more than three unrelated persons to live in a building or premises . . . in violation of the use regulations for the R-2 Residential District . . . ." The R-2 Residential District is zoned for single-family and two-family dwellings. Section 27.03.220 defines a "family" as "[o]ne or more persons immediately related by blood, marriage, or adoption and living as a single housekeeping unit . . . . A family may include, in addition, not more than two persons who are unrelated . . . ."

On February 16, 1994, Champoux filed a motion to quash, arguing that § 27.03.220 was unreasonable and arbitrary, in violation of the due process clause of the Nebraska Constitution, and that § 27.03.220 violated his tenants' constitutional right of privacy. The county court overruled the motion, a trial was held on stipulated facts, and Champoux was found guilty and fined $25.

Champoux appealed to the district court for Lancaster County. The district court affirmed the county court's judgment, finding that the ordinance was neither unreasonable nor arbitrary and that the ordinance did not implicate the tenants' right of privacy.

Champoux then appealed to the Nebraska Court of Appeals, which also affirmed. See *State v. Champoux*, 5 Neb. App. 68, 555 N.W.2d 69 (1996). The Court of Appeals found that the def-

inition of "family" in § 27.03.220 did not violate the due process clause of the Nebraska Constitution, because the ordinance and the city's legitimate objectives of promoting community values and a certain quality of living were rationally related, and that Champoux did not demonstrate a constitutional defect in the zoning ordinance. The Court of Appeals also found that the ordinance did not implicate any of the tenants' fundamental constitutional rights.

Champoux timely petitioned this court for further review. On appeal, Champoux alleges that the Court of Appeals erred in (1) applying an equal protection violation standard of review when determining whether § 27.03.220 could survive Champoux's due process challenges, (2) finding that Champoux failed to demonstrate a constitutional defect in § 27.03.220, and (3) finding that § 27.03.220 did not violate Champoux's due process rights under the Nebraska Constitution.

The constitutionality of a zoning ordinance which defines "family" as any number of related persons living together as a single housekeeping unit and not more than two additional unrelated persons is an issue of first impression.

The constitutionality of a statute or an ordinance is a question of law. *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *Kuchar, supra*; *Village of Brady, supra*.

In his first assignment of error, Champoux alleges that the Court of Appeals erred in applying an equal protection violation standard of review when determining whether § 27.03.220 could survive Champoux's due process challenges. We disagree.

The Court of Appeals stated in its opinion that to successfully challenge the validity of a zoning ordinance that does not affect a fundamental right or a suspect classification, a litigant must prove that the conditions imposed by the city in adopting the ordinance were unreasonable, discriminatory, or arbitrary and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance. *Champoux, supra*. The Court

of Appeals also stated, " '[C]lassifications appearing in social or economic legislation require only a rational relationship between the state's legitimate interest and the means selected to accomplish that end. The ends-means fit need not be perfect; it need only be rational.' " *Id.* at 72, 555 N.W.2d at 72 (quoting *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985)).

Champoux argues that *Michalski* involved a challenge to an ordinance on equal protection grounds and that the Court of Appeals' reliance on *Michalski* in determining the type of relationship that must exist between the regulation and its purposes resulted in an improper analysis of his underlying claims. Although Champoux is correct in stating that *Michalski* involved an equal protection challenge, we have held in numerous cases involving due process challenges under the Nebraska Constitution that when a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994); *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992); *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991). The standard of review employed by the Court of Appeals was identical to the standard we have utilized in other due process challenges. Thus, we find Champoux's first assignment of error to be without merit.

In his final two assignments of error, Champoux argues that the Court of Appeals erred in finding that he failed to demonstrate a constitutional defect in § 27.03.220 and in finding that § 27.03.220 did not violate Champoux's due process rights under the Nebraska Constitution. We disagree, and because we note that these two assignments of error are interrelated, we will discuss them together.

The constitutionality of a statute or an ordinance is a question of law. *Village of Brady, supra.* When passing on the constitutionality of an ordinance, this court begins with a presumption of validity. The burden of demonstrating a constitutional defect rests with the challenger. *Village of Brady, supra*; *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991).

As noted above, to successfully challenge the validity of a zoning ordinance that does not affect a fundamental right or a suspect classification, a litigant must prove that the conditions imposed by the city in adopting the ordinance were unreasonable, discriminatory, or arbitrary and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989). Under the due process clause of the Nebraska Constitution, when a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest. *Jeffrey, supra*; *Robotham, supra*; *Two IGT Video Poker Games, supra.*

The question of whether a statute which defines "family" as any number of related individuals living together as a single housekeeping unit and not more than two additional individuals who are unrelated violates the due process clause of the Nebraska Constitution is an issue of first impression. However, this same question has been addressed by both the U.S. Supreme Court and numerous other jurisdictions.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), the U.S. Supreme Court upheld an ordinance which defined "family" as

> "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit . . . . A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

The landlord in *Village of Belle Terre* rented a house to six unrelated students, and the landlord and three students sued, asking for an injunction prohibiting the enforcement of the ordinance and a declaration that the ordinance was unconstitutional and arguing that the ordinance violated multiple federal constitutional rights. The U.S. Supreme Court found that the ordinance did not affect any fundamental constitutional right and that it was a valid exercise of the police power to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S. at

9. In response to Boraas' argument that the ordinance was arbitrary, the Court stated:

> It is said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.

416 U.S. at 8.

Other states have also addressed the issue of whether zoning ordinances similar to the one in the instant case violated their state constitutions' due process clauses. Those states that uphold such zoning ordinances do so based on the reasoning that an ordinance which defines "family" as an unlimited number of related individuals or a certain number of unrelated individuals is related to a legitimate governmental interest in controlling population density or protecting certain family values. See, *City of Brookings v. Winker*, 554 N.W.2d 827 (S.D. 1996) (finding that zoning ordinance requiring that no more than three unrelated individuals live together did not violate state constitution's due process clause because, under particular facts of case, ordinance bore real and substantial relation to town's attempt to regulate population density); *Dinan v. Board of Zoning Appeals*, 220 Conn. 61, 595 A.2d 864 (1991) (holding that zoning ordinance which excluded any group of unrelated individuals from living together as single housekeeping unit was not violative of state constitution's due process clause because city was statutorily authorized to define "family" and ordinance was rationally related to objective of controlling population density); *City of Ladue v. Horn*, 720 S.W.2d 745 (Mo. App. 1986) (finding that city ordinance limiting definition of family to only related individuals living together did not violate state constitution's due process clause because ordinance bore substantial relation to public health, morals, and welfare of city and its governmental interest in marriage and preserving integrity of biological or legal family); *Stegeman v Ann Arbor*, 213 Mich. App. 487, 540 N.W.2d 724 (1995) (finding that ordinance which prohibited more than six unrelated individuals from living together in single-family home did not violate state constitution's due process clause).

Those states which have struck down ordinances similar to the one at issue in this case have done so generally because the ordinances preclude functional families from living together. See, *Delta Charter Twp. v Dinolfo*, 419 Mich. 253, 351 N.W.2d 831 (1984) (finding that ordinance which limited occupation of single-family residences to any number of related individuals and not more than one other unrelated person violated state constitution's due process clause because it was not rationally related to governmental objectives in that ordinance precluded functional family from living together); *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 568 A.2d 888 (1990) (stating that New Jersey has repeatedly invalidated zoning ordinances intended to cure or prevent antisocial conduct in dwelling situations and stating that municipalities can appropriately deal with overcrowding or congestion by ordinance provisions that limit occupancy based on reasonable relationship to available sleeping and bathroom facilities or requiring minimum amount of habitable floor area per occupant); *Baer v Town of Brookhaven*, 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989) (finding invalid on state due process grounds ordinance which limited family to include no more than four unrelated individuals because differentiation between unrelated persons who were functionally equivalent to family and related persons was not reasonably related to legitimate zoning purpose).

In the present case, the Nebraska Legislature has given the city of Lincoln the power to pass zoning ordinances "to promote the public health, safety, and general welfare . . . with consideration having been given to the character of the various parts of the area zoned . . . ." Neb. Rev. Stat. § 15-902 (Reissue 1991). The city of Lincoln, in accordance with this statutory authority, passed a zoning ordinance which defined "family" as "[o]ne or more persons immediately related by blood, marriage, or adoption and living as a single housekeeping unit . . . . A family may include, in addition, not more than two persons who are unrelated . . . ." The city's stated reason for so limiting this definition of family is to preserve the "sanctity of the family, quiet neighborhoods, low population, few motor vehicles, and low transiency." Brief for appellee at 17.

While Champoux agrees that these are legitimate governmental objectives, Champoux argues that Lincoln's zoning

ordinance is not rationally related to those purposes. Champoux suggests that the limitation of not more than two unrelated individuals is an arbitrary limitation in that five unrelated individuals living together may make less noise, be more permanent, and create fewer parking problems than seven related individuals living together.

However, we find persuasive the decision of the U.S. Supreme Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), as well as the decisions of those state courts which have upheld similar zoning ordinances in the face of due process challenges. As the U.S. Supreme Court noted:

> "When a legal distinction is determined . . . a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

Village of Belle Terre, 416 U.S. at 8 n.5 (quoting *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41, 48 S. Ct. 423, 72 L. Ed. 770 (1928) (Holmes, J., dissenting)). In this case, the city of Lincoln enacted a zoning ordinance clearly within the ambit of its police power and defined "family" in a way that is rationally related to its legitimate objectives of preserving the sanctity of the family, quiet neighborhoods, low population, few motor vehicles, and low transiency. While Champoux posits a variety of ways in which the city of Lincoln could have chosen to effectuate its objectives, his arguments do not demonstrate any constitutional defect in § 27.03.220, and we find that he has not met his burden of demonstrating that the definition of "family" in this ordinance is not rationally related to the city's legitimate objectives. Accordingly, we find that § 27.03.220 did not violate Champoux's due process rights under the Nebraska Constitution. Therefore, we determine that Champoux's last two assignments of error are also without merit.

Because we hold that the Court of Appeals applied the correct standard of review, that Champoux did not demonstrate a constitutional defect in § 27.03.220, and that § 27.03.220 did not violate Champoux's due process rights under the Nebraska Constitution, we affirm.

AFFIRMED.

GERRARD, J., concurring.

In any challenge to a statute or ordinance under the due process clause of the Nebraska Constitution, the degree of judicial scrutiny is often dispositive of whether that statute or ordinance is upheld or struck down. See *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992) (citing *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989)). Thus, while I concur in the judgment in the instant case, I write separately to address Champoux's contention that the Nebraska Court of Appeals erroneously applied the wrong level of judicial scrutiny in determining whether Lincoln Mun. Code § 27.03.220 (1994) withstands his due process challenge.

The Court of Appeals, quoting *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985), recited that " '[c]lassifications appearing in social or economic legislation require only a rational relationship between the state's legitimate interest and the means selected to accomplish that end. The ends-means fit need not be perfect; it need only be rational.' " *State v. Champoux*, 5 Neb. App. 68, 72, 555 N.W.2d 69, 72 (1996).

In *State v. Michalski, supra*, the appellant challenged the constitutionality of a recently enacted driving while under the influence (DUI) statute which provided for the permanent revocation of a driver's license for an individual with two or more prior DUI convictions. The appellant contended that the new DUI statute imposed harsher punishment upon those subject to permanent revocation who were employed than it did for those subject to permanent revocation who were not employed, because the statute failed to provide an exemption for those requiring the use of private transportation for the purposes of their employment.

We concluded that driving was not a fundamental right and that the right to possess a driver's license was an entitlement, not a property right. As such, analysis of the appellant's claim

involved the lowest level of judicial scrutiny, the rational relationship test. *Id.*

Champoux points out that *State v. Michalski, supra*, is inapposite because it involved an equal protection challenge, that is, one involving a governmental act which divided affected citizens into separate groups and treated these groups differently. Champoux's claim is one of due process, that being, that the city's zoning ordinance interferes with his right to use his property. As such, Champoux asserts that *Eckstein v. City of Lincoln*, 202 Neb. 741, 277 N.W.2d 91 (1979), holds that a higher level of judicial scrutiny is applicable when a zoning ordinance is challenged on due process grounds.

In *Eckstein v. City of Lincoln, supra*, the appellant challenged a city ordinance limiting the use of private wells within the city limits for domestic purposes to only those properties where the city's water distribution system was not available. We stated:

> The right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law. The owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by the state in the legitimate exercise of its police powers. *The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city.* [Citation omitted.]
>
> . . . .
>
> There must be a reasonable relationship between the object the ordinance seeks to accomplish and the means by which it operates. [Citation omitted.] *There must be a clear, real, and substantial connection between the assumed purpose of the enactment and its actual provisions.*

(Emphasis supplied.) *Eckstein v. City of Lincoln*, 202 Neb. at 744, 277 N.W.2d at 93.

Thus, Champoux asserts that consistent with *Eckstein v. City of Lincoln, supra*, the appropriate "level of scrutiny" to be

employed in analyzing the Lincoln zoning ordinance at issue is not merely a rational relationship, but, instead, that there must exist a real and substantial connection between the governmental interest and the ordinance at issue. Champoux's assertion is partially correct. Although we have not required a heightened "level of scrutiny" in such instances, we have required a greater nexus between the legitimate governmental interest and the zoning regulation at issue than a mere rational relationship. See *id.*

Generally, various levels of judicial scrutiny are defined by both the identification of a governmental interest (e.g., legitimate, important, or compelling) and a statement in regard to a requisite nexus between the governmental interest and the challenged governmental action (e.g., a rational relationship, a substantial relationship, or the least restrictive means). See 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law, Substance and Procedure § 18.3 (2d ed. 1992).

With that in mind, *Eckstein v. City of Lincoln, supra*, identifies that when a zoning ordinance is claimed to effect a deprivation of an individual's property right, the first step is to identify a legitimate governmental interest. Recognizing that a citizen's private property rights are cherished under our state Constitution, we do, in *Eckstein v. City of Lincoln*, insist upon a tighter nexus between the legitimate governmental purpose and the zoning ordinance at issue than the mere rational relationship identified in *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). Champoux is correct in asserting that we required a real and substantial connection between the legitimate governmental interest and the challenged zoning ordinance in *Eckstein v. City of Lincoln, supra.*

Notwithstanding the tighter nexus requirement, I concur in the judgment because Champoux has failed to rebut the zoning ordinance's presumption of constitutionality with respect to his alleged injury. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

At the outset, it is important to recognize that Champoux is asserting a deprivation of his property right, that being, his claimed right to lease his premises to anyone he chooses. We are

not concerned with any issues regarding the right of association, privacy, or any other deprivation of right which, arguably, one of Champoux's tenants might assert on his or her own behalf.

Thus, with our focus solely on Champoux's property right, the record is devoid of any evidence that Champoux has in fact been deprived of the use of his property. Certainly, Champoux is still able to lease his premises to a "family" within the meaning of § 27.03.220. Further, Champoux has failed to prove any diminution in value of his property so as to constitute a violation of his due process rights.

However, even accepting Champoux's bare assertion that his property rights have been abridged, I nonetheless conclude that the legitimate governmental interests identified by the city bear a real and substantial connection to the zoning ordinance at issue.

In this context, it is clear that a city may designate certain areas as residential districts and limit such areas to specific uses pursuant to its police powers. See, e.g., 2 Kenneth H. Young, Anderson's American Law of Zoning § 9.24 at 186 (4th ed. 1996) ("delegation of the power to establish residential districts is not in doubt"). Thus, having the authority to designate an area as a residential neighborhood, it necessarily follows that a city then has the authority to regulate living conditions it finds inimical to its concept of a residential neighborhood. Limiting the use of residences within such districts to single-family and two-family dwellings is clearly such a living condition which the city may regulate to effect its concept of a residential neighborhood. See *id.*

However, § 27.03.220 goes one step further by defining a "family" as only those related by blood, marriage, or adoption living as a single housekeeping unit and, in addition, not more than two persons who are unrelated. The State asserts that the city's legitimate objectives furthered by this definition of family include the preservation of the "sanctity of the family, quiet neighborhoods, low population, few motor vehicles, and low transiency." Brief for appellee at 17.

Champoux claims that there is absolutely no relationship between the ordinance's limitation on the number of unrelated occupants of a dwelling and the city's legitimate objectives. I disagree.

In the instant case, Champoux had leased one side of a duplex to five unrelated, single adults. These individuals were sharing the duplex not to function as a family, but for convenience and economics over a limited period of time. A houseful of unrelated adults, unlike a typical family, leads lives separate from one another. This means separate automobiles, separate jobs, separate comings and goings, and separate friends, all with their separate automobiles. Limiting this sort of household in what the city intends to be a residential neighborhood bears a real and substantial connection to the city's objectives of quiet neighborhoods, few motor vehicles, and low transiency.

Moreover, excluding those related by blood, marriage, or adoption from this limitation bears a real and substantial connection to the city's objective of preserving the sanctity of the family. Champoux asserts that the lack of a biological or a marital relationship between residents of a dwelling does not necessarily lead to the creation of problems in a residential neighborhood or a predisposition to transiency. While this may be true in certain instances, the fact that some families and certain individuals differ with respect to their habits and conduct in relation to the community does not render invalid the overall legislative judgment on how this type of occupancy will affect family life in residential neighborhoods as a whole. As the principal opinion points out, the definition of "family" in § 27.03.220 is an exercise in legislative line drawing. This line drawing is appropriately a legislative, not a judicial, function.

I cannot say that the line drawn by the city in this case, with respect to Champoux's property right, is unreasonable, discriminatory, or arbitrary. Instead, the provisions of § 27.03.220 bear a real and substantial relationship to the public health, morality, and welfare of the city in promoting values that are important to the community as a whole and maintaining a suitable quality of living for those in the community.

For these reasons, I concur in the judgment.

CONNOLLY, STEPHAN, and MCCORMACK, JJ., join in this concurrence.

RUTH BROWN AND JOE BROWN, AS PARENTS AND NATURAL GUARDIANS OF SUNSHINE BROWN, A MINOR, APPELLANTS, V. KEVIN WILSON AND VICKIE WILSON, APPELLEES.

567 N.W.2d 124

Filed July 3, 1997. No. S-95-1020.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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 trial court.
4. **Statutes: Legislature: Intent.** When interpreting 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.
5. ____: ____: ____. The court's duty is to discover, if possible, legislative intent from the statute itself.
6. **Statutes: Intent.** When construing a statute, a court looks to the objects sought to be accomplished, the evils and mischief sought to be remedied, or the purposes to be served, and places upon the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
7. **Recreation Liability Act.** Because the Nebraska Recreation Liability Act is in derogation of common law, the statutes are strictly construed.
8. ____. The Nebraska Recreation Liability Act does not apply to a residential setting not open to the public for recreational purposes.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded for further proceedings.

Kay A. Nehring, of Reed, King & Nehring Law Office, for appellants.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

McCORMACK, J.

The district court for Box Butte County granted summary judgment in favor of Kevin Wilson and Vickie Wilson, defendants in a negligence action, finding that the Nebraska Recreation Liability Act (Act), Neb. Rev. Stat. § 37-1001 et seq. (Reissue 1993), insulated the Wilsons from liability and barred the claim of the plaintiffs, Ruth Brown and Joe Brown. The Browns appealed the decision of the district court directly to this court, having filed a petition to bypass which we granted. We reverse, and remand.

FACTUAL BACKGROUND

On or about November 27, 1991, 10-year-old Randi Wilson, the daughter of the Wilsons, invited her friend, 9-year-old Sunshine Brown, to her home to play. With the permission of Ruth Brown, Sunshine's mother, Kevin Wilson collected Randi, Sunshine, and Sunshine's brother, Skye, from school that day and took them to the Wilsons' home.

The Wilsons' home was situated on about 5 acres of land which included a shop, a small barn, a chickenhouse, a small building, corrals, and a small wire-fenced enclosure. The Wilsons owned Cactus, a quarter-horse-cross mare; Daisy, a miniature pony; Misty, a Shetland pony; and Mah Jong, a quarter-horse gelding retired from the racetrack.

Randi decided to lunge Mah Jong. Lunging is a method of training a horse where a lunge line is attached to the horse's halter and a person holds on to the other end of the line and has the horse move in circles around the person. Although Randi was allowed to work with Mah Jong, Randi's friends were not. Randi put a halter on Mah Jong, led him into a corral next to the one where Sunshine and Skye were, attached a lunge line to his halter, and proceeded to have him circle around her. Mah Jong repeatedly attempted to approach Cactus in the other corral. Randi asked Sunshine to help her, so Sunshine climbed the fence into the corral with Randi and helped Randi hold on to Mah Jong's lunge line as he circled them. After Mah Jong was circling correctly, Randi told Sunshine to go outside the circle and wait by the fence and that Randi would call if she needed further help. Mah Jong behaved for awhile, and then he started

to go faster than Randi could control, so Randi again called Sunshine to help her. When Sunshine approached Randi to help her, she was kicked in the face by Mah Jong, sustaining injuries to her face, mouth, and teeth.

The Browns filed this action on Sunshine's behalf as her parents and natural guardians. The Wilsons filed a motion for summary judgment, which the district court granted, holding the Browns' claim was barred because the Act applied to this case and insulated the Wilsons from liability.

ASSIGNMENTS OF ERROR

The Browns claim the district court erred by sustaining the Wilsons' motion for summary judgment and finding the Act applied to this case; by finding that the Wilsons' home fell within the meaning of "land" in the Act, that Sunshine was a member of the "public," and that Sunshine's purpose for entering the land was recreational; and in determining that there were no genuine issues of material fact regarding whether or not the exception to liability found at § 37-1005(1) applied in this case.

STANDARD OF REVIEW

> Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Bowling Assocs. Ltd. v. Kerrey, ante p. 458, 461, 562 N.W.2d 714, 716 (1997). Accord, *Kime v. Hobbs, ante* p. 407, 562 N.W.2d 705 (1997); *Northern Bank v. Pefferoni Pizza Co., ante* p. 321, 562 N.W.2d 374 (1997).

"In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence." *Bowling Assocs. Ltd. v. Kerrey, ante* at 461, 562 N.W.2d at 716-17. Accord, *Kime v. Hobbs, supra*; *Vilcinskas v. Johnson, ante* p. 292, 562 N.W.2d 57 (1997).

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

pendent, correct conclusion irrespective of the determination made by the court below." *Moore v. Eggers Consulting Co., ante* p. 396, 400, 562 N.W.2d 534, 538-39 (1997). Accord, *Loup City Pub. Sch. v. Nebraska Dept. of Rev., ante* p. 387, 562 N.W.2d 551 (1997); *Metropolitan Utilities Dist. v. Balka, ante* p. 172, 560 N.W.2d 795 (1997); *In re Estate of Muchemore, ante* p. 119, 560 N.W.2d 477 (1997); *Robertson v. School Dist. No. 17, ante* p. 103, 560 N.W.2d 469 (1997).

ANALYSIS

The Act insulates landowners from negligence liability when they allow members of the public to enter and use their land for recreational purposes. See, §§ 37-1001 to 37-1008; *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993); *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984). The Act defines recreational purposes and provides that

> the term recreational purposes shall include, but not be limited to, any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water-skiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user[.]

§ 37-1008(3).

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 . . . ." § 37-1001. Under the Act, "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." § 37-1002. Specifically, the Act states:

> [A]n owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or

> licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

§ 37-1003. A landowner protected by the Act is liable only for "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity," or when the owner charges the person for entry on the land. § 37-1005.

The Browns argue that Randi's invitation to Sunshine to go home with Randi and play did not constitute an invitation to the "public" under § 37-1001 and that the Legislature did not intend the Act to apply to residential settings. The Act does not define the term "public"; therefore, the determination of this issue is a matter of statutory interpretation.

When interpreting 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. *Loup City Pub. Sch. v. Nebraska Dept. of Rev., supra*; *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997). The court's duty is to discover, if possible, legislative intent from the statute itself. *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993); *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992); *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). When construing a statute, a court looks to the objects sought to be accomplished, the evils and mischief sought to be remedied, or the purposes to be served, and places upon the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *Arizona Motor Speedway v. Hoppe, supra*; *In re Interest of McManaman*, 222 Neb. 263, 383 N.W.2d 45 (1986). See *Sarpy County v. City of Springfield, supra*. Because the Act is in derogation of common law, the statutes are strictly construed. See, *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989); *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985).

The term "public" connotes "an unexclusive group of persons." 73 C.J.S. *Public* at 330 (1983). The word "public" has also been defined as "[t]he whole body politic, or the aggregate of the citizens of a state, nation, or municipality[;] . . . does not

mean all the people, nor most of the people, . . . but so many of them as contradistinguishes them from a few[;] . . . the people of the neighborhood[;] . . . the inhabitants of a community." Black's Law Dictionary 1227 (6th ed. 1990). The record in this case is devoid of evidence that the Wilsons opened their land to the public. See, e.g., *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993) (defendant often gave others permission to use his land without charge for hunting, fishing, and other purposes); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987) (defendant gave permission to neighborhood association to use empty lots for recreational purposes, primarily baseball and softball).

We determine that Sunshine is not a member of the "public" as contemplated by the Act. When interpreting the word "public" in the Act, we must determine and give effect to the purpose and intent of the Legislature in enacting the Act; therefore, we are guided by the stated purpose of the Act, which 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." § 37-1001.

Several courts, including this court, have limited the scope of the Act's immunity when considering the purpose of the Act. See, e.g., *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989) (holding Act did not apply to independent indoor recreational facilities, including indoor swimming pools); *LePoidevin v. Wilson*, 111 Wis. 2d 116, 330 N.W.2d 555 (1983) (finding recreational use act did not apply where defendant did not open his land to public; rather, defendant opened his land to social guest who was invited onto land); *Wymer v. Holmes*, 429 Mich. 66, 412 N.W.2d 213 (1987) (holding recreational use act applied only to large tracts of undeveloped land suitable for outdoor recreational uses); *Herring v. Hauck*, 118 Ga. App. 623, 165 S.E.2d 198 (1968) (holding recreational use act inapplicable to 13-year-old boy injured in neighbor's swimming pool); *Snyder v. Olmstead*, 261 Ill. App. 3d 986, 634 N.E.2d 756 (1994), *appeal denied* 157 Ill. 2d 523, 642 N.E.2d 1304 (finding recreational use act did not apply where owner did

not open his land to public but simply invited private persons to picnic); *Boileau v. De Cecco*, 125 N.J. Super. 263, 310 A.2d 497 (1973), *aff'd* 65 N.J. 234, 323 A.2d 449 (1974) (holding recreational use act did not apply to homeowners in suburbia).

We conclude that the Legislature, when enacting the Act, did not intend that a child invited to her friend's home constitutes a member of the "public" in order that the landowner be considered as having opened his or her land to the "public" for purposes of coming under the Act's protection. Sunshine was a friend invited by the landowners' daughter to their home. The Act's purpose, to encourage a landowner to open his land to the public for recreation, is not advanced by applying the Act to this situation; rather, such application would distort the Act's purpose by extending its immunity beyond the scope intended by the Legislature. Accordingly, we hold that the Act does not apply to a residential setting not open to the public for recreational purposes, where the landowners' daughter invites a private friend home to play. To hold otherwise would eviscerate the common law by immunizing all homeowners from negligence claims of their guests who engaged in recreational activities and would lead to absurd results.

CONCLUSION

Because we hold that the Nebraska Recreation Liability Act does not apply to this case, we find it unnecessary to address the Browns' other assignments of error. We reverse the district court's grant of summary judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. THE CITY OF ELKHORN, NEBRASKA, APPELLANT, V. JULIE M. HANEY, DOUGLAS COUNTY TREASURER, APPELLEE.

566 N.W.2d 771

Filed July 3, 1997. No. S-95-1112.

1. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.

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. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a duty by a public official, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion.
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.** Inquiry into the legislative history requires that legislation be open for construction. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
6. ____. In the absence of clear legislative intent, a construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.
7. ____. It is not within the province of a court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute.
8. ____. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
9. **Taxation: Public Officers and Employees.** The plain language of Neb. Rev. Stat. § 77-1759 (Reissue 1996) authorizes a taxing authority to make demand for payment of its tax revenues which have been collected by the county treasurer.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

Malcolm D. Young and Jeff C. Miller, of Young & White, for appellant.

James S. Jansen, Douglas County Attorney, and John E. Huber for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

This is an action by the City of Elkhorn, Nebraska, for a writ of mandamus compelling Julie M. Haney, the duly elected treasurer of Douglas County, Nebraska (Treasurer), to comply with Elkhorn's demand for weekly remittance of taxes and assessments levied by Elkhorn and collected by the Treasurer. The district court for Douglas County denied Elkhorn's request for

a writ of mandamus, and Elkhorn appealed. Because we find that the Treasurer has not complied with a clear legal duty imposed by Neb. Rev. Stat. § 77-1759 (Reissue 1996), we reverse, and remand to the district court with instructions to issue a peremptory writ of mandamus.

FACTS

Elkhorn is a city of the second class, located in Douglas County. As part of her official duties, the Treasurer collects taxes and assessments levied by Elkhorn and other taxing authorities in Douglas County. These collections are maintained in separate accounts, with all receipts entered in a "cash book."

On or about February 20, 1995, the mayor of Elkhorn sent a letter to the Treasurer, in which he stated:

> Pursuant to Neb. Rev. Stat. [§ 77-1759], please report and pay over all taxes and assessments due to the City of Elkhorn collected by you on the Monday of each week.
>
> In the event the amount collected and held by you does not equal One Thousand Dollars ($1,000.00) on a Monday, this request and demand may be postponed until the next Monday or until the amount equals One Thousand Dollars ($1,000.00).

Section 77-1759 provides: "The county treasurer shall report and pay over the amount of tax and special assessments due to towns, districts, cities, villages, corporations and persons, collected by him, when demanded by the proper authorities or persons."

On February 24, 1995, the Treasurer sent a letter to Elkhorn refusing its demand. In her letter, the Treasurer stated that § 77-1759 "must be read in a broader context beginning with 77-1751 et. seq. which pertains to the collection of 'state property taxes' which, as you know, no longer exists [sic] and, therefore does not apply to the distribution of local property taxes." The Treasurer further stated that the "distribution of local property taxes and my duties to distribute the same are found in 23-1601(4) of the Nebraska Revised Statutes." Neb. Rev. Stat. § 23-1601(4) (Reissue 1991) provides in pertinent part: "On or before the fifteenth day of each month, the county treasurer (a) shall pay to each city or village located within such county the amount of all funds collected or received for such city or village the previous calendar month . . . ." The Treasurer concluded that

she had fully complied with this statutory requirement and would do so in the future.

Elkhorn commenced this action in the district court for Douglas County on April 14, 1995. In the operative amended petition filed June 20, Elkhorn alleged its demand for weekly payment of tax collections and the Treasurer's refusal to comply with that demand. Elkhorn prayed for a peremptory writ of mandamus requiring the Treasurer to comply with Elkhorn's demand pursuant to § 77-1759. In her answer, the Treasurer asserted the same defenses set forth in her February 24 letter, summarized above.

On July 27, 1995, Elkhorn filed a motion with accompanying affidavit requesting that the district court issue a peremptory writ of mandamus compelling the Treasurer to pay to Elkhorn the funds collected by the Treasurer on behalf of Elkhorn. A hearing was held on July 31, during which the district court received in evidence the legislative history of 1978 Neb. Laws, L.B. 847, pursuant to the Treasurer's offer. On August 8, Elkhorn filed a second motion, requesting that the district court issue a peremptory writ or an alternative writ with an order to the Treasurer to show cause as to why the writ should not be issued. At a second hearing on August 9, the parties stipulated to the material facts which are summarized above.

On September 21, 1995, the district court issued an order denying Elkhorn's request for a peremptory writ of mandamus or for an alternative writ of mandamus. In its analysis, the district court agreed with the Treasurer's contention that her duty to remit taxes and assessments to cities of the second class was determined solely by § 23-1601(4), which required such payments on a monthly basis, and that she had no duty to make more frequent payments "on demand." The district court, therefore, denied the requested writ of mandamus.

Elkhorn perfected a timely appeal to the Nebraska Court of Appeals. Pursuant to our authority to regulate the dockets of the Court of Appeals and this court, we transferred the appeal to our docket.

ASSIGNMENTS OF ERROR

Elkhorn contends that the district court erred in (1) denying the issuance of a writ of mandamus compelling the Treasurer to

pay over the amount of taxes and special assessments due Elkhorn in compliance with its demand and (2) dismissing the amended petition for writ of mandamus.

SCOPE OF REVIEW

In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997); *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995); *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995).

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., ante* p. 396, 562 N.W.2d 534 (1997); *Loup City Pub. Sch. v. Nebraska Dept. of Rev., ante* p. 387, 562 N.W.2d 551 (1997); *Metropolitan Utilities Dist. v. Balka, ante* p. 172, 560 N.W.2d 795 (1997).

ANALYSIS

To warrant the issuance of a peremptory writ of mandamus to compel the performance of a duty by a public official, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion. *Kortum, supra*; *Mullen, supra*; *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994).

The only issue before us is whether the Treasurer has a clear legal duty under § 77-1759 to remit tax collections to Elkhorn pursuant to its demand. Resolution of this issue requires application of well-established standards of statutory construction. 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*

Estate of Muchemore, ante p. 119, 560 N.W.2d 477 (1997); *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Memorial Hosp. of Dodge Cty. v. Porter*, 251 Neb. 327, 557 N.W.2d 21 (1996). Inquiry into the legislative history requires that legislation be open for construction. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992). We find the language of § 77-1759 to be plain, direct, and unambiguous and therefore determine that it is not open for construction.

The Treasurer contends that § 77-1759 applies to the distribution of state property taxes and that because state property taxes are no longer collected in the State of Nebraska, § 77-1759 does not apply. We disagree. It is true that Neb. Rev. Stat. §§ 77-1751 through 77-1758 (Reissue 1990) dealt with the collection of state property taxes by county treasurers and the remittance of those taxes to the state treasury, and it is also true that these statutes were repealed by 1995 Neb. Laws, L.B. 490, § 195, operative January 1, 1996. However, there are two fatal flaws in the Treasurer's argument regarding the effect of this repeal. First, the plain language of § 77-1759 makes no reference to state property taxes, but deals instead with an entirely different subject matter: "tax[es] and special assessments due to towns, districts, cities, villages, corporations and persons" which are collected by the county treasurer. Second, § 77-1759 was *not* repealed. Thus, the repeal of §§ 77-1751 through 77-1758 has no relevance to the issue presented in this case.

The Treasurer insists that she is not governed by § 77-1759, but by § 23-1601(4). Therefore, her principal contention, adopted by the district court, is that she fully satisfied her legal duty under § 23-1601(4) by remitting taxes to Elkhorn on a *monthly* basis, as provided in § 23-1601(4). The Treasurer argues that when § 23-1601(4) was enacted in its current form in 1978, the Legislature also repealed Neb. Rev. Stat. § 17-705 (Reissue 1977), which provided:

> The treasurer of the county shall pay over on demand to the treasurer of any city of the second class or village all

> money received by him arising from taxes levied belonging to such city or village, together with all money collected as a tax on dogs from residents of such corporation, for the use of the general fund therein. It shall be the duty of the county treasurer in making such remittance to specify what part thereof is derived from allocation of gas tax and what part from other sources.

The Treasurer contends that the repeal of § 17-705 and the implementation of § 23-1601(4) reflect an intent that county treasurers be required to remit taxes collected for cities of the second class on a monthly basis instead of "on demand." Further, the Treasurer argues that the repeal of § 17-705 removed the authority of a city of the second class to demand more frequent payments pursuant to § 77-1759. In contrast, Elkhorn argues that the repeal of § 17-705 eliminated a redundancy with § 77-1759 and that § 23-1601(4) merely establishes the *minimum* frequency with which treasurers must remit tax collections to cities of the second class if no demand for more frequent remittance is made pursuant to § 77-1759. We agree that the repeal of § 17-705 did not remove the authority of a city of the second class to demand payment under § 77-1759. The plain language of § 77-1759 provides that the county treasurer shall pay over the amount of tax collected when demanded by the proper authorities or persons. Clearly, the mayor of Elkhorn, who made the demand on the Treasurer in this case, was the proper authority to make said demand.

It is unnecessary for us to attempt to determine *why* the Legislature did not repeal § 77-1759 when it enacted § 23-1601(4); it is sufficient to note that it did not. The question then becomes, are §§ 77-1759 and 23-1601(4) in diametric conflict with each other, so that the application of one statute nullifies the other? In the absence of clear legislative intent, a construction of a statute will not be adopted which has the effect of nullifying or repealing another statute. See *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). We conclude that §§ 23-1601(4) and 77-1759 can be read so as to give effect to the plain language of each. Section 23-1601(4) requires county treasurers to remit tax collections to cities of the second class once a month regardless of whether the cities

have demanded remittance. Section 77-1759 gives a city the option of demanding remittance more frequently than once a month if it wishes to do so.

The Treasurer's contention that her duty to remit tax collections to cities of the second class is derived exclusively from § 23-1601(4) would essentially require us to disregard § 77-1759. This we cannot do. It is not within the province of a court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995); *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995). Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. See, *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992); *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960). Giving effect to every provision in the relevant statutes, we find that the plain language of § 77-1759 authorizes a taxing authority to make demand for payment of its tax revenues which have been collected by the county treasurer.

In *State v. Roderick*, 23 Neb. 505, 37 N.W. 77 (1888), this court held that under statutory language similar to § 77-1759, a county treasurer had a legal duty to remit taxes due a city on demand and that compliance with this duty could be enforced by a writ of mandamus. There is no basis on the record before us to depart from this precedent. In the absence of ambiguity, courts must give effect to statutes as they are written. If the Treasurer feels aggrieved by this outcome, her remedy is in the Legislature. See *Bemis v. Board of Equalization of Douglas County*, 197 Neb. 175, 247 N.W.2d 447 (1976).

We, therefore, reverse the judgment of the district court for Douglas County and remand the cause with directions to issue a peremptory writ of mandamus requiring the Treasurer to pay tax collections which she holds for Elkhorn on a weekly basis, in compliance with Elkhorn's demand made on February 20, 1995, pursuant to the Treasurer's legal duty under § 77-1759.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DANIEL G. CEBUHAR, APPELLANT.

567 N.W.2d 129

Filed July 3, 1997. No. S-96-901.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Trial: Witnesses: Indictments and Informations.** A trial court may allow witnesses to be endorsed after an information is filed when doing so does not prejudice the defendant in the preparation of his defense.
3. **Witnesses: Indictments and Informations.** The purpose of Neb. Rev. Stat. § 29-1602 (Reissue 1995) is to notify the defendant as to witnesses who may testify against him and give him an opportunity to investigate them.
4. **Trial: Witnesses: Indictments and Informations: Motions for Continuance.** In order to obtain a reversal on the grounds of an additional endorsement of witnesses, the defendant must have requested a continuance at trial and must demonstrate prejudice.
5. **Criminal Law: Assault: Police Officers and Sheriffs: Intent.** Assault on a peace officer is a general intent crime.
6. **Criminal Law: Assault: Police Officers and Sheriffs: Proof.** For purposes of Neb. Rev. Stat. § 28-931 (Reissue 1995), the State must prove that the victim assaulted was, in fact, a peace officer engaged in the performance of his or her official duties, but is not required to prove that the defendant was so aware.
7. **Jury Instructions: Evidence: Lesser-Included Offenses.** It is not prejudicial error to not instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
8. **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.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, 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.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

A jury found appellant, Daniel G. Cebuhar, guilty of third degree assault on a peace officer (Neb. Rev. Stat. § 28-931 (Reissue 1995)), first degree criminal trespass (Neb. Rev. Stat. § 28-520 (Reissue 1995)), and third degree assault (Neb. Rev. Stat. § 28-310 (Reissue 1995)). Cebuhar appeals, contending the district court erred, inter alia, in failing to instruct the jury that a defendant must know that his victim is a peace officer in order to be found guilty of third degree assault on a peace officer. Cebuhar also asserts the district court erred when it allowed the State to endorse witnesses after the jury had been empaneled. We affirm Cebuhar's conviction of third degree assault on a peace officer, concluding that knowledge of a victim's status as a peace officer is not an element of § 28-931. However, we reverse Cebuhar's conviction of third degree assault because the jury was erroneously instructed.

FACTS

Shortly after midnight on February 10, 1996, Cebuhar, intoxicated and disoriented, forcibly entered the apartment of Mark Specht looking for liquor. At one point during his pursuit, Cebuhar approached Specht and pushed him in the chest with both hands. Specht eventually persuaded Cebuhar to leave the apartment, only to have him return a few minutes later with a friend. In his attempt to once again placate Cebuhar, Specht offered him whatever was in the apartment. After searching the kitchen, Cebuhar discovered a case of beer, opened a bottle for himself as did his friend, and proceeded to Specht's balcony. Specht testified that while he was on the balcony with Cebuhar and his friend, he was concerned about being struck on the head with a beer bottle.

During this activity, Specht's girl friend called the police. Lincoln police officer Bryon D. Pachunka answered the call at approximately 12:30 a.m. Upon Pachunka's arrival, Specht showed Pachunka the damage Cebuhar did to the screen and metal doors of the apartment. Concluding he had probable cause to arrest Cebuhar for vandalism, Pachunka subdued Cebuhar and placed him under arrest.

Pachunka placed Cebuhar in the back seat of his squad car and proceeded to take him to the jail. While the squad car was

stopped at a traffic light, Cebuhar began striking his head against the Plexiglas divider separating him from Pachunka. Concerned for Cebuhar's safety, Pachunka pulled the car over and determined that Cebuhar would have to be restrained. Officer Brian Tankesley was following Pachunka in his squad car and pulled over to assist. An Officer Amen arrived shortly thereafter with leg restraints.

Prior to the officers' attempts to apply the leg restraints, Pachunka crawled into the back seat of his squad car, which allowed him to straddle Cebuhar around his waist. At this point, Cebuhar was lying on his side facing toward the front seat of the squad car and Pachunka was facing the rear passenger-side window. According to Pachunka, Cebuhar looked at Tankesley and said something to the effect of "Who is that sergeant over there?" to which Amen responded that Tankesley was not a sergeant. Cebuhar responded, "I am talking about that mother . . . over there." After this exchange, Tankesley and Amen attempted to apply the leg restraints. During this attempt, Cebuhar kicked Tankesley in the face. Approximately 3 hours later, Tankesley went to the hospital, where he received x rays and was instructed to take Tylenol for his pain and to place ice on his face to prevent swelling.

An information charged Cebuhar with burglary, third degree assault on a peace officer, first degree criminal trespass, and third degree assault. At trial, Cebuhar testified that he was at Specht's apartment on February 10, 1996, but that he remembered only portions of what happened because he was intoxicated. Cebuhar stated that he also had some memory of striking his head against the Plexiglas divider in Pachunka's car but that he did not recognize Tankesley or remember kicking him. Tankesley testified that he could not see the upper half of Cebuhar's body when he was kicked. Pursuant to a jury verdict, the district court adjudged Cebuhar not guilty on the burglary count but guilty on the remaining three counts. Cebuhar was sentenced to concurrent terms of 2 years' probation on each count and now appeals his convictions for third degree assault on a peace officer on Tankesley and third degree assault on Specht. We granted the State's petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Restated, Cebuhar asserts the district court erred in the following respects: (1) allowing the State to call witnesses whose names were not endorsed on the information, (2) allowing the State to endorse the names of witnesses on the information after the trial began, (3) refusing to instruct the jury that an element of third degree assault on a peace officer is knowledge that the person assaulted was a peace officer, (4) instructing the jury that it could find Cebuhar guilty of assault if he recklessly threatened Specht, and (5) failing to instruct the jury that third degree assault is a lesser-included offense of third degree assault on a peace officer.

STANDARD OF REVIEW

Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. See, *State v. Nissen, ante* p. 51, 560 N.W.2d 157 (1997); *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996).

ANALYSIS

ENDORSED WITNESSES REQUIREMENT

Cebuhar's first two assigned errors focus on the State's failure to endorse the names of its witnesses on the information. Prior to the receipt of evidence, Cebuhar objected to this failure and requested that the State not be allowed to call any witness. The district court overruled the objection and granted the State's motion for leave to endorse the names of the witnesses on the information. Cebuhar contends the court erred in both instances.

Neb. Rev. Stat. § 29-1602 (Reissue 1995) provides that a prosecutor, when filing an information, shall

> endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him.

A trial court may allow witnesses to be endorsed after an information is filed when doing so does not prejudice the

defendant in the preparation of his defense. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). See, also, *State v. Mecum*, 225 Neb. 293, 404 N.W.2d 431 (1987). The purpose of § 29-1602 is to notify the defendant as to witnesses who may testify against him and give him an opportunity to investigate them. *State v. Boppre, supra*. In order to obtain a reversal on the grounds of an additional endorsement of witnesses, the defendant must have requested a continuance at trial and must demonstrate prejudice. *State v. Brandon*, 240 Neb. 232, 481 N.W.2d 207 (1992); *State v. Boppre, supra*.

While we do not condone the State's carelessness in failing to endorse its witnesses' names on the information, we note that although Cebuhar did request leave to take the depositions of the endorsed witnesses, he did not make a motion for a continuance. Moreover, we fail to see how Cebuhar was prejudiced by the court's granting the State's motion to endorse witnesses. The State called only three witnesses to testify at trial: Specht (victim), Pachunka (arresting officer), and Tankesley (victim). Cebuhar does not argue, nor can it be seriously entertained, that he was surprised by the fact that these three persons would testify against him. In fact, we have expressly rejected the contention that failure to endorse the name of an arresting officer prejudices a defendant, noting that the "defendant would have reason to know that such police officer might be called as a witness." *McCartney v. State*, 129 Neb. 716, 717, 262 N.W. 679, 680 (1935). We conclude that the same reasoning applies to the failure to endorse the names of the alleged victims in that a defendant would have reason to know that the alleged victims will be called to testify at trial. The main thrust of § 29-1602 is to notify the defendant of the witnesses that will testify against him. *State v. Boppre, supra*. Under the facts of this case, Cebuhar was clearly aware that the arresting officer and two alleged victims might be called to testify against him. That being the case, the first two assigned errors are without merit.

Knowledge That Victim Is Peace Officer

Cebuhar's proposed jury instruction No. 4 would have required that the jury find that "the defendant knew Brian Tankesley was a peace officer engaged in the performance of

his official duties." The district court rejected this instruction and gave instruction No. 4, which provided in part:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime [of third degree assault of a peace officer] are:
>
> 1. That the defendant caused bodily injury to Brian Tankesley, a peace officer.
>
> 2. That the defendant did so intentionally, knowingly or recklessly.
>
> 3. That the victim, Brian Tankesley, was then a peace officer who was engaged in the performance of his official duties.
>
> 4. That the defendant did so on or about February 10, 1996 in Lancaster County, Nebraska.

Determining whether Cebuhar's proposed jury instruction No. 4 is a correct statement of law requires us to answer a question of first impression: Must a defendant know that the person he or she assaults is a peace officer in order to be convicted of third degree assault on a peace officer?

The answer to this question involves a statutory interpretation. Although penal statutes are strictly construed, they are 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. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996).

The crime of third degree assault on a peace officer is defined by § 28-931: "A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer . . . while such officer . . . is engaged in the performance of his or her official duties."

According to Cebuhar, § 28-931 requires the State to prove that the defendant knew the victim was a peace officer at the time of the assault. In support of his contention, Cebuhar argues that the purpose of making an assault on a peace officer a felony is to deter persons from in fact assaulting a peace officer. Cebuhar also asserts that because an assault on a peace officer constitutes a felony, a heightened knowledge requirement is

necessary. The State contends that a plain and ordinary reading of the statute indicates that knowledge of the victim's status is not an element of the crime.

This court has not previously determined whether the State must prove that a defendant convicted of assaulting a peace officer must know the victim is a peace officer. See *State v. LaPlante*, 183 Neb. 803, 164 N.W.2d 448 (1969) (recognizing but not deciding the issue). However, we are directed to the decisions of various jurisdictions that have held that knowledge of the victim's status as an officer is a required element. See, *State v. Allen*, 67 Wash. App. 824, 840 P.2d 905 (1992); *Reese v. State*, 106 N.M. 498, 745 P.2d 1146 (1987); *State v. Moll*, 206 N.J. Super. 257, 502 A.2d 87 (1986); *State v. Rowland*, 54 N.C. App. 458, 283 S.E.2d 543 (1981); *State v. Copher*, 581 S.W.2d 59 (Mo. App. 1979); *Dotson v. State*, 358 So. 2d 1321 (Miss. 1978). Conversely, courts in other states with statutes similar to § 28-931 have held that a defendant need not know his or her victim is an officer. See, *Com. v. Flemings*, 539 Pa. 404, 652 A.2d 1282 (1995); *State v. Feyereisen*, 343 N.W.2d 384 (S.D. 1984). See, also, *United States v. Feola*, 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975) (holding knowledge not an element of statute making assault on federal officer illegal).

While offering insight, the determinations of other jurisdictions are not determinative in our inquiry, for the resolution of the question before us lies within the plain wording of § 28-931 and our prior decisions. In *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), we examined the required mens rea for first and third degree assault. We noted that first degree assault occurs when a person " 'intentionally or knowingly causes serious bodily injury to another person,' " *id.* at 961, 503 N.W.2d at 564 (see Neb. Rev. Stat. § 28-308(1) (Reissue 1995)), whereas third degree assault occurs when a person " '[i]ntentionally, knowingly, or recklessly causes bodily injury to another person . . . ,' " *id.* at 962, 503 N.W.2d at 564 (see § 28-310(1)). Recognizing the similarities of these crimes, we noted that all assaults are general intent crimes. As such, we held that the required intent for these offenses "relates to the assault, not to the injury which results." *Id.* at 963, 503 N.W.2d at 565. Therefore, a defendant may assault a person, intending to cause

bodily injury, but nevertheless be charged with the felony of first degree assault if serious bodily injury is actually inflicted.

Similarly, in *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987), we held that the required intent for second degree assault concerns only the defendant's choice of action involving a dangerous instrument and not the resulting injury. In reaching this conclusion, we wrote:

> When one deliberately does an act which proximately causes and directly produces a result which the criminal law is designed to prevent, the actor is legally and criminally responsible for all the natural or necessary consequences of the unlawful act, although a particular result of the act was not intended or desired.

Id. at 139, 416 N.W.2d at 237.

The wording of § 28-931 is remarkably similar to that of the definitions of first and third degree assault as interpreted in *Williams*. In keeping with the reasoning and analysis put forth in both *Williams* and *Hoffman*, we conclude that assault on a peace officer is also a general intent crime. As such, the required level of mens rea set forth in the statute applies only to the course of action that brings about the actual assault. Although the State must necessarily prove that the victim assaulted was, in fact, a peace officer engaged in the performance of his or her official duties, it is simply not incumbent upon the State to prove that the defendant was so aware under the circumstances of this case.

This is not to say that in a situation in which an officer is the aggressor and his or her identity is not known to the defendant (e.g., undercover officer), that the defendant may not use such force as may be necessary to protect himself from the impending assault. Courts in other jurisdictions have held that under such circumstances where a defendant's lack of intent is based upon an honest mistake of fact with respect to an officer's official status, the defendant ought to be able to assert this honest mistake of fact to the jury as evidence that no unlawful conduct was intended. See, e.g., *United States v. Hillsman*, 522 F.2d 454 (7th Cir. 1975), *cert. denied* 423 U.S. 1035, 96 S. Ct. 570, 46 L. Ed. 2d 410; *Dotson v. State*, 358 So. 2d 1321 (Miss. 1978). In the instant case, however, there is no claim or evidence of mis-

taken belief, and the unlawful intent of Cebuhar is clear. As such, lack of knowledge as to the officer's status does not negate his intent to commit the assault.

We are not persuaded by Cebuhar's contention that because third degree assault on a peace officer is a felony, a heightened knowledge requirement is mandated. As noted in *Williams*, a defendant may be convicted of first degree assault, a felony, even though he or she did not intend to bring about the particular result. Furthermore, it is not within the province of this court to read a meaning into a statute that is not warranted by the language employed therein. See *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Had the Legislature intended to make knowledge of the victim's identity a required element, it could have done so. See, e.g., Ariz. Rev. Stat. Ann. § 13-1204A.5. (West 1989); Colo. Rev. Stat. Ann. § 18-3-203(1)(c) (West 1990); 720 Ill. Comp. Stat. Ann. 5/12-4(b)(6) (West 1993). We therefore conclude that the district court did not err in refusing Cebuhar's proposed instruction.

Lesser-Included Offense Instruction

Cebuhar's proposed jury instruction No. 4 also provided that the jury could find Cebuhar guilty of third degree assault on a peace officer or guilty of the lesser-included offense of third degree assault. The court refused this instruction, and the jury was instructed only on the elements of third degree assault on a peace officer.

A similar argument was addressed by this court in *State v. LaPlante*, 183 Neb. 803, 164 N.W.2d 448 (1969). There, the defendant was charged with unlawfully and feloniously assaulting a peace officer engaged in the performance of his duties, in violation of Neb. Rev. Stat. § 28-729.01 (Supp. 1967). On appeal, the defendant asserted that the lower court erred in not instructing the jury on simple assault as a lesser-included offense. This court concluded that it was beyond dispute that the victim was an officer engaged in official duties at the time of assault. As such, the defendant was either guilty or not guilty of the crime charged, thereby making a lesser-included offense instruction inappropriate.

In the instant case, the undisputed evidence offered at trial was that Tankesley was an officer engaged in the performance

of official duties at the time he was kicked by Cebuhar. Notably, Cebuhar offered no conflicting testimony about this fact at trial. Assuming that third degree assault may, under certain circumstances, be a lesser-included offense of third degree assault on a peace officer, we have held that it is not prejudicial error to not instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. *State v. Faatz*, 234 Neb. 796, 452 N.W.2d 751 (1990). Because it was clear that Tankesley was a peace officer engaged in official duties at the time of his injury, the district court was correct in refusing to instruct the jury on third degree assault.

THIRD DEGREE ASSAULT INSTRUCTION

The final assignment of error before us concerns Cebuhar's conviction for third degree assault of Specht in violation of § 28-310. Concerning this charge, the court, over Cebuhar's objection, tendered instruction No. 4, which provided that the State must prove that "the defendant did threaten Mark Specht in a menacing manner" and that "the defendant did so intentionally, knowingly or recklessly."

Section 28-310 provides in part: "(1) A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or (b) Threatens another in a menacing manner."

The record indicates the State was proceeding against Cebuhar pursuant to subsection (b). We have held that a violation of this subsection requires an intentional act. See *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986). As such, the State concedes the district court erred in instructing the jury that it could find Cebuhar guilty if he intentionally, knowingly, or recklessly threatened Specht in a menacing manner.

Nevertheless, the State asserts the erroneous instruction 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. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). According to the State, the evidence adduced at trial

made it clear that Cebuhar intended to threaten Specht in a menacing manner. While this argument has some appeal, we simply cannot conclude that the jury would necessarily have found Cebuhar guilty of third degree assault based on the evidence offered had it been properly instructed on the level of culpability required. Based on the fact that the jury could have reached its guilty verdict in reliance on the lesser culpability standards of knowingly or recklessly, we determine that Cebuhar was prejudiced by the instructions given, and his conviction of third degree assault must therefore be reversed, and remanded.

CONCLUSION

In accordance with the preceding analysis, we affirm Cebuhar's conviction of third degree assault on a peace officer, but reverse his conviction of third degree assault and remand that matter for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

MIDLANDS RENTAL & MACHINERY, INC., A NEBRASKA CORPORATION, APPELLEE, V. CHRISTENSEN LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, APPELLANT.

566 N.W.2d 115

Filed July 11, 1997. No. S-95-1128.

1. **Equity: Mechanics' Liens: Foreclosure.** An action to foreclose a construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Mechanics' Liens: Claims.** The object of the mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
4. **Liens: Leases.** The reasonable rental value of the equipment in question is to be used in determining the appropriate lien amount for leased equipment.
5. **Mechanics' Liens: Words and Phrases.** The word "owner," as used in the mechanic's lien law, is not limited in its meaning to an owner of the fee, but means

the owner of any interest in the lands and includes every character of title, whether legal or equitable, fee simple, or leasehold.

6. **Real Estate: Mechanics' Liens.** Despite the fact that the properties and houses in question are subject to purchase agreements, the interest in the real estate a vendor retains is subject to a construction lien.

Appeal from the District Court for Dodge County: Mark J. Fuhrman, Judge. Affirmed as modified.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Raymond R. Aranza, P.C., and John M. Lingelbach, of Marks Clare & Richards, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Pursuant to separate agreements, Midlands Rental & Machinery, Inc., furnished to L & L Homes, Inc., two forklifts and a storage unit to be used in framing houses on property in a new subdivision. Upon L & L's failure to make payments on this equipment, Midlands filed a construction lien on the property, of which Christensen Limited Partnership is the title owner. The district court for Dodge County determined that Christensen was not a "protected party" for purposes of the Nebraska Construction Lien Act (Act) and that Midlands had a valid lien in the amount of $13,300. We agree that Midlands has a valid lien, but only in the amount of $5,690. We therefore affirm, as modified, the decision of the district court.

FACTS

On March 15, 1994, Christensen entered into an agreement with Deerfield Homes, L.L.C., whereby Deerfield obtained the exclusive right to purchase from Christensen property lots within the Deerfield Subdivision (known as the Deerfield Meadows Subdivision) in Fremont, Nebraska. Pursuant to the agreement, Deerfield would then contract with potential homeowners to build homes on the lots. The agreement also provided that once construction was completed on a home, the real estate

would transfer from Christensen to Deerfield, with Deerfield then transferring the property to the homeowner.

In constructing houses in the Deerfield Meadows Subdivision, Deerfield would utilize various subcontractors. One such subcontractor was L & L, whose job it was to frame the houses. To assist in this endeavor, L & L entered into an agreement with Midlands to obtain two forklifts and a storage container for tools and material.

L & L initially entered into a rental purchase agreement with Midlands for one forklift on June 24, 1994. The second forklift and storage container were leased to L & L in subsequent lease agreements. L & L made no payments on either forklift or the storage container, and all were subsequently taken back by Midlands. On October 4, Midlands filed a construction lien against Christensen, as owner of the lots on which L & L used the equipment, in the amount of $17,499.43. After substituting collateral pursuant to Neb. Rev. Stat. § 52-142 (Reissue 1993), Christensen challenged the lien, contending its ownership in the lots in question was not subject to Midlands' lien.

Mark Ferraina, general managing partner of Christensen and president of Deerfield, testified that he witnessed L & L using the forklifts and storage container at various lots within the Deerfield Meadows Subdivision during June, July, and August 1994. According to Ferraina, Midlands did not give Deerfield or Christensen notice of a potential lien, and at the time he was actually made aware of the lien, Deerfield had already paid L & L in full for its framing work.

Donald Partridge, sales manager for Midlands for the past 11 years, stated that David Leander of L & L contacted him in the spring of 1994 concerning the purchase of a forklift to assist in framing homes in the Deerfield Meadows Subdivision. L & L contacted Midlands again a short time later to rent the other forklift and the storage container. No payments were ever made to Midlands. Partridge testified that after L & L failed to make payments on the purchase of the first forklift, the agreement was converted into a rental agreement; however, there is no document in evidence that replaced the rental purchase agreement for that forklift. For purposes of determining the appropriate lien amount, Partridge prepared exhibit 7, which is a summary

of the rentals showing the starting and ending dates of each rental period and the reasonable rental fee charged for the time the equipment was at the jobsite. This summary concluded that the total amount due Midlands for the rental of both forklifts and the storage container was $13,300.

Partridge also testified that he stopped by Deerfield's construction office to discuss L & L's failure to pay its rental debts on several occasions but that no one was present at the office. Ultimately, Midlands sent a notice of lien liability to Ferraina on October 6, 1994, 2 days after the lien was filed.

The district court concluded that Christensen does not qualify as a protected party and that Midlands therefore has a valid construction lien pursuant to the Act in the amount of $13,300. Christensen appeals.

ASSIGNMENTS OF ERROR

Summarized and restated, Christensen's assignments of error contend the district court erred in (1) granting judgment in favor of Midlands, because the decision is contrary to law and not supported by sufficient evidence; (2) permitting Partridge to testify as to the reasonable rental value of the two forklifts and storage container; and (3) receiving exhibit 7 into evidence.

STANDARD OF REVIEW

An action to foreclose a construction lien is one grounded in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996); *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995).

ANALYSIS

We begin our analysis by noting that this appeal requires us to determine whether Midlands has a valid construction lien enforceable against Christensen. The answer to this inquiry lies

within the Act. In that connection, we reiterate that "[t]he object of the mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. at 402, 529 N.W.2d at 20.

The Act allows the supplier of a subcontractor to file a construction lien. See Neb. Rev. Stat. § 52-126 (Reissue 1993). In particular, the Act allows a lien to be filed for tools, appliances, or machinery used in the construction process. Neb. Rev. Stat. § 52-134(1)(b)(iv) (Reissue 1993). The amount of a lien arising from the supplying of tools, appliances, or machinery is limited as follows:

> (a) If they are rented, the lien is for the reasonable rental value for the period of actual use and any reasonable periods of nonuse taken into account in the rental contract; and
>
> (b) If they are purchased, the lien is for the price but arises only if they were purchased for use in the course of the particular improvement and have no substantial value to the purchaser after the completion of the improvement on which they were used.

§ 52-134(3).

Christensen asserts that L & L purchased the first forklift, as evidenced by both the rental purchase agreement and Midlands' filing of a financing statement on it. Christensen therefore asserts that, pursuant to § 52-134(3)(b), a lien can be filed as to that forklift only if it had no substantial value when it was taken back by Midlands. Since the testimony offered at trial established that the forklift did have substantial value when returned to Midlands, Christensen claims there can be no lien for that particular forklift. Midlands disagrees, contending that because L & L made no payments pursuant to the rental purchase agreement, the purchase of the forklift was not consummated. In making this assertion, Midlands relies on Partridge's testimony that the rental purchase agreement for the first forklift was changed to a straight rental agreement after L & L failed to make payments. It is therefore argued that the first forklift was only rented to L & L and that Midlands can obtain a lien for its reasonable rental value.

Partridge testified at trial that Leander contacted him concerning his desire to purchase a forklift on behalf of L & L. After Partridge checked credit references, Midlands entered into the rental purchase agreement with L & L. This agreement is contained in the record as exhibit 9 and provides the "monthly rental per unit" price to be $5,000 and the "delivered price per unit" to be $79,000. According to Partridge, these amounts were based upon L & L's purchasing the forklift. Consistent with the testimony establishing that L & L intended to purchase the forklift is Midlands' act of obtaining a financing statement from L & L for the forklift and filing it with the Nebraska Secretary of State. Based upon this evidence we conclude, in our de novo review, that both Midlands and L & L thought the forklift was being purchased by L & L and that the rental purchase agreement did not turn into a straight rental agreement as Midlands now asserts. That being the case, there can be no lien for the amount owed on the first forklift because when it was returned to Midlands it still had substantial value. See § 52-134(3)(b).

The parties are in agreement, however, that the remaining forklift and the storage unit were leased to L & L. Determination of the proper lien amount for these pieces of equipment is therefore dependent upon the reasonable rental value for both. Testimony as to the rental value of the forklifts and the storage unit was given by Partridge. Partridge's computations were compiled into exhibit 7, which was received over Christensen's objection. The figures summarized in exhibit 7 show a rental cost of $7,700 for the first forklift, $5,200 for the second forklift, and $490 for the storage unit. As an aside, we note that although the total of these figures is $13,390, exhibit 7 sets the total at $13,300, presumably because the $90 delivery fee for the storage unit was inadvertently overlooked. Regardless, Partridge testified that in arriving at these rental figures he took into consideration a number of factors, including the cost of acquisition of the forklifts, the estimated utilization, and the cost to maintain the forklifts.

Christensen asserts the court erred in relying on these figures to arrive at the lien amount, because the "reasonable rental value," as used in § 52-134(3)(a), means the value that such

equipment provides to the real estate improvement and does not depend upon the agreement, between the parties as to rental value. In making this argument, Christensen notes that Rod Nielsen, a building contractor, testified at trial that the normal practice of framers is to rent a crane instead of a forklift to assist in placing beams. Nielsen further testified that renting a crane costs between $50 and $150. Christensen therefore contends that any lien allowed should be limited to this amount.

We first note that the reasonable rental value for the first forklift, as set forth in exhibit 7 or otherwise, is irrelevant in accordance with our above analysis that the forklift was actually purchased. Concerning the remaining forklift and the storage unit, we do not agree with Christensen's assertion that a lien for amounts owed on this equipment is determined solely by the value the real estate is actually improved. Section 52-134(3)(a) specifically states that the lien amount for the supply of equipment is "for the reasonable rental value for the period of actual use and any reasonable periods of nonuse taken into account in the rental contract." The intent of this section is clear: the reasonable rental value of the equipment is to be used in determining the appropriate lien amount for leased equipment. Thus, despite Nielsen's testimony that a different machine could accomplish the same results as a forklift at a cheaper rate, the fact remains that L & L entered into agreements with Midlands to rent the forklift and the storage unit to assist in framing houses. Thus, § 52-134(3)(a) requires that the reasonable rental value of that equipment be determined in setting the amount of a lien, regardless of the monetary amount by which the value of the real estate is actually increased by the use of the rented equipment.

In computing the reasonable rental value of the equipment rented to L & L, Partridge, an individual with 11 years' experience in renting construction equipment, stated that he took into account the cost of acquiring the equipment as well as the estimated utilization of it. Partridge's conclusions were set forth in exhibit 7. The second forklift was leased to L & L from August 1 to September 25, 1994, a period of 8 weeks or 2 months. According to Partridge, the reasonable rental value of the forklift was $2,500 per month. As such, the reasonable rental value

for the second forklift was found to be $5,000. Partridge added $200 to this amount for a delivery charge, for a total rental value of $5,200. From our de novo review of the evidence, we cannot conclude that this figure is incorrect. Indeed, the rental agreement Midlands entered into with L & L established that the rental price for the forklift was $750 per week. Multiplying the 8-week rental period by this amount equals $6,000, actually more than the amount set forth by Partridge at trial and in exhibit 7.

The rental period for the storage unit was 4 months, from June 6 to September 25, 1994. In arriving at the reasonable rental value for this unit, Partridge concluded that a rental value of $100 per month was appropriate. In fact, the rental agreement between Midlands and L & L for the storage unit was for this amount. As such, Partridge concluded, in exhibit 7, that the reasonable rental value of the storage unit delivered to L & L was $400 plus a $90 delivery charge, for a total rental value of $490. Once again, from our de novo review of the record, we conclude that this rental figure is correct.

We therefore conclude that while the trial court erred in finding that L & L leased the first forklift, it did not err in admitting and relying on exhibit 7 in determining the reasonable rental value of the second forklift and the storage unit. Thus, the amount of the lien should have been set at $5,690.

As an additional argument, Christensen points out that special protection is given under the Act to a "protected party contracting owner." A contracting owner is "a person who owns real estate and who, personally or through an agent, enters into a contract, express or implied, for the improvement of the real estate." Neb. Rev. Stat. § 52-127(3) (Reissue 1993). A protected party is either:

> (a) An individual who contracts to give a real estate security interest in, or to buy or to have improved, residential real estate all or a part of which he or she occupies or intends to occupy as a residence;
>
> (b) A person obligated primarily or secondarily on a contract to buy or have improved residential real estate or on an obligation secured by residential real estate if, at the time he or she becomes obligated, he or she is related to an

> individual who occupies or intends to occupy all or a part of the real estate as a residence[.]

Neb. Rev. Stat. § 52-129(1) (Reissue 1993). According to Neb. Rev. Stat. § 52-136(2) (Reissue 1993), a claimant's lien, as against a "protected party contracting owner," is the lesser of "(a) [t]he amount unpaid under the claimant's contract; or (b) [t]he amount unpaid under the prime contract through which the claimant claims at the time the contracting owner receives the claimant's notice of lien liability."

Christensen argues that the houses L & L worked on are subject to purchase agreements with third-party buyers who intend to occupy the houses as residences. As such, Christensen contends that those purchasers constitute "protected party contracting owners," thereby invoking § 52-136(2) to determine the amount of the lien. The evidence adduced at trial establishes that no notice of lien liability was given until the lien was actually filed on October 4, 1994, which was after Deerfield had paid L & L in full. Thus, Christensen asserts that the lien should be disallowed because § 52-136(2)(b) limits the amount of a lien to the amount the prime contractor owes the subcontractor when notice of the lien is received, which, in this case, is nothing.

In light of the fact that the Midlands lien was filed on property owned by Christensen, we find its argument that the purchasers of the houses are protected parties peculiar. The parties stipulated at trial that Christensen was the record titleholder of the properties on which the lien was filed. There can be little doubt, therefore, that Christensen is a contracting owner, especially in light of our statement: "The word 'owner' as used in our mechanic's lien law is not limited in its meaning to an owner of the fee, but means the owner of any interest in the lands and includes every character of title, whether legal or equitable, fee simple, or leasehold." *May Plumbing Co. v. Shaver*, 182 Neb. 251, 256, 153 N.W.2d 911, 915 (1967).

Moreover, despite the fact that the properties and houses are subject to purchase agreements, the interest in the real estate a vendor retains is subject to a construction lien. See *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, 46 N.W. 1123 (1890).

The determinative issue for Christensen's argument therefore becomes whether it is a "protected party" contracting owner. As

noted, one must intend to occupy the real estate as a residence to be considered a "protected party." See § 52-129(1)(a) and (b). Obviously, neither Deerfield nor Christensen intended to occupy the newly built houses. This fact was made clear during the trial by testimony from Ferraina. Because Christensen is not a protected party for purposes of the Act, its assertion that the amount of the lien should be determined by § 52-136 is without merit.

Finally, we address Christensen's contention that Midlands breached its duty to provide notice of lien. Christensen attempts to support this contention with Neb. Rev. Stat. § 52-135(1) (Reissue 1993), which states, in part, that "[a]t any time after a claimant has entered into the contract under which he or she may claim a lien . . . he or she *may* give a notice of lien liability to the contracting owner." (Emphasis supplied.) Christensen's reliance on this statute is incorrect for two reasons. First, § 52-135(1) applies only to protected party contracting owners. See § 52-135(5). As noted above, Christensen is not a protected party. Second, as the plain words of this statute make clear, a party that may eventually claim a lien may, if it so desires, give notice of lien liability to the contracting owner. Christensen's belief that this statute *requires* that such notice be given is simply inconsistent with the statute's plain wording. Thus, Christensen's assertion that Midlands was required to give notice of lien liability prior to its filing of the lien is without merit.

CONCLUSION

In accordance with the above analysis, we affirm the district court's determination that Midlands has a valid construction lien under the Act and that it may enforce the lien against Christensen, the owner of the property improved. However, we conclude that the district court erred in considering the amount owed on the first forklift in determining the amount of the lien. As noted above, the evidence establishes that the lien should have been granted in the amount of $5,690.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
MICHELE S. READY, APPELLANT.
565 N.W.2d 728

Filed July 11, 1997. No. S-95-1370.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen. In order for a consent to search to be effective, however, it must be a free and unconstrained choice and not the product of a will overborne.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and voluntariness is a question of fact to be determined from the totality of the circumstances.

Petition for further review from the Nebraska Court of Appeals, SIEVERS and INBODY, Judges, and NORTON, District Judge, Retired, on appeal thereto from the District Court for Cass County, Randall L. Rehmeier, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

The State of Nebraska has petitioned for further review of a Nebraska Court of Appeals opinion that reversed a conviction for criminal attempt of unlawful possession of a controlled substance.

SCOPE OF REVIEW

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory

stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

FACTS

On August 19, 1995, Nebraska State Patrol Sgt. Lloyd Peters was driving southbound on U.S. Highway 63 at the intersection of Rock Creek Road. He observed a westbound Chevrolet Impala stopped at the intersection with its left turn signal on, indicating that it was going to proceed in the same direction Peters was traveling. However, the Impala did not turn left and follow Peters, but, instead, drove through the intersection and continued westward. Peters, who had 15 years of patrol experience, believed that this activity was suspicious. He turned his patrol car around and followed the Impala. He found it stopped at the intersection of Rock Creek Road and U.S. Highway 6, where he saw it make a left turn without signaling. Peters stopped the Impala, which was being driven by Michele S. Ready, and obtained Ready's driver's license, registration, and proof of insurance.

During the initial contact, Peters noticed a cooler in the car and a slight odor of alcohol. Peters then had Ready accompany him to his patrol car for the purpose of administering field sobriety tests. Ready passed the horizontal nystagmus test and the recitation of the alphabet test. Peters thereafter issued her a warning for failure to signal a turn and returned her documents to her.

Before Ready left the patrol car, however, Peters asked her if she had any weapons or drugs or anything illegal in the car. Ready responded in the negative to each question. Peters then asked Ready if he could search her car. Peters did not recall the exact words with which Ready responded, but he recalled that she did not have any objection to the search.

Prior to beginning the search, Peters told Ready that he wanted to search the trunk first. Ready then proceeded to the

front of the car to obtain the keys from the ignition. Peters was able to see Ready's purse sitting on the front seat, and he watched Ready "fiddling around" in her purse for nearly a minute. He observed her take the keys out of the ignition, pick up the purse, put the purse strap over her shoulder, and clutch the purse tightly. Peters testified that Ready's handling of her purse aroused concerns and suspicions in his mind.

Peters then proceeded to the rear of the car, where he searched the trunk. Following that search, he asked Ready for consent to search the purse she was holding. Ready took the purse off her shoulder and handed it to Peters. Upon searching the purse, Peters found what was later determined to be methamphetamine.

Ready was originally charged with unlawful possession of a controlled substance, in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1994). She filed a motion to suppress physical evidence, which was later amended to include a request to suppress statements she made to Peters following the arrest. Following oral argument on the motion to suppress, the district court suppressed the statements but overruled the portion of the motion seeking to suppress the evidence seized from Ready's purse. The State then dropped the unlawful possession charge and filed an amended information charging Ready with criminal attempt of unlawful possession of a controlled substance, in violation of Neb. Rev. Stat. § 28-201(1)(b) and (4)(d) (Reissue 1995).

Trial was held without a jury, and Ready reasserted her objection to the admission of physical evidence seized from her purse following a traffic stop. The district court convicted Ready and sentenced her to 18 months' probation.

On appeal, the Court of Appeals reversed Ready's conviction, finding that her consent to the search was given during an illegal detention and, therefore, was not voluntary. The court held that her consent was insufficient to purge the taint of the illegal detention and that, therefore, the contraband subsequently found in Ready's purse was the product of an illegal search and seizure. See *State v. Ready*, 5 Neb. App. 143, 556 N.W.2d 264 (1996). The State petitioned for further review, and we granted the petition.

ASSIGNMENT OF ERROR

In its petition for further review, the State alleges that the Court of Appeals erred in finding that the detention of a citizen for questioning, no matter how briefly, after the purpose of a traffic stop has been accomplished is an unreasonable seizure and a violation of the 4th and 14th Amendments to the U.S. Constitution.

ANALYSIS

The fundamental issue in the present case is whether Ready's consent to the search of her vehicle and purse was voluntarily given. The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). In order for a consent to search to be effective, however, it must be a free and unconstrained choice and not the product of a will overborne. *State v. Prahin, supra*. The consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *Id.*

It is undisputed that the initial stop of Ready was proper. The Court of Appeals determined that when Peters finished processing the violation for which he initially stopped Ready, the legitimate stop of Ready was complete. At that point, the Court of Appeals reasoned, unless there was a reasonable suspicion that Ready was engaged in other criminal activity, further questioning of Ready amounted to an illegal detention. As a result, because Peters questioned Ready regarding the existence of contraband in her vehicle prior to her leaving the patrol car, without any independent basis for the questioning, the time during which Peters asked Ready about contraband amounted to an illegal detention.

The Court of Appeals held that Ready's consent to Peters' request to conduct a search was so tainted by this illegal detention that the consent was not voluntary. The Court of Appeals

stressed the significance of the illegal detention with respect to the analysis of the voluntariness of Ready's consent.

> Most importantly . . . the *Terry* violation in this case was flagrant. There is no evidence we can point to that could have given Peters the right to continue questioning Ready after issuing her a warning for improper signaling. Neither Ready's words nor deeds gave Peters cause to be reasonably suspicious. Peters testified that he asked Ready whether she had any drugs, weapons, or illegal items, not because he had reasonable suspicion, but, rather, because he routinely asks such questions after stopping people for traffic violations. This court does not approve of such a practice. Absent probable cause or reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), we hold that the detention of a citizen for questioning, no matter how briefly, after the purpose of a traffic stop has been accomplished is an unreasonable seizure and a violation of the 14th Amendment. Thus, we find that Ready's consent was insufficient to purge the taint of what we consider to be an illegal detention. Accordingly, the contraband found in Ready's purse was the product of an illegal search and seizure . . . .

State v. Ready, 5 Neb. App. 143, 152, 556 N.W.2d 264, 270 (1996).

This holding is contrary to our analysis in *Prahin*, in which a state patrol officer stopped a driver for speeding and asked the driver to accompany him to the patrol car while the officer checked on the ownership of the vehicle. The driver went back to the patrol car and entered the passenger side of the car. The officer eventually issued the driver a ticket for speeding and a violation card for failure to have a driver's license and returned the driver's identification card and registration.

However, before the driver exited the patrol car, the officer asked, "'"Excuse me, by the way, would it be all right [for me] to take a look inside of your vehicle for narcotics, drugs, weapons [or] large amounts of cash[?]"'" *Prahin*, 235 Neb. at 411, 455 N.W.2d at 557. The driver answered "yes," and then the officer asked the driver to sign a written consent-to-search form. After the driver signed the form, the officer searched the vehicle and found packages of cocaine. The driver was arrested,

and after the trial court overruled his motion to suppress, the driver was found guilty of possession of a controlled substance with the intent to deliver.

On appeal, the driver argued that his consent to the search of his vehicle was not voluntarily given. We disagreed. Although we granted that the driver may still have been in custody when the officer asked him for permission to search the vehicle, the fact that he was in custody did not render his consent involuntary. Instead, we held that in order to determine whether a person's consent to search was voluntarily given, a court must review the totality of the circumstances. We concluded from the totality of the circumstances that the driver's consent was voluntary.

The circumstances immediately prior to Peters' request for permission to search Ready's vehicle are essentially identical to the circumstances in *Prahin*. In both cases, the officer had issued the ticket or warning and had returned the driver's license and other documents. In both cases, the officer then asked the driver about contraband and for permission to search. However, in *Prahin*, we did not characterize the officer's questioning of the driver following completion of the stop as an "illegal detention" in violation of the Fourth Amendment, nor did we find that the driver's consent was so tainted by the continued detention that his consent to the search could not be voluntary. We held that in order to determine whether the consent was voluntary, it was necessary to consider the totality of the circumstances surrounding the consent. This analysis is also necessary in the present case.

Recently, the U.S. Supreme Court in *Ohio v. Robinette*, ___ U.S. ___, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996), held that the Fourth Amendment does not require that a lawfully seized defendant be advised that he is legally "free to go" before his consent to search will be recognized as voluntary. In that case, an Ohio deputy sheriff stopped the defendant for speeding, obtained the defendant's driver's license, and ran a computer check which indicated that the defendant had no previous violations. The deputy then issued a verbal warning and returned the defendant's license.

Before the defendant left, the deputy asked, " 'One question before you get gone: [A]re you carrying any illegal contraband

in your car? Any weapons of any kind, drugs, anything like that?' " *Robinette*, 117 S. Ct. at 419. The defendant answered "no" to each of these questions, after which the deputy asked the defendant if he could search the car. The defendant consented. During the subsequent search, the deputy found marijuana and methamphetamine. The defendant was arrested and charged with possession of a controlled substance.

The trial court overruled the defendant's motion to suppress the evidence of the drugs. The defendant pled no contest and was found guilty. On appeal, the Ohio Court of Appeals reversed the trial court's judgment, holding that the search of the defendant's vehicle was the result of an unlawful detention. The Ohio Supreme Court affirmed the judgment of the Ohio Court of Appeals, explaining that when the motivation of the police officer's continued detention is not related to the original stop and the detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity, the continued detention constitutes an illegal seizure. The Ohio Supreme Court established a "bright line prerequisite" for consensual interrogation such that citizens stopped for traffic offenses must be clearly informed by the detaining officer when they are legally "free to go" after a valid detention before the officer attempts to engage in any consensual interrogation.

The U.S. Supreme Court rejected this bright line prerequisite, however, and reversed the Ohio Supreme Court's vacation of the defendant's conviction. The Court explained that whether a person has been illegally seized for purposes of the Fourth Amendment depends upon whether the actions of the officer during the encounter with the person are "reasonable." The Court noted that the subjective intent of the officer has no role in the ordinary probable cause Fourth Amendment analysis. Citing *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), the Court noted that the subjective intentions of the officer do not make the continued detention of the defendant illegal under the Fourth Amendment. Rather, the Court stated that the Fourth Amendment test for a valid consent to search is that the consent be voluntary and that voluntariness is a question of fact to be determined from the totality of the circumstances. The Court explicitly rejected the use of a per se

rule such as that implemented by the Ohio Supreme Court to gauge whether the detention of the defendant was unreasonable and, therefore, illegal.

In the case at bar, the Court of Appeals considered the facts of this case and concluded that Peters improperly detained Ready after the warning was issued. The Court of Appeals opined that it was clear that Peters was attempting to exploit the situation. Given the fact that it was nighttime, Ready was alone in the car, and the stop occurred off a dirt road, Ready's consent was insufficient to purge the taint of what the court considered an illegal detention. The court held that absent probable cause or reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the detention of a citizen for questioning, no matter how briefly, after the purpose of a traffic stop has been accomplished is an unreasonable seizure and a violation of the 14th Amendment.

As we described above, however, the *Robinette* Court affirmatively rejects this "per se" understanding of *Terry*. Rather, the determination of whether a consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances surrounding the giving of consent. *Ohio v. Robinette*, ___ U.S. ___, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996). To this end, a trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

The district court held that Ready voluntarily consented to the search of her vehicle and purse. The evidence supports this finding. Peters testified that after he gave Ready a warning ticket for failing to signal a turn, he returned Ready's driver's license and vehicle documents to her. Peters stated that he then asked her a series of three questions: "[D]o you have any weapons in your car?" "[D]o you have any drugs in your car?"

"[D]o you have anything at all that's illegal in your car?" Ready answered in the negative to each of the questions.

Peters then asked Ready if it would be all right with her if he searched her car. At trial, Peters could not recall the words with which Ready responded, but he testified that she did not have any objection to Peters searching the car. Peters testified that he told Ready he would like to search the trunk first and that Ready went to get the keys out of the ignition. Ready retrieved the keys from the ignition and returned to the trunk while clutching her purse.

Peters testified that after he finished searching the trunk, he asked Ready if he could search her purse. Peters could not remember if Ready responded verbally, but he recalled that Ready then handed him the purse. Peters indicated that he did not take the purse from Ready, but that she simply handed it to him without resistance. Peters stated that after Ready consented to the search of her car and purse, she never attempted to revoke her consent or asked that Peters stop the search.

In sum, the evidence shows that Peters asked Ready if he could search her vehicle and that Ready agreed to let Peters search the vehicle. When Peters asked Ready if he could search her purse, she handed the purse to him. There is no evidence that Peters overtly or subtly coerced Ready or offered her any inducements to submit to the search. Cf. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). As in *Prahin*, the evidence indicates that Ready not only voluntarily consented to the search, but also voluntarily participated in the search by retrieving the keys to the car so that the trunk could be opened and eventually handing Peters her purse. See *State v. Forney*, 181 Neb. 757, 150 N.W.2d 915 (1967) (defendant's opening of automobile trunk for officer's inspection suggested voluntariness of consent). Cf. *U.S. v. Brown*, 102 F.3d 1390 (5th Cir. 1996).

In view of the totality of the circumstances, the district court's finding that Ready's consent was voluntary was not clearly erroneous, and Ready's conviction should not have been vacated. Therefore, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to reinstate the conviction and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C.J., dissenting.

The justification for the detention in this case had expired. The continued detention was clearly illegal and tainted the purported consent for the search of the vehicle.

I agree with the opinion of the Court of Appeals.

MARY H. SHERIDAN, APPELLEE, V. CATERING MANAGEMENT, INC., DOING BUSINESS AS 1ST AVENUE BAR & GRILL, AND MILWAUKEE INSURANCE COMPANY, APPELLANTS.

566 N.W.2d 110

Filed July 11, 1997. No. S-96-399.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1993), 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. **Rules of Evidence: Expert Witnesses.** Where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community.
4. ____: ____. This state adheres to the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), under which the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists.
5. **Workers' Compensation: Rules of Evidence.** The Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.
6. **Workers' Compensation: Rules of Evidence: Legislature: Due Process.** Subject to the limits of constitutional due process, the Legislature, through Neb. Rev. Stat. §§ 48-164 and 48-168 (Reissue 1993), has granted the Nebraska Workers' Compensation Court the power to prescribe its own rules of evidence and related procedure.
7. **Workers' Compensation: Rules of Evidence.** Although the evidentiary rules of the Nebraska Workers' Compensation Court may not be more restrictive than those of trial courts, they may be less so.

8. ____: ____. The Nebraska Workers' Compensation Court is permitted to admit evidence which over proper objection could not be introduced in a state trial court.
9. **Workers' Compensation: Evidence: Due Process: Appeal and Error.** Subject to the limits of constitutional due process, the admission of evidence is within the discretion of the Nebraska Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
10. **Workers' Compensation: Due Process: Evidence: Expert Witnesses.** Due process, not *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), provides the standard for admitting expert scientific testimony in a workers' compensation trial.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Darrell K. Stock, of Snyder & Stock, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The Nebraska Workers' Compensation Court ruled that the plaintiff-appellee employee, Mary H. Sheridan, suffered permanent and total disability as the result of an accident arising out of and in the course of her employment with the defendant-appellant employer, Catering Management, Inc., doing business as 1st Avenue Bar & Grill, and ordered it and its insurer, the defendant-appellant Milwaukee Insurance Company, to pay benefits accordingly. Catering Management and Milwaukee Insurance, hereinafter collectively referred to as the "employer," appealed to the Nebraska Court of Appeals, which affirmed the award of the compensation court. See *Sheridan v. Catering Mgmt., Inc.*, 5 Neb. App. 305, 558 N.W.2d 319 (1997). The employer thereafter successfully petitioned this court for further review, asserting, in summary, that the Court of Appeals erred in ruling the evidence sufficient to support the award. We

now affirm the judgment of the Court of Appeals and award Sheridan an attorney fee.

II. SCOPE OF REVIEW

Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1993), 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. *Winn v. Geo. A. Hormel & Co., ante* p. 29, 560 N.W.2d 143 (1997); *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). However, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Winn, supra*; *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

III. FACTS

Catering Management employed Sheridan as a bartender. Around 1:30 a.m. on Sunday, September 19, 1993, an exterminator treated the bar for cockroaches by spraying, dusting, and power-fogging with substances containing a number of chemicals, including esfenvalerate, which enter the insect through its skin. The exterminator left the bar around 4:30 a.m. and advised bar employees not to reenter for at least 4 hours after the fogging and to clean prior to serving customers.

Sheridan arrived at the premises around noon on September 19 and cleaned for 2½ hours to remove residue from the fogging. Without wearing any protective gloves, she removed the residue by dipping towels into a water bucket, wiping the surfaces, and then resoaking the cloth in the bucket. Sheridan worked the rest of that Sunday until about midnight and, while there, began experiencing a burning sensation in her eyes and throat, body aches, ringing in her ears, and nausea. The next day, Sheridan experienced soreness, paralysis, blurred vision, and seizures, and could barely talk. She was hospitalized on September 20. Sheridan claims that she experiences pain, phan-

tom itching which causes her to scratch until she breaks her skin, blurred and double vision, and memory loss; lacks patience with her children; and is of short temper.

Sheridan has seen a number of physicians, psychologists, and psychiatrists. Although there is a conflict in that evidence concerning the nature and extent of Sheridan's disability and its cause, there is evidence which, if admissible and believed by the trier of fact, supports a finding that Sheridan is permanently and totally disabled as the result of brain damage caused by the aforedescribed exposure to esfenvalerate, as more particularly set forth hereinafter.

IV. ANALYSIS

The employer contends that the courts below erred as a matter of law by finding sufficient probative expert scientific evidence to establish a causal relationship between Sheridan's exposure to pesticides during her employment and her organic brain damage. That contention rests on the premise that, save for the opinion of a neurologist who wrongly thought Sheridan had been exposed to organophosphate poison, all of the medical evidence relating the cause of Sheridan's disability to her work exposure to the pesticides is dependent upon the opinion of Dr. Carol R. Angle in that regard.

For purposes of this analysis, we accept the employer's premise and therefore focus on Angle's testimony. Angle, a professor of pediatrics and director of clinical toxicology at the University of Nebraska Medical Center who holds a courtesy appointment in the department of psychology at the University of Nebraska at Omaha, saw Sheridan twice as a treating physician. She testified that esfenvalerate is a class II pyrethrin and a more toxic isomer of fenvalerate. While fenvalerate has been used for about 15 years, esfenvalerate is fairly new.

According to Angle, there are no clinical reports involving human exposure to esfenvalerate, and there are no anatomical or histopathologic studies for the human response to esfenvalerate. Angle stated that medicine has not been able to determine what the result of esfenvalerate exposure is on humans. While the current medical literature does not report any evidence of per-

manent organic brain injury in humans from class II pyrethrin exposure, neither does the literature exclude such a relationship.

No testing has been conducted to determine whether exposure to class II pyrethrins can cause organic memory loss or permanent human organic brain impairment. However, based on the experimental data, Angle would expect neurologic injury.

When Angle first saw Sheridan, she described her symptoms, which were consistent with "moderate acute poisoning." After performing a gross neurologic examination and ordering laboratory studies, Angle concluded that Sheridan suffered organic brain damage due to toxic encephalopathy resulting from the "exposure to esfenvalerate, pyrethrins, synergist and petroleum distillate on 9/19/93." Angle is also of the opinion that Sheridan has persistent symptoms and deficits and persistent evidence of organic brain damage.

There is no question that a workers' compensation claimant bears the burden to establish a causal relationship between the alleged injury and the employment. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). Moreover, to recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Winn v. Geo. A. Hormel & Co., ante* p. 29, 560 N.W.2d 143 (1997).

At the heart of the employer's position is the contention that the courts below erroneously concluded that *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), does not apply to cases arising under the Nebraska Workers' Compensation Act.

In this state, where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. Stated otherwise, this state adheres "to the *Frye* standard, under which the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists." *State v. Dean*, 246 Neb. 869, 882, 523

N.W.2d 681, 692 (1994), *cert. denied* 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995). We have written that

> [o]ne of the primary objectives of this test is to shield jurors from misleading or prejudicial scientific testimony. This rationale is based on the concern that (1) lay jurors tend to be overly impressed by science, (2) lay jurors lack the capacity to evaluate such scientific evidence critically, and (3) lay jurors are likely to give unreliable scientific testimony more weight than it deserves. Another benefit of *Frye* is protecting the courts from unproven and potentially erroneous scientific theories until those theories have been appropriately subjected to scrutiny by experts from the relevant scientific community.

State v. Carter, 246 Neb. 953, 973, 524 N.W.2d 763, 777-78 (1994).

The employer argues that pursuant to *Dean, supra*, Sheridan must prove "general acceptance" through one of four ways: (1) scientific publications, (2) judicial decisions, (3) practical applications, or (4) testimony from scientists as to the attitudes of their fellow scientists. The employer further contends that the record lacks any foundational evidence for the admission of Angle's opinions regarding causation. According to the employer, Sheridan attempted, through Angle's testimony,

> to prove that the amounts of chemicals absorbed by [her] were sufficient to produce permanent brain injuries. Nowhere in the record is there any evidence of (3) practical applications or (4) that "fellow scientists" agree with the proposition that fenvelerates [sic], esfenvelerates [sic] or any other Class II pyrethrin or pyrethroid (the types of active chemicals to which [Sheridan] was exposed) will cause permanent injuries in humans.

Brief for appellants at 12. The employer also urges that Sheridan has failed to find any scientific publications or judicial decisions supporting Angle's view.

However, as a general matter, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence. Neb. Rev. Stat. § 48-168(1) (Reissue 1993); Neb. Rev. Stat. § 27-1101(4)(d) (Reissue 1995); *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545

N.W.2d 727 (1996); *Paulsen, supra.* Subject to the limits of constitutional due process, the Legislature has granted the compensation court the power to prescribe its own rules of evidence and related procedure. *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989).

> The Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may 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.

§ 48-168. "The Nebraska Workers' Compensation Court shall regulate and provide . . . the nature and extent of the proofs and evidence and the method of taking and furnishing the same for the establishment of the right to compensation." Neb. Rev. Stat. § 48-164 (Reissue 1993).

Although the evidentiary rules of the compensation court may not be more restrictive than those of trial courts, they may be less so. *Harpham, supra.* Thus, the compensation court is permitted to admit evidence which over proper objection could not be introduced in a state trial court. *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977). In short, subject to the limits of constitutional due process, the admission of evidence is within the discretion of the compensation court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Berggren, supra*; *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

Therefore, due process, not *Frye*, provides the standard for admitting expert scientific testimony in a workers' compensation trial. See *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991) (although Nebraska Evidence Rules are inapplicable to proceedings in Nebraska Workers' Compensation Court, due process requirements may control type of evidence in trial of workers' compensation case).

As to medical testimony:

> The witness must qualify as an expert, and the witness' testimony must assist the trier of fact to understand the

> evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant.
>
> A qualified expert may not testify without adequate basis for his or her opinions concerning the facts of the case on which the expert is testifying. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. [Citation omitted.] The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess. [Citation omitted.] Thus, a trial court may exclude an expert opinion because the expert is not qualified, because there is no proper foundation or factual basis for the opinion, because the testimony would not assist the trier of fact to understand the factual issue, or because the testimony is not relevant.

Paulsen, 249 Neb. at 123, 541 N.W.2d at 644.

Despite the foundational and relevancy requirements set out above, it is clear that federal due process does not require the proponent of the evidence to prove general acceptance, for in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Supreme Court rejected *Frye*'s general acceptance test, ruling that Fed. R. Evid. 702 superseded it. If federal due process mandated the general acceptance test, the *Daubert* Court could not have ruled as it did. We see no reason to conclude that state due process requires more in this context than does federal due process.

V. JUDGMENT

Being correct, the judgment of the Court of Appeals is, as first noted in part I above, affirmed. Sheridan is awarded the sum of $1,375 to apply toward the services of her attorney in this court.

AFFIRMED.

MICHAEL J. OSTRANSKY, APPELLANT, V. STATE FARM INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLEE.

566 N.W.2d 399

Filed July 25, 1997. No. S-95-860.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Insurance: Motor Vehicles: Damages.** The purpose of the Underinsured Motorist Insurance Coverage Act is to provide a means whereby victims of less than adequately insured motorists are made as nearly whole as possible.
3. **Insurance: Contracts.** The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
4. **Insurance: Contracts: Public Policy.** A provision in an insurance policy prohibiting double recovery for medical expenses does not violate public policy if it does not prevent an insured from being fully compensated for injuries.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

James R. Welsh, of Bradford, Coenen & Welsh, and William C. Warnes for appellant.

Rex A. Rezac and Jill V. Perales, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The appellant, Michael J. Ostransky, brought this action against appellee, State Farm Insurance Company, to declare his rights under an automobile policy of which he is an "insured," contending that the amount payable to him under the underinsured motorist coverage portion of the policy should not be offset by amounts he has received under the medical payments portion of the policy. We conclude that the insurance policy in question validly prohibits an insured from recovering medical expenses twice under both the medical payments coverage and the underinsured motorist coverage of the policy. Thus, we

affirm the district court's determination that Ostransky has been made whole for his injuries, thereby relieving State Farm of further liability.

FACTS

The stipulated facts establish that Ostransky was injured in an automobile accident on October 21, 1990, sustaining $95,000 in damages. The accident was the direct and proximate result of Julie A. Bonnell's negligence. At the time of the accident, Bonnell was insured under a policy limiting bodily injury liability to $25,000 per person and $50,000 per accident. Bonnell's insurer paid its $50,000 policy limit to the passengers in the car operated by Ostransky, with Ostransky receiving $12,500. It is agreed that State Farm's financial responsibilities to Ostransky under the policy can be offset by this amount.

At the time of Ostransky's injuries, he was insured by State Farm under a policy providing underinsured motorist coverage with a limit of $100,000 per person. The policy also provided medical coverage with a limit of $25,000 per person. State Farm paid $14,228.90 to Ostransky under the medical coverage portion of the policy and $68,271.10 under the underinsured portion of the policy, for total payments of $82,500.

The insurance policy in question provides, in relevant part, that "[t]he liability, uninsured motor vehicle and underinsured motor vehicle coverages shall be excess over and shall not pay again any medical expenses paid under this coverage." Relying on this provision, State Farm informed Ostransky that its payment obligations under the policy were satisfied because the payments it made under the medical coverage and underinsured portions of the policy, when added with the $12,500 paid from Bonnell's insurer, fully compensated Ostransky for his $95,000 damages. Ostransky initiated this declaratory judgment action seeking an interpretation of the insurance policy, arguing that the amount payable to Ostransky under the underinsured provision should not be offset by the medical payments made under the policy, because separate premiums are paid for each. Ostransky therefore argued that State Farm owes him $14,228.90 under the underinsured motorist coverage.

The district court determined that State Farm had met its obligations under the policy because the $82,500 payments it

made to Ostransky added to the $12,500 paid by Bonnell's insurance company equal Ostransky's stipulated damages of $95,000. Ostransky's motion for new trial was overruled, and his appeal from that order is before us.

ASSIGNMENT OF ERROR

Ostransky's sole assignment of error is that the district court erred in allowing State Farm to offset payments it made under its medical payments coverage from amounts due and owing under its underinsured motorist coverage.

STANDARD OF REVIEW

When a declaratory judgment action presents a question of law, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Burke v. Blue Cross Blue Shield,* 251 Neb. 607, 558 N.W.2d 577 (1997). See, also, *Luedke v. United Fire & Cas. Co., ante* p. 182, 561 N.W.2d 206 (1997); *Muller v. Tri-State Ins. Co., ante* p. 1, 560 N.W.2d 130 (1997).

ANALYSIS

The issue in this case is whether State Farm can, by a contractual provision in its insurance policy, prevent the overlapping of benefits paid under the medical payments coverage and the underinsured motorist coverage provisions of the policy. The provision in question provides that "[t]he liability, uninsured motor vehicle and underinsured motor vehicle coverages shall be excess over and shall not pay again any medical expenses paid under this coverage." State Farm's position is clear: No insured can recover for medical expenses under the underinsured motorist coverage if such expenses have already been paid by the medical payment coverage.

This court has addressed a similar situation in the context of an uninsured motorist case in *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968). There, an insured purchased a policy providing both uninsured motorist and medical payments coverage. When the insured was injured in an accident and attempted to recover under the uninsured motorist coverage, his insurer, pursuant to a provision in the policy, attempted to offset the amount it owed (the policy limit of

$10,000) by payments it had already made to the insured under the medical payments coverage of the policy ($1,000). The uninsured motorist statute at the time the policy was established required a minimum of $10,000 uninsured motorist coverage. As such, this court held that the policy offset provision was void and against public policy because if it were given effect, the reduction in the amount owed under the uninsured motorist coverage would drop below the statutory minimum. In reaching this conclusion, the court noted:

> The general rule is that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through "other insurance," excess insurance, or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) or other insured motorist coverage. And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance.

Id. at 571, 156 N.W.2d at 139.

Recently, we have revisited the public policy rationale on two occasions. In *Muller v. Tri-State Ins. Co., supra*, the underinsured motorist policy in question contained a provision that provided that " '[a]ny amount payable for damages shall be reduced by all sums paid or payable under any workers' compensation, disability benefits or similar law.' " *Id.* at 3, 560 N.W.2d at 133. Relying on *Stephens v. Allied Mut. Ins. Co., supra*, we noted that the purpose of both the uninsured motorist statute in *Stephens* and the underinsured motorist statute in place when the policy under review was written "is to provide a means to make the victims of less than adequately insured motorists whole, or as nearly so as reasonably possible . . . ." *Muller v. Tri-State Ins. Co., ante* at 8, 560 N.W.2d at 135-36. That being the case, we held the reduction clause void because if workers' compensation benefits were deducted, the victim would not be made as economically whole as possible.

A similar provision was also rejected in *Luedke v. United Fire & Cas. Co., supra*. In that case, the victim was injured in an automobile accident, suffering $150,000 in damages. The

victim recovered $38,711.77 in workers' compensation benefits and $25,000 from the responsible driver. When the victim attempted to recover from his insurer under his underinsured motorist coverage (with a $100,000 limit), the insurer attempted to offset both the workers' compensation award and the funds received from the negligent driver. The insurer therefore offered the victim $61,288.23. Relying on *Muller v. Tri-State Ins. Co., supra*, we held the workers' compensation offset provision void and allowed the insurer to offset the underinsured motorist coverage ($100,000) by only the $25,000 the victim received from the negligent driver. To hold otherwise, we noted, would not make the victim as "whole" as possible. As it was, the victim received total benefits of $100,000, still $50,000 less than his damages.

Ostransky relies heavily on *Stephens v. Allied Mut. Ins. Co., supra*, for the proposition that any offset of underinsured motorist coverage by an amount already paid under the medical payment coverage is void. Such a blanket reading and application of the language in *Stephens* are unwarranted. The factual situation is that the court in *Stephens* demanded that the provision in question be held void, for as noted above, if the reduction clause had been enforced, the insurer would have had to pay only $9,000 in uninsured motorist coverage when the statute specifically required that a minimum of $10,000 worth of coverage be provided.

The instant case differs from *Stephens*, *Muller*, and *Luedke* in one important respect: The victim has been completely compensated for his injuries. Ostransky's damages totaled $95,000. Both parties agree that this amount should be reduced by the $12,500 Ostransky received from Bonnell, thereby leaving $82,500 in damages. Adding together the $14,228.90 State Farm paid under the medical payment coverage and the $68,271.10 paid under the underinsured motorist coverage makes Ostransky "whole." As noted in both *Muller* and *Luedke*, the purpose of the Underinsured Motorist Insurance Coverage Act is to provide a means whereby victims of less than adequately insured motorists are made as nearly whole as possible. That purpose has been met in the instant case as evidenced by Ostransky's being fully compensated for his $95,000 worth of

damages. Allowing Ostransky to recover an additional $14,228.90 under the guise of underinsured motorist claims would allow him to be compensated twice for medical payments. See, *Schultz v. Farmers Ins. Group*, 167 Ariz. 148, 805 P.2d 381 (1991) (nonduplication of medical benefits endorsement valid, provided insured receives full compensation for loss); *Barnes v. Allstate Ins. Co.*, 608 So. 2d 1045 (La. App. 1992) (where damages do not exceed uninsured/underinsured policy limits and language of policy allows, insurance carrier is entitled to credit for any amount paid to insured under medical payments coverage); *Taxter v. Safeco Insurance Co.*, 44 Wash. App. 121, 721 P.2d 972 (1986) (personal injury protection coverage setoff against underinsured motorist coverage valid only when insured's damages are less than policy limits; where damages are greater, public policy dictates against offset).

The " 'parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.' " *Muller v. Tri-State Ins. Co.*, 252 Neb. 1, 6, 560 N.W.2d 130, 134 (1997) (quoting *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993)). The provision in the policy issued by State Farm does not run afoul of the Underinsured Motorist Insurance Coverage Act because it does not prevent Ostransky from being fully compensated for his injuries. Thus, despite the fact that separate premiums were paid for the medical payment coverage and the underinsured motorist coverage, a valid contract was entered into with State Farm, and Ostransky should not be allowed to receive extra compensation (in the form of double recovery of medical expenses) that was not bargained for.

CONCLUSION

Because the insurance provision in question does not prevent Ostransky from being fully compensated, we conclude that the district court was correct in determining that State Farm has fulfilled its obligations under the insurance policy.

AFFIRMED.

WHITE, C.J., dissents.

JoAnn Brandon, Personal Representative of the Estate of Teena Brandon, Deceased, Appellant, v. The County of Richardson, Nebraska, and Charles B. Laux, Richardson County Sheriff, Appellees.

566 N.W.2d 776

Filed July 25, 1997. No. S-95-1019.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages.
3. **Actions: Wrongful Death: Negligence: Pleadings.** When an action for wrongful death sounds in negligence, to determine whether the petition states facts sufficient to constitute a cause of action, it is necessary to examine whether specific facts are enumerated which would serve to establish that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of plaintiff's damages.
4. **Police Officers and Sheriffs: Liability.** Law enforcement officials may not be held liable for failure to protect individual citizens from harm caused by criminal conduct.
5. **Police Officers and Sheriffs: Liability: Proof.** Liability is established if police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking.
6. **Police Officers and Sheriffs: Liability.** There are situations that provide exceptions to the no-duty rule: (1) where individuals who have aided law enforcement as informers or witnesses are to be protected or (2) where the police have expressly promised to protect specific individuals from precise harm.
7. **Police Officers and Sheriffs: Words and Phrases.** A special relationship exists where an individual assists law enforcement officials in the performance of their duties.
8. **Actions: Decedents' Estates: Damages.** A decedent's estate may recover as an element of damages for decedent's conscious pain, suffering, and mental anguish resulting from the apprehension and fear of impending death.
9. **Actions: Mental Distress: Death.** A claim for intentional infliction of emotional distress survives the death of the victim.
10. **Actions: Mental Distress.** To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege facts showing (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
11. **Pleadings: Demurrer.** It is generally an abuse of discretion to grant a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment.

Appeal from the District Court for Richardson County: WILLIAM B. RIST, Judge. Reversed and remanded with direction.

James M. Kelley and Michael J. Hansen, of Berry, Kelley, Hansen & Burt, for appellant.

Richard L. Boucher and, on brief, Tamra L. Walz, of Boucher Law Firm, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Appellant, JoAnn Brandon (Brandon), as personal representative of the estate of Teena Brandon, deceased, filed suit in the district court for Richardson County against Richardson County and Sheriff Charles B. Laux for breaching their duty to protect Teena Brandon (victim) and thus causing her wrongful death. The district court dismissed Brandon's second amended petition based on Richardson County and Laux's demurrer alleging that the petition did not set forth facts sufficient to allege a cause of action. We reverse, and remand with direction.

BACKGROUND

The factual context of the damage claim involved the death of the victim. Brandon's allegations, which must be accepted as true facts for the purposes of a demurrer, are set out in her second amended petition. On December 25, 1993, John Lotter and Marvin Nissen forcibly abducted, imprisoned, assaulted, and raped the victim. Lotter and Nissen then threatened the victim that if she informed anyone as to what they did to her, they would " 'silence her permanently.' " The victim escaped from the imprisonment imposed upon her by Lotter and Nissen and sought aid from Laux and his agents. On that same day, the victim told Laux she had been raped, imprisoned, and threatened with death if she revealed what had happened; identified Lotter and Nissen as the perpetrators of the crimes committed against her; and stated that she would sign all appropriate complaints and would testify against them. Laux represented to the victim that the reason for the interview with her was to get facts for the arrest and prosecution of Lotter and Nissen.

Following the interview, Laux directed his deputy, Tom Olberding, to pursue the investigation. Olberding completed his investigation, retrieved several items of physical evidence at the rape scene, and told Laux that the physical evidence corroborated the victim's statement and that he wanted to arrest Lotter and Nissen. Laux did not arrest Lotter or Nissen, and he did not advise the victim of his decision not to do so. Instead, Laux delegated other parts of the investigation to the Falls City Police Department, which detained Lotter and Nissen for questioning. The victim was not informed of Laux's decision not to arrest Lotter and Nissen, and she believed that Lotter and Nissen would be arrested; in reliance on the expectation that Lotter and Nissen would be arrested, she remained in Richardson County instead of returning to Lincoln despite the threat on her life. The victim was shot and killed by Lotter and Nissen on December 31, 1993.

The second amended petition alleges that Laux breached his common-law and statutory duties to the victim by his failure and refusal to arrest Lotter and Nissen. Brandon also alleges that Laux further breached his common-law duty to the victim by his failure and refusal to inform the victim of his decision not to arrest Lotter and Nissen. Brandon's second amended petition alleges in paragraph 24 that the victim, relying on the expectation that "Laux would execute his common law and statutory duties," remained in Richardson County despite the threat on her life by Lotter and Nissen, which threat was known to Laux. In paragraph 26, Brandon then alleges that the victim told her that believing Lotter and Nissen were to be arrested by Laux, and in reliance thereon, she planned to stay in the area and return to Lincoln January 3, 1994.

Brandon originally made a claim under the Political Subdivisions Tort Claims Act. The 6-month period for Richardson County and Laux to respond to said claim expired without a response. Brandon, pursuant to Neb. Rev. Stat. § 13-906 (Reissue 1991), withdrew the above claim. Brandon filed a petition, seeking damages for the wrongful death of her daughter, the victim, pursuant to Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 1995), and for the injuries and damages sustained by the victim prior to her death. Richardson County and Laux filed

a demurrer, which was sustained. Brandon filed an amended petition in which she added a fourth cause of action, that of intentional infliction of emotional distress. Richardson County and Laux filed another demurrer, which was sustained. Brandon was given leave to file a second amended petition with regard to her first, second, and third causes of action, but her fourth cause of action, for intentional infliction of emotional distress, was dismissed.

Brandon filed a second amended petition, alleging causes of action based on wrongful death, predeath injuries and damages, and funeral and burial expenses. She again alleged a cause of action based on intentional infliction of emotional distress.

Richardson County and Laux demurred to the second amended petition, arguing that the second amended petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, denied further leave to amend, and dismissed Brandon's case. From this order, Brandon appeals.

ASSIGNMENT OF ERROR

Brandon assigns as error the district court's determination that her second amended petition did not state a cause of action.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996).

ANALYSIS

A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). Because Brandon's action for wrongful death sounds in negligence, to determine whether her petition

states facts sufficient to constitute a cause of action, it is necessary to examine whether specific facts are enumerated which would serve to establish that Richardson County and Laux owed a duty to the victim, that Richardson County and Laux breached that duty, and that the breach was the proximate cause of the victim's damages. See *id.*

In *Hamilton*, the plaintiff alleged that she had relied upon a police officer's assurances and remained in her apartment following an attack by her ex-husband. The plaintiff alleged that she requested a " 'special watch number' " because she feared for her safety. *Id.* at 255, 498 N.W.2d at 558. She further alleged that the officer stated she would not need a special watch number and that he would be on duty and in the immediate area to protect her. The plaintiff's ex-husband returned to her residence approximately 20 minutes later. At that time, Hamilton called the 911 emergency service number to report the attack in progress. She was assaulted with a tire iron by her ex-husband as she attempted to get help.

The plaintiff alleged that the officer was negligent in failing to protect her from her assailant after affirmatively assuring her he would protect her and in failing to be available to provide protection to her after assuring her he would do so. She further alleged that she stayed at her residence in reliance on this assurance, although no allegation existed of an alternative she would have pursued absent such reliance. The defendants, the officer and the city, demurred on the ground that the petition failed to state a cause of action. The demurrer was sustained by the lower court. This court found that the petition relied "on bare legal conclusions and generalizations and lack[ed] any allegations of specific acts or omissions which would establish a duty as well as a breach of that duty and proximate causation." (Emphasis omitted.) *Id.* at 264, 498 N.W.2d at 562-63.

In *Hamilton*, we noted that over 100 years ago, the U.S. Supreme Court held that law enforcement officials may not be held liable for failure to protect individual citizens from harm caused by criminal conduct. See *South et al. v. State of Maryland, Use of Pottle*, 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1855). We also recognized that such a rule is not absolute and that there are exceptions. Liability is established if police have specifically

undertaken to protect a particular individual and the individual has specifically relied upon the undertaking. *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983). Such a duty to provide police services arises when there is some form of privity—a "special relationship"—between the police department and the victim that sets the victim apart from the general public and there are explicit assurances of protection that give rise to reliance on the part of the victim.

We recognize that there are situations that provide exceptions to the no-duty rule: (1) where individuals who have aided law enforcement as informers or witnesses are to be protected or (2) where the police have expressly promised to protect specific individuals from precise harm. These two situations were discussed at length in *Morgan*. The court in *Morgan* recognized that a special relationship undoubtedly exists where an individual assists law enforcement officials in the performance of their duties.

We conclude that Brandon has stated facts sufficient to qualify for an exception to the no-duty rule because the victim witnessed a crime and agreed to aid the police. A special relationship was created when the victim went to law enforcement officials and offered to testify and aid in the prosecution of Lotter and Nissen. The fact that she was the victim of the crime does not change this relationship. The victim was abducted, imprisoned, and raped. She offered to collaborate with the police in the arrest and prosecution of the criminals, and Laux's office was aware of the danger to the victim. Upon further investigation, Olberding determined that the physical evidence at the rape scene corroborated the victim's statement. Olberding wanted to arrest Lotter and Nissen, but he was not permitted to do so. For purposes of the demurrer, these facts, if true, qualified the victim for an exception to the no-duty rule.

The district court erred in sustaining Richardson County and Laux's demurrer to Brandon's causes of action Nos. 1, 2, and 3.

The threshold question on the claim for intentional infliction of emotional distress is whether this cause of action survives the death of the victim. In *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989), this court held that a decedent's estate may recover as an element of damages for decedent's conscious

pain, suffering, and mental anguish resulting from the apprehension and fear of impending death. We find the reasoning in *Nelson* persuasive and see no reason why it would not also apply in this case; therefore, the claim in this case for intentional infliction of emotional distress would also survive the death of the victim. Brandon claims intentional infliction of emotional distress against the County of Richardson and Laux. To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege facts showing (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

It is not clear from the petition that any such severe emotional distress occurred. In fact, the only specific allegation states: "Laux stated that [the victim's] absence from a scheduled second interview reflected poorly on her credibility as to the truthfulness of the reported sexual and physical assaults upon her by Lotter and Nissen." This allegation does not rise to the level of severe distress needed to allege intentional infliction of emotional distress. It is generally an abuse of discretion, however, to grant a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997); *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). Therefore, Brandon should have been given leave to amend her petition with regard to the emotional distress claim.

CONCLUSION

We reverse the trial court's order sustaining the demurrer to Brandon's second amended petition as to causes of action Nos. 1, 2, and 3 and remand the cause for further proceedings. With regard to cause of action No. 4, we reverse the trial court's fail-

ure to allow Brandon to amend her second amended petition and direct the trial court to allow an amendment.

REVERSED AND REMANDED WITH DIRECTION.

CAPORALE, J., concurring.

I agree that the operative petition states a cause of action both for the breach of the duty to protect the victim, Teena Brandon, and for intentionally inflicting emotional distress upon her. I write separately because in my view the allegations as to the conduct of the defendants, Sheriff Charles B. Laux and the County of Richardson, are more compelling in asserting a breach of the duty to protect than are the allegations concerning the assistance that the victim promised in the prosecution of the perpetrators, John Lotter and Marvin Nissen.

The victim avers she complained of her abduction, assault, and rape to Laux and his agents and reported as well the perpetrators' threat to " 'silence her permanently' " were she to inform anyone as to what was done to her. The petition further asserts that the investigation corroborated the victim's complaint; that Laux nonetheless decided not to arrest the perpetrators; that notwithstanding Laux's knowledge of the perpetrators' threat, he told them of the victim's complaint; and that he failed to make the victim aware that the perpetrators had been questioned but had not been arrested.

I submit that under those allegations, Laux violated his duty to protect the victim regardless of her agreement to assist in the prosecution. Notwithstanding his knowledge of the threat to the victim's life, Laux informed the perpetrators of the victim's complaint; it seems to me that the moment the perpetrators were made so aware, Laux acquired a duty to protect the victim. If the allegations are proved, by talking with the perpetrators but not arresting them, Laux laid an essential link in the chain that led to the victim's death.

COUNTY OF ADAMS ET AL., APPELLANTS, V. NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL., APPELLEES.

566 N.W.2d 392

Filed July 25, 1997. No. S-95-1122.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Taxation: Valuation: Words and Phrases.** Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.
4. **Judgments: Collateral Attack.** When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a "collateral attack."
5. **State Equalization Board: Taxation: Valuation: Collateral Attack.** The actions of the Nebraska State Board of Equalization and Assessment in equalizing as between different counties are in their nature quasi-judicial and are not subject to collateral attack except upon grounds of fraud, actual or constructive, or for the exercise of a power not conferred upon the board by statute.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Patrick T. O'Brien, of Bauer & Galter Law Firm, Paul L. Douglas, and John M. Boehm for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Board.

Tim Engler, of Harding, Shultz & Downs, for appellees Mid-America Long Distance Corp. et al.

William R. Johnson and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellees Natural Gas Pipeline Company of America et al.

William E. Peters, of Peters & Chunka, P.C., for appellees Williams Natural Gas Co. et al.

Norman H. Wright, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees American Airlines, Inc., et al.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ.

WRIGHT, J.

The appellants are 124 political subdivisions of the State of Nebraska, including 72 counties, 23 cities, and 29 school districts (Subdivisions). The Subdivisions appeal from the order of the Lancaster County District Court, which sustained demurrers to the Subdivisions' petitions. The demurrers were filed by the appellees, the Nebraska State Board of Equalization and Assessment (Board) and numerous taxpayers.

SCOPE OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996).

On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996).

FACTS

On April 12, 1995, the Subdivisions filed petitions alleging that in tax years 1989 and 1990, the Board wrongfully valued certain centrally assessed personal property at zero as a part of the normal equalization process for the respective tax years. The petitions requested that the Board's order of April 12, 1991, which recertified the valuations of numerous centrally assessed taxpayers for tax year 1989 at zero, be declared void. In addition, the 72 counties asked that the Board's order of June 14, 1991, which recertified the valuations of flight equipment owned by various centrally assessed air carriers at zero for tax year 1990, be declared void.

The orders of April 12 and June 14, 1991, were made by the Board pursuant to *Northern Natural Gas Co. v. State Bd. of*

Equal., 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990), and *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991). A review of those cases is helpful in understanding the disposition of the present case.

In *Northern Natural Gas Co.*, we considered the effect of *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), which construed "§ 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act)," 232 Neb. at 809, 443 N.W.2d at 252. We concluded that we were required to correct a "constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state." *Northern Natural Gas Co.*, 232 Neb. at 815, 443 N.W.2d at 256. We reversed the decision of the Board, which had refused Northern Natural Gas Company and Enron Liquids Pipeline Company's request that their property be equalized with property of railroads and car companies operating in Nebraska, and remanded the cause to the Board for further proceedings. At the same time, we determined that a companion case involving Natural Gas Pipeline Company of America (NGPL) and Trailblazer Pipeline Company (Trailblazer) was controlled by our holding in *Northern Natural Gas Co.* Thus, we reversed the Board's order and remanded those causes for further proceedings. See *Trailblazer Pipeline Co. v. State Bd. of Equal.*, 232 Neb. 823, 442 N.W.2d 386 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990).

Following the issuance of *Northern Natural Gas Co.*, NGPL and Trailblazer, which owned centrally assessed property in Nebraska and operated natural gas transmission pipelines in Nebraska, sought equalization by the Board of the value of their property for taxation. The Board found that the State of Nebraska was preempted from taxing the personal property of car companies and railroad companies pursuant to the 4-R Act and that as a result of such federal preemption, the personal property of car companies and railroad companies was not subject to tax and therefore could not be the basis for a claim for equalization. The Board explained that, as a practical matter, the claims of NGPL and Trailblazer were claims requesting that

their business and personal property and/or real property be exempt from taxation. The Board concluded that it had no statutory or constitutional authority to rule upon such a claim. On appeal, we reversed the Board's decision and remanded the causes to the Board for further proceedings. See *Natural Gas Pipeline Co. v. State Bd. of Equal., supra.*

Following remand in *Natural Gas Pipeline Co.*, the Board in the instant case equalized the personal property portion of the taxpayers' 1989 valuation to zero and ordered the State Tax Commissioner to recertify the 1989 value of each company to its respective counties in accordance with the order of the Board. The Nebraska Department of Revenue recommended that the Board order that the personal property of the taxpayers be "equalized to zero," and the Board did so. Pursuant to directions from the Board, the State Tax Commissioner notified the counties of the Board's decision and directed that refunds be issued to the taxpayers in accordance with the recertified values. No appeal of the 1991 orders was taken. See *County of Adams v. State Bd. of Equal.*, 247 Neb. 179, 525 N.W.2d 629 (1995) (*County of Adams I*).

In July 1991, we issued *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (*MAPCO I*), *cert. denied* 508 U.S. 960, 113 S. Ct. 2930, 124 L. Ed. 2d 681 (1993). *MAPCO I* was a direct appeal from the Board's denial of the taxpayers' request for equalization of the 1990 values of their real and personal property with certain statutorily exempted property. The taxpayers contended that their property should be equalized at zero for 1990 because the State Tax Commissioner did not value, assess, or tax any rolling stock of railroad or carline companies operating in Nebraska in 1990. We concluded in *MAPCO I* that this proposed remedy was inappropriate:

> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. . . . As we said in *Natural Gas Pipeline Co.*, [237 Neb.] at 366, 466 N.W.2d at 467, "The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax."

238 Neb. at 577, 471 N.W.2d at 742. We determined that

> [t]he process of equalization, therefore, cannot be applied to property that is not taxed. The appellants' remedy in this case, although based on the uniformity and proportionality requirement of Neb. Const. art. VIII, § 1, does not involve "equalization." Any language in our opinion in *Northern Natural Gas Co., supra*, which might be read as implying the contrary is hereby disapproved.

MAPCO I, 238 Neb. at 577, 471 N.W.2d at 742.

MAPCO I determined that the taxpayers' remedy was not for their property to be "equalized" at zero percent of actual value, but for the property to be taxed uniformly and proportionately in compliance with Neb. Const. art. VIII, § 1. Therein, we declared unconstitutional a number of statutory exemptions which the federal court in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), had cited as the basis for finding discriminatory taxation of railroad rolling stock and for enjoining the collection of any taxes on that property. We stated that the Board had not erred in assessing and taxing in 1990 the railroad rolling stock with respect to which the taxpayers had sought equalization. We remanded the cause to the Board, but did not specify what the Board was to do other than to follow the law.

Upon remand, the Board ordered reduction of the taxpayers' 1990 values by 18.81 percent. The taxpayers appealed, and we affirmed the decision of the Board in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 242 Neb. 263, 494 N.W.2d 535 (1993) (*MAPCO II*), *cert. denied* 508 U.S. 960, 113 S. Ct. 2930, 124 L. Ed. 2d 681. In *MAPCO II*, we explained that *MAPCO I* required that the property which had been improperly and unconstitutionally exempted should be returned to the tax rolls and its value equalized with other property subject to the tax. We approved the Board's remedy of taxing property at the level at which it would have been taxed had the improperly exempted property been included on the tax rolls. We explained that the State could choose to erase the property deprivation by providing the taxpayer with a full refund of the tax payments or could cure the invalidity by refunding the difference between the tax paid and the tax which would have been paid if all taxpayers had been treated equally. See *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 110 S. Ct. 2238, 110 L.

Ed. 2d 17 (1990) (holding that in order to remedy discriminatory taxation, state may assess and collect back taxes from taxpayers who received unlawful benefits or choose to utilize combination of partial refunds and partial retroactive assessments of tax increases).

The Board opted to refund the difference between the taxes levied against the property of the parties and the taxes which the parties would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed. We found that this relief corrected the disproportionality in taxation of the taxpayers' property in compliance with article VIII, § 1, of the Nebraska Constitution and the Due Process Clause of the 14th Amendment to the U.S. Constitution.

As discussed above, prior to *County of Adams I*, the Board in the present case recertified the values of the taxpayers' personal property at zero for tax years 1989 and 1990. After the Board's action, the State Tax Commissioner sent letters to the Subdivisions recertifying the value of the taxpayers' property at zero. The tax liability of the taxpayers was reduced, and consequently, the taxpayers were owed refunds by the Subdivisions. After our decisions in *MAPCO I* and *MAPCO II* were released, however, the Subdivisions which owed refunds to the taxpayers in the instant case—pursuant to the Board's orders dated April 12 and June 14, 1991—asked the Board to vacate its orders which equalized the property to zero.

On January 13, 1994, the Board determined that it did not have jurisdiction regarding the petitions requesting the Board to vacate its orders entered April 12 and June 14, 1991. The Subdivisions appealed to the district court from this determination, alleging that the Board should have vacated its prior orders because this court held in *MAPCO I* and *MAPCO II* that recertification to zero is an improper remedy to achieve equalization. See *County of Adams I*.

On appeal, we held that an administrative agency may reconsider its decisions only until the aggrieved party institutes judicial review or until the statutory time for review has expired. Thus, we held that the Board had properly concluded that it did not have jurisdiction to revisit its prior orders after the time for appeal had passed. We did not address, however, whether the

Subdivisions could collaterally attack the decision of the Board, because after reviewing the petitions, we determined that the case was not a collateral attack. See *id.* Therefore, we did not consider whether the Board's orders were void.

The Subdivisions considered our decision in *County of Adams I* to be an " 'invitation' for the bringing of these actions." Brief for appellants at 9. Thus, they filed their petitions collaterally attacking the Board's 1991 orders, alleging that the orders were "beyond the authority of the Board, illegal, based upon mistake and erroneous conclusions of law, unconstitutional, null and void, and erroneously omitting personal property from taxation . . . ." The Board and the various taxpayers filed demurrers on the grounds that the district court lacked subject matter jurisdiction and that the petitions did not state facts sufficient to constitute a cause of action. On September 12, 1995, the court sustained the demurrers and dismissed the petitions for want of jurisdiction. The court also found that although the Subdivisions were not parties to the prior proceedings, they were bound by the Board's orders as " 'privies.' "

ASSIGNMENTS OF ERROR

The Subdivisions assign the following errors to the district court: (1) The court erred in determining that the Subdivisions' petitions did not present a proper basis for collateral attack on the Board's orders, (2) the court erred in finding that the Board's orders were final and binding on the Subdivisions as privies, and (3) the court erred in sustaining the demurrers of the Board and the taxpayers and dismissing the Subdivisions' petitions for want of jurisdiction.

ANALYSIS

It is undisputed that the Subdivisions are collaterally attacking prior judgments of the Board. When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a "collateral attack." *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484 (1989).

When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law

and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996). A defendant may demur to a petition when it appears on its face "(1) that the court has no jurisdiction of . . . the subject of the action . . . or (6) that the petition does not state facts sufficient to constitute a cause of action." Neb. Rev. Stat. § 25-806 (Reissue 1995).

We first consider whether the Subdivisions may collaterally attack the prior judgments of the Board. In *Schilke v. School Dist. No. 107*, 207 Neb. 448, 451, 299 N.W.2d 527, 530 (1980), we stated:

> It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. . . . This rule is not limited to courts of general jurisdiction, and has been held to apply to administrative boards and tribunals acting in a quasi-judicial capacity.

Here, the Subdivisions have not asserted that the Board lacked subject matter jurisdiction when it rendered its 1991 orders. Instead, the Subdivisions rely upon our decision in *Hacker v. Howe*, 72 Neb. 385, 101 N.W. 255 (1904), which held that actions by the Board which exceed its authority may be collaterally attacked.

In *Hacker*, a plaintiff-taxpayer sought an injunction to prevent the collection of taxes that resulted from an increase in valuation of several counties as ordered by the Board. The plaintiff claimed that the Board's action was null and void on the grounds that the Board had exceeded its powers and jurisdiction and that the statute under which the Board had acted was unconstitutional. We stated that "[t]he actions . . . of the state board of equalization in equalizing as between different counties, are in their nature *quasi* judicial, and are not subject to collateral attack except upon grounds of fraud, actual or constructive, or for the exercise of a power not conferred upon them by statute." (Emphasis in original.) *Id.* at 393, 101 N.W. at 258.

The Subdivisions do not contend that the Board's orders amounted to fraud. Rather, relying upon *Hacker*, the Subdivisions assert that they may state a cause of action collaterally attacking the Board's April 12 and June 14, 1991, orders

because they were "beyond the authority of the Board, illegal, based upon mistake and erroneous conclusions of law, unconstitutional, null and void, and erroneously omitting personal property from taxation . . . ." We therefore consider whether the Board's decision to recertify the values of the taxpayers' personal property was beyond the Board's authority.

At the time the Board addressed the taxpayers' protest, it was well established that the appropriate remedy for a taxpayer who had successfully challenged discriminatory taxation was to recertify the taxpayer's property at the same level as the favored taxpayer. In *Sioux City Bridge Co. v. Dakota County*, 105 Neb. 843, 182 N.W. 485 (1921), the bridge company claimed that the county board of equalization had arbitrarily assessed its property at 100 percent of its "true value," although the real estate in the county had been assessed at 55 percent of its true value. We stated that "when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced." *Id.* at 848, 182 N.W. at 487. The U.S. Supreme Court reversed, holding that the right of the taxpayer whose property is uniquely taxed at 100 percent of its true value is to have its assessment reduced to the percentage at which others are taxed even though this is a departure from the requirement of the statute. See *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923).

Accordingly, in *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we applied the principles set out by the U.S. Supreme Court in *Sioux City Bridge* and held that where a taxpayer's property had not been assessed uniformly and proportionately with other property in the county, the assessment of the taxpayer's property at its actual value should be reduced to 44 percent of that value to equalize the value of the taxpayer's property with other property in the county. Similarly, in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990), we held that the taxpayers were entitled to have their personal property equalized with railroads and car companies

that had previously been subject to federal litigation and therefore reduced to zero valuation.

Therefore, we conclude that the Board's April 12 and June 14, 1991, orders are not subject to collateral attack. Although the Board was not correct when in tax years 1989 and 1990 it valued certain centrally assessed personal property at zero as a part of the equalization process for the respective years, its decision was made under an interpretation of our opinions in *Northern Natural Gas Co. v. State Bd. of Equal., supra*, and *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991).

It was not until *MAPCO I* that we stated that the process of equalization could not be applied to property that is not taxed. In *MAPCO I*, we found that the taxpayers' proposed remedy of having their property "equalized" at zero percent was inappropriate.

However, the Board's 1991 orders were not in excess of the Board's authority to equalize taxes and therefore cannot be said to be null and void. See, *Natural Gas Pipeline Co. v. State Bd. of Equal., supra*; *Northern Natural Gas Co. v. State Bd. of Equal., supra*.

The Subdivisions' reliance upon our decision in *County of Adams I* is misplaced. We did not hold in *County of Adams I* that the Board's April 12 and June 14, 1991, orders exceeded the powers of the Board, nor did we find that such decisions were generally subject to collateral attack. Instead, we held that the petition in that case did not present a collateral attack, and therefore, we could not address it as such.

The right of a party to collaterally attack the validity of a prior order by the Board was set forth in *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980). In *Richardson*, we stated:

> It is clear that the School District took no steps to prosecute an appeal of any nature within 30 days of entry of the State Board's order, as required by Neb. Rev. Stat. §§ 25-1931 (Reissue 1975) and 84-917 (2) (Reissue 1976). Rather, it attempted to collaterally attack an order of the State Board which had long before become final. "A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction

> of the parties and the subject matter, its judgment is not subject to collateral attack because the judgment is only voidable and not void." *State ex rel. Casselman v. Macken*, 194 Neb. 806, 809, 235 N.W.2d 867, 869 (1975). "The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration . . . ."

206 Neb. at 25-26, 290 N.W.2d at 808-09.

Here, the Subdivisions seek a declaration that the April 12 and June 14, 1991, orders of the Board were invalid or void. The orders have long since become final and are not subject to collateral attack by the Subdivisions. The Subdivisions had a right to appear before the Board and to appeal the Board's orders. The Subdivisions did not appear at the Board's hearings on remand and did not appeal from either of the Board's orders. The orders of the Board therefore constitute final judgments which were not appealed.

We find that the district court was correct in concluding that the Subdivisions' petitions did not set forth a cause of action to collaterally attack the Board's orders of April 12 and June 14, 1991. There being no basis upon which the Subdivisions can collaterally attack the judgments, the court was correct in sustaining the demurrers on the basis that the petitions failed to state a cause of action.

The judgment of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.
WHITE, C.J., concurs.

STATE OF NEBRASKA, APPELLEE, V. EDWIN B. YEUTTER, APPELLANT.
566 N.W.2d 387

Filed July 25, 1997. No. S-96-255.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.

2. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. Because of this duty, the trial court, on its own motion, must correctly instruct on the law.
3. **Police Officers and Sheriffs: Assault: Arrests: Jury Instructions: Self-Defense: Evidence.** In prosecutions for assaulting an officer, obstructing a peace officer, or resisting arrest, a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim that the police officer used unreasonable force in making the arrest.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the District Court for Dawson County, DONALD E. ROWLANDS II, Judge. Judgment of Court of Appeals affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Edwin B. Yeutter was convicted by a jury of third degree assault on an officer, Neb. Rev. Stat. § 28-931 (Reissue 1995); obstructing a peace officer, Neb. Rev. Stat. § 28-906 (Reissue 1989); and resisting arrest, Neb. Rev. Stat. § 28-904 (Reissue 1995). The district court for Dawson County sentenced Yeutter to 180 days' imprisonment on each of the three convictions, with the sentences to run concurrently. The Nebraska Court of Appeals, in a memorandum opinion filed December 18, 1996, affirmed Yeutter's convictions for resisting arrest and third degree assault on an officer and reversed his conviction and vacated his sentence for obstructing a peace officer.

We granted Yeutter's petition for further review solely to determine whether Yeutter was entitled to an instruction on self-defense. We conclude that Yeutter failed to adduce any evidence which raised a legally cognizable claim that the police officer used unreasonable force in making the arrest. Accordingly, Yeutter was not entitled to a self-defense instruction, and the judgment of the Court of Appeals is affirmed.

BACKGROUND

On September 3, 1995, Officer Russell Besmer of the Cozad Police Department picked up a dog that was running at large in violation of a Cozad city ordinance. From prior contacts with that particular dog, Besmer was aware that the dog belonged to Yeutter. When Besmer arrived at Yeutter's residence, there was no one at home, so he put the dog inside a fenced area and left his business card on Yeutter's door with instructions for Yeutter to contact the police department.

The following day Yeutter called the police department and spoke to Besmer. Besmer informed Yeutter that he needed to come to the police station and pick up a citation for allowing his dog to run at large. Yeutter refused to come to the police station and told Besmer that if he wanted to cite him, Besmer would need to come to his residence to do so.

Besmer proceeded to Yeutter's residence to issue the "dog at large" citation. When Besmer arrived at the residence, he saw Yeutter's wife in their driveway and asked her "where the guy was with the attitude on the phone." At that time, Yeutter approached the driveway and stated that it sounded like Besmer was "the one with the attitude."

Besmer asked Yeutter for identification so that he could fill out the "dog at large" citation (name, date of birth, height, weight, et cetera). According to Besmer, Yeutter refused to provide the requested identification and to accept a citation. Besmer again asked Yeutter for identification and stated that if Yeutter did not cooperate, he would be arrested for obstructing a police officer. According to Yeutter, after Besmer asked for identification, Yeutter explained that he did not have any on him and then attempted to get his identification out of his car, but Besmer "would not give [him] a chance." Yeutter denies stating that he would not accept a citation.

Yeutter eventually held out his arms and stated, "[G]o ahead and take me." Besmer told Yeutter to place his hands on a nearby car, which Yeutter refused to do. Besmer radioed for backup and again told Yeutter to place his hands on the vehicle because he was under arrest. Again, Yeutter did not comply.

At that time, Yeutter's wife got between the two men and pushed Besmer back with her hand on his chest, stating, "[Y]ou

are not taking him." According to Besmer, while he was trying to hold Yeutter's wife back and get around her to place Yeutter under arrest, Yeutter came around the side of his wife toward Besmer in "a threatening manner." According to Yeutter, Besmer came around Yeutter's wife toward him. Besmer grabbed Yeutter's arm and forced Yeutter down on the gravel driveway so that he could place handcuffs on him.

While the two men were on the ground, Besmer's baton fell out of its holder. Besmer testified that Yeutter grabbed the baton but dropped it after being instructed to do so by Besmer. Yeutter testified that he saw the baton on the ground but never touched it.

Yeutter admits to grabbing one end of Besmer's handcuffs during the struggle and not letting go after being repeatedly instructed to do so by Besmer. Yeutter testified, "I didn't want him to cuff me. I thought he was out of line." Besmer admits that at one point, Yeutter stated that if Besmer would get off him, he would let Besmer handcuff him. However, Besmer testified that he did not let Yeutter up because "I didn't feel he would let me put the handcuffs on him at that time because he was already fighting at that time."

Besmer attempted to get Yeutter's arms out from underneath Yeutter by applying a pressure point. However, when Besmer put his left hand over Yeutter's face so that he could apply the pressure point, Yeutter bit one of Besmer's fingers. Yeutter admits to biting down on Besmer's finger but states that it was "a natural instinct: when something goes in my mouth I bite." Yeutter testified that he never saw Besmer's finger because Besmer was covering Yeutter's eyes in an attempt to apply a pressure point and that he ceased biting when he realized that it was Besmer's finger in his mouth. Besmer testified that when he had his hand over Yeutter's eyes, Yeutter reached up and bit his finger. Besmer further testified that the bite did not break the skin, but that it caused pain and caused his finger to swell and turn red.

A backup officer eventually arrived at Yeutter's residence, and the two officers handcuffed Yeutter. While Besmer was escorting Yeutter to the police cruiser, Yeutter unsuccessfully attempted to pull away. When they arrived at the police cruiser, Besmer opened the vehicle's door and told Yeutter to get in the

vehicle, but Yeutter refused to sit down. After a second request, Yeutter entered the police cruiser.

As a result of the struggle, Besmer also received several scratches on his right hand and received a blood blister on his right little finger from the handcuffs and the gravel on the driveway.

ASSIGNMENT OF ERROR

Yeutter asserts that the Court of Appeals erred in failing to determine that the district court had a duty to instruct the jury on the amount of force that a police officer may employ in making an arrest and the amount of force that a citizen may employ to defend himself against excessive force.

STANDARD OF REVIEW

Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996); *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

ANALYSIS

In his sole assigned error to this court, Yeutter asserts that the Court of Appeals erred in failing to determine that the district court had a duty to instruct the jury on the amount of force that a police officer may employ in making an arrest and the amount of force that a citizen may employ to defend himself against excessive force. Before addressing this assertion, we must first note that Yeutter's arrest for obstructing a police officer was an illegal arrest.

> A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he intentionally obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer or judge acting under color of his official authority.

§ 28-906.

The record does not reflect that at the time that Besmer attempted to arrest Yeutter, Yeutter used or threatened to use violence or force or physically interfered with the officer. The

record does reflect that Yeutter refused to answer routine questions necessary for the officer to complete a citation. However, the mere verbal refusal to provide information to an officer does not constitute an obstacle to the enforcement of the penal laws as contemplated by § 28-906. There must be some sort of physical act in order for a violation of this statute to occur. Cf. *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987) (running away from police constituted physical obstacle within meaning of § 28-906).

However, it is well established that "[t]he use of such force is not justifiable . . . to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful." Neb. Rev. Stat. § 28-1409(2) (Reissue 1995). Because it is uncontroverted that Yeutter knew that Besmer was a police officer, Yeutter was not justified in using force on the basis that he was being arrested unlawfully. Regardless, Yeutter's assigned error does not focus on the unlawfulness of his arrest. Instead, Yeutter asserts that he was entitled to a jury instruction on self-defense.

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. Because of this duty, the trial court, on its own motion, must correctly instruct on the law. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997).

Thus, in order to determine the merit of Yeutter's assigned error, we must first determine the quality and quantity of evidence necessary to raise a duty on the part of the trial court to instruct the jury on self-defense in prosecutions for assaulting an officer, obstructing a peace officer, or resisting arrest. This issue is one of first impression.

In cases outside the context of prosecutions for assaulting an officer, obstructing a peace officer, or resisting arrest, a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. See *State v. Kinser, ante* p. 600, 567 N.W.2d 287 (1997). To successfully assert the claim of self-defense, one must have a both reasonable and good faith belief in the necessity of using force. *Id.*; *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996). In addition, the force used in defense

must be immediately necessary and must be justified under the circumstances. *State v. Kinser, supra*; *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990). We have also stated that a police officer, in making an arrest, must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances. *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993); *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

Thus, in prosecutions for assaulting an officer, obstructing a peace officer, or resisting arrest, we hold that a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim that the police officer used unreasonable force in making the arrest.

In the instant case, the following facts are uncontroverted: Besmer told Yeutter that he would arrest Yeutter for obstructing a police officer if Yeutter did not provide the requested identification. Yeutter held out his arms and stated, "[G]o ahead and take me." Besmer then told Yeutter to place his hands on a nearby car, which Yeutter refused to do. Besmer again told Yeutter to place his hands on the vehicle because he was under arrest. Again, Yeutter did not comply. Eventually, Besmer grabbed Yeutter's arm and forced Yeutter down on the gravel driveway so that he could place handcuffs on him.

While the two men were on the ground, Yeutter grabbed one end of Besmer's handcuffs and would not let go after being repeatedly instructed to do so by Besmer. Yeutter testified, "I didn't want him to cuff me. I thought he was out of line." At one point, Yeutter stated that if Besmer would get off him, he would let Besmer handcuff him. Besmer attempted to get Yeutter's arms out from underneath Yeutter by applying a pressure point. However, when Besmer put his left hand over Yeutter's face so that he could apply the pressure point, Yeutter bit one of Besmer's fingers.

Thus, the uncontroverted evidence shows that Besmer did not take Yeutter to the ground until after Yeutter twice refused to put his hands on the vehicle as ordered by the officer. Besmer did not attempt to apply a pressure point to Yeutter until after

Yeutter grabbed the officer's handcuffs and otherwise resisted being handcuffed. The fact that Yeutter initially held out his hands and said "[G]o ahead and take me" and later stated to Besmer that if Besmer would get off him, he would let Besmer handcuff him is of no significance. An officer need not comply with a suspect's requests on how and when the officer should conduct the arrest.

CONCLUSION

We conclude that Yeutter failed to adduce any evidence which raised a legally cognizable claim that the police officer used unreasonable force in making the arrest. Accordingly, Yeutter was not entitled to a self-defense instruction.

AFFIRMED.

WHITE, C.J., concurs.

IN RE INTEREST OF TABATHA R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. RONDA R., APPELLANT, RONALD D., APPELLEE AND CROSS-APPELLANT, AND NEBRASKA DEPARTMENT OF SOCIAL SERVICES, INTERESTED PARTY, APPELLEE.

566 N.W.2d 782

Filed July 25, 1997. No. S-96-552.

SUPPLEMENTAL OPINION

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Supplemental opinion: Motion for rehearing overruled.

A. Michael Bianchi for appellant.

Regina T. Makaitis for appellee State.

Dean M. Johnson for appellee Ronald D.

Don Stenberg, Attorney General; Royce N. Harper; and Douglas D Dexter, Special Assistant Attorney General, for appellee Nebraska Department of Social Services.

Thomas M. Kenney, Douglas County Public Defender, and Ann C. Holtz, guardian ad litem for Tabatha R.

V. Gene Summerlin, of Gelt, Fleishman, Sterling & Ogborn, P.C., and James Bopp, Jr., Thomas J. Marzen, Daniel Avila, and Jane E.T. Brockmann, of National Legal Center for the Medically Dependent and Disabled, Inc., for amicus curiae Scholl Institute of Bioethics.

Carr E. Heaney, Jr., of Kennedy, Holland, DeLacy & Svoboda, for amicus curiae Creighton-Saint Joseph Regional Healthcare System, L.L.C., doing business as Saint Joseph Hospital.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

This case is now before the court on the motion of the appellee State of Nebraska for rehearing calling to our attention that our opinion reported at *In re Interest of Tabatha R., ante* p. 687, 567 N.W.2d 598 (1997), suggests but does not expressly rule that the juvenile court correctly adjudged the infant girl, Tabatha R., to be within its jurisdiction under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) as a juvenile lacking proper parental care by reason of the fault or habits of her parents.

We overrule the motion and substitute for the present language following the heading "Conclusion" the following language:

> For the foregoing reasons, we affirm the judgment of the juvenile court that notice, service, and jurisdiction were proper and that Tabatha R. is a juvenile within the meaning of § 43-247(3)(a); but we reverse the remainder of the judgment of the juvenile court and remand the cause for further proceedings consistent with this opinion.

We also substitute for the present language of the holding the following language: "AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS."

MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V. DARRELL LEE MCBRIDE, APPELLANT.

567 N.W.2d 136

Filed July 25, 1997. No. S-96-815.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below.
2. **Constitutional Law: Criminal Law: Pleas.** The considerations involved in determining whether one freely, intelligently, voluntarily, and understandingly pleads guilty have no application where a criminal defendant pleads not guilty, for in such a circumstance, the defendant does not surrender the constitutional rights inherent in a trial.
3. **Lesser-Included Offenses.** To constitute a lesser-included offense, the elements of the lesser crime must be such that it is impossible to commit the greater crime without at the same time having committed the lesser one.
4. **Courts: Lesser-Included Offenses.** In determining whether a lesser crime is a lesser-included offense, a court applies a statutory elements test, wherein it initially looks not to the evidence but, rather, only to the elements of the criminal offense.
5. **Sentences.** A sentence imposed without a legal basis is void; a void sentence is no sentence.
6. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal unless the sentencing court's rulings unfairly deprive a litigant of a substantial right and a just result.
7. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
8. ____: ____. The Double Jeopardy Clause precludes multiple punishment for the same offense imposed in a single proceeding.
9. **Double Jeopardy: Statutes: Legislature: Intent: Convictions.** A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on both offenses.
10. **Double Jeopardy: Statutes: Proof.** In both the multiple punishment and multiple prosecution contexts, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one for double jeopardy purposes is whether each provision requires proof of a fact which the other does not.
11. **Double Jeopardy: Words and Phrases.** For double jeopardy purposes, the phrase "same offense" means the same whether or not the punishments or prosecutions are successive.
12. **Convictions: Evidence: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition.

13. **Constitutional Law: Criminal Law: Courts: Speedy Trial: Effectiveness of Counsel.** It is the duty of a court to see that justice is administered speedily, without delay, and legally, and is in conformity with constitutional mandates, including that a criminal defendant receives a trial which is fair and does not contravene an indigent criminal defendant's Sixth Amendment right to effective counsel.
14. **Constitutional Law: Criminal Law: Trial: Effectiveness of Counsel.** A trial court discharges its duty to ensure a trial which does not contravene an indigent criminal defendant's Sixth Amendment right to effective counsel by appointing, where counsel is required, a qualified attorney to represent the defendant.
15. **Appeal and Error.** Errors argued but not assigned are not considered.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part vacated and set aside and remanded with direction.

James E. Mitchell for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and McCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The defendant-appellant, Darrell Lee McBride, was charged in the first case, at the district court's docket 9672, page 149, with attempted first degree assault, a Class IV felony, in violation of Neb. Rev. Stat. §§ 28-201 and 28-308 (Reissue 1995); with discharge of a firearm, a Class III felony, in violation of Neb. Rev. Stat. § 28-1212.02 (Reissue 1995); and with use of a firearm to commit a felony, a Class II felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1995). In the second case, at the district court's docket 9672, page 285, McBride was charged with being a felon in possession of a firearm, a Class III felony, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1995). After the cases were consolidated for trial, McBride waived a jury in the second case, which was tried to the bench at the same time as the first case was tried to a jury.

In accordance with the verdict in the first case, the district court adjudged McBride guilty on each of the three offenses charged in that case and further adjudged him guilty of the

offense charged in the second case. The district court thereafter sentenced McBride in the first case to imprisonment for a single period of not less than 20 months nor more than 5 years on both the attempted assault and discharge crimes combined, and to a consecutive like period of imprisonment on the use crime. In the second case, the district court sentenced McBride to imprisonment for a period of not less than 2 nor more than 10 years, to be served consecutively to the sentences imposed in the first case.

McBride appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) improperly arraigning him, (2) imposing improper sentences, (3) permitting him to be placed in multiple jeopardy, (4) finding the evidence sufficient to support the charges, and (5) failing to ensure that he received the effective assistance of counsel. He thereafter successfully petitioned to bypass the Court of Appeals.

For the reasons hereinafter stated, the judgment in the first case is affirmed in part and in part vacated and set aside and the cause remanded with direction; the judgment in the second case is affirmed.

II. FACTS

1. Events

At approximately 10:15 p.m. on January 13, 1996, Brandon Griswold, Richard Rodrigo, and another man drove to the residence of John Labs, which was located in the area of West 23d and Calhoun Streets in Bellevue, Sarpy County, Nebraska, to attend a "little get-together" Labs was having. Griswold testified that after about 15 minutes to half an hour, he, Rodrigo, and two others, Luis Victoria and Jean-Paul "JP" Reavill, who were also at Labs' residence, went outside, preparing to leave. Rodrigo testified that he believed they remained at the house "probably an hour or two."

In any event, according to Griswold, as the four men approached Griswold's automobile, McBride appeared and said, "what's up . . . you want some of this . . . ." Griswold and the three other men entered Griswold's automobile, with Griswold taking the driver's seat, Rodrigo the front passenger seat, Victoria the passenger-side back seat, and Reavill the

driver's-side back seat. As Griswold backed the automobile onto the street from a driveway, Rodrigo opened the passenger-side window and asked McBride what the problem was. Griswold claims that as he turned the corner, reaching a speed of between 35 and 45 miles per hour, he saw through his rearview mirror that McBride and another man wearing a white T-shirt were "chasing after" them. He also saw through his rearview mirror that McBride had pulled out a gun. Griswold then ducked, slammed on the accelerator, and heard four or five quick gunshots. He did not actually see McBride fire the weapon and was not focused on the other man with McBride.

At this same time, Rodrigo had his head outside the vehicle's window to see what was happening. He testified that he saw McBride run directly behind the automobile, pull out a gun from behind his leg, point it in the automobile's direction, and fire it. He heard four shots and pulled his head back into the vehicle once he saw that McBride was firing.

Contrary to the testimony of those two witnesses, Reavill testified that he did not see McBride at any time before he got into Griswold's automobile. He further testified that while he was seated in the vehicle, he could not "really see out of it" because it was dark outside and the windows were tinted. He stated, "I couldn't really picture faces and everything, but I saw like a whitish shirt and flashing right next to it, but I don't know who did it or — I didn't really think nothing of it because it didn't sound real." Reavill testified that he did not see McBride with a gun at any time that evening.

After the shooting, the four men proceeded to a nearby gas station where, while inspecting the automobile for damage, Griswold discovered what he believed to be two bullet holes in the passenger-side mirror. In actuality, the plastic encasement around the right outside rearview mirror contained two areas of damage. One of the broken areas was approximately three-eighths of an inch in width and one-fourth of an inch deep. The other area was approximately three-fourths of an inch in width and one-fourth of an inch deep. The two damaged areas were 2⅛ inches apart.

Although the gas station was open for business, none of the men asked to use the telephone. Griswold, Reavill, and Rodrigo

also saw a police officer at a nearby parking lot, but none of them flagged him down. Instead, according to Griswold, he and Rodrigo reentered Griswold's automobile and returned to Labs' residence. Reavill, however, testified that all four of the men and two other men driving another vehicle returned to Labs' residence.

Griswold claimed that once at Labs' residence, McBride again approached them, but that this time he did not have a gun. Griswold and Rodrigo testified that McBride said he had mistaken the four men for some other people and that he would pay for the damage to Griswold's automobile. An argument subsequently developed between Rodrigo and McBride, which escalated to the point that McBride punched Rodrigo in the chest. After a number of other people entered the fight, Griswold drove to the police station to report the incident.

McBride and his friend, Michael Surrett, testified to a very different version. According to them, on the night in question Labs, a neighbor of the Surretts, contacted Surrett's wife, who, in turn, contacted Surrett and McBride at a drinking establishment. Labs asked that Surrett and McBride come to Labs' house because some people he had had in the house earlier were tearing it up. Surrett claimed that he and McBride arrived at the Surretts' house between 11 and 11:30 p.m.

McBride testified that after he helped Surrett's wife carry groceries into her house, he went to Labs' house to see if everything was under control and to get a can of beer. At the same time, Rodrigo hung his head out of an automobile window and loudly said something, causing McBride to ask Rodrigo what he was saying. McBride claims he then asked Labs what was going on, to which Labs replied that the situation was "okay" because the people in the automobile were leaving. As McBride turned to start walking back toward the Surretts' house, he heard noises which could be described as gunfire and then ran to the Surretts' house. He further claimed he did not have a gun in his possession and did not see any of the gunfire.

Five minutes later, McBride went outside the Surretts' house to smoke a cigarette. While doing so, Griswold and the other men drove up, got out of the automobile, and started walking toward McBride. McBride stated that the fight in the street

began after Rodrigo approached McBride and asked him what he had said and whether somebody had shot at them, to which McBride replied that it was not his, McBride's, business and that Rodrigo should "get out of [his, McBride's,] face." McBride claims he never had a conversation with Rodrigo or Griswold to the effect that he, McBride, was sorry, that he thought the men were somebody else, or that he would pay for any damages to the automobile's mirror.

Police were dispatched in response to the physical disturbance. During their investigation, they discovered six .25-caliber spent shell casings in the roadway along Calhoun Street. Because so many people were milling around the area, one officer "stuck" four of the casings in his pocket. The other two casings were protected by a traffic cone. The officers also located a .25-caliber firearm in the crook of a tree behind a residence in the area. McBride was arrested that same evening in a residence adjacent to the area.

Once at the jail, McBride's hands were swabbed for a gunshot residue test, during which he volunteered that there had been a confrontation between him and some other individuals; that someone had fired a gun; and that although he had started picking up the empty shells that were lying on the street, he threw them back down after a friend so instructed. With regard to the continuing examination of the evidence found at the scene, four of the shell casings could not be tested for fingerprints because of the manner in which they were collected. No prints were found on the gun. The record establishes that McBride had previously been convicted of a felony.

2. ARRAIGNMENT

At the time McBride was arraigned in the first case, he was represented by Steven M. Delaney, assistant Sarpy County public defender. The district court informed McBride of the elements of the crimes charged and correctly advised him that the attempted assault was a Class IV felony carrying a maximum punishment of 5 years' imprisonment, a $10,000 fine, or both. However, the district court incorrectly apprised McBride that the discharge crime likewise was a Class IV felony and that the use crime was a Class III felony carrying a maximum punishment of 20 years' imprisonment, a $25,000 fine, or both, with a

minimum of 1 year's imprisonment. McBride thereafter pled not guilty to each of the crimes charged.

With Delaney again representing McBride, the district court subsequently arraigned McBride on the crime of "Discharging [sic] a Firearm by a Felon," advising him of the elements of the crime and correctly informing him that it was a Class III felony for which the punishment was a maximum of 20 years' imprisonment, a $25,000 fine, or both, with a minimum of 1 year's imprisonment.

Alternate Sarpy County public defender Julie E. Bear acted as McBride's defense counsel during the trials.

3. Sentencing

Prior to sentencing, Bear was allowed to withdraw as counsel for McBride, and James E. Mitchell became McBride's counsel and represents him in this court. On the day of sentencing, the district court first dealt with a motion to set aside the convictions filed by McBride's most recent counsel. McBride's motion brought to the district court's attention for the first time that at the arraignment on the first case, the court had incorrectly stated the classifications of the discharge and use crimes charged and thus misstated their respective penalties.

The motion further recited that prior to the trials, the State had offered McBride a plea agreement by which the State offered to dismiss the use and possession crimes if McBride would agree to plead guilty to attempted assault and the discharge crimes. McBride had rejected the agreement, being advised by his then attorney that by exercising his right to a trial by jury, he exposed himself to no greater risk than a finding of guilt for two Class III and two Class IV felonies. McBride claimed in a supporting affidavit that had he been advised by anyone that he faced a possible conviction on a Class II felony, two Class III felonies, and a Class IV felony, he would have accepted the plea agreement to avoid the possible convictions. McBride's motion also asserted that the State had violated his right to be free from double jeopardy.

The district court denied McBride's motion and proceeded to sentence him.

III. ANALYSIS

1. ARRAIGNMENT

In the first assignment of error, McBride asserts that since the district court did not properly advise him as to the penalties for each of the crimes with which he was charged, he was improperly arraigned and, as a consequence, could not and did not freely, intelligently, voluntarily, and understandingly elect to proceed to trial rather than accept the plea bargain offered by the State.

(a) Scope of Review

The issues raised by this assignment of error present questions of law, in connection with which an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *State v. Thieszen, ante* p. 208, 560 N.W.2d 800 (1997). See, also, *In re Interest of Tabatha R., ante* p. 687, 564 N.W.2d 598 (1997).

(b) Application of Law to Facts

The district court apparently overlooked that the relevant statutes had recently been amended and that at the time the crimes were alleged to have been committed, § 28-1212.02 made the discharge crime a Class III felony and § 28-1205 made the use crime a Class II felony. The penalty for a Class III felony is a maximum of 20 years' imprisonment, a $25,000 fine, or both, with a minimum of 1 year's imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1995). The penalty for a Class II felony is 1 to 50 years' imprisonment. *Id.*

In support of his position that he was prejudiced by the wrong information he received, McBride directs our attention to *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The defendant therein had entered a plea of nolo contendere to second degree forgery, but argued on appeal that his acceptance of the plea bargain was not made intelligently or voluntarily because he had not been advised that the punishment for second degree forgery might run consecutively to a sentence he was already serving. In determining what must exist in order to support a finding that a plea of guilty or nolo contendere was entered freely, intelligently, voluntarily, and understandingly, we wrote:

1. The court must

a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and

b. examine the defendant to determine that he or she understands the foregoing.

2. Additionally, the record must establish that

a. there is a factual basis for the plea; and

b. the defendant knew the range of penalties for the crime with which he or she is charged.

Id. at 820, 394 N.W.2d at 883. See, also, *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

Although we had previously written in *State v. Curnyn*, 202 Neb. 135, 140, 274 N.W.2d 157, 161 (1979), that it is "difficult to conceive how a guilty plea can be voluntary and intelligent unless and until the defendant is informed or is made aware of the possible penalties to which he may be subjected," we reasoned in *Irish* that this statement did not mean a trial court must explain whether each sentence imposed for each separate crime is to be served concurrently with or consecutively to any other sentence which may be imposed. We concluded by stating that "[e]xplaining the possible range of penalties for each crime is adequate to enable a defendant to freely, voluntarily, intelligently, and understandingly plead to each crime with which he is charged." *Irish*, 223 Neb. at 821, 394 N.W.2d at 883. In *Irish*, we thus rejected the defendant's claim that he should have been told of the effect of the possible imposition of consecutive sentences.

Moreover, it must be noted that the admonition in *Irish* that a defendant must be told the possible range of penalties for each crime was applied to a defendant who had accepted a plea agreement and pled guilty. Here, McBride could not have been prejudiced by pleading not guilty because by so pleading, he did not give up any of his constitutional rights. For example, the defendant in *Robtoy v. Kincheloe*, 871 F.2d 1478 (9th Cir. 1989), *cert. denied sub nom., Robtoy v. Callahan*, 494 U.S.

1031, 110 S. Ct. 1483, 108 L. Ed. 2d 619 (1990), was charged with first degree aggravated murder, and the trial court entered a not guilty plea on his behalf when he stood mute at his arraignment. Following a jury trial, the defendant was convicted and sentenced to death. Because the statute under which he was sentenced to death was subsequently found to be unconstitutional, the sentence was modified to one of life without parole.

After his sentence was modified, the defendant became aware that he had the right to plead guilty, in which case the maximum sentence was life with parole. He made a motion in the trial court to withdraw his not guilty plea and enter a plea of guilty; however, the state supreme court held that the trial court had no jurisdiction to grant the motion. On appeal to the U.S. Court of Appeals for the Ninth Circuit, the defendant contended that the state court's refusal to allow him to alter his plea to guilty violated his right to due process because his right to make a voluntary and intelligent plea was denied when he was not informed at his arraignment that a plea of guilty would result in the lesser maximum sentence of life with parole versus the sentence of life without parole he risked by proceeding to trial.

The federal court concluded that the defendant's contention could not constitute the basis for a writ of habeas corpus, and wrote:

> Although [the defendant] may have been misinformed by his counsel and the court as to the consequences of a guilty plea, he did allow a plea of not guilty to be entered for him. Thus, he cannot argue he was coerced to give up the rights inherent in a trial.

871 F.2d at 1481-82.

Similarly, McBride has failed to point to the deprivation of any right when he elected to proceed to trial on his not guilty pleas and points to no authority for the notion that a defendant has the right to be offered a plea bargain. While he appears to urge that he was prejudiced because he put himself at risk for more severe penalties by proceeding to trial than he would have had he accepted the plea bargain, he fails to recognize that the district court tried him on the same crimes concerning which he had been advised; required the State to prove the identical elements about which he had been advised; and of the utmost sig-

nificance, sentenced him within the ranges of punishment he was originally informed were possible.

A somewhat similar situation was presented in *Hill v. Estelle*, 653 F.2d 202 (5th Cir. 1981), *cert. denied* 454 U.S. 1036, 102 S. Ct. 577, 70 L. Ed. 2d 481. The defendant therein was convicted on his plea of guilty for assault upon a peace officer with the intent to murder. He had committed the alleged act prior to the effective date of a new Texas Penal Code, but was tried and sentenced after the effective date of that code. Although the new code provided that a defendant might be sentenced under the new code for crimes committed before its effective date if the defendant so elected, the defendant was sentenced under the new code even though he did not so elect. Under the old code, the defendant's offense was punishable by imprisonment for life or for any term of years not less than 2. The new code provided for punishment by life imprisonment or for any term of years not more than 99 nor less than 5. The defendant was sentenced to imprisonment for not less than 5 nor more than 25 years.

On appeal to the U.S. Court of Appeals for the Fifth Circuit, the defendant claimed, inter alia, that the trial court had failed to properly admonish him on the range of punishment, in violation of state law regarding admonishments on guilty pleas. Relying on the familiar test that to rise to the level of a due process violation, the trial court's incorrect admonishment must somehow affect the knowing and voluntary character of the plea, the court of appeals concluded that even if a defendant is misinformed about the maximum possible sentence, the defendant's plea is not to be set aside as involuntary if he or she receives a sentence less than the law permitted or less than the defendant was informed that the court could impose.

In short, the considerations involved in determining whether one freely, intelligently, voluntarily, and understandingly pleads guilty have no application where a criminal defendant pleads not guilty, for in such a circumstance, the defendant does not surrender the constitutional rights inherent in a trial.

(c) Resolution

Accordingly, McBride's argument regarding the risk he placed upon himself with regard to the possible greater punishments is without merit, and this assignment of error fails.

2. SENTENCING

In the second assignment of error, McBride claims that the district court wrongly treated for purposes of sentencing the attempted assault and discharge crimes as a single offense subject to a single sentence, notwithstanding the separate adjudication of guilt on each of the crimes.

(a) Scope of Review

This assignment of error also raises issues which present questions of law and is reviewed accordingly.

(b) Application of Law to Facts

(i) Attempted Assault and Discharge Crimes

We begin by noting that although both parties treat the district court's action in this regard as an attempt to correct, by the sentences imposed, the misstatements of the court at arraignment, the record suggests instead that the district court combined the two offenses to correct a perceived double jeopardy problem. For while it is true the record reflects that at the sentencing the district court discussed the arraignment issues, the record also reveals that the district court then immediately turned its attention to the double jeopardy issues by stating:

> The Court considers [the attempted assault crime] and [the discharge crime] to be one [offense] for sentencing purposes. It is true the Nebraska Courts use the elements test to discern whether offenses are contained within another offense. The test is decided in State v. Parks at 245 Neb. 205. The elements of [the two crimes] certainly sound different, except for the date and venue, but the proof shows that the elements are one and the same if they had been spelled out in particulars.

It appears therefrom that the district court improvidently considered one of the two crimes to be a lesser-included offense of the other. However, we have held that to constitute a lesser-included offense, the elements of the lesser crime must be such that it is impossible to commit the greater crime without at the same time having committed the lesser one. *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). In determining whether a lesser crime

is a lesser-included offense, we apply a statutory elements test, wherein a court initially looks not to the evidence but, rather, only to the elements of the criminal offense. See, *Null, supra*; *White, supra*.

In that regard, McBride asks that we revisit our holding in *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), setting forth the statutory elements test, and instead reconsider applying the "cognitive analysis approach," found in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990) (disapproved by *Woodfork*), because the "five years of jurisprudence in Nebraska [after *Woodfork*] shows that the statutory elements analysis [approach] is no more judicially expedient than the cognitive analysis approach." Brief for appellant at 18. Contrary to McBride's characterization of *Woodfork*, however, to the extent it relied upon the cognate-evidence approach, *Woodfork* was also subsequently overruled on that basis. See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). We decline McBride's invitation and adhere to the statutory elements test.

One commits an attempted first degree assault if one intentionally engages in conduct which is a substantial step in a course of conduct "intended or known to cause" "serious bodily injury to another person." §§ 28-201 and 28-308. One unlawfully discharges a firearm if one intentionally discharges it at, among other things, an occupied motor vehicle. § 28-1212.02. Thus, one offense is not a lesser-included offense of the other because one need not discharge a firearm to be proved guilty of attempted first degree assault and also because one need not intend or know that one's conduct will cause serious bodily injury to another to be proved to have discharged a firearm.

Accordingly, the district court had no legal basis upon which to impose a single sentence on the two adjudications of guilt. A sentence imposed without a legal basis is void. In the context of determining the effects of a prior sentence for enhancement purposes, we explained in *Berumen v. Casady*, 245 Neb. 936, 940, 515 N.W.2d 816, 819 (1994):

> For example, in *Mingus v. Fairbanks*, [211 Neb. 81, 317 N.W.2d 770 (1982)], we held that the trial court could not find the defendant guilty of the uncharged offense of

debauching a minor, notwithstanding defendant's plea of not guilty to pandering, as the former offense was not a lesser offense included with the pandering charge. In so ruling, we quoted with approval from *In re McVey*, 50 Neb. 481, 70 N.W. 51 (1897), which was cited with approval in *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966), as follows: "In *McVey*, the appellant was charged with the crime of burglary. The jury acquitted the appellant on the charge of burglary, but found him guilty of breaking and entering in the daytime. In discharging appellant from custody, we said at 483-84, 70 N.W. at 52: 'The only further question presented is whether the sentence of the court was merely erroneous or whether it was illegal in such a sense as to be void. It may be said that the modern doctrine or idea is that a court must possess jurisdiction not only of the person and subject-matter, but to impose the sentence which is adjudged. If the latter is lacking the sentence is not merely voidable but void. (Black, Judgments, sec. 258; citing, among others, *Ex parte Lange*, 18 Wall. [U.S.], [1]63[, 21 L. Ed. 872 (1874)]; *Ex parte Milligan*, 4 Wall. [U.S.], 131[, 18 L. Ed. 281 (1866)]; *Ex parte Wilson*, 114 U.S., 417[, 5 S. Ct. 935, 29 L. Ed. 89 (1885)]; *Ex parte Kearny*, 55 Cal., 212; *In re Petty*, 22 Kan., 477. See, also, *Ex parte Cox*, 32 Pac. Rep. [Ida.], 197; *Ex parte Yarbrough*, 110 U.S., 651[, 4 S. Ct. 152, 28 L. Ed. 274 (1884)].) In the case at bar, the jury having, by its verdict, determined the prisoner not guilty as charged, although it further adjudged him guilty of another crime, the trial court had no jurisdiction to sentence him; hence its attempt in that direction was illegal in such sense that it was void, and *habeas corpus* the appropriate remedy. (*In re Betts*, 36 Neb., 282[, 54 N.W. 524 (1893)]; *In re Hav[e]lik*, 45 Neb., 747[, 64 N.W. 234 (1895)].) It follows that the prisoner must be discharged.' "

See, also, *State v. Bensing*, 249 Neb. 900, 547 N.W.2d 464 (1996); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). A void sentence is no sentence. *Campbell, supra.* Accordingly, the single sentence imposed for the separate attempted assault and discharge crimes must be vacated and set aside.

(ii) Use Crime

McBride further argues that even though the sentence imposed for the use crime is within the possible ranges of punishment therefor, the district court nevertheless abused its discretion by imposing such sentence because it explicitly stated that to correct the error it had made during arraignment, it was treating the conviction as a Class III felony instead of the more severely punishable Class II felony it actually was. McBride argues that the sentence imposed does not exist under current Nebraska law.

We have stated many times that a sentence imposed within statutory limits will not be disturbed on appeal unless the sentencing court's rulings unfairly deprive a litigant of a substantial right and a just result. See, *State v. Earl, ante* p. 127, 560 N.W.2d 491 (1997); *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997); *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996). Because McBride's sentence for using a deadly weapon to commit a felony was within the permissible ranges of punishment for the crime as the Class II felony it was and within the range about which he was advised at arraignment, McBride cannot show that he was deprived of a substantial right by the district court's treatment of the use crime for the purpose of sentencing as a lesser crime.

(c) Resolution

Because of the void sentence analyzed in subpart (b)(i) above, this assignment of error is in part meritorious.

3. Double Jeopardy

In the third assignment of error, McBride avers that the district court incorrectly failed to rule that he was subjected to double jeopardy first by being charged with both the discharge crime and its lesser-included offense, the use crime, and again by being charged with both the discharge crime and the possession of a firearm crime.

(a) Scope of Review

This assignment of error presents matters of statutory construction; as such, it presents questions of law, see *State v. Thieszen, ante* p. 208, 560 N.W.2d 800 (1997), and is reviewed accordingly.

(b) Application of Law to Facts

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Wolf*, 250 Neb. 352, 549 N.W.2d 183 (1996); *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

The Double Jeopardy Clause precludes multiple punishment for the same offense imposed in a single proceeding. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on both offenses. *McHenry, supra.*

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the U.S. Supreme Court held that in both the multiple punishment and multiple prosecution contexts, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. See, also, *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996). Moreover, in applying the test, the phrase "same offense" means the same whether or not the punishments or prosecutions are successive. *Stubblefield, supra.* See *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

(i) Discharge and Use

With that background, we turn to McBride's claim that he was twice put in jeopardy by being separately punished for both discharging and using the same firearm.

The issue is resolved by *McHenry*, 250 Neb. at 635, 550 N.W.2d at 378, wherein we wrote:

> A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the legislature that designated the criminal statutory scheme intended that cumulative sentences be applied for

> conviction on both offenses. If the statute clearly and affirmatively indicates that the legislature intended that the defendant be punished cumulatively under both charges and the sentences for both charges are imposed in a single trial, the Double Jeopardy Clause is not offended.

Section 28-1205(3) provides that the crime of using a deadly weapon to commit a felony "shall be treated as [a] separate and distinct [offense] from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed." See, also, *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995).

The quoted statutory language expressly provides that the Legislature intended the crime of using a deadly weapon to commit a felony to remain an independent offense from the underlying felony. Furthermore, the crime of using a deadly weapon to commit a felony applies to "[a]ny person who uses a firearm . . . to commit any felony." § 28-1205(1). Accordingly, there can be no question that the Legislature intended that one using a deadly weapon be subjected to cumulative punishments for committing the underlying felony and for the use of the weapon to commit it.

(ii) Discharge and Possession

This brings us to McBride's claim that he was twice put in jeopardy by being separately punished for both discharging and possessing the same firearm.

To the extent relevant, one is a felon in possession of a firearm if one possessing a firearm "has previously been convicted of a felony." § 28-1206(1). As noted in subpart (2)(b)(i) above, one unlawfully discharges a firearm if one intentionally discharges it at an occupied motor vehicle. § 28-1212.02.

It is therefore apparent that the one offense is not a lesser-included offense of the other because each requires proof of different elements. One need not be a felon to be proved guilty of discharging a firearm; one need not discharge a firearm to be proved to have been a felon possessing it.

(c) Resolution

For the foregoing reasons, this assignment of error fails.

4. Sufficiency of Evidence

In the fourth assignment of error, McBride challenges the sufficiency of the evidence to support the charges.

(a) Scope of Review

On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *Mantich, supra.*

(b) Application of Law to Facts

So viewed, there can be no question that the evidence detailed in part II above supports each of the convictions. The strongest evidence is that two witnesses testified that they saw McBride behind their automobile, both saw him pull out a gun, and one saw McBride fire the gun at the occupied automobile. See *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985) (finding evidence was sufficient to establish requisite "substantial step" for conviction of attempted murder where evidence showed defendant was in firing stance, appeared to point gun at victim, and victim heard gun click four times and saw cylinder advance). There was also evidence that McBride apologized to the owner of the automobile for any damage he might have caused, explaining that he thought the victims were other people; if believed, that evidence amounted to an admission that he did the shooting.

McBride argues that these witnesses were not "objective" because, among other things, the viewing conditions during the shooting were poor and the witnesses' stories had some inconsistencies. He states that he "was convicted solely on the testimony of two adverse and visually impaired witnesses, without a shred of physical evidence." Brief for appellant at 21. However, in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

(c) Resolution

Accordingly, this assignment of error also fails.

5. Effective Assistance of Counsel

In the fifth and final assignment of error, McBride contends not that his convictions should be vacated and set aside because he did not receive the effective assistance of counsel, but, rather, that we should "reverse the judgments of the [district court]," brief for appellant at 25, because it erred in failing "to ensure that [he] received effective representation by counsel throughout all significant phases of the proceedings below," *id.* at 3.

(a) Scope of Review

This assignment presents a question of law and is reviewed as such.

(b) Application of Law to Facts

There can be no question that it is the duty of a court to see that justice is administered speedily, without delay, and legally, and is in conformity with constitutional mandates. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). See, also, *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). That obviously includes the duty to ensure that a criminal defendant receives a trial which is fair and does not contravene an indigent criminal defendant's Sixth Amendment right to effective counsel. See *State v. Wallace*, 258 Kan. 639, 908 P.2d 1267 (1995).

However, a trial court discharges its duty to ensure a trial which does not contravene an indigent criminal defendant's Sixth Amendment right to effective counsel by appointing, where counsel is required, a qualified attorney to represent the defendant. See *Huff v. State*, 267 Ala. 282, 100 So. 2d 769 (1957). Here, there is no claim that the various attorneys who represented McBride prior to sentencing were not qualified to do so.

Whether they performed ineffectively, as argued by McBride, is an entirely different question and, thus, a question which is not reached by the claim that the district court failed to perform its duty. See, *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995) (errors argued but not assigned not considered); Neb. Ct. R. of Prac. 9D(1)d (rev. 1996).

(c) Resolution

Therefore, this assignment of error fails.

IV. JUDGMENT

Because of the error set forth in part III(2)(b)(i) above, the sentence imposed in the first case on the assault and discharge crimes is, as first noted in part III(2)(b)(i) above, vacated and set aside and the cause remanded for resentencing on those crimes; the judgment in the first case is otherwise affirmed, as is the judgment in the second case.

AFFIRMED IN PART, AND IN PART VACATED AND SET ASIDE AND REMANDED WITH DIRECTION.

WHITE, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLANT, V. JAMES T. HALL, ALSO KNOWN AS THOMAS DUANE STRAWDER, APPELLEE.

566 N.W.2d 121

Filed July 25, 1997. No. S-96-960.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Criminal Law: Final Orders: Appeal and Error.** The State's right to seek review of a ruling made during the prosecution of a criminal case is limited to the procedure set forth in Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), which permits a county attorney to file an application to the trial court seeking leave to appeal within 20 days after the final order is entered in the cause.
3. **Criminal Law: Final Orders.** An order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Appeal dismissed.

Ellen L. Totzke, Hall County Attorney, for appellant.

L. William Kelly, of Kelly & Schroeder, for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

The State of Nebraska brought this error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), seeking review

of an order by the district court for Hall County sustaining a demurrer to count II of a two-count information filed against appellee, James T. Hall, also known as Thomas Duane Strawder. The remaining count contained in the information remains pending in the district court. We conclude that we have no jurisdiction in this matter because there has been no final order and, accordingly, dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Hall was arrested on January 3, 1991, and charged with the shooting death on January 2, 1991, of George D. "Joe" Allan. Hall was charged with multiple counts which included first degree murder and use of a weapon in the commission of a felony. As the result of a plea agreement, on July 16, Hall entered a plea of guilty to second degree murder and use of a weapon in the commission of a felony; other pending charges against him were dismissed at that time. He was sentenced to life imprisonment on the second degree murder charge and 20 years' imprisonment on the weapons charge. We affirmed the convictions and sentences in *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992). Our opinion in that case sets forth a detailed statement of the facts pertinent to the shooting death of which Hall was convicted.

On February 16, 1996, we held that Hall was entitled to post-conviction relief. We set aside both convictions and remanded the cause to the district court with directions for a new trial. *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996).

On May 20, 1996, an information was filed in the district court for Hall County charging Hall, alleging in count I that Hall "purposely and with deliberate and premeditated malice killed George D. Allen aka Joe Allen" and in count II that Hall "used a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit a felony offense, to-wit: used a handgun to commit the felony offense of Murder in the First Degree[.]" These charges are identical to counts I and II originally filed against Hall on January 3, 1991.

In response to this information, Hall filed a demurrer pursuant to Neb. Rev. Stat. § 29-1810 (Reissue 1995), directed to count II of the information. Hall's demurrer recited the following grounds:

> Defendant respectfully shows to the Court that the Defendant plead [sic] guilty and was found guilty of use of a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit a felony offense, to-wit: Used a hand gun to commit the felony offense of murder in the second degree.
>
> An Opinion rendered on the 16th day of February, 1996, the Nebraska Supreme Court reversed and remanded for a new trial thereon.
>
> . . . [T]he filing of the Second Amended Information alleging the crime changes the underlying felony to that of Murder in the First Degree. Said change alters one of the necessary elements the State must prove with regards to Count II.
>
> It is therefore moved that [because] a necessary element has been changed by the State of Nebraska by filing the Amended Information, said prosecution of Count II is barred by the Statute of Limitations.

Following a hearing and submission of briefs, the district court entered an order on July 1, 1996, sustaining the demurrer based upon its finding that count II of the information was barred by the statute of limitations contained Neb. Rev. Stat. § 29-110(1) (Reissue 1995).

The State subsequently perfected an error proceeding to the Nebraska Court of Appeals pursuant to § 29-2315.01, asserting that the district court erred in sustaining Hall's demurrer to count II of the operative information under which he is currently charged. Pursuant to our authority to regulate the dockets of the Court of Appeals and this court, we removed this matter to our docket.

ASSIGNMENT OF ERROR

Restated, the State contends that the trial court erred in sustaining Hall's demurrer to count II of the May 20, 1996, information based on the court's determination that the charge contained therein was barred by the 3-year statute of limitations contained in § 29-110(1).

SCOPE OF REVIEW

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. See, *State v. Wieczorek, ante* p. 705, 565 N.W.2d 481 (1997); *Trew v. Trew, ante* p. 555, 567 N.W.2d 284 (1997).

ANALYSIS

During the pendency of this proceeding and after submission of the parties' briefs, we decided *State v. Thieszen, ante* p. 208, 560 N.W.2d 800 (1997), which involved a statute of limitations issue similar to that in this case. During oral argument in the case at bar, counsel for the State contended that *Thieszen* was controlling and compelled reversal of the district court's order sustaining the demurrer to count II of the operative information. Counsel for Hall contended that *Thieszen* was incorrectly decided and should be overruled.

We conclude that we cannot reach this issue because we lack jurisdiction over this matter. The record contains no order dismissing this action, and counsel for the parties confirmed that it remains pending in the district court, awaiting the outcome of our review. We are not asked to review any aspect of the pending first degree murder count, but only the sustaining of the demurrer as to the weapons count.

In our recent decision in *State v. Wieczorek, supra*, we held that the State's right to seek review of a ruling made during the prosecution of a criminal case is limited to the procedure set forth in § 29-2315.01, which permits a county attorney to file an application to the trial court seeking leave to appeal " 'within twenty days after the final order is entered in the cause.' " (Emphasis omitted.) *Ante* at 708, 565 N.W.2d at 483. If the application is granted by the trial court, the county attorney must present it " 'to the appellate court within thirty days from the date of the final order.' " (Emphasis omitted.) *Id.*

In *Wieczorek*, we held that because the State filed its application for review of the dismissal of three counts of a four-count information before the defendant had been sentenced on the one count for which he was convicted, the application was filed before entry of a final order and was, therefore, untimely and

insufficient to confer appellate jurisdiction. We held that "an order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending." *Ante* at 710, 565 N.W.2d at 484. See, also, *State v. Martinez*, 198 Neb. 347, 354, 252 N.W.2d 630, 634 (1977) ("[t]he State's right to appeal in criminal cases is limited by section 29-2315.01, R. R. S. 1943, which provides that the State may appeal only after a final order has been entered in the case").

We have reviewed an order sustaining a demurrer in a criminal case only where it is dispositive of the entire case. See *State v. Buttner*, 180 Neb. 529, 143 N.W.2d 907 (1966) (demurrer sustained as to all counts of indictment and counts dismissed). See, also, *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960) (demurrer sustained and cause dismissed). In this case, the district court's order of July 1, 1996, sustained the demurrer to count II of the operative information but did not dismiss it, and it had no effect upon count I. The order did not completely dispose of the case and does not constitute a final order subject to review under § 29-2315.01. This court, therefore, lacks jurisdiction over the State's appeal, necessitating its dismissal.

APPEAL DISMISSED.

WHITE, C.J., participating on briefs.

KIMBERLY KLINGINSMITH, FORMERLY KNOWN AS KIMBERLY KNERL, FORMERLY KNOWN AS KIMBERLY WICHMANN, APPELLANT, V. JEFFREY WICHMANN, APPELLEE.

567 N.W.2d 172

Filed August 1, 1997. No. S-95-413.

1. **Contempt: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews 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 neither arbitrary, capricious, nor unreasonable.
3. **Contempt: Appeal and Error.** A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.

4. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
5. **Divorce: Contempt: Equity.** Dissolution of marriage cases are equitable in nature, and a civil contempt proceeding cannot be the means to afford equitable relief to a party.
6. **Divorce: Final Orders.** Once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself.
7. **Contracts: Divorce.** Like a contract, a decree under which all rights have vested must be construed as a whole, and if possible, effect must be given to every part thereof.
8. **Contempt.** When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element.
9. **Contempt: Words and Phrases.** "Willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order.
10. **Contempt: Proof.** A party's contempt must be established by proof beyond a reasonable doubt.
11. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.
12. **Judgments.** An order entered pursuant to Neb. Rev. Stat. § 42-371(5) (Reissue 1993), requiring a person to post sufficient security, is a somewhat extraordinary and drastic remedy, and such order should only be invoked when compelling circumstances require it.

Petition for further review from the Nebraska Court of Appeals, HANNON and SIEVERS, Judges, and HOWARD, District Judge, Retired, on appeal thereto from the District Court for Howard County, RONALD D. OLBERDING, Judge. Judgment of Court of Appeals affirmed.

John B. McDermott, of Shamberg, Wolf, McDermott & Depue, for appellant.

David C. Huston, of Huston & Higgins, for appellee.

CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ROWLANDS, D.J.

GERRARD, J.

Appellant Kimberly Klinginsmith filed an application for contempt and an application to require appellee Jeffrey Wichmann to post security in connection with Wichmann's failure to pay interest on the property distribution made pursuant to the parties' dissolution of marriage decree. The district court

denied Klinginsmith's applications, and, on appeal, the Nebraska Court of Appeals affirmed. See *Klinginsmith v. Wichmann*, 96 NCA No. 29, case No. A-95-413 (not designated for permanent publication). Klinginsmith successfully petitioned this court for further review. For substantially different reasons than those set forth in the courts below, and because of the procedural posture of the instant case, we affirm the judgment of the Court of Appeals.

BACKGROUND

Klinginsmith and Wichmann were divorced by a decree filed in the district court for Howard County on January 19, 1990. Neither party appealed. At issue in the instant appeal, however, is the meaning of a provision in the dissolution decree which divided Wichmann's business. In the decree, the district court found and ordered the following:

> 11. That the net value of the business is found to be $106,000.00; the Petitioner [Klinginsmith] is awarded one half of the value thereof and the Respondent [Wichmann] is to pay to the Petitioner the sum of $368.00 per month for a period of 12 years, together with interest as provided by Law; the stock in the business is ordered quieted in the Respondent . . . .

The sum of $368 per month for 12 years equals $52,992; $8 short of exactly one-half of the amount the district court found as the value of Wichmann's business. Since entry of the decree, Wichmann has paid through the clerk of the district court the sum of $368 per month in satisfaction of the property judgment, along with an amount sufficient to satisfy his child support obligation.

In the summer of 1994, in a separate matter, Wichmann's sole proprietorship, Wichmann Inc., recovered a judgment of approximately $220,000. On November 4, 1994, nearly 5 years after the entry of the dissolution decree, Klinginsmith filed an application to require Wichmann to post security and an application for increased child support. On February 2, 1995, Klinginsmith filed an application for contempt.

Klinginsmith's application to require Wichmann to post security alleged that Wichmann was in arrears on the ordered

property judgment. In the application for contempt, Klinginsmith again alleged that Wichmann was in arrears on the ordered property judgment and that, in violation of the dissolution decree, Wichmann has failed to maintain health insurance on his minor children, refused to reimburse Klinginsmith for his one-half share of medical and dental expenses for their children, and failed to pay the ordered $12 per year alimony award.

An amortization schedule attached as an exhibit to both applications indicates that Klinginsmith understands the decree provision at issue requiring Wichmann to pay "$368.00 per month for a period of 12 years, together with interest as provided by Law," means that Wichmann is to pay an amount attributable to the principal, $368, and, in addition, that amount of interest permitted by law on the balance. The amortization schedule sets forth that the amount of interest permitted by law at the time of the decree was 8.66 percent annual simple interest. In other words, Klinginsmith alleges that the decree provides that Wichmann's payments are to be much like an amortized loan; payment of an amount attributable to the principal, $368, plus an amount attributable to interest at 8.66 percent annually on the remaining principal.

Wichmann filed a response to the applications on March 17, 1995, in which he denied the substance of the applications. Wichmann also asserted that Klinginsmith was not due interest on the property settlement principal because there is no provision in Nebraska law to assess interest against such an award and that Klinginsmith's reading of the decree created a judgment which was not sufficiently certain in its terms so as to be enforced.

A hearing was held on March 24, 1995, concerning Klinginsmith's applications. Wichmann testified that each month he has paid to the clerk of the court the total amount of child support and property settlement due. He considered the amount of property settlement due each month to be $368. Wichmann also testified that he has paid all alimony due and that he has always maintained health insurance for his children, even though his own health insurance may have lapsed at times.

Klinginsmith testified that the basis for her contempt application was that Wichmann has failed to pay interest on the prop-

erty settlement award. She also testified that Wichmann was erratic with his property settlement payments and that, although unsure, she did not think she had received all of the $36 of alimony she was due for the 3 years prior to trial. In regard to reimbursement of medical expenses, Klinginsmith testified that she has incurred medical expenses for their children and has asked Wichmann to pay his one-half share. Klinginsmith said Wichmann refused her request. Klinginsmith thought Wichmann owed her "around between $500 and $1,000.00" for medical expenses. On cross-examination, Klinginsmith said she did not have any copies of medical bills with her to verify her claim.

In an order entered on March 31, 1995, the trial court found that the decree provision at issue was unambiguous and that the decree provided that interest was not to accrue on an installment until such installment became delinquent. In addition, the trial court concluded that Klinginsmith had failed to carry her burden of proof regarding her allegation that she had not been reimbursed for the medical expenses of her children. Accordingly, the trial court found that Wichmann was not in contempt and denied Klinginsmith's application to post security. The court sustained Klinginsmith's application to modify child support and increased Wichmann's obligation.

Klinginsmith timely appealed the district court order, which the Court of Appeals affirmed. Citing *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995), the Court of Appeals identified that Nebraska's statute which provides for interest on judgments, Neb. Rev. Stat. § 45-103 (Reissue 1993), requires that when a judgment is to be paid in installments, interest begins to accrue on an individual installment only from the date it is due and payable.

The Court of Appeals acknowledged that in *Thiltges v. Thiltges, supra*, this court held that a trial court may, in its discretion, award interest on deferred installments payable as part of a marital property distribution. However, the Court of Appeals found no such exercise of discretion in the instant case and held that the decree provision at issue was unambiguous, since the phrase "as provided by Law" was capable of only one reasonable interpretation, that being interest as provided by statutory law; specifically, § 45-103.

The Court of Appeals also agreed with the district court that Klinginsmith had failed to carry her burden of proof regarding her claim that Wichmann refused to reimburse her for his share of their children's medical expenses. Accordingly, the Court of Appeals concluded that the trial court did not err in finding that Wichmann was not in contempt. Having found Wichmann not to be in arrears on his property settlement payments, the Court of Appeals concluded that the trial court did not abuse its discretion by not requiring Wichmann to post security.

ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

Klinginsmith assigns that the Court of Appeals erred in (1) concluding that the decree did not provide for interest on the property settlement award principal, but, instead, only on a delinquent installment; (2) failing to find that Wichmann should post security for the property settlement award; and (3) failing to hold Wichmann in contempt of the terms of the divorce decree for failure to pay interest on the property settlement principal and failure to reimburse Klinginsmith for his share of the children's medical expenses.

STANDARD OF REVIEW

An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994); *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994). 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. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995). A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. *Novak v. Novak, supra*. On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Boettcher v. Balka, ante* p. 547,

567 N.W.2d 95 (1997); *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

ANALYSIS

The procedural posture in which this matter is before us obviously affects our analysis. Klinginsmith filed her action as an application for contempt, not as an appeal of the dissolution decree. In Nebraska, dissolution of marriage cases are equitable in nature, *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994), and a civil contempt proceeding cannot be the means to afford equitable relief to a party, *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993). However, in *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), in obiter dictum, we recognized that in certain circumstances it may be necessary for an individual to cite the other party for contempt to determine whether the other party is holding property that properly belongs to that individual under the terms of a decree. In making that determination, we acknowledged that the trial court must attempt to resolve the question based upon the language of the decree and the evidence then presented. Even though that may require some "interpretation" of the decree, the interpretation must be based upon the language of the decree and not based upon what the parties believed the court meant but did not say. See *id.* Thus, Klinginsmith may not use this proceeding to effect an equitable change in the decree, but a contempt proceeding is appropriate to resolve the meaning of disputed language in the decree under these circumstances.

It is well settled that once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself. See, *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993); *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Neujahr v. Neujahr, supra.*

The courts below found the decree provision at issue to be unambiguous because there is only one reasonable interpretation of the phrase "as provided by Law"; that being as provided by statutory law, specifically, § 45-103. The Court of Appeals noted that a court may, in its discretion, award interest on deferred property settlement installments, but concluded that in this case, the decree evinces no such discretionary award.

Klinginsmith likewise asserts that the decree provision at issue is unambiguous. However, contrary to the conclusion reached by the Court of Appeals, she argues that the decree provision in this matter evinces a discretionary award when it recites, "$368.00 per month for a period of 12 years, *together with interest* as provided by Law." (Emphasis supplied.) Klinginsmith asserts that "together with" indicates that the court intended to add interest onto that portion of the installment attributable to the principal. Further, Klinginsmith contends that since Nebraska law requires an equitable distribution of a marital estate, without interest assessed on the principal, distribution of the marital estate in this case was inequitable. We agree.

In *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995), we exercised our equitable discretion and modified a dissolution decree of the district court to award interest on a property settlement award payable in installments over a 12-year period. In so doing, we expressed a strong preference in favor of a discretionary award of interest on property settlement installments payable over an extended period of time where the facts and circumstances of the case indicate that such an award effects an equitable distribution of the marital estate. We recently affirmed this preference toward discretionary awards of interest when warranted by the facts in *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996).

However, the matter before us is not one of equity, but, instead, must be determined from the four corners of the decree alone. In *Dryden v. Dryden*, 205 Neb. 666, 289 N.W.2d 525 (1980), a decree of dissolution provided for the payment of a property settlement award in monthly installments, but made no mention of interest in regard to the remaining principal. We held that interest would begin to accrue only on those installments which were due and payable. Thus, when a decree is silent as to interest, the law provides for interest only when each installment is due and payable.

In the instant case, the decree is not silent on the subject of interest. The decree requires payment of $368 per month *together with* interest as provided by law. Like a contract, a decree under which all rights have vested must be construed as

a whole, and if possible, effect must be given to every part thereof. See, *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996); *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996). If we are to give effect to the language in the decree, "together with interest as provided by Law," it must be that such language evinces a discretionary award of interest on the remaining principal. Thus, we hold that the language in the decree evinces a discretionary award of interest in favor of Klinginsmith.

Notwithstanding, we agree with the courts below that Wichmann is not in contempt of court, even though we conclude that Wichmann was to pay interest on the property settlement award. When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994); *Bahm v. Raikes*, 200 Neb. 195, 263 N.W.2d 437 (1978). "Willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order. *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993); *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985). A party's contempt must be established by proof beyond a reasonable doubt. *Novak v. Novak, supra.*

Wichmann did not act with knowledge that he was in violation of the dissolution decree. Instead, Wichmann, without fault but nonetheless in error, thought that payment of $368 per month satisfied his property settlement obligation pursuant to the decree. As such, Wichmann's failure to pay interest was not willful beyond a reasonable doubt. Accordingly, the courts below, although for different reasons, correctly concluded that Wichmann was not in contempt of court. A proper result will not be reversed merely because it was reached for the wrong reasons. *Boettcher v. Balka, ante* p. 547, 567 N.W.2d 95 (1997); *Ochs v. Makousky*, 249 Neb. 960, 547 N.W.2d 136 (1996).

Thus, while we hold that the language of paragraph 11 of the decree evinces an award of interest in favor of Klinginsmith and that Klinginsmith is entitled to interest consistent with this opinion, we point out that a contempt proceeding may not be

used to afford a party equitable relief. *Dunning v. Tallman, supra.* Therefore, even though Klinginsmith requested equitable relief in her application for contempt, such relief is not available under the present posture of these proceedings. As we stated in *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), Nebraska law is replete with other methods of relief for litigants in these circumstances.

Klinginsmith's other assigned errors are without merit. Klinginsmith claimed that Wichmann had refused to reimburse his one-half share of their children's medical expenses. However, the only evidence offered in support of this claim is Klinginsmith's bare assertion that she thought Wichmann owed her around $500 to $1,000. The trial court was not clearly wrong in concluding that Klinginsmith had failed to carry her burden of proof in this regard.

Neb. Rev. Stat. § 42-371(5) (Reissue 1993) provides that a court may "order a person required to make payments to post sufficient security, bond, or other guarantee with the clerk to insure payment of both current and any delinquent amounts." However, an order requiring security to be given is a somewhat extraordinary and drastic remedy, and such order should only be invoked when compelling circumstances require it. See *Lacey v. Lacey*, 215 Neb. 162, 337 N.W.2d 740 (1983).

In the instant case, no such compelling circumstances exist. The evidence reveals that Wichmann was reasonably prompt with his monthly payments of child support and with payment of that amount which he believed was required to satisfy his property settlement obligation. The trial court did not abuse its discretion by concluding that Wichmann would continue to comply with the dissolution decree.

CONCLUSION

For each of the foregoing reasons, and recognizing that Klinginsmith is entitled to interest on payments for her award of one-half of the net value of the business identified in paragraph 11 of the decree, we affirm the judgment of the Court of Appeals.

AFFIRMED.

WHITE, C.J., participating on briefs.

DAVID CUNNINGHAM, APPELLANT, V. PRIME MOVER, INC., AND CLARKLIFT OF NEBRASKA, APPELLEES.

567 N.W.2d 178

Filed August 1, 1997. No. S-95-862.

1. **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.
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. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
4. **Collateral Estoppel: Summary Judgment.** Collateral estoppel, when shown to be applicable, presents a question of law which may properly be raised on a motion for summary judgment.
5. **Workers' Compensation: Proximate Cause: Proof.** In a workers' compensation case, the employee must prove by a preponderance of the evidence that (1) the employee was injured in the scope and course of his employment and (2) the injuries to the employee were proximately caused by the accident.
6. **Collateral Estoppel.** Collateral estoppel may be raised by parties who were not involved in the initial proceeding.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for further proceedings.

Robert E. O'Connor, Jr., for appellant.

Michael F. Kinney and John R. Klein, of Cassem, Tierney, Adams, Gotch & Douglas, and Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

In this negligence and product liability action, David Cunningham appeals the district court's summary judgments in favor of Prime Mover, Inc., and Clarklift of Nebraska.

SCOPE OF REVIEW

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. *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

FACTS

Cunningham alleges that on September 13, 1991, while in the course and scope of his employment with K-B Foods, Inc., he was operating a pallet jack when the brakes suddenly seized and he was thrown off the pallet jack.

Prior to filing the petition in this case, Cunningham filed a claim in the Nebraska Workers' Compensation Court to recover for injuries allegedly sustained as a result of the same accident. There, Cunningham alleged that his injuries consisted of a kidney bruise and a neck and spine injury resulting in partial paralysis. A central issue in the compensation court was whether Cunningham's injuries were causally related to the accident. The evidence showed that the paralysis was the result of a condition known as syringomyelia, in which a syrinx or cyst develops in the spinal cord. Conflicting medical testimony was offered by Cunningham and K-B Foods as to the cause of the syringomyelia.

The compensation court found that the syringomyelia was not caused by Cunningham's accident of September 13, 1991, and that the accident did not hasten, accelerate, or aggravate the cyst, which the court found was already present and growing, and dismissed Cunningham's petition. He appealed to a three-judge panel, which affirmed the dismissal without opinion. Cunningham appealed to the Nebraska Court of Appeals, which affirmed the review panel's decision. *Cunningham v. K-B Foods*, 94 NCA No. 28, case No. A-93-1088 (not designated for permanent publication). Cunningham did not seek further review of the Court of Appeals' decision.

In the case at bar, Cunningham alleges that while in the course and scope of his employment with K-B Foods, he was

operating a pallet jack when the brakes suddenly seized, causing him to be thrown off. Cunningham claims that Prime Mover, the manufacturer of the pallet jack, and Clarklift, the maintenance company, are responsible for the accident. Asserting theories of negligence and product liability, Cunningham claims he sustained syringomyelia resulting in partial paralysis.

Summary judgments were granted in favor of Prime Mover and Clarklift. The district court found as a matter of law that Cunningham was collaterally estopped by the compensation court's determination that his syringomyelia was not caused by the accident of September 13, 1991. Cunningham timely appealed.

ASSIGNMENTS OF ERROR

Cunningham assigns as error that the district court erred (1) in applying the doctrine of collateral estoppel to a third-party action which arose from a workers' compensation claim and (2) in applying the doctrine of collateral estoppel to a finding of a court of limited jurisdiction.

ANALYSIS

Essential to Cunningham's recovery in this negligence and product liability action is a determination that the syringomyelia was causally related to his fall from the pallet jack. See, e.g., *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994). Prime Mover and Clarklift contend that this issue was finally and conclusively determined adversely to Cunningham in the Workers' Compensation Court and that, therefore, Cunningham is collaterally estopped from relitigating this issue in the current action.

There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994). Collateral estoppel, when shown to be applicable, presents a question of law which may properly be raised on a

motion for summary judgment. See *Scott v. Mattingly*, 241 Neb. 276, 488 N.W.2d 349 (1992). A determination regarding the application of collateral estoppel is a question of law, and as an appellate court, we are obligated to reach a conclusion independent from the trial court's conclusion. See *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

Regarding the first element of collateral estoppel, Cunningham contends that the issue decided in the compensation court was not identical to the issue in the case at bar. In particular, Cunningham argues that the legal theory of recovery in the case at bar is different from that heard by the compensation court. He claims that the issue in the compensation court was compensability and that the issue here is proximate causation. We disagree.

In a workers' compensation case, the employee must prove by a preponderance of the evidence that (1) the employee was injured in the scope and course of his employment and (2) the injuries to the employee were proximately caused by the accident. See *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996). It is not disputed that Cunningham was thrown from the pallet jack while in the course and scope of his employment. The disputed issue in the compensation court was whether the injuries for which Cunningham sought compensation were proximately caused by his fall. The compensation court found against Cunningham on that issue and denied workers' compensation benefits.

In this negligence and product liability action, Cunningham must prove by a preponderance of the evidence that his syringomyelia was caused by the accident that occurred on September 13, 1991. See, *World Radio Labs. v. Coopers & Lybrand, supra*; *Kudlacek v. Fiat S.p.A., supra*. The identical issue was decided by the compensation court in the prior action, and thus, the first element of collateral estoppel has been met.

The second element of collateral estoppel requires that there be a judgment on the merits which is final. The parties do not dispute that the judgment of the compensation court was final, and therefore, the second element has been met.

We next consider the third element of collateral estoppel. Although Cunningham points out that neither of the defendants

was a party to the workers' compensation action, this fact is inapposite. Collateral estoppel may be raised by parties who were not involved in the initial proceeding. See *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). As to the status of the parties regarding collateral estoppel, the only requirement is that "the party against whom the rule is applied was a party or in privity with a party to the prior action." *Id.* at 854, 510 N.W.2d at 48. It is not disputed that Cunningham, the party against whom collateral estoppel was applied, was a party to the workers' compensation action, and therefore, the third element has been met.

Finally, we consider the fourth element of collateral estoppel, whether there was an opportunity to fully and fairly litigate the issue in the prior action. Cunningham argues that the limited jurisdiction of the compensation court prevented him from fully and fairly litigating the issue of proximate causation.

First, Cunningham claims the compensation court's determination as to proximate causation was merely incidental. He contends the compensation court has a limited purpose of determining, without expensive litigation and unnecessary delay, whether an employee's injury occurred within the scope of his employment. According to Cunningham, the "indirect determination" of the compensation court was that his medical condition was not hastened, accelerated, or aggravated by his fall. Cunningham thus concludes that the larger issues of negligence and product liability should not be precluded upon an indirect determination of causation.

Second, Cunningham asserts that the issue of proximate causation was not fully and fairly litigated in the compensation court because of differences in the quality and extensiveness of the procedures followed by the two courts. Cunningham explains that the theories of recovery, the manner of presentation, the discovery process, the manner of proof, and the possible remedies available in the compensation court are different from those available in the district court.

In order to recover workers' compensation benefits, it was essential for Cunningham to prove causation. Therefore, the compensation court's determination as to causation was not incidental. See *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80

(1996). However, there are procedural differences between the two courts and sound policy reasons for leaving a degree of separation between factual determinations in the compensation court and the trial courts of this state. These considerations are particularly relevant in regard to a determination of causation made by the compensation court which is then offered to collaterally estop litigation regarding the issue of proximate causation in a subsequent tort action against a third-party tort-feasor.

The compensation court is not bound by the rules of evidence or procedure required in the trial courts. See Neb. Rev. Stat. § 48-168(1) (Reissue 1993). Thus, for example, since the rules of evidence do not apply to workers' compensation proceedings, in the normal course of a compensation proceeding, causation can be established or disputed with only an opinion letter from an appropriate witness. Such a letter would be hearsay and excluded by the rules of evidence in a suit against a third-party tort-feasor.

In *Messick v. Star Enterprise*, 655 A.2d 1209 (Del. 1995), the Delaware Supreme Court recognized that evidentiary distinctions, as well as differences in the quality and extensiveness of workers' compensation and civil court proceedings, are reasons why collateral estoppel should not be applied with regard to a determination of causation made in a compensation court. The court noted that differences between workers' compensation proceedings and civil litigation were appreciable, including differences in the evidentiary rules, the award of damages, and the time allowed to present a case. It was noted that both courts present the claimant with an opportunity to litigate, but that the tools available to prosecute the claim in each court are not equal. Particularly, the court determined that the forum in the civil court afforded the party against whom preclusion was asserted procedural opportunities in the presentation and determination of the issue that were not available in the compensation court.

We point out that the application of collateral estoppel may also chill the purpose and effect of the compensation court. One of the significant purposes of the compensation court is to provide a forum wherein an injured worker can obtain a prompt determination of his or her claim. If the compensation court's

determination on the issue of causation is binding upon an action in tort against a third party, the injured party may be reluctant to proceed with a workers' compensation claim unless and until extensive and expensive discovery has been completed involving all potential claims against third parties. The court in *Kelly v. Trans Globe Travel Bureau, Inc.*, 60 Cal. App. 3d 195, 202-03, 131 Cal. Rptr. 488, 493 (1976), explained:

> The adverse effect of the potential of collateral estoppel upon the economic balance of civil litigation is particularly undesirable in workers' compensation proceedings. The policy of the workers' compensation law is to secure the quick and, where possible, certain resolution of questions of coverage. Any doctrine which encourages delay in final resolution by the exercise of procedural and appellate steps is counter to the policy. The workers' compensation law, in stark contrast to the system of other personal injury litigation, is one of simplified procedure to reduce the call of legal expense upon the societal fund available for compensation for injury so that the maximum possible portion of the fund is available to compensate loss rather than the cost of determining controversies. The possibility of collateral estoppel consequences of a workers' compensation determination with its effect upon the economic balance of the controversy is counter to that policy also.

For public policy reasons and because Cunningham did not have the opportunity to fully and fairly litigate his claim, we conclude that the doctrine of collateral estoppel should not be applied so as to bar Cunningham from relitigating the issue of causation against third parties. We therefore reverse the summary judgments of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JUNEAL PRATT, APPELLANT, V. NEBRASKA BOARD OF PAROLE, APPELLEE.

567 N.W.2d 183

Filed August 1, 1997. No. S-95-1033.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer must be overruled.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Demurrer: Appeal and Error.** When a demurrer is interposed stating several grounds, the court sustaining the demurrer should specify the grounds upon which it is sustained. Otherwise, an appellate court is not informed in regard to wherein the complaint was determined to be deficient.
5. **Demurrer: Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as that phrase is used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), is a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
6. **Demurrer: Pleadings.** A demurrer reaches only defects which appear on the face of a petition and admits all allegations of fact which are relevant, material, and well pled, but does not admit the pleader's conclusions of law.
7. ____: ____. A demurrer reaches an instrument filed with a petition and made a part thereof but does not admit any construction placed on any instrument pled and set forth in the petition.
8. **Mandamus: Words and Phrases.** Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
9. **Mandamus.** In considering whether to grant a writ of mandamus, an appellate court considers whether the duty to be enforced was one which existed at the time the petition was filed.
10. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
11. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
12. **Probation and Parole.** The granting of parole to an inmate is a discretionary act on the part of the Nebraska Board of Parole based upon a predictive judgment of what is best for the inmate and the community.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Juneal Pratt, pro se.

Don Stenberg, Attorney General, and Marie C. Pawol for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

This is an appeal from the grant of a demurrer and the dismissal of Juneal Pratt's petition for writ of mandamus to compel the Nebraska Board of Parole (Board) to consider him eligible for parole in accordance with Neb. Rev. Stat. § 83-1,110 (Reissue 1994).

SCOPE OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996).

In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer must be overruled. *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997); *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Ackles v. Luttrell, ante* p. 273, 561 N.W.2d 573 (1997); *Ethanair Corp. v. Thompson, ante* p. 245, 561 N.W.2d 225 (1997).

FACTS

Pratt filed a petition for writ of mandamus in Lancaster County District Court, asking the court to compel the Board to consider him eligible for parole. The petition alleged that

Douglas County District Court Judge Donald J. Hamilton had submitted an official letter to the Board recommending that it consider Pratt for early parole in accordance with § 83-1,110 prior to completion of his minimum term. The petition further alleged that due to the letter, the Board set a parole hearing for Pratt on January 23, 1995; a hearing was held at the Lincoln Correctional Center; and during the hearing, the chairman of the Board announced that he had received a notice from the Attorney General stating that in the opinion of the Attorney General, § 83-1,110 was unconstitutional and directing the Board not to follow § 83-1,110. Attached to Pratt's petition were Attorney General opinions dated November 17, 1993, and January 17, 1995; the December 14, 1989, letter from Judge Hamilton giving approval for the parole of Pratt; a letter from Pratt to the Board dated February 3, 1995; and a January 23, 1995, newspaper article from the Lincoln Journal headlined "Second Pratt parole vote postponed."

On April 17, 1995, the Board filed its demurrer, which alleged the following:

> 1. The Petition fails to set forth sufficient facts to constitute a cause of action. Specifically, Petitioner seeks to be paroled pursuant to the provisions of Neb. Rev. Stat. § 83-1,110. However, mandamus only lies to enforce the performance of a ministerial act or duty, and not to control judicial discretion. Parole is a completely discretionary function.
>
> 2. Further, this Court has ruled that § 83-1,110 is unconstitutional. When a statute is unconstitutional, it is void and unenforceable.
>
> 3. Finally, mandamus will not lie where there is a plain and adequate remedy in the ordinary cou[r]se of the law.

The district court sustained the demurrer on August 22, 1995, without opinion and dismissed Pratt's petition. Pratt timely appealed.

ASSIGNMENT OF ERROR

Pratt assigns as error that the district court erred in its conclusion that mandamus will not lie to compel the performance of state executive officers.

ANALYSIS

The district court did not state its reasons for sustaining the demurrer. We have previously expressed that when a demurrer is interposed stating several grounds, the court sustaining the demurrer should specify the grounds upon which it is sustained. Otherwise, this court is not informed in regard to wherein the complaint was determined to be deficient. See, *Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90 (1993); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990). However, in *Fulk*, we stated further that when we have no specific findings before us, we must review the grounds of the demurrer to determine if any one objection, or any objections taken together, support the trial court's decision to sustain the demurrer and dismiss the action.

The Board's demurrer alleged that Pratt's petition for writ of mandamus did not state facts sufficient to constitute a cause of action upon which the district court could grant the relief sought. A statement of "facts sufficient to constitute a cause of action," as that phrase is used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), is a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Giese v. Stice, post* p. 913, 567 N.W.2d 156 (1997).

The rules with regard to demurrers are well settled. A demurrer reaches only defects which appear on the face of a petition and admits all allegations of fact which are relevant, material, and well pled, but does not admit the pleader's conclusions of law. *Clyde v. Buchfinck*, 198 Neb. 586, 254 N.W.2d 393 (1977). When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer must be overruled. *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997); *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996). A demurrer reaches an

instrument filed with a petition and made a part thereof but does not admit any construction placed on any instrument pled and set forth in the petition. *Clyde v. Buchfinck, supra.* Therefore, in determining whether a demurrer should be sustained, the trial court may construe an instrument made a part of the petition. *Id.*

Pratt attached to the petition a newspaper article from the Lincoln Journal dated January 23, 1995, which indicates that the Board did not act on Pratt's request. Without addressing the reasons why the Board did not act, we can infer that the Board refused to consider Pratt's request to be considered for early parole.

Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997).

Pratt relies on § 83-1,110 to establish the Board's clear duty to act and Pratt's corresponding right to relief. We note that since Pratt's petition was filed, the relevant statutory language has been omitted by amendment. However, in considering whether to grant a writ of mandamus, we consider whether the duty to be enforced was one which existed at the time the petition was filed. See *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993).

Thus, we first consider whether § 83-1,110, as it existed at the time Pratt's petition was filed (March 1, 1995), imposed a clear duty on the Board. In other words, we must examine whether the determination of early parole eligibility under § 83-1,110 was a ministerial duty. See *Watts v. City of Omaha*, 184 Neb. 41, 165 N.W.2d 104 (1969). Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990).

The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the exis-

tence of certain facts. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994). In *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 670, 380 N.W.2d 259, 263 (1986), quoting *State ex rel. Herman v. City of Grand Island*, 145 Neb. 150, 15 N.W.2d 341 (1944), we explained that

> " '[a] duty or act is ministerial . . . when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law. It is such an act as an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. . . .' "

Section 83-1,110(1) provided:

> Every committed offender shall be eligible for release on parole upon completion of the minimum term less good time. A committed offender shall be eligible for parole prior to the expiration of the minimum term whenever the sentencing judge or the judge's successor in office gives approval for the parole of such offender.

As the Board points out, the granting of parole to an inmate is a discretionary act on the part of the Board based upon a predictive judgment of what is best for the inmate and the community. See *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). However, under the plain language of § 83-1,110(1), a finding of eligibility for parole was not discretionary. Rather, it was the duty of the Board to recognize the offender's parole eligibility upon a showing of certain facts, regardless of the Board's own judgment or opinion concerning the propriety or impropriety of such a determination. Therefore, the Board's duty to recognize Pratt's parole eligibility was ministerial. The Board did not have to grant Pratt parole, but it had the duty to consider him for parole.

Still, the Board contends that it did not have a ministerial duty because § 83-1,110 was unconstitutional and therefore void and unenforceable. The demurrer stated: "Further, this Court has ruled that § 83-1,110 is unconstitutional. When a statute is unconstitutional, it is void and unenforceable." In

Hoesly v. State, 243 Neb. 304, 312, 498 N.W.2d 571, 576 (1993), we addressed the requirements for challenging the constitutionality of a statute: "A mere blanket challenge of unconstitutionality is not specific enough to allow a trial court to make an informed ruling on the constitutional validity of a statute and robs the trial court of its role as a decisionmaker; it thus does not properly raise a constitutional issue." As a general matter, a constitutional question will not be considered on appeal if not properly raised in the trial court. *Id.*; *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993).

Although the Board has asserted that § 83-1,110 is unconstitutional, its blanket assertion is not specific enough to properly raise the issue. A statute is presumed to be constitutional, see *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996), and because the constitutional question was not properly raised in the trial court, the question will not be considered on appeal, see *Hoesly v. State, supra.*

Having found a clear legal duty, we consider whether there was no other plain and adequate remedy available in the ordinary course of the law. The Board contends that a writ of mandamus is not proper in this case because Pratt had the plain and adequate remedy at law to file a petition in error. At the time Pratt filed his petition, petition in error jurisdiction was limited by statute to review of a "judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court . . . ." See Neb. Rev. Stat. § 25-1901 (Cum. Supp. 1994). Having determined that the duty of the Board to recognize parole eligibility under § 83-1,110(1) was ministerial, not judicial, we conclude that petition in error proceedings were not available. See *Singleton v. Kimball County Board of Commissioners*, 203 Neb. 429, 279 N.W.2d 112 (1979) (petition in error proceedings not available to appeal from ministerial acts). Given that Pratt had no other means for compelling the Board to consider him for parole in accordance with § 83-1,110(1) as it existed at the time of Pratt's petition, a writ of mandamus is the appropriate remedy.

Since Pratt's petition alleged facts sufficient to state a cause of action for a writ of mandamus, we find that the district court erred in sustaining the demurrer. Therefore, we reverse the

judgment of the district court and remand the cause for further proceedings in accordance with this opinion. Pratt's motion for attorney fees is overruled.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., participating on briefs.

SUSAN GIESE, APPELLANT AND CROSS-APPELLEE, V. RITA COLLEEN STICE, M.D., APPELLEE, AND BISHOP CLARKSON MEMORIAL HOSPITAL, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

567 N.W.2d 156

Filed August 1, 1997. No. S-95-1093.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. ____: ____. In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
4. **Demurrer: Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
5. **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.
6. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
7. **Health Care Providers: Informed Consent: Words and Phrases.** Informed consent means consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent includes failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

8. **Health Care Providers: Malpractice: Limitations of Actions.** Unless tolled by the provisions of Neb. Rev. Stat. § 25-213 (Reissue 1995), an action for damages against a health care provider under the Nebraska Hospital-Medical Liability Act must be commenced within 2 years next after the alleged act or omission in rendering or failing to render professional services providing the basis for such action, except that if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, the action may be commenced within 1 year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.
9. **Health Care Providers: Malpractice: Informed Consent.** A hospital has no independent duty to obtain a patient's informed consent to a surgical procedure to be performed by a physician who is not an employee of the hospital; such duty lies exclusively with the treating physician.
10. **Demurrer: Pleadings: Negligence.** Even a general allegation of negligence is good against a demurrer.
11. **Health Care Providers.** As a general rule, hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient.
12. **Health Care Providers: Malpractice.** Under some circumstances, hospital personnel have a duty to communicate with an attending physician concerning a hospitalized patient.
13. **Demurrer: Pleadings: Limitations of Actions.** When it is apparent from the face of a petition that the cause of action asserted is ostensibly barred by the statute of limitations, the petition is demurrable as failing to state a cause of action unless the plaintiff alleges some excuse which tolls the operation and bar of the statute.
14. **Limitations of Actions: Malpractice.** A cause of action for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission alleged to constitute negligence.
15. **Limitations of Actions: Words and Phrases.** Discovery of a cause of action occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action.
16. **Limitations of Actions: Pleadings.** A plaintiff seeking to invoke the "discovery" clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Jeffrey A. Silver for appellant.

John R. Douglas and John R. Klein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Hospital.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Susan Giese brought an action alleging that Rita Colleen Stice, M.D., and Bishop Clarkson Memorial Hospital (Clarkson) were negligent in connection with breast implant procedures performed on Giese at Clarkson by Dr. Stice. Giese appeals from an order of the district court for Douglas County dismissing Clarkson from the action after sustaining its demurrer on the ground that the petition failed to state a cause of action. Clarkson cross-appeals from the order of the district court overruling that part of Clarkson's demurrer in which it alleged that the statute of limitations barred Giese's claim. Dr. Stice is not a party to this appeal. For the reasons stated herein, we affirm in part, reverse in part, and remand with directions.

PROCEEDINGS BELOW

In her petition filed on December 30, 1994, Giese alleged that she underwent three separate breast implantation procedures performed by Dr. Stice. The first, on March 21, 1989, was performed at Methodist Hospital. The subsequent procedures on April 29, 1991, and January 3, 1992, were performed at Clarkson. Giese alleged that during the second and third procedures, Dr. Stice "was assisted by nurses and other personnel" employed by Clarkson and that the implants used in those procedures "were procured by . . . Clarkson and billed to [Giese] through . . . Clarkson." There is no allegation of any agency relationship between Clarkson and Dr. Stice, and no allegation that the breast implants were defective in any manner.

Paragraph 10 of the petition contains a general allegation that employees of Clarkson "failed to exercise the degree of care or skill, or possess the degree of knowledge ordinarily exercised by others of like employment in their profession in their community or similar communities." In paragraph 11, Giese alleged that Clarkson was negligent in four particulars:

> a. In failing to fully and adequately warn [Giese] of the potential side effects from breast implants.
>
> b. In failing to obtain informed consent from [Giese].

> c. In failing to timely provide quality medical care or consultation to [Giese].
>
> d. Failing to consult with other medical personnel with respect to [Giese's] condition.

Giese asserted these same specifications of negligence against Dr. Stice. Giese alleged that as a proximate result of the negligence of Dr. Stice and Clarkson, she sustained "severe and permanent personal injury including, but not limited to[,] Atypical Neurological Disease," for which she claimed damages. Giese further alleged that she "could not and did not discover the cause of action against the Defendants until September 1, 1994, and that this action was commenced within one year thereof pursuant to §25-222 Neb. Rev. Stat. 1943 (Reissue 1989)."

Giese alleged that the Nebraska Hospital-Medical Liability Act (NHMLA), Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1993) "may be applicable to this case." She affirmatively waived her right to a medical review panel pursuant to the NHMLA and alleged that the NHMLA itself was unconstitutional.

Clarkson filed a demurrer alleging that the petition (1) failed to state a cause of action against it and (2) was barred by the statute of limitations period contained in Neb. Rev. Stat. § 25-222 (Reissue 1995). In an order entered on June 28, 1995, the district court found that because Giese alleged that she "could not and did not discover" her cause of action until September 1, 1994, the action was commenced within the limitations period prescribed by § 25-222. Noting that Giese's counsel characterized her claim as one based upon informed consent, the district court examined authorities from Nebraska and other jurisdictions and concluded that the duty to obtain a patient's informed consent to a surgical procedure was that of the attending physician and not of the hospital. The district court, therefore, sustained Clarkson's demurrer on the ground that the petition failed to state a cause of action against Clarkson and denied Giese leave to amend "[b]ecause the defect is one that cannot be corrected."

On September 6, 1995, the district court denied Giese's motion for reconsideration and dismissed Clarkson from the case. Giese perfected a timely appeal to the Nebraska Court of Appeals, and Clarkson cross-appealed from the district court's

ruling on the statute of limitations issue. Pursuant to our authority to regulate the caseloads of the Court of Appeals and this court, we removed the case to our docket.

ASSIGNMENTS OF ERROR

Restated, Giese contends that the district court erred in (1) sustaining Clarkson's demurrer and (2) failing to provide her the opportunity to amend her petition following the court's decision to sustain Clarkson's demurrer.

In its cross-appeal, Clarkson contends that the district court erred in not sustaining its demurrer on the ground that Giese's claim was barred by the statute of limitations.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996).

In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Baltensperger, supra*; *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996).

In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997); *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996).

A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545

N.W.2d 451 (1996); *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995).

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. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997); *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Ackles v. Luttrell, ante* p. 273, 561 N.W.2d 573 (1997); *Ethanair Corp. v. Thompson, ante* p. 245, 561 N.W.2d 225 (1997).

ANALYSIS

Applicable Law.

There is a threshold issue of whether this case is governed by the provisions of the NHMLA. Giese alleged in her petition that the NHMLA "may be applicable," and because of the procedural posture of the case at the time of dismissal, Clarkson was never required to respond to this substantive allegation.

Physicians, hospitals, and other health care providers may elect to "qualify" under the NHMLA by filing proof of financial responsibility with the Department of Insurance and agreeing to pay periodic surcharges levied to create and maintain the Excess Liability Fund established by the NHMLA. See § 44-2824. The substantive provisions of the NHMLA provide the exclusive remedy by which a patient may assert professional liability claims against the health care provider unless the patient filed an election not to be bound by the NHMLA prior to receiving professional services. If the health care provider does not elect to qualify under the NHMLA, its liability for professional negligence is determined under doctrines of common law. See § 44-2821. See, also, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

The NHMLA defines "informed consent" as follows:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall

> include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

§ 44-2816. We have held that the same definition of informed consent applies in a professional negligence action governed by the common law. See *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987).

Unless tolled by the provisions of Neb. Rev. Stat. § 25-213 (Reissue 1995), an action for damages against a health care provider under the NHMLA must be commenced

> within two years next after the alleged act or omission in rendering or failing to render professional services providing the basis for such action, except that if the cause of action is not discovered and could not be reasonably discovered within such two-year period, the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

§ 44-2828. This language is identical in all material respects to that contained in § 25-222, which applies to professional negligence actions governed by the common law.

Because Giese alleged that the NHMLA "may be applicable" to her claim and also because there is nothing in the record to the contrary, we will apply the substantive provisions of the NHMLA in resolving this appeal. We note, however, that the result would be the same under the applicable principles of common law outlined above. See *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988) (holding that it was not prejudicial error to give jury instruction based on NHMLA's definition of standard of care in action against hospital which was not qualified under NHMLA, where common-law definition was identical).

Informed Consent.

Giese's first two specifications of negligence present an issue of first impression in Nebraska: Does a hospital have an inde-

pendent duty to warn a patient of surgical risks in order to obtain the patient's informed consent to a surgical procedure which is to be performed by a surgeon who is not an agent of the hospital? In order to state a cause of action based upon negligence, a plaintiff must allege facts supporting the existence of a legal duty, a breach of that duty by the defendant, and damages proximately caused by the breach. See, *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997); *Hand v. Starr*, 250 Neb. 377, 550 N.W.2d 646 (1996). The existence of a legal duty upon which actionable negligence can be predicated is a question of law dependent on the facts in a particular situation. See, *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

The vast majority of courts considering the issue have "declined to impose upon hospitals the general duty to obtain informed consent." See *Kelly v. Methodist Hosp.*, 444 Pa. Super. 427, 434, 664 A.2d 148, 151 (1995) (stating, in context of action brought under theory of corporate negligence, that in "every jurisdiction which has considered the issue," no court has imposed general duty upon hospital to obtain patient's informed consent). Typically, courts reach this conclusion after determining that it is the treating physician who has the education, expertise, skill, and training necessary to treat a patient and determine what information a patient must have in order to give informed consent. See, e.g., *Johnson v. Sears, Roebuck & Co.*, 113 N.M. 736, 832 P.2d 797 (N.M. App. 1992). These courts recognize that nurses and other nonphysician hospital employees do not normally possess knowledge of "a particular patient's medical history, diagnosis, or other circumstances which would enable the employee to fully disclose all pertinent information to the patient." *Id.* at 738, 832 P.2d at 799. See, also, *Schloendorff v. New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914), *overruled on other grounds by Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957) (hospital which did not employ surgeon had no duty to obtain patient's informed consent to surgery); *Krane v. Saint Anthony Hosp. Systems*, 738 P.2d 75, 77 (Colo. App. 1987) ("hospital does not generally have a duty to advise the patient prior to surgery as to

the surgical procedure to be employed and the risks involved and, therefore, has no duty to obtain an informed consent similar to that which the surgeon is obligated to obtain"); *Ackerman v. Lerwick*, 676 S.W.2d 318, 321 (Mo. App. 1984) ("duty to inform rests with the physician and requires the exercise of delicate medical judgment. The hospital is not required to interfere with the physician-patient relationship"); *Petriello v. Kalman*, 215 Conn. 377, 576 A.2d 474 (1990) (hospital has no duty to obtain patient's informed consent to surgery to be performed by surgeon who is not hospital employee); *Goss v. Oklahoma Blood Institute*, 856 P.2d 998 (Okla. App. 1990) (hospital has no duty to inform patient of material risks of procedure prescribed by patient's physician, nor must it inform patient of available alternatives); *Ritter v. Delaney*, 790 S.W.2d 29 (Tex. App. 1990) (hospital under no obligation to obtain patient's informed consent to surgery merely because physician had directed nurse to have patient sign consent form); *Kershaw v. Reichert*, 445 N.W.2d 16 (N.D. 1989) (hospital generally has no duty to obtain informed consent); *Pauscher v. Iowa Methodist Medical Center*, 408 N.W.2d 355, 362 (Iowa 1987) (no duty on part of hospital "to inform a patient of matters that lie at the heart of the doctor-patient relationship"); *Baltzell v. Baptist Medical Center*, 718 S.W.2d 140 (Mo. App. 1986) (hospital had no duty to inform patient of risk of infection from surgeon where surgeon not agent of hospital); *Lincoln v Gupta*, 142 Mich. App. 615, 370 N.W.2d 312 (1985) (physician had exclusive duty to inform patient of risks associated with medical procedures); *Pickle v. Curns*, 106 Ill. App. 3d 734, 435 N.E.2d 877 (1982) (hospital has no duty to inform patient of surgical risks); *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982) (hospital had no duty to obtain informed consent in absence of agency relationship with physician); *Parr v. Palmyra Park Hospital*, 139 Ga. App. 457, 460, 228 S.E.2d 596, 598 (1976) ("[t]o require a hospital to contact a patient to discuss the risks of a surgical procedure involving the transfusion of blood would be a presumptuous invasion of the province of the physician, on whom rests the responsibility of the patient's welfare").

Giese relies on *Urban v. Spohn Hosp.*, 869 S.W.2d 450 (Tex. App. 1993), and *Keel v. St. Elizabeth Medical Center*, 842

S.W.2d 860 (Ky. 1992), in urging us to recognize a duty on the part of a hospital to obtain a patient's informed consent to surgery. In *Urban*, the plaintiff alleged that she told the hospital nurses that she did not want and had not consented to a surgical procedure, and claimed that the nurses were negligent in not communicating her wishes to the surgeon. In reversing summary judgment for the hospital, the Texas Court of Appeals concluded that it could not state, as a matter of law, that the nurses did not have a duty to report the patient's statements to the surgeon. In *Keel*, the Supreme Court of Kentucky "note[d] incidentally," 842 S.W.2d at 862, that a hospital had a duty to obtain the informed consent of a patient before performing a CT scan ordered by the patient's physician but performed by hospital personnel. We view these cases as factually distinguishable and not supportive of a general proposition that a hospital has an independent duty to warn a patient of surgical risks in order to obtain the patient's informed consent to a particular surgical procedure which is to be performed by a physician who is not a hospital employee.

Giese argues that because the statutory definition of "informed consent" found at § 44-2816 uses the term "health care providers," which can include both physicians and hospitals, see § 44-2803, a hospital and a physician have a joint duty to obtain informed consent. This argument was specifically rejected by the appellate courts of the State of Washington in *Alexander v. Gonser*, 42 Wash. App. 234, 711 P.2d 347 (1985), and *Howell v. Blood Bank*, 114 Wash. 2d 42, 785 P.2d 815 (1990). Both courts held that to impose a general duty upon all entities meeting the statutory definition of "health care provider" would result in an unwarranted imposition on the physician-patient relationship and would be " 'far more disruptive than beneficial to a patient.' " *Howell*, 114 Wash. 2d at 55, 785 P.2d at 822 (quoting *Alexander, supra*). We agree with this rationale and reject Giese's contention that a hospital has a duty to obtain informed consent merely because it meets the statutory definition of "health care provider" as that term is used in § 44-2816.

Finally, Giese argues that Clarkson should have a duty to obtain informed consent because it supplied the implants used

in her 1991 and 1992 surgeries. Giese contends that a representative of the hospital's purchasing department should have counseled her prior to surgery regarding possible side effects associated with the implants. We conclude that this was not legally required and would constitute an unwarranted interference in the physician-patient relationship.

We agree with the majority of jurisdictions which have considered this issue. We hold that a hospital has no independent duty to obtain a patient's informed consent to a surgical procedure to be performed by a physician who is not an employee of the hospital and that such duty lies exclusively with the treating physician. The district court was, therefore, correct in sustaining Clarkson's demurrer with respect to the allegations contained in paragraphs 11(a) and 11(b) of Giese's petition and in finding that the defect could not be cured by amendment.

Other Specifications of Negligence.

In paragraphs 11(c) and 11(d) of her petition, Giese alleges that Clarkson was negligent in "failing to timely provide quality medical care or consultation" and "failing to consult with other medical personnel" with respect to her condition. These allegations, which are unrelated to the issue of informed consent, were not addressed by the district court in its order sustaining Clarkson's demurrer. That order refers to a statement by Giese's counsel that " '[t]he cause of action is really based on informed consent.' " However, Giese's counsel represented during oral argument on appeal that the allegations in paragraphs 11(c) and 11(d) pertain to theories of recovery other than informed consent, which were never abandoned. Since there is nothing in the record establishing that these allegations were ever stricken or withdrawn, we must consider them in determining whether the petition is sufficient to withstand Clarkson's demurrer.

Clarkson contends in its brief that these allegations are "vague" and "relate to obligations owed by a physician, not a hospital." Brief for appellee at 24. While the allegations are vague and general in nature, it has long been the law of Nebraska that even a general allegation of negligence is good against a demurrer. *Crawford v. Ham*, 209 Neb. 802, 311

N.W.2d 896 (1981). We have held that "[a]s a general rule, hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient." *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 8, 459 N.W.2d 178, 183 (1990). However, we have recognized that under some circumstances, hospital personnel have a duty to communicate with an attending physician concerning a hospitalized patient. *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995) (holding that hospital employees had duty to report change in patient's condition to appropriate medical personnel).

Applying these authorities and the required liberal construction to paragraphs 11(c) and 11(d) of the petition, we conclude that no cause of action is stated against Clarkson by paragraph 11(c) because Giese alleges no facts upon which Clarkson would have a duty to provide "medical care or consultation" to her. See *Jensen, supra*. However, the allegation in paragraph 11(d) that Clarkson "failed to consult with other medical personnel with respect to [Giese's] condition" and the allegations of proximately caused injury and damages contained in paragraphs 12 and 13 of the petition are sufficient to state a cause of action against Clarkson. See *Critchfield, supra*. Because one of the four specifications of negligence directed at Clarkson was legally sufficient, the petition stated a cause of action unless barred by the statute of limitations.

Statute of Limitations.

We next address Clarkson's cross-appeal, in which it contends that the district court should have sustained its demurrer on the ground that the petition was barred by the statute of limitations. When it is apparent from the face of a petition that the cause of action asserted is ostensibly barred by the statute of limitations, the petition is demurrable as failing to state a cause of action unless the plaintiff alleges some excuse which tolls the operation and bar of the statute. See, *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995); *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994). A cause of action for professional negligence accrues and the statute of limitations begins to run at

the time of the act or omission alleged to constitute negligence. See *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). The last date on which Giese alleges to have received care at Clarkson is January 3, 1992, more than 2 years before the petition was filed. In paragraph 14 of the petition, Giese alleges that "she could not and did not discover the cause of action against the Defendants until September 1, 1994." The issue, therefore, is whether Giese has adequately alleged the tolling of the 2-year limitation period by her failure to "discover" the claim within the 2-year period.

In *Zion Wheel Baptist Church, supra*, we held that because the petition alleging professional negligence was filed more than 2 years after the cause of action accrued, the plaintiff was required to "allege *why* its cause of action was not discovered and could not reasonably have been discovered within such 2-year period." (Emphasis supplied.) 249 Neb. at 358, 543 N.W.2d at 450. We further noted that "[d]iscovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action." *Id.*, citing *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). See, also, *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996).

Under this authority, a plaintiff seeking to invoke the "discovery" clause to toll the statute of limitations for professional negligence must allege more than a conclusion that the cause of action was not and reasonably could not have been discovered within the 2-year period. The petition must allege facts explaining *why* this is so. Giese did not allege such facts in her petition, and Clarkson's demurrer should, therefore, have been sustained on the grounds that the claim was barred by the statute of limitations. However, since it may be possible to cure this defect by amendment, Giese should be given leave to file an amended petition following remand of this action to the district court.

CONCLUSION

In summary, the district court correctly found that Clarkson had no independent legal duty to warn Giese of surgical risks and to obtain her informed consent to the surgery performed by

Dr. Stice, and that this deficiency in the petition could not be cured by amendment. However, since the petition also alleged a breach of the legally cognizable duty of hospital personnel to consult with medical personnel, the petition was sufficient to state a cause of action unless barred by the statute of limitations. Clarkson's demurrer should have been sustained because it was apparent from the face of the petition that the statute of limitations had expired and because Giese did not allege facts sufficient to establish tolling. Giese should have been given leave to amend the tolling allegation only. We, therefore, reverse, and remand with directions to allow Giese 14 days to amend her petition if she wishes to do so.

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

McCORMACK, J., concurring.

I agree with the majority that under the facts presented in this case there is no agency relationship between the hospital and the physician which would require the hospital to obtain the patient's informed consent. I do feel, however, that with the increasing consolidation of hospital services and physician practices, a case could be made for finding the hospital liable for the physician's failure to obtain informed consent where the hospital actually owns or controls the physician's practice or where both the hospital and the physician's practice are owned or controlled by another corporation which sets policy for both the hospital and the physician's practice.

BANK OF PAPILLION, A NEBRASKA BANKING CORPORATION, APPELLEE, V. KY THI NGUYEN AND KHOI DINH HOANG, APPELLANTS.

567 N.W.2d 166

Filed August 1, 1997. No. S-95-1152.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision

of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly erroneous.

3. **Trusts: Deeds: Foreclosure.** The Nebraska Trust Deeds Act provides two methods of foreclosing a trust deed. The trustee may exercise the power of sale conferred by the trust deed or the beneficiary may foreclose in the same manner as provided by law for the foreclosure of mortgages.
4. **Secured Transactions: Trusts: Deeds: Limitations of Actions.** Neb. Rev. Stat. § 76-1013 (Reissue 1990) establishes the limitations period for an action to recover a deficiency on any obligation, such as a promissory note or other contract, after sale of the real estate which secured the obligation pursuant to the Nebraska Trust Deeds Act.
5. **Contracts.** The law does not require the doing of a useless act.
6. **Real Estate.** A property owner holding property in fee simple is permitted to freely alienate any part of the property.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded with directions to dismiss.

Donald C. Hosford, Jr., of Crossman & Hosford, for appellants.

James C. Cripe for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Defendants-appellants, Ky Thi Nguyen and Khoi Dinh Hoang, filed an appeal from a deficiency judgment under the Nebraska Trust Deeds Act (Act), Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 1990, Cum. Supp. 1992 & Supp. 1993), entered by the district court for Douglas County in favor of the plaintiff-appellee, Bank of Papillion (Bank). Because we determine that the deficiency claim was barred by the statute of limitations set forth in § 76-1013, we reverse the judgment and remand the cause to the district court with directions to dismiss.

FACTS

On November 20, 1990, appellants (and two other individuals who are not parties to this action) executed a promissory note in the amount of $74,040.64 payable to the Bank. On April 14, 1992, appellants executed a trust deed for the purpose of securing the note, which at that time had an unpaid balance of $64,234.89. The real property subject to the trust deed was a

residence owned by appellants. The final payment of principal and interest on the note secured by the trust deed was due by April 20, 1995.

The trust deed designated the Bank as both "trustee" and "beneficiary." As trustee, the Bank was given the power of sale upon default in the payment of the indebtedness secured by the trust deed. The power of sale provision specifically authorized the beneficiary to purchase the property at a public sale conducted by the trustee. The trust deed was recorded on May 7, 1992, in the office of the register of deeds for Douglas County.

After executing the trust deed, appellants made irregular payments on the promissory note until January 1994, when their payments ceased. As of that date, the outstanding balance on the note secured by the trust deed was $50,313.05.

In its capacity as trustee, the Bank exercised the power of sale contained in the trust deed. The sale occurred on May 24, 1994. The Bank submitted the only bid, which was in the amount of $52,427.60. On May 27, a trustee's deed was filed with the Douglas County register of deeds whereby the Bank, in its capacity as trustee, conveyed the real property subject to the trust deed to itself. The trustee's deed contained the following recitations:

> [I]n compliance with Sec. 76-1008, Statutes of Nebraska, on the 7th day of March, 1994, the Trustee filed a Notice of Default in the Office of the Register of Deeds of Douglas County, Nebraska, as noted at Book 1113, Page 229, which Notice fully complied with the requirements of said Statute; and
>
> . . . in compliance with Sec. 76-1008, Statutes of Nebraska, on the 10th day of March, 1994, the Trustee mailed by certified mail, with postage prepaid, a copy of such Notice of Default with the recording date shown thereon, addressed to KHOI HOANG and KY NGUYEN, at 2122 N. 121st Street, Omaha, Nebraska 68164; and
>
> . . . in compliance with Sec. 76-1007, Statutes of Nebraska, the Trustee gave written notice of the time and place of sale, particularly describing the property to be sold by publication of such notice on April 12, 1994, and continuing once each week for five (5) consecutive weeks,

> the last publication being at least ten (10) days, but not more than thirty (30) days, prior to the date of such sale in The Daily Record, a newspaper, which fully complied with the requirements of said Statute; and
>
> . . . in compliance with Sec. 76-1008, Statutes of Nebraska, on the 13th day of April, 1994, the Trustor [sic] mailed by certified mail, with postage prepaid, a copy of the notice of the time and place of sale, addressed to KHOI HOANG and KY NGUYEN, at 2122 N. 121st Street, Omaha, Nebraska 68164[.]

The trustee's deed further recited that the sale was held on May 24, 1994, and that the Bank submitted the highest bid in the amount of $52,427.60.

The Bank considered the amount of its bid on the May 24, 1994, sale to be the balance due on the note which it "bid in," and therefore made no cash payment. The Bank then regarded itself as the "title owner" as a result of the sale. On June 1, the Bank paid off a prior lien in the amount of $10,675.66 and added that amount to the balance due from appellants. During the remainder of that month, the Bank obtained an appraisal, cleaned the property and removed debris, erected a "For Sale By Owner" sign, and showed the property to prospective purchasers. As a result of its efforts to sell the property, the Bank obtained purchase offers in the amounts of $36,000 and $40,000 and accepted the latter. The fair market value as determined by the appraiser was $41,000.

On August 10, 1994, the Bank, ostensibly acting in the capacity of trustee, executed a "Corrective Trustee's Deed" conveying the same real property to the "BANK OF PAPILLION." This document was similar to the original trustee's deed dated May 24, 1994, in that it recited the filing of a notice of default on March 7, the mailing of a copy of that notice to appellants on March 10, and the sale of the property to the Bank for $52,427.60. However, the "Corrective Trustee's Deed" differed from the earlier trustee's deed in three respects: (1) It recited that the public sale occurred on August 8, instead of May 24; (2) it recited that notice of the sale was published for 5 weeks beginning on June 28, instead of April 12; and (3) it recited that a copy of the notice was mailed to appellants on July 5 instead

of April 13. This document was recorded on August 11. An officer of the Bank testified that the "Corrective Trustee's Deed" and the August 8 sale reflected therein were necessitated by a "technical problem with a notice that occurred in or about August of 1994." However, the specific nature of that "problem" is not disclosed in the record.

The evidence received at trial includes two certified mail receipts reflecting delivery of mail to "Ky Nguyen" and "Khoi Hoang" at 2122 N. 121 St., Omaha, NE 68164 on March 12 and July 7, 1994. The receipts show that the mail was sent by the attorney who represents the Bank in these proceedings, but there is nothing in the record to identify what documents were actually delivered on these dates. Appellant Khoi Dinh Hoang testified that he did not receive any notice of default or notice of sale. Appellant Ky Thi Nguyen did not testify. There is nothing in the record to indicate that either appellant sought to invalidate the May 24, 1994, sale because of inadequate notice.

On or about September 7, 1994, the Bank sold the property to a third party for $40,000. On November 4, 1994, the Bank filed a petition in the district court for Douglas County, naming Ky Thi Nguyen and Khoi Dinh Hoang as defendants and sought a deficiency judgment in the amount of $25,706.57. After a demurrer to the original petition was sustained, the Bank filed an amended petition on January 24, 1995, which contained the same substantive allegations as the original petition but attached a copy of the trust deed and the promissory note.

Appellants filed an answer on January 31, 1995, which consisted of a general denial and an allegation that the action was "barred by the applicable statute of limitations." A bench trial was held on August 31.

In a ruling from the bench immediately following trial, the district court found that the operative date of sale under the Act was September 7, 1994, the date when the property was sold by the Bank to a third party. The court then determined that the Bank was entitled to a deficiency judgment in the amount of $25,196.47, calculated by taking the principal balance on the note of $50,313.05 and subtracting "late charges" of $155, to which the court held that the Bank was not entitled; subtracting the amount of $30,324.34, representing the stipulated fair mar-

ket value of $41,000 less the $10,675.66 paid by the Bank to clear the first lien; and adding $1,643.39 in expenses and $3,719.37 in interest. The judgment was entered on the record on August 31, 1995.

After their motion for new trial was overruled on October 6, 1995, appellants perfected a timely appeal to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the Court of Appeals and this court, we removed this case to our docket.

ASSIGNMENTS OF ERROR

Restated, appellants contend the district court erred in (1) failing to determine that the Bank made an inadequate pleading against them, (2) failing to conclude that the applicable statute of limitations barred the Bank's action against them, (3) incorrectly determining the date of sale of the property held under a trust deed in this matter, (4) failing to consider the sale price of the property held under the trust deed in computing the deficiency judgment, and (5) including certain expenses in the deficiency judgment.

SCOPE OF REVIEW

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. *Metropolitan Utilities Dist. v. Balka, ante* p. 172, 560 N.W.2d 795 (1997); *In re Estate of Muchemore, ante* p. 119, 560 N.W.2d 477 (1997).

The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly erroneous. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

ANALYSIS

This case is governed by the Act, which controls the use of deeds of trust in this state. See *Douglas Cty. Bank & Trust v. Stamper*, 244 Neb. 226, 505 N.W.2d 693 (1993). The Act provides two methods of foreclosing a trust deed. The trustee may

exercise the power of sale conferred by the trust deed or the beneficiary may foreclose in the same manner as provided by law for the foreclosure of mortgages. *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997). See, also, § 76-1005.

In this case, the Bank, as trustee, chose to exercise the power of sale conferred by the trust deed. In *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 774, 497 N.W.2d 38, 42 (1993) (quoting *Blair Co. v. American Savings Co.*, 184 Neb. 557, 169 N.W.2d 292 (1969)), we summarized this power as follows:

> "The Nebraska Trust Deeds Act . . . authorizes the use of trust deeds to secure the performance of obligations and prescribes, generally, the procedures for their execution and enforcement. The act provides that a trust deed may confer a power of sale upon the trustee. In the event of a default, the trust property may be sold by the trustee to satisfy the obligation secured. The act also provides for the substitution of trustees, reinstatement after default, and the procedure for the sale and conveyance of the trust property by the trustee.
>
> . . . .
>
> "The Nebraska Trust Deeds Act authorizes the use of a security device which was not available prior to its enactment. The act permits the use of an instrument which may be foreclosed by sale without the necessity of judicial proceedings. It authorizes and permits a method of financing which was not formerly available, since trust deeds have been considered to be subject to the same rules and restrictions as mortgages. [Citation omitted.] The act is complete in that it prescribes in detail the procedures to be followed in the execution and enforcement of trust deeds."

In *Meginnis*, we determined that § 76-1013 establishes the limitations period for "an action to recover a deficiency on any obligation, such as a promissory note or other contract, after sale of the real estate which secured the obligation pursuant to the Nebraska Trust Deeds Act." 242 Neb. at 775, 497 N.W.2d at 43. Section 76-1013 provides in relevant part: "At any time *within three months after any sale of property under a trust deed*, as hereinabove provided, an action may be commenced to

recover the balance due upon the obligation for which the trust deed was given as security . . . ." (Emphasis supplied.)

In this case, the pivotal issue is the date on which the "sale of property under a trust deed" occurred, because that is the date on which the 3-month limitations period began to run. The district court found that the sale under the trust deed occurred on September 7, 1994, the date the Bank sold the property to a third party for $40,000. We conclude that this finding was clearly erroneous. The phrase "sale of property under a trust deed" contained in § 76-1013 clearly refers to the exercise of the power of sale conferred by the trust deed upon the trustee pursuant to the statutory authority contained in § 76-1005. Under § 76-1003, a bank may be both the trustee and the beneficiary of a trust deed. Under § 76-1009, the beneficiary may bid at the public sale conducted by the trustee. Thus, when a bank which is both the trustee and beneficiary under a trust deed submits the highest bid at a public auction conducted pursuant to the Act, the resulting conveyance from the bank *as trustee* to the bank *as purchaser* constitutes the "sale of property under a trust deed" from which the 3-month limitations period is computed pursuant to § 76-1013. Any subsequent sale to a third party who did not bid at the public sale is not a "sale of property under a trust deed," but, rather, a sale by the party who acquired the property at such a sale.

We must, therefore, decide whether the sale under the trust deed occurred on May 24, 1994, the date of the initial sale and execution of the original trustee's deed, or on August 8, 1994, the date of the second sale and execution of the "Corrective Trustee's Deed." On its face, the trustee's deed executed on May 24 and recorded 3 days later conveyed legal title to the property which had been secured by the trust deed. The trustee's deed specifically recites that the trustee "sold said property at public auction to the BANK OF PAPILLION" at the public sale on May 24. The fact that no money changed hands in this transaction is not controlling, because the Bank was both the seller and purchaser in its different capacities as trustee and beneficiary. Under these circumstances, no actual payment of the bid price would have been required. The law does not require the doing

of a useless act. *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993).

By virtue of the May 24, 1994, trustee's deed, the Bank no longer held title to the property as trustee, but, rather, as the fee simple owner. A property owner holding property in fee simple is permitted to freely alienate any part of the property. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996).

There is uncontroverted evidence that the Bank considered itself the fee simple owner of the property upon receipt and recording of the original trustee's deed. John Schmid, the only employee of the Bank who testified at trial, stated that the Bank became "title owners" of the property after the May 24, 1994, sale. He testified that during June 1994, the Bank arranged for an appraisal, paid off a prior lien on the property in the amount of $10,675.66, cleaned the property and removed debris in preparation for sale, and placed a sign on the front lawn stating "For Sale By Owner." Schmid further testified that he personally showed the property to prospective purchasers and obtained two offers to purchase the property, one of which was accepted by the Bank.

Schmid testified that due to a "technical problem with the notice," a second public sale occurred on August 8, 1994. The record does not disclose the nature of this "problem," nor is there any evidence that appellants sought to invalidate the May 24, 1994, trustee's sale because of any deficiency in notice. The trustee's deed executed on May 24 contained specific recitals of compliance with notice requirements set forth in the Act. These recitals constituted "prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice." § 76-1010(1). Thus, during the period from May 27, when the original trustee's deed was recorded, until September 7, when the property was sold to a third party, the Bank was the fee simple owner of record in actual possession of the property. Anyone examining the public records or visiting the property during this period would have been placed on notice of the Bank's ownership.

Under these facts, we hold that for purposes of § 76-1013, the "sale of property under a trust deed" occurred on May 24, 1994, and that the petition for a deficiency judgment filed on

November 4, 1994, was outside the 3-month limitations period and thus barred. Because the August 8, 1994, sale at which the Bank purported to resell the property to itself was conducted unilaterally by the Bank for reasons which are not apparent from the record, it cannot be used to extend the 3-month period in which the Bank was required to file its deficiency action.

Because our holding on the statute of limitations issue is dispositive, we do not address appellants' other assignments of error. We, therefore, reverse the judgment of the district court and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, C.J., concurring.

I agree with the opinion of the majority. I write separately to simply point out that on the date of the sale, the outstanding balance on the note secured by the trust deed was $50,313.05. In its capacity as trustee, the Bank exercised the power of sale contained in the trust deed and purchased the property with a bid of $52,427.60, an amount which is admittedly in excess of the total indebtedness due the Bank.

There is no basis in fact for the recovery of a deficiency, since the sale price was in excess of the debt.

MCCORMACK, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. JEFF BOPPRE, APPELLANT.

567 N.W.2d 149

Filed August 1, 1997. No. S-96-309.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
3. **Postconviction: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
4. **Effectiveness of Counsel: Proof.** 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 and thereby obtain reversal of a defendant's con-

viction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

5. ____: ____. The two prongs of the test stated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
6. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
7. **Postconviction: Judgments: Proof: Appeal and Error.** A court making the prejudice inquiry in a postconviction proceeding must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.
8. **Postconviction: Effectiveness of Counsel: Proof.** The "prejudice" component of the test stated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
9. **Postconviction: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
10. **Postconviction.** A court is not required to grant an evidentiary hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidentiary hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
11. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
12. ____: ____. Where the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.
13. **Postconviction: Right to Counsel: Appeal and Error.** Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant.
14. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

Appeal from the District Court for Scotts Bluff County: RONALD D. OLBERDING, Judge. Affirmed.

Lawrence G. Whelan for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BURKHARD and CASSEL, D. JJ.

GERRARD, J.

INTRODUCTION

On March 13, 1989, the defendant-appellant, Jeff Boppre, was convicted, inter alia, of two counts of first degree murder for the deaths of Richard Valdez and Sharon Condon. On August 17, 1995, Boppre filed an initial motion for postconviction relief. Thereafter, on January 25, 1996, Boppre filed a second amended motion for postconviction relief, which hereinafter will be referred to as "the motion for postconviction relief." The district court overruled this motion without an evidentiary hearing. Boppre's motion for appointment of counsel for appeal of the ruling on the motion for postconviction relief was also denied. It is from these orders that Boppre timely appeals and argues, for a third time in this court, that he should be granted a new trial. Because we determine that the district court did not err in any respect, we affirm.

FACTUAL BACKGROUND

Pursuant to verdicts, Boppre was adjudged guilty of two charges of first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1995), two charges of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1995), and two charges of using a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). These charges arose out of the murders of Valdez and Condon on September 20, 1988. Boppre was sentenced to consecutive life terms of imprisonment on the murder convictions; to concurrent terms of 8 to 15 years' imprisonment on the robbery convictions; and to 6⅔ to 20 years' imprisonment on each of the use of a firearm convictions, to be served consecutively to the other sentences. Boppre's direct appeal was heard by this court, and his convictions were affirmed in *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990) (*Boppre I*). Boppre then appealed from the

district court's denial of a later motion for new trial on the basis of newly discovered evidence. We affirmed the denial of that motion in *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993) (*Boppre II*).

The facts underlying Boppre's convictions as adduced at trial are contained in *Boppre I* and are not repeated herein, except as otherwise indicated. Two key witnesses against Boppre were Alan Niemann and Kenard Wasmer, who testified as to the events of the night of September 20, 1988, and who accompanied Boppre to Arizona following the murders. Niemann testified that he was present at the Valdez residence at the time Boppre murdered Valdez and Condon. Wasmer also testified against Boppre. However, Wasmer maintained that he had not been present at the Valdez residence on the night of the murders.

Boppre filed a motion for postconviction relief in the instant cause, and, upon request, counsel was appointed to represent him on this motion in district court. In his motion for postconviction relief, Boppre alleged that he was denied effective assistance of counsel at trial because his trial counsel failed to develop the theory that it was Wasmer who murdered Valdez and Condon, as indicated by a pair of blue jeans that contained Condon's blood and enzyme type that were found in the trailer shared by Niemann and Wasmer and which fit the body structure of Wasmer. Boppre urges that this evidence places Wasmer at the scene, even though Wasmer claimed not to have been there. In addition, Boppre alleges that trial counsel failed to adequately examine and have tested grease stains found on the jeans to determine whether they matched the grease in which Valdez' alleged dying declaration was written. Accordingly, Boppre alleges that his trial counsel failed to adequately cross-examine witnesses, specifically Wasmer and Niemann, as to the stained jeans.

Boppre's motion was supported by the affidavit of Boppre's trial counsel, Leonard Tabor. Tabor's affidavit states that he remembers viewing the jeans during discovery and that he knew the jeans were found in the Wasmer/Niemann trailer, but that he was only recently informed that the jeans would have potentially fit the body structure of Wasmer rather than that of Boppre or Niemann. The affidavit states that until Tabor became

aware that the jeans would potentially fit Wasmer, rather than Boppre or Niemann, Tabor had not made the connection between the jeans and Condon's blood type. The affidavit states further that had Tabor made these connections, he would have used the evidence at trial to cross-examine Wasmer and Niemann and that his failure to do so was not part of his strategy at trial.

The district court denied Boppre's motion for postconviction relief without an evidentiary hearing. The district court found that trial counsel did pursue other theories of defense, including that either Wasmer or Niemann was the killer. In addition, the district court denied Boppre's motion for appointment of counsel to represent him in the appeal of this ruling. Boppre appeals both the denial of the postconviction motion without an evidentiary hearing and the denial of appointed counsel for the appeal.

SCOPE OF REVIEW

A criminal defendant requesting postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Massey, ante* p. 426, 562 N.W.2d 542 (1997); *State v. Randall*, 249 Neb. 718, 545 N.W.2d 94 (1996).

Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. Livingston*, 244 Neb. 757, 509 N.W.2d 205 (1993).

ASSIGNMENTS OF ERROR

Boppre asserts that the district court erred in (1) not granting an evidentiary hearing on his motion for postconviction relief, (2) not granting him a new trial on his motion for postconviction relief, (3) not appointing counsel to represent him on appeal of the overruling of the postconviction motion, and (4) using terminology that evinced bias and prejudice toward Boppre, thereby denying him due process of law.

ANALYSIS

INEFFECTIVE ASSISTANCE OF COUNSEL

Boppre first asserts that the district court erred in not granting an evidentiary hearing on his motion for postconviction relief and in not granting him a new trial on his motion for post-

conviction relief. Boppre contends that failure to use the blood-stained jeans to impeach Wasmer and as evidence of Wasmer's complicity was prejudicial error. In response, the State contends that there was substantial direct and circumstantial evidence against Boppre presented at trial and that implicating Wasmer in the killings would not exculpate Boppre. In order to resolve this issue, we must determine whether the failure of Boppre's trial counsel to identify the significance of the blood-stained jeans and to introduce the jeans at trial resulted in prejudice to Boppre.

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Massey, supra*; *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996). Boppre asserts that his Sixth Amendment right to effective assistance of counsel has been violated.

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 and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Massey, supra*; *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996). Because there was no evidentiary hearing, we examine Boppre's allegations to determine whether he alleges facts which, if proved, establish these elements.

The two prongs of the *Strickland* test may be addressed in either order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland v. Washington, supra*; *State v. Schoonmaker, supra*.

Thus, we will initially analyze the second prong of the *Strickland* test, which requires the defendant to make a showing of how he was prejudiced in the defense of his case as a result of his counsel's actions or inactions. *State v. Russell*, 248 Neb.

723, 539 N.W.2d 8 (1995). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Randall*, 249 Neb. 718, 545 N.W.2d 94 (1996); *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

(Citation omitted.) *Strickland v. Washington*, 466 U.S. at 693.

The defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington, supra*; *State v. Massey, ante* p. 426, 562 N.W.2d 542 (1997); *State v. Schoonmaker, supra*. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. *Strickland v. Washington, supra*; *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993). The U.S. Supreme Court in *Strickland* stated that

> [i]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached *would reasonably likely have been different* absent the errors.

(Emphasis supplied.) 466 U.S. at 695-96.

For the purposes of our analysis, we assume that Boppre could prove that the subject jeans would have fit Wasmer, and would not have fit Boppre or Niemann, and that the jeans were found in the Wasmer/Niemann trailer. Boppre argues that the jeans would have been useful to (1) implicate Wasmer by placing him at the scene and (2) impeach Wasmer and Niemann because both testified that Wasmer had not been at the scene. Thus, Boppre contends that trial counsel ought to have cross-examined Wasmer and Niemann about the jeans and ought to have introduced the jeans into evidence. However, while placing Wasmer at the scene would have been instrumental in showing that *Wasmer* was more involved in the events of the night of September 20, 1988, than he has admitted, it does not make it less probable that Boppre was involved as well.

While Wasmer and Niemann were important witnesses against Boppre, they were not the sole sources of incriminating evidence. There is evidence that Boppre had previously sought to kill Valdez. Ricky Zogg testified that approximately 2 months prior to the killings, Boppre had suggested that they kill Valdez and take his money and drugs. Zogg testified that he and Boppre had attempted to kill Valdez on two prior occasions. In addition, Boppre's gun was used in the murders. A firearms expert testified that bullets recovered at the crime scene and at the Boppre residence were fired from Boppre's gun, which was recovered along the route which the three men took to Arizona.

Writings that were introduced as Valdez' dying declarations incriminated Boppre. The letters "J-F-F B-O-P-E" were written in white grease on the floor and the letters "J-E-F-F" were written on the casement of the door. Both of these writings were near where Valdez' body was found. Further, Boppre was in possession of a large sum of money shortly after the date of the murders. While Boppre had made only a few small withdrawals from an automatic teller machine on the night of September 20, 1988, he was able to pay for most of the expenses on the trip to Arizona, and Boppre's friend, Cassi Bosworth, testified that upon arrival in Arizona, Boppre possessed approximately $700 to $800 in cash. Finally, Michael Neu, a fellow prisoner of Boppre's, testified as to incriminating statements that Boppre allegedly made to him.

Accordingly, in the instant case, there is other evidence sufficient that it cannot be said, to a reasonable probability, that the result would have been different had defense counsel used the jeans to impeach Niemann and Wasmer and to implicate Wasmer. The " 'prejudice' component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). Given the weight of the evidence against Boppre and the inconclusive manner in which the jeans would have been useful to his defense, it cannot be said that the trial was unreliable or fundamentally unfair.

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). However, a court is not required to grant an evidentiary hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidentiary hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable. *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996); *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992). The files and records do not show a denial of Boppre's constitutional rights because, even taking the facts as he asserts them, Boppre has not proved that he was prejudiced by any alleged deficiencies in his trial counsel's performance. Because we determine that Boppre was not sufficiently prejudiced in this matter, we do not address whether his trial counsel's performance was, in fact, deficient.

For the foregoing reasons, we conclude that the district court did not err in denying Boppre an evidentiary hearing. We further conclude that the district court did not err in overruling

Boppre's motion for postconviction relief and, consequently, in denying him a new trial.

Appointment of Counsel

Boppre next asserts that the district court erred in not appointing counsel to represent him on this appeal regarding the overruling of his motion for postconviction relief.

Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Parmar, supra*; *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). See, also, Neb. Rev. Stat. § 29-3004 (Reissue 1995).

We have held that where the defendant's petition presented a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel. *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988). Conversely, we have held that where the assigned errors in the postconviction petition before the district court were either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant. *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993).

In the instant case, Boppre was appointed counsel to assist him on his postconviction motion in the district court. Further, because the postconviction motion before the district court did not establish that Boppre was prejudiced by alleged ineffective assistance of counsel, it failed to present a justiciable issue of law or fact to the court. Under such circumstances, we conclude that the district court did not abuse its discretion in refusing to appoint counsel for the appeal of the denial of the postconviction motion in the case at bar.

Judicial Bias

Finally, Boppre asserts that the district court used language in its orders of February 21, 1996, and March 26, 1996, that evidenced bias and a negative disposition toward Boppre. Specifically, Boppre contends that the court's reference to him as a "convict" throughout the orders was derogatory and disrespectful and gave the appearance of bias. Boppre asserts that the

trial judge should have, therefore, recused himself from the case.

A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992). Boppre has not met this burden in the instant case. The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), refers to the individual seeking postconviction relief as a "prisoner in custody" and as "the prisoner." Black's Law Dictionary 333 (6th ed. 1990) defines a "convict" as "[o]ne who has been adjudged guilty of a crime and is serving a sentence as a result of such conviction. A prisoner." The district court's use of either the word "convict" or "prisoner" accurately described Boppre and his statutory status at the time that his motion was filed. Indeed, this court has, in the past, referred to Boppre as a "convict." See *Boppre II*.

Consequently, the district court's use of the term "convict" in this context, without other evidence of bias or prejudice, does not overcome the presumption of impartiality and does not evince due process concerns. This assignment of error is without merit.

CONCLUSION

Finding no merit in any of Boppre's assigned errors, we affirm the judgment of the district court.

AFFIRMED.

CRYSTAL D. CHILDERS, APPELLANT AND CROSS-APPELLEE, V. PHELPS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION AND NONPROFIT CORPORATION, APPELLEE AND CROSS-APPELLANT.

568 N.W.2d 463

Filed August 8, 1997. No. S-95-1084.

1. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
2. **Trial: Rules of Evidence: Expert Witnesses.** In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions:

(1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.

3. **Trial: Rules of Evidence: Witnesses.** Under Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 1995), opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
4. **Trial: Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value.
5. **Trial: Witnesses.** Lay witnesses may testify in the form of opinions or inferences only when those opinions or inferences are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue.
6. **Trial: Witnesses: Appeal and Error.** A trial court is given discretion in determining whether a sufficient basis for a lay witness' opinion has been established, and such determination will not ordinarily be disturbed on appeal absent an abuse of that discretion.
7. **Motions to Dismiss: Directed Verdict.** A motion to dismiss in a nonjury trial is equivalent to a motion for directed verdict in a jury trial.
8. **Motions to Dismiss: Proof.** In a court's review of the evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and he has made a prima facie case, the motion to dismiss is to be overruled.
9. **Motions to Dismiss.** When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion.
10. ____. On a motion to dismiss, if there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law; at that point, a court must assume that all of the evidence presented by the plaintiff is true, even when the evidence is contradicted.
11. **Judgments.** In rendering judgment as the finder of fact, a trial court resolves credibility issues and weighs the evidence in the same manner as does a jury.
12. **Negligence: Proximate Cause: Liability.** If the effects of a defendant's negligence actively and continuously operate to bring about harm to another, the fact that the active negligence of a third person is also a substantial factor in bringing about harm does not protect the defendant from liability.
13. **Political Subdivisions Tort Claims Act: Counties: Highways.** The duty of care imposed by the Political Subdivisions Tort Claims Act upon a county is to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while the traveler is in the exercise of reasonable and ordinary caution and prudence.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Reversed and remanded for further proceedings.

Robert P. Chaloupka, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., and Jeffrey M. Cox, of Person, Dier, Person, Osborn & Cox, P.C., for appellant.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

In this case arising under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1992), the plaintiff-appellant, Crystal D. Childers, seeks damages for the alleged negligent failure of the defendant-appellee, Phelps County, to have properly posted and maintained traffic signs on one of its roads. The district court sustained the county's motion for dismissal made at the close of Childers' evidence. Childers appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) excluding certain testimony and (2) sustaining the county's motion. The county cross-appealed, asserting that the district court erred in admitting certain evidence. Under our authority to regulate the caseloads of the Court of Appeals and this court, we, on our own motion, removed the matter to our docket. We reverse, and remand for further proceedings.

I. FACTS

On June 23, 1993, Childers and Shari Unger decided to drive from the latter's house in Loomis to a truckstop in Overton to eat breakfast. The two left somewhere between 10:30 p.m. and midnight, with Unger driving on the so-called Loomis Blacktop Road, on which the speed limit is 55 miles per hour. The road contains a sharp curve and is marked by solid yellow lines in the center and white lines on both sides, which are clearly visible at night. Although Unger had ridden as a passenger on the

Blacktop Road on several occasions, she had never driven it at night.

A gravel road, the so-called River Road, intersects the Blacktop Road at the curve. A yellow diamond-shaped warning sign with the word "SLOW" printed in black is located approximately 950 feet from the curve. Additionally, a yellow diamond-shaped warning sign with a graphic of a black arrow bent at a right angle is located 435 feet from the curve. This sign can be seen from 1,000 feet and read from at least 500 feet and is clearly visible at night. Thus, if a driver were traveling at 60 miles per hour toward the sign, the sign would be readable for approximately 6 seconds.

On the night in question, rain was falling so hard and causing such poor visibility that at one point Unger stopped to discuss whether to return home. Nonetheless, Unger had no trouble negotiating the curve on the way to Overton; she proceeded cautiously enough that she could see the surface and the lines on the Blacktop Road.

The two girls left Overton between midnight and 2 a.m. Although it was still dark, the rain had stopped. According to Unger, she was driving approximately 55 miles per hour, her headlights were working, and she could see adequately. Notwithstanding that she and Childers were listening to the radio, talking, and would occasionally turn toward each other, Unger testified that she was awake and paying attention.

Unger does not recall seeing the "SLOW" warning sign. As they neared the curve, Childers warned Unger, "[D]on't forget the curve." Unger testified that she did not see any sign prior to the curve until Childers said, "curve sign." Traveling at 55 miles per hour when she passed the turn sign, Unger slowed to about 45 or 50 miles per hour at the curve. She testified that she knew the curve was coming up, but did not know exactly where it was. After Unger caught "a quick glance" of the curve depicted on the turn sign, her "reaction was to take [her] foot off the gas and brake." However, she did not brake hard enough and "came to a point where there was either the curve or the gravel road that went straight ahead." She was confused and did not know whether to take the River Road or to attempt the curve, and ended up going between the two. In her own words, she was

"just going too fast to not make the curve and just the two roads just really screwed me up. I didn't really know which way to go." The automobile then traveled from the edge of the Blacktop Road approximately 50 to 55 feet into a guy wire, climbed the wire, and flipped over. Childers sustained serious injuries.

Unger does not recall whether she applied the brakes prior to going off the road and at a later point testified that she does not remember applying her brakes at all. She testified that had she known she was approaching the sharp curve, she would have reduced her speed gradually to a speed that would have allowed her to negotiate it.

In the spring of 1994, the county placed chevrons at the curve. On the evening prior to her later trial testimony, Unger drove through the curve again. The district court did not allow her to testify as to whether she could have seen the location of the curve sufficiently to negotiate it. However, Unger did testify that she again drove at 55 miles per hour, that she exercised the same degree of attention, and that the presence of the chevrons made it "more possible" to determine where the curve was.

Neither did the district court allow Unger to testify as to whether she would have been able to safely negotiate the curve had it appeared as depicted in certain computer-altered photographs purporting to depict how the curve would appear at night if marked with chevrons or reflectors. Childers made an offer of proof that Unger would have been able to successfully negotiate the curve had it been marked as depicted in the altered photographs.

The county's sign superintendent, Dick Stadler, is responsible for the road signs, markers, delineators, and the like in the county. As part of his responsibilities, he drives around the county and ensures that signage is in place and accurate. Stadler also has the responsibility of fixing or replacing broken or missing delineators (reflectors mounted on posts) and checks all roads once or twice a month. If he notices that a sign needs either replacing or repair, he prepares a written sign report. Stadler testified that not all of the posts had reflector strips on June 24, 1993.

A photograph of the curve taken in July 1993 shows multiple delineators either missing or broken. Likewise, a photograph

taken in February 1994 shows delineators missing or broken. Stadler did not replace the delineators in a timely manner because the county ran out of them. Eventually, he contacted the state highway department for help. In the spring of 1994, Stadler replaced the delineators with chevrons.

Dr. Ronald J. Hensen, a civil engineer with a background in traffic safety and engineering and a consultant on projects dealing with traffic safety, signaling, and signage programs, visited the accident site on June 29, 1994. Among other things, he observed where the delineators had originally been placed.

According to Hensen, the accident scene is clearly hazardous. The curve has a very short radius and should have a recommended speed of 25 to 30 miles per hour. Hensen explained that historically, motorists often fail to successfully negotiate sharp curves that follow long straight stretches of road and that such situations require more than advance warning signs. He testified that the fact that people often fail to successfully negotiate the curve in question, as other witnesses testified, is the most significant factor in determining that the curve is dangerous. Hensen also testified that the "SLOW" sign provides no guidance to the driver, is inappropriate, and should not be used.

The Nebraska Department of Roads has adopted a Manual on Uniform Traffic Control Devices, which, according to Hensen, reflects the standard of care within the State of Nebraska with regard to proper warnings to a motorist of a hazardous curve. According to the manual, "[t]he determination of the sign or signs to be erected shall be on the basis of an engineering study using the following sections as guidelines." The manual recommends that jurisdictions without qualified engineers on their staffs seek assistance from the state highway department, their county, a nearby large city, or a traffic consultant. Hensen testified that the Nebraska highway department is available as a resource to assist the county in traffic safety.

Hensen is of the view that the county failed to act reasonably and prudently with regard to warning motorists of the hazardous corner in question. According to Hensen, the corner requires three things: the advance warning turn sign, a speed plate under the advance warning turn sign indicating what is the safe speed for driving the curve, and chevrons on the back side of the curve

to show the location of the curve. In Hensen's opinion, the county failed to meet this standard of care, and the proximate cause of the accident was the county's failure to have in place adequate signage to assure that a driver would not be confused by the location of the curve.

Hensen explained that delineators are used to indicate the edge of a road, while chevrons are used to indicate a sharp change in alignment. Hensen is of the view that at the time of the accident, the curve had only three delineators visible to the eastbound nighttime traffic. According to him, the delineators did not effectively mark the corner and did not indicate the change in direction, mainly because there were delineators on both sides of the road. In Hensen's opinion, the delineators were misleading. According to him, for delineators to be effective, the reflectors must be within 45 degrees of the headlights and on every post. Further, according to Hensen, once a county installs a traffic control device, it has a responsibility to keep it in place.

In sustaining the county's motion, the district court stated:

> Well, I am not so sure it is a question of the absence of proof for proximate cause is concerned. I kicked this around in my head last night quite a while because I anticipated your argument this morning, at least in part. And every once in a while the Court has to do something it doesn't like to do. I don't — I certainly don't like to do this but I am going to grant the motion to dismiss. I believe the proximate cause of this accident was the driver. Regardless of how long I take it under advisement or how much I ponder it, why, that is a factual finding that I just can't seem to get around. So motion to dismiss will be granted.

The district court also made a number of factual findings in support of its conclusions that Unger drove at an unsafe speed and had failed to keep a proper lookout and proper control of her automobile.

II. COUNTY'S CROSS-APPEAL

Since the county's cross-appeal involves an issue which affects our consideration of Childers' appeal, we first direct our attention to the county's claim that the district court erred by

receiving into evidence Hensen's opinion that the inadequate signage was the proximate cause of the accident.

1. SCOPE OF REVIEW

Our review of this claim is controlled by the rule that the admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Thieszen, ante* p. 208, 560 N.W.2d 800 (1997); Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995).

2. APPLICATION OF LAW TO FACTS

In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to § 27-702; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

There is no dispute whatsoever as to Hensen's qualifications as a traffic safety engineering and accident reconstruction expert. Neither is the issue one that the probative value of Hensen's opinion is outweighed by the danger of unfair prejudice.

Further, Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 1995), provides that opinion testimony is "not objectionable because it embraces an ultimate issue to be decided by the trier of fact." As such, Hensen's opinion is not inadmissible because it embraces the ultimate issue as to the proximate cause of the accident giving rise to Childers' injuries. See *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). It is also undisputed that Hensen's opinion would assist the trier of fact, which, in this case, was the trial court, to whose discretion in admitting the opinion of an otherwise qualified expert, absent abuse thereof, this court must defer.

The sole question as to the admissibility of Hensen's opinion is whether it is of probative value and thus relevant. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995).

The record demonstrates that Hensen was in possession of such facts as to enable him to express a reasonably accurate conclusion as to the proximate cause of the accident. Hensen testified that he had extensive knowledge and expertise in the area of foreseeable or predictable driver error. He explained that predictable driver error involved an evaluation of various conditions of roadway alignment and traffic control devices to determine the percentage of drivers which, in spite of the traffic control devices, will fail to act and have an accident.

Hensen was specifically asked, based upon his investigation in this matter, to identify the actions or omissions of Unger that were relevant to his determination of proximate cause. Hensen testified that he heard Unger discuss two such acts or omissions. One was her delayed reaction to seeing the sign, and the other was her not being able to find the curve. Hensen said that he understood that Unger was alert and looking forward at the time of the accident and was not intoxicated or unable to make the proper responses due to any incapacity.

Hensen testified that Unger clearly demonstrated the difference between pure driver inattention or plain mistake, and probable driver confusion based on roadway conditions. Hensen opined that the proximate cause of the accident was the failure of the county to have in place adequate signing to ensure that the driver would not be confused by this location. His opinion was based upon reasonable engineering certainty, taking into account his understanding of the conditions that confronted Unger, the fact that the location at issue was typical of the type of area that causes driver confusion, and his knowledge of predictable driver error.

Based on the foregoing, the district court received into evidence Hensen's opinion as to the proximate cause of the acci-

dent. Even though Hensen's opinion may have been better expressed in terms of "a" proximate cause rather than "the" proximate cause of the accident, the district court did not abuse its discretion in admitting Hensen's opinion. It is true that we have ruled, in circumstances where an expert had no underlying facts or data upon which to base his or her opinion, that such opinion should be stricken. See *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984). However, in the instant case, Hensen clearly interfaced his knowledge of predictable driver error with the facts and circumstances that existed for Childers and Unger during the early morning hours of June 24, 1993.

3. Resolution

Thus, we conclude that the district court did not err in admitting Hensen's opinion as to the proximate cause of the accident.

III. CHILDERS' APPEAL

1. Exclusion of Testimony

That brings us to Childers' appeal and the contention in the first assignment of error that the district court wrongly refused to permit Unger to testify as to whether she would have been able to safely negotiate the curve had it appeared as it was depicted in the computer-altered photographs described in part I above.

(a) Scope of Review

This assignment of error is reviewed under the rule that where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by rule, not by judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *Koehler v. Farmers Alliance Mut. Ins. Co., ante* p. 712, 566 N.W.2d 750 (1997); *In re Interest of Tabatha R., ante* p. 687, 564 N.W.2d 598 (1997).

(b) Application of Law to Facts

Lay witnesses may testify in the form of opinions or inferences only when those opinions or inferences are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in

issue. Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 1995). A trial court is given discretion in determining whether a sufficient basis for a lay witness' opinion has been established, and such determination will not ordinarily be disturbed on appeal absent an abuse of that discretion. *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

But it is clear that rule 701 does not permit a lay witness to render an opinion based upon obvious speculation or conjecture. *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983). Furthermore, the opinion must be based on the witness' perception of the facts. *Belitz v. Suhr*, 208 Neb. 280, 303 N.W.2d 284 (1981).

The opinion sought from Unger was not based on her perception of the facts, but on her viewing of computer-altered photographs for which no foundation had been laid, which had not yet been received in evidence, and which were later admitted only for the limited purpose of illustrating Hensen's opinions.

(c) Resolution

Under those circumstances, it cannot be said that the district court abused its discretion in excluding the questioned testimony. This assignment of error thus fails.

2. Motion to Dismiss

In the second assignment of error, Childers contends both that the district court wrongly made up its mind before it heard all the evidence and that it improvidently sustained at the close of Childers' evidence the county's motion for dismissal.

(a) Scope of Review

A motion to dismiss in a nonjury trial is equivalent to a motion for directed verdict in a jury trial. *Ethanair Corp. v. Thompson, ante* p. 245, 561 N.W.2d 225 (1997); *Kreus v. Stiles Service Ctr.*, 250 Neb. 526, 550 N.W.2d 320 (1996). Thus, in a court's review of the evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and he has

made a prima facie case, the motion to dismiss is to be overruled. See, *Kreus, supra*; *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996).

(b) Application of Law to Facts

We note as an initial matter that Childers' assertion that the district court made up its mind before it heard all the evidence does not meaningfully contribute to the analysis of the issue presented. It is true that a judge acting as a fact finder on the merits should, as should any other fact finder, keep an open mind until all the evidence and the arguments of the parties have been heard, see *In re Estate of Ayers*, 84 Neb. 16, 120 N.W. 491 (1909), but the legal reality remains that upon a defendant's motion at the close of a plaintiff's case, a judge must determine whether the plaintiff has made a prima facie case; if not, the lawsuit is subject to dismissal at that point, *Schroeder v. Bartlett*, 129 Neb. 645, 262 N.W. 447 (1935). Thus, the question is simply one of determining whether the district court correctly sustained the county's motion for dismissal.

As explained in *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986), it is important when a trial court acts as the finder of fact in an action tried without a jury not to confuse its function in ruling on a motion to dismiss with its function in adjudicating the controversy. When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion. *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997); *Hill, supra*; *Herman, supra*. On such a motion, if there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law. *Hill, supra*; *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). At that point, a court must assume that all of the evidence presented by the plaintiff is true, even when the evidence is contradicted. See *Knaub, supra*. In contrast, in rendering judgment as the finder of fact, a trial court resolves credibility issues and weighs the evidence in the same manner as does a jury. *Herman, supra*.

Childers does not argue that Unger was not negligent and that her negligence was not a proximate cause of the accident;

rather, Childers contends that the county was negligent as well and that such negligence was also a proximate cause of the accident. See *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994) (if effects of defendant's negligence actively and continuously operate to bring about harm to another, fact that active negligence of third person is also substantial factor in bringing about harm does not protect defendant from liability). In short, Childers argues that the district court was wrong in ruling as a matter of law that Unger's negligence was the sole proximate cause of the accident.

We recently addressed a county's duty with respect to the construction, maintenance, and repair of its highways and bridges in *Millman v. County of Butler*, 244 Neb. 125, 504 N.W.2d 820 (1993). In *Millman*, a passenger died when the truck in which he was riding, traveling at 10 miles per hour as it approached a bridge, slid through the railing of the bridge and fell into the creek below. The trial court found that the county was negligent in the construction and maintenance of the bridge by failing to provide adequate railings and by failing to post signs along the roadway warning of the dangers of the road and bridge and that such negligence was the proximate cause of the accident resulting in the passenger's death. In affirming, we wrote that

> the duty of care imposed [on counties] by the Political Subdivisions Tort Claims Act is "to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence."

Id. at 131, 504 N.W.2d at 824 (quoting *Hendrickson v. City of Kearney*, 210 Neb. 8, 312 N.W.2d 677 (1981)).

If Childers' evidence were believed, a finder of fact could reasonably find that the county had been negligent and might or might not conclude therefrom that the county's negligence contributed to Unger's failure to identify the precise location of the curve, notwithstanding her knowledge that it existed.

(c) Resolution

That being so, this assignment of error has merit, for the district court erred in resolving the issue of the county's liability as

a matter of law by sustaining the county's motion for dismissal at the close of Childers' evidence.

IV. CONCLUSION

Accordingly, the judgment of the district court is, as noted earlier, reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE NEW LIGHT COMPANY, INC., DOING BUSINESS AS THE GREAT WALL RESTAURANT, APPELLANT, V. WELLS FARGO ALARM SERVICES, A DIVISION OF BAKER PROTECTIVE SERVICES, INC., AND GENERAL ELECTRIC COMPANY, JOINTLY AND SEVERALLY, APPELLEES.

567 N.W.2d 777

Filed August 8, 1997. No. S-95-1123.

1. **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.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Pleadings.** 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 permitted where they are proposed at an opportune time and will be in the furtherance of justice.
4. **Actions: Parties.** The propriety of substituting parties depends on whether the cause of action otherwise remains the same. Where such substitution will introduce a new cause of action into the case, the substitution will not be allowed.
5. ____: ____. In determining whether a new cause of action results from the substitution of parties, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced.
6. ____: ____. In order to substitute one party for another, the party substituted must bear some relation to the original party or possess an interest in the controversy sufficient to enable that party to maintain the proceeding.

7. **Pleadings: Appeal and Error.** It is an abuse of discretion to refuse to permit an amendment to a pleading which is proposed at an opportune time and in the furtherance of justice.
8. **Corporations: Words and Phrases.** A corporation is a legal entity complete and separate from its shareholders and officers.
9. **Limitations of Actions.** The main purpose of a statute of limitations is to notify the defendant of a complaint against it within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against it long after the time it could have prepared a defense against the claim.
10. **Pleadings: Limitations of Actions.** Where an amendment to a pleading does not introduce a new cause of action, but, rather, relies upon the same set of facts as the original pleading and the defendant is not prejudiced by the amendment, the right to a statute of limitations defense has not been violated.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded with directions.

Bruce C. Kempton and Jeffrey R. Learned, of Morrison, Mahoney & Miller, and Kile W. Johnson and Mark T. Gokie, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellant.

Michael G. Connery and Diana J. Vogt, of Kutak Rock, for appellee Wells Fargo.

Con M. Keating, of Keating, O'Gara, Davis & Nedved, P.C., for appellee General Electric.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

The plaintiff, The New Light Company, Inc. (New Light), appeals a summary judgment in favor of the defendants, Wells Fargo Alarm Services (Wells Fargo) and General Electric Company (General Electric), which was granted by the district court after the plaintiff's motion to substitute the real party in interest was overruled.

SCOPE OF REVIEW

The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Id.*

FACTS

On January 7, 1989, a fire damaged The Great Wall Restaurant (Great Wall) located at 1013 Farnam Street in Omaha, Nebraska. On January 4, 1991, New Light, doing business as The Great Wall Restaurant, filed a petition against the defendants to recover damages resulting from the fire.

In its petition, New Light alleged that on July 1, 1983, Great Wall and Wells Fargo entered into an alarm installation contract pursuant to which Wells Fargo installed a fire detection/protection system at 1013 Farnam Street. On or about October 6, 1988, Great Wall and Wells Fargo entered into a renewal of the alarm service agreement, which agreement was in effect on January 7, 1989. The contracts with Wells Fargo for alarm installation and maintenance named the Great Wall at 1013 Farnam Street as the subscriber. New Light alleged that the fire was caused by a defective, unsuitable, and unreasonably dangerous light fixture manufactured by General Electric and that as the result of Wells Fargo's grossly negligent and/or willful and wanton conduct in failing to properly design and maintain its detection system, the fire spread undetected.

New Light is a corporation which owns two Great Wall restaurants, located at 144th and Arbor Streets and 72d and Farnam Streets in Omaha, but it does not own the Great Wall at 1013 Farnam Street. In 1992, New Light was owned 90 percent by Grace Ai-Chu Huang, its president, and 10 percent by Joseph Chieng Kuo. Huang is now deceased, and Kuo is the corporation's president, sole director, and registered agent.

Galilee International (Galilee) is a corporation owned by Kuo and his wife. It owns and operates the Great Wall at 1013 Farnam Street. Common to both Galilee and New Light is the fact that Kuo is the president, sole director, and registered agent of each. Although the evidence is not entirely clear, the restau-

rants apparently had the same bookkeeper. Additionally, all three Great Wall locations were covered by the same property insurance policy, issued by Grain Dealers Insurance Company, which policy listed "The Great Wall Restaurant" as the insured.

In response to interrogatories dated July 3, 1992, New Light informed Wells Fargo that Galilee owned and operated the Great Wall at 1013 Farnam Street. According to General Electric's affidavit, General Electric was not aware that Galilee was the owner of the Great Wall at 1013 Farnam Street until after the deposition of Kuo on June 20, 1995.

On August 4, 1995, the defendants moved for summary judgment on the grounds that New Light was not the real party in interest and that allowing substitution of the real party in interest (Galilee) would violate the defendants' substantial rights. On September 8, New Light moved to amend its petition to name the proper plaintiff. On September 20, the district court overruled the motion to amend, granted the defendants' motion for summary judgment, and dismissed New Light's petition with prejudice. New Light timely appealed.

ASSIGNMENT OF ERROR

New Light asserts that the district court erred in denying its motion for leave to amend its petition and, as a result, dismissing the petition.

ANALYSIS

The ultimate issue in this case is whether the district court abused its discretion by refusing to permit New Light to substitute Galilee as the plaintiff and real party in interest. As New Light correctly points out, had the court permitted the substitution of Galilee as the real party in interest, there would be no basis for the court's summary judgment and dismissal of the petition.

The applicable statute regarding amendments to pleadings, Neb. Rev. Stat. § 25-852 (Reissue 1995), provides:

> The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of the

> party or a mistake in any other respect or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of Chapter 25, the court may permit the same to be made conformable thereto by amendment.

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, § 25-852 is to be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice. See, *Postma v. B & R Stores*, 250 Neb. 466, 550 N.W.2d 34 (1996); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

Our most recent case addressing the substitution of a plaintiff after the statute of limitations period has run is *Hoiengs*. In *Hoiengs*, William Fairbanks, an employee of York County, sought a declaration that employees of the 91 defendant counties were entitled to certain benefits under the County Employees Retirement Act, Neb. Rev. Stat. § 23-2301 et seq. (Reissue 1991). The defendants' demurrers to the petition were sustained, the petition was dismissed, and Fairbanks appealed. While the appeal was pending, Fairbanks' employment was terminated, and he withdrew all of his retirement funds. Upon Fairbanks' motion, the Nebraska Court of Appeals granted leave to substitute Daniel Hoiengs, an employee of the defendant Cass County, as the plaintiff.

We considered whether it was proper to permit the substitution of another plaintiff. In requesting the amendment, Fairbanks sought to substitute one employee of the defendant counties for another. No other change was sought or made, and the newly named plaintiff bore the same relationship to the dispute as did his predecessor. We found that under the circumstances, it could not be said that the Court of Appeals abused its discretion in permitting Hoiengs to be substituted as the plaintiff.

In so doing, we set forth the propositions of law which controlled our resolution of that issue. We stated that the propriety of substituting parties depends on whether the cause of action

otherwise remains the same. Where such substitution will introduce a new cause of action into the case, the substitution will not be allowed. We held that in determining whether a new cause of action results from the substitution of parties, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced. In addition, we stated that in order to substitute one party for another, the party substituted must bear some relation to the original party or possess an interest in the controversy sufficient to enable that party to maintain the proceeding.

In *Hoiengs*, we reiterated that the decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. However, § 25-852 is to be liberally construed and amendments permitted when proposed at an opportune time in the furtherance of justice. Thus, we noted *Kleinknecht v. McNulty*, 169 Neb. 470, 100 N.W.2d 77 (1959), in which we held that it was an abuse of discretion to refuse to permit an amendment proposed at an opportune time and in the furtherance of justice.

New Light contends that the substitution of Galilee would not introduce a new cause of action because the underlying facts, evidence, and damages remain the same and that Galilee possesses an interest in the controversy sufficient to enable it to maintain the proceeding. Conversely, the defendants argue that because New Light was never a party in interest, the substitution of Galilee introduces a new cause of action. The defendants further assert that since the case was not instituted by the real party in interest, there is no viable cause of action to amend. Finally, they claim that the substitution of Galilee as plaintiff would violate their "substantial right" to a statute of limitations defense.

In deciding whether it was an abuse of discretion for the district court to refuse New Light's request to substitute Galilee as the real party in interest, the first question is whether the substitution would introduce a new cause of action. The answer is determined by our decision in *Hoiengs*. The test pronounced by *Hoiengs* is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced.

The defendants argue that *Hoiengs* is distinguishable because the plaintiff in *Hoiengs* had standing at the suit's inception. They argue that a cause of action consists of a group of facts which establish the legal liability of the named defendant to the named plaintiff. Therefore, the defendants contend that there never was a viable petition to amend or, in the alternative, that the substitution of the real party in interest would create a new cause of action or a substantial change in the original cause of action.

In *McDonald v. State of Nebraska*, 101 F. 171, 178 (8th Cir. 1900), an early case which considered the right of a party to amend because the suit was brought in the name of the wrong party, the court stated:

> A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment.

This rationale is consistent with our decision in *Hoiengs*. Here, it is the legal obligation or liability of the defendants that must not be changed by the amendment to the petition.

We thus consider whether the substitution in this case introduced new facts which would give rise to a wholly distinct and different legal obligation against the defendants, or change the liability sought to be enforced. See *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). General Electric

stated in its brief that if New Light were allowed to substitute Galilee as the plaintiff, the facts from which the cause of action arose would remain the same, the "substantive cause of action" would remain the same, and the named defendants would remain the same. Brief for appellee General Electric at 8. Yet, at oral argument, General Electric claimed that its experts had spent much time analyzing New Light's tax returns, profit-and-loss statements, and balance sheets in order to determine damages for lost profits and that the measure of damages would be changed if Galilee was substituted for New Light. Wells Fargo, on the other hand, stated at oral argument that other than the change in named plaintiffs, the substitution of Galilee for New Light would not change any of the underlying facts or the measure of damages.

We find that the substitution of Galilee for New Light would not give rise to a wholly distinct and different legal obligation against the defendants or change the liability sought to be enforced. We observe that discovery focused on the events and contracts in issue, which revolved primarily around the Great Wall located at 1013 Farnam Street, rather than who was the actual corporate owner. When discovery was conducted on the Great Wall's corporate owner, it was in the form of the deposition of Kuo, who was the president, sole director, and registered agent of both New Light and Galilee. Interrogatories were answered with regard to the 1013 Farnam Street restaurant. The alarm service contracts in question listed the Great Wall at 1013 Farnam Street as the subscriber, without regard to the corporate owner. Likewise, the named insured in the property insurance policy, which included information regarding business income for the various locations, was "The Great Wall Restaurant."

The facts giving rise to this cause of action involve only the Great Wall located at 1013 Farnam Street and the alarm service contracts which Wells Fargo entered into with the Great Wall at that location. Any damages as a result of the fire, including loss of profits, would be related to the operation of the restaurant at this location only, not at another Great Wall restaurant, regardless of the corporate ownership.

Thus, we conclude that the substitution of Galilee for New Light would not introduce a new cause of action. It would not

change the legal obligation against the defendants, nor would it change the liability sought to be enforced.

We next consider the requirement that the substituted party must bear some relation to the original party or possess an interest in the controversy. We stated in *Hoiengs* that in addition to the requirement that the substitution not introduce a new cause of action, "in order to substitute one party for another, the party substituted must bear some relation to the original party or possess an interest in the controversy sufficient to enable that party to maintain the proceeding." 245 Neb. at 885-86, 516 N.W.2d at 232.

It is not disputed that New Light and Galilee are two distinct corporations. A corporation is a legal entity complete and separate from its shareholders and officers. *Slusarski v. American Confinement Sys.*, 218 Neb. 576, 357 N.W.2d 450 (1984). However, we need not address whether under *Hoiengs* the relationship between Galilee and New Light is significant enough to permit the substitution of the parties, because it is clear that, regardless, Galilee possesses an interest in the controversy as the real party in interest. In *Hoiengs*, we did not require that the substituted party must be related to the original plaintiff and have a sufficient interest in the controversy. Instead, we held that the substituted party must be related to or have a sufficient interest in the controversy. Galilee has met this requirement, since it clearly has a sufficient interest in the cause of action.

Finally, we consider the defendants' contention that the substitution of Galilee as plaintiff would violate their substantial right to a statute of limitations defense. Neb. Rev. Stat. § 25-853 (Reissue 1995) provides that the court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. Thus, we have previously considered the propriety of allowing an amendment of pleadings by analyzing whether the amendment affected the adverse party's substantial rights. See *Schwank v. County of Platte*, 152 Neb. 273, 40 N.W.2d 863 (1950).

In arguing that the substitution of Galilee would violate their substantial rights, the defendants rely on *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991). Our decision in

Givens dealt with the question of whether subsections (2) and (5) of the 1981 amendment to a statute of limitations, Neb. Rev. Stat. § 25-224 (Reissue 1979), could be retroactively applied to causes of action based upon injury allegedly resulting from exposure to asbestos products, which causes had earlier been extinguished by the provisions of subsection (2) of the 1978 enactment of § 25-224. The question presented was whether the amended statute could be retroactively applied to lift a bar which had already been completed before the exception was adopted. We held that the amendment could not resurrect an action which the prior version of the statute had already extinguished.

Givens does not reflect the factual situation presented in this case. It is true that had the cause of action against the defendants been time barred as to all plaintiffs, the defendants would have a substantive right to assert the statute of limitations. However, in contrast to *Givens*, it is clear that Galilee had a right to bring a cause of action against the defendants at the time New Light filed the petition. The only issue is whether an amendment substituting Galilee as plaintiff relates back to the original petition.

In *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988), we explained that the main purpose of a statute of limitations is to notify the defendant of a complaint against it within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against it long after the time it could have prepared a defense against the claim. We noted that similar principles exist under Fed. R. Civ. P. 15(c) and quoted the following from *Wirtz v. W. G. Lockhart Construction Co.*, 230 F. Supp. 823 (N.D. Ohio 1964):

> "So long as the original complaint notices the defendant that a claim is lodged against him, amendment will be freely granted to help in particularizing the claim, so long as the purported amendment does not in fact serve as a subterfuge for including a *separate* claim which would otherwise be barred at the time of amendment."

(Emphasis in original.) *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. at 796, 420 N.W.2d at 298.

Accordingly, where the amendment does not introduce a new cause of action, but, rather, relies upon the same set of facts as

the original pleading and the defendant is not prejudiced by the amendment, the right to a statute of limitations defense has not been violated. See *West Omaha Inv. v. S.I.D. No. 48, supra.* Having already concluded that the substitution of Galilee would not introduce a new cause of action, we likewise conclude that such substitution would not affect the substantial rights of the defendants.

The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Id.* The refusal to permit an amendment which is proposed at an opportune time and which should be made in the furtherance of justice is an abuse of discretion by the trial court. *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 327 N.W.2d 95 (1982).

As we review the facts in this case, it appears that allowance of the amendment would not adversely affect the defendants because there would be no change in the facts which constitute the cause of action. In contrast, the refusal to allow the amendment to substitute the real party in interest would put an end to Galilee's right to pursue its cause of action.

An application to amend pursuant to § 25-852 is to be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987). As early as *Berrer v. Moorhead*, 22 Neb. 687, 36 N.W. 118 (1888), we held that amendments should be liberally construed to prevent a failure of justice. We have not changed that rule and have reaffirmed the rule as recently as *Hoiengs*. In *Westrope v. Anderson*, 98 Neb. 57, 58, 151 N.W. 955 (1915), we stated: "The rule of the statute in regard to amendment of pleadings is very liberal . . . ." We continue to adhere to the rule that

the statute is to be liberally construed to permit amendments either before or after judgment in the furtherance of justice.

We can determine no reason why, under the facts of this case, Galilee should not have been permitted to be substituted for New Light. Therefore, we conclude that the district court abused its discretion in refusing to grant New Light's request to amend its petition to substitute the real party in interest.

The judgment of the district court is reversed, and the cause is remanded with directions to permit the substitution of Galilee as the real party in interest.

REVERSED AND REMANDED WITH DIRECTIONS.

MARGUERITE "PEG" MARTIN AND ROY MARTIN, APPELLANTS, V. BRAD J. ROTH, APPELLEE.

568 N.W.2d 553

Filed August 8, 1997. No. S-95-1180.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Directed Verdict.** The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
3. **Motor Vehicles: Negligence.** According to the range of vision rule, a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision.
4. ____: ____. An exception to the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and relatively indiscernible.
5. **Motor Vehicles: Highways: Negligence: Juries.** A following driver need not anticipate that a motorist will suddenly stop or slow on a roadway, but when a collision occurs and a dispute exists as to whether such a stop was made, the issue of the driver's negligence is for the jury.
6. **Motor Vehicles: Highways: Negligence.** Gravel, like snow or ice, is a condition of the road during periods of inclement weather and is not an intervening cause such that its presence prevents application of the range of vision rule.

7. **Motor Vehicles: Negligence.** Absent conflicting evidence as to whether a driver brought his vehicle to a sudden and abrupt stop, the determination of whether the sudden stop exception to the range of vision rule applies is to be determined as a matter of law.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Douglas County, JAMES A. BUCKLEY, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial on the issue of damages.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, for appellants.

Michael F. Coyle and Colin Croft, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The appellants, Marguerite "Peg" Martin (Martin) and her husband, Roy Martin, brought this consolidated personal injury and loss of consortium action against the appellee, Brad J. Roth, whose vehicle collided with the rear end of Martin's vehicle after sliding on gravel. The district court for Douglas County denied the Martins' motions for a directed verdict on the issue of liability and for a new trial. The Nebraska Court of Appeals affirmed the judgment in an unpublished memorandum opinion filed January 24, 1997. We granted the Martins' petition for further review and now reverse, concluding that Roth violated the "range of vision" rule when he rear-ended the Martins' vehicle. We also determine that under the facts of this case, neither the "indiscernible object" nor the "sudden stop" exception to the range of vision rule exists, and that the district court should therefore have directed a verdict on the issue of liability in favor of the Martins.

FACTS

On December 30, 1989, Martin had just driven through the intersection of West Center Road and 132d Street in Omaha,

Nebraska, heading east, when she was forced to come to a stop because the cars ahead of her stopped. Roth was also eastbound on West Center Road, two cars behind Martin's vehicle. When the car between Martin and Roth switched lanes, Roth came upon Martin's stopped car and applied his brakes like he "normally would behind traffic," but his vehicle slid on gravel and collided with the rear end of Martin's vehicle. Roth's vehicle was then struck by a third vehicle, the driver of which is not a part of this action.

Martin brought suit against Roth for injuries allegedly sustained as a result of the collision. Roy Martin also brought suit against Roth for loss of consortium allegedly suffered as a result of the collision. The two cases were consolidated for trial.

Evidence of the weather conditions on the day of the collision established that it was a damp, overcast day. Roth testified that the temperature was approximately 30 degrees and that "there wasn't ice everywhere but we had some ice the night before," although there was no ice at the location of the collision. Roth further testified that on the day in question, he had traveled from the Millard area and had not encountered any gravel which caused him to lose traction. However, Roth did acknowledge his familiarity with the use of gravel on icy roads in Omaha:

> Q. . . . Would you consider the rock a condition that you had to deal with on that particular day, the gravel?
>
> [Objection overruled]
>
> A. Definitely, yes.
>
> . . . .
>
> Q. . . . And [the collision] was in December; is that correct, also, the accident?
>
> A. Yes.
>
> Q. Had there been some snow and/or ice just sometime generally previous to that?
>
> A. A couple days before, yes.
>
> Q. Okay. Are you generally familiar with the fact that in Omaha, they put down sand and gravel in order to allow autos to have better tread when there is snow, that type of thing?
>
> A. Sure.

> Q. And are you generally — were you generally familiar at the time that when the snow melts and the ice melts or almost melted off, that there is some residual gravel around the streets during the winter months?
>
> A. Yes.

At the conclusion of all the evidence, the Martins moved for a directed verdict on the issue of liability. The district court denied the motions and submitted the case to the jury. The jury returned verdicts in favor of Roth in both cases. The Martins subsequently filed motions for new trial, which were also overruled.

On appeal, the Nebraska Court of Appeals affirmed, stating in its memorandum opinion that

> [w]e conclude that, based upon [the testimony adduced at trial], Roth did not have any reason to expect the gravel upon the road and there was nothing to place Roth on specific notice that the road would be slippery because of the "unusual amount" of gravel. It cannot be said, as a matter of law, that Roth should have anticipated the presence of the gravel on which his vehicle slid in time to have avoided colliding with Peg's vehicle. [Citation omitted.] As such, the district court properly refused to direct a verdict on the issue of liability.

ASSIGNMENTS OF ERROR

Rephrased, the Martins allege that the Court of Appeals erred in (1) failing to reverse and remand the trial court's refusal to direct a verdict on the issue of liability in favor of the Martins based on the range of vision rule and (2) failing to grant the Martins' motions for new trial due to the trial court's failure to direct a verdict on the issue of liability.

STANDARD OF REVIEW

A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Ethanair Corp. v. Thompson, ante* p. 245, 561 N.W.2d 225 (1997); *Hawkes v. Lewis, ante* p. 178, 560 N.W.2d 844 (1997). The party against

whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996).

ANALYSIS

The Martins contend that the district court was required, pursuant to the range of vision rule, to grant their motions for directed verdict on the issue of liability. Roth disagrees, contending that reasonable minds could differ and draw more than one conclusion from the evidence with respect to whether the facts of the instant case bring Roth's actions within one of the exceptions to the range of vision rule.

According to the range of vision rule, "a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision." *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 152, 555 N.W.2d 778, 785 (1996). An exception to this rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and relatively indiscernible. *Traphagan v. Mid-America Traffic Marking, supra*; *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995). We have also stated that a following driver need not anticipate that a motorist will suddenly stop or slow on a roadway and that where a dispute exists as to whether such a stop was made, the issue of the driver's negligence is for the jury. *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981).

INDISCERNIBLE OBJECT EXCEPTION

In affirming the overruling of the Martins' motions for directed verdict, the Court of Appeals determined that the range of vision rule does not apply to the instant case because Roth

should not have anticipated the presence of gravel at the intersection. The Court of Appeals therefore concluded that the indiscernible object exception applied. In reaching this conclusion, the Court of Appeals examined two cases with similar facts, one of which applied the range of vision rule and the other of which applied the exception.

In *Burkey v. Royle*, 233 Neb. 549, 446 N.W.2d 720 (1989), a passenger suffered injuries when the car she was riding in was rear-ended by a vehicle driven by the defendant. The collision occurred at an icy intersection when the defendant driver unexpectedly hit "ice or a clump of snow," *id.* at 553, 446 N.W.2d at 723, causing her to slide into the vehicle in which the plaintiff was a passenger. The district court overruled the plaintiff's motion for a directed verdict on the issue of liability, and the jury found for the defendant. We reversed, holding that the range of vision rule required a directed verdict on the issue of liability and noting that the rule applies "notwithstanding that a motorist's ability to maneuver the vehicle is impaired by the presence of ice or snow upon the road surface." *Id.* at 555, 446 N.W.2d at 724-25. We also disregarded the position that since the patch of ice or snow the defendant slid on was unexpected, the indiscernible object exception applied, because "if the presence of ice or snow upon the road surface is known *or should have reasonably been anticipated*, the snow and ice are considered conditions rather than intervening causes and thus do not exonerate a motorist from the application of the range of vision rule." (Emphasis supplied.) *Id.* at 556, 446 N.W.2d at 725. In light of the inclement weather conditions and the presence of ice and snow on the roads on the day in question, we determined that the defendant was necessarily aware of the slick conditions and that a directed verdict should therefore have been entered.

One year after *Burkey*, we examined a similar factual situation in *Edgerton v. Lawry*, 235 Neb. 100, 453 N.W.2d 743 (1990). The record in that case showed that the defendant's vehicle slid on a patch of ice into the rear end of the plaintiff's stopped vehicle. The plaintiff's motion for directed verdict on liability was overruled and her case dismissed. Unlike the situation in *Burkey*, there was no ongoing storm nor were the streets covered with ice or snow at the time the defendant's car slid into

the plaintiff's car. Moreover, the plaintiff testified that she had driven 25 miles prior to the collision and had not encountered any ice. Based upon these facts, we concluded that the range of vision rule did not apply, finding that the defendant had no reason to anticipate the presence of ice on the road until she actually slid on it.

Roth asserts that the facts in the instant case are analogous to *Edgerton* insofar as he testified that he did not encounter any gravel prior to the intersection at the site of the collision. Roth therefore argues that he could not reasonably have expected the "unusual accumulation of gravel," brief for appellee at 13, that caused him to rear-end Martin's vehicle and that the indiscernible object exception to the range of vision rule applies. A review of the record, however, reveals that Roth also testified that he was aware that the city of Omaha routinely places gravel on the roads during times of inclement weather and that such gravel would remain on the streets after the ice or snow had melted. Roth also testified that there had been ice and snow 2 days before the accident and that he had encountered ice at certain locations on the day of the collision. Based upon this testimony, we cannot conclude that Roth was unaware that gravel would be on Omaha roads that day. Gravel, like snow or ice, is a condition of the road during periods of inclement weather and is not an intervening cause such that its presence prevents application of the range of vision rule. As such, we disagree with Roth's contention that he must be placed on "*specific notice*," brief for appellee at 15, of gravel at intersections, for the test is whether Roth knew or should have known that gravel could be on the streets of Omaha, thereby altering driving conditions on the day of the collision.

Roth nevertheless argues that the gravel he slid on was an "unusual" amount, such that a jury must decide whether he was liable for rear-ending Martin's vehicle. However, Roth offered no evidence as to the depth, volume, or specific amount of gravel he encountered, nor did he offer any explanation as to why he considered the amount of gravel at the intersection to be unusual. Regardless, having concluded that Roth should have been put on notice of the presence of gravel on the streets of Omaha on the day in question, we can discern no reason to

make application of the range of vision rule dependent upon the amount of gravel Roth opines he encountered. Just as the depth of snow or ice is irrelevant for purposes of applying the rule, so, too, is the amount or depth of gravel. Indeed, as the amount of gravel present increases, so, too, should the driver's awareness of that condition. Accordingly, we disagree with Roth's contention that the indiscernible object exception applies to the facts of this case.

SUDDEN STOP EXCEPTION

Roth also contends that the district court was correct in overruling the Martins' motions because the evidence established that Martin made a sudden stop prior to her vehicle's being rear-ended, thereby invoking the sudden stop exception to the range of vision rule. After viewing all relevant facts in favor of Martin, we conclude that the only reasonable inference to be drawn is that Martin did not come to a sudden stop prior to her vehicle's being rear-ended.

On direct examination, Martin did testify that the car in front of her stopped abruptly, causing her to stop suddenly. However, on both direct and cross-examination, Martin stated that her vehicle was not rear-ended until 30 to 60 seconds after she came to a stop. Roth offered no testimony that Martin came to a sudden and unexpected stop in front of him. Indeed, as the following testimony of Roth shows, he was well aware of stopping vehicles in his lane of traffic and in no way attributed the cause of the collision to Martin's "sudden stop":

> Q. And this vehicle then moved from your lane into the next lane; is that correct?
>
> A. Yes, it did.
>
> Q. And after he did so, were you able to observe whether there was traffic in your lane?
>
> A. Yes.
>
> Q. And tell the ladies and gentlemen of the jury what you saw.
>
> A. I saw stopped or very slow moving traffic in my lane.
>
> Q. And did you observe the automobile that was owned and operated by Mrs. Martin?
>
> A. Yes, I did.

Q. And was her car directly in front of your car?
A. Yes, it was.
Q. Did you hit your brakes, then?
A. Yes, I did.
Q. Did it slow your vehicle down?
A. Not — it did at first, yes.
Q. Okay. And then tell the ladies and gentlemen of the jury what happened.
A. Okay. I was coming to a stop like I normally would behind traffic and all the sudden — I mean I wasn't — I noticed I wasn't getting the same amount of braking as I was a few seconds earlier. It was — I was sliding on gravel, and I did that until I hit the back of Mrs. Martin's car.

Absent conflicting evidence as to whether a driver brought his vehicle to a sudden and abrupt stop, the determination of whether the sudden stop exception to the range of vision rule applies is to be determined as a matter of law. See *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.*, 161 Neb. 152, 72 N.W.2d 669 (1955). The evidence, even when viewed in a light most favorable to Roth, establishes that Martin's vehicle was completely stopped prior to being rear-ended 30 to 60 seconds later by Roth, who applied his brakes like he "normally would behind traffic." Thus, despite Martin's characterization of her stop as a sudden one, we conclude that the testimony adduced concerning what actually happened provides no evidence of a sudden and abrupt stop such that the sudden stop exception to the range of vision rule applies.

CONCLUSION

Like any other driver on Nebraska's roads, Roth was required to operate his vehicle in such a manner as to be able to stop or turn aside without colliding with an object or obstruction in his path within his range of vision. Because Martin's vehicle was within Roth's range of vision and neither exception to the range of vision rule applies, we conclude that the district court erred in failing to grant the Martins' motions for directed verdict on liability. We therefore reverse the Court of Appeals' decision and remand this cause for a trial on dam-

ages. In light of this holding, we do not address the Martins' second assigned error.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WRIGHT, J., not participating.

STEPHAN, J., dissenting.

I agree with the majority that our decisions in *Burkey v. Royle*, 233 Neb. 549, 446 N.W.2d 720 (1989), and *Edgerton v. Lawry*, 235 Neb. 100, 453 N.W.2d 743 (1990), provide an appropriate framework for analysis of this case. I respectfully disagree with the manner in which the majority applies those decisions to the evidence in the record.

In my view, the critical inquiry is whether the motorist knew or should have known of a road surface condition which would affect his ability to stop or control his vehicle at the time and place of the accident. In *Burkey*, the motorist testified that sleet was falling and that there was ice and packed snow on the road surface where the accident occurred. She was aware of these conditions just before the accident and realized that they affected her ability to control and stop her vehicle. We held that because of this knowledge, she was not exonerated from application of the range of vision rule and was negligent as a matter of law.

However, in *Edgerton* we affirmed a judgment in favor of a motorist whose vehicle hit a patch of ice and slid into another vehicle, stating: "Unlike the situation in *Burkey*, there was . . . no ongoing storm nor were the streets covered with ice or snow, circumstances which should put any reasonable driver on notice of the prevailing dangerous conditions *and on specific notice of the fact the streets were slippery*." (Emphasis supplied.) 235 Neb. at 102, 453 N.W.2d at 745. We further noted that although there had been recent freezing and thawing, neither driver had encountered any ice prior to reaching the scene of the collision and that the defendant had no reason to be aware of the ice on the roadway until it was too late to avoid the collision. *Id.*

I disagree with the majority in that I read these cases as requiring some form of "specific notice" that a road surface is

slippery before a motorist can be held negligent as a matter of law for failing to avoid a collision despite slippery conditions. Roth admitted that he was generally aware of gravel on the streets of Omaha during the winter, but he testified that its presence that day had not affected his ability to stop his vehicle prior to the collision. The record indicates that he did not actually see the "unusual amount" of gravel on which he slid until after the accident. In fact, he had no opportunity to see this particular section of the road surface until the vehicle ahead of him changed lanes to avoid colliding with Martin's stopped vehicle. He testified that he applied his brakes immediately after this occurred, but was unable to avoid the collision because his vehicle "slid" on the gravel.

I agree with the Court of Appeals that the material facts of this case are more similar to *Edgerton* than *Burkey*. Like the defendant in *Edgerton*, Roth had no awareness of the slippery road condition caused by the presence of gravel until moments before the collision. Giving Roth the benefit of all reasonable inferences, as required on a motion for directed verdict, a reasonable person could find that Roth had no actual knowledge of, or reason to anticipate, gravel on the road surface in an amount sufficient to affect traction and braking until it was too late to avoid the collision. Thus, in my view, the issue of whether Roth was negligent in operating his vehicle was properly submitted to the jury for decision, and I would therefore affirm.

CAPORALE, J., joins in this dissent.

JOHN SCHENDT, APPELLANT, V. JOHN L. DEWEY, M.D., APPELLEE.
CINDY SCHENDT, APPELLANT, V. JOHN L. DEWEY, M.D., APPELLEE.
568 N.W.2d 210

Filed August 8, 1997. Nos. S-95-1197, S-95-1198.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to 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. **Fraud: Estoppel: Limitations of Actions: Malpractice.** The doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering malpractice.
4. **Estoppel: Malpractice.** Equitable estoppel arises from active or affirmative efforts to conceal malpractice.
5. **Estoppel: Physician and Patient.** Equitable estoppel arises from a failure to disclose material information when a fiduciary or confidential relationship exists between a physician and a patient.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Richard J. Dinsmore and William G. Garbina for appellants.

John R. Douglas and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

John L. Dewey, M.D., at all relevant times, held himself out as an allergy specialist. He treated Cindy Schendt from September 1961 until November 1971. During the course of his treatment, Dewey recommended and conducted various radiation treatments on Schendt. Once Schendt discontinued her contact with Dewey in 1971, she never contacted him again.

In August 1991, Schendt was first diagnosed with breast cancer and subsequently had breast surgery in September 1991 and again in April 1992. Schendt attributed her cancer to the radiation treatment she had received as a patient of Dewey's.

Schendt filed suit on August 19, 1992, alleging negligence and fraudulent concealment. More specifically, Schendt alleged that Dewey was negligent in (1) administering the radiation treatments, (2) failing to warn Schendt of the risks of the treatment, and (3) failing to notify Schendt after the termination of the physician-patient relationship of information establishing a link between radiation and the development of cancer.

With regard to her fraudulent concealment claims, Schendt alleged that during the treatment Dewey fraudulently concealed the risks of radiation treatment, which was the direct and proximate cause of her injuries. Schendt's husband, John Schendt, individually and as guardian of the couple's minor children, also filed suit against Dewey and alleged facts identical to those presented in Schendt's petition. The two cases had been consolidated on appeal.

Dewey demurred to the Schendts' petitions on the basis that the actions were barred by the statute of repose provision as set out in Neb. Rev. Stat. § 25-222 (Reissue 1995). The district court sustained the demurrers and dismissed the actions. The Schendts then appealed to the Nebraska Supreme Court. *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994).

In *Schendt, supra*, this court held that the actions would be time-barred. Instead of sustaining the district court's dismissals, however, we reversed part of the district court's judgment in recognition of the doctrine of equitable estoppel. Moreover, we recognized that it would be possible to state a cause of action for malpractice in which Dewey might be equitably estopped from raising the statute of repose, in the event that the petitions could be amended to establish that Dewey fraudulently concealed a material fact, that the fraudulent concealment prevented the Schendts from bringing their actions within the confines of § 25-222, and that the actions were brought within a reasonable time after discovery of the fraudulent concealment.

On remand, the Schendts amended their petitions. The petitions stated (1) that Dewey fraudulently concealed or misrepresented the risks and consequences of the treatment process during the course of the treatment, (2) that Dewey fraudulently concealed or misrepresented the risks and consequences of the treatment process after the treatment process and continuing to date, and (3) that one or both of these acts or a failure to act prevented the Schendts from initiating actions within the confines of § 25-222.

After answering the amended petitions, Dewey moved for summary judgment. Such motions were sustained by the district court on October 4, 1995.

In reaching its decision, the court considered Schendt's deposition. Schendt stated that she had been treated by Dewey during the years 1961 to 1971 for asthma, that treatment included radiation therapy, and that Dewey never discussed risks associated with receiving such treatment. The court also considered the affidavit of Dr. Robert B. Thompson, a board-certified physician practicing radiation oncology. The affidavit provided in pertinent part as follows:

> Based upon my knowledge, education, and experience, I am familiar with the general body of knowledge available to the medical community regarding the inherent risks of human exposure to radiation, including human exposure to . . . low doses of x-rays, during the period of time beginning in 1961 and ending in 1971.
>
> . . . I know that a known risk of human exposure to radiation, during the time period beginning in 1961 and ending in 1971, was the carcinogenic potential of x-ray irradiation.
>
> . . . [T]he risk of contracting cancer from exposure to radiation including human exposure to low doses of x-rays, during the time period beginning in 1961 and ending in 1971, would be considered material information especially with regard to the treatment of children, and consequently, it should have been communicated to a patient exposed to this type of radiation.

The court also considered the deposition of Dewey. When asked whether he believed that the doses he was using were presenting a risk to his patients, Dewey answered as follows: "In large doses, certainly, but we were told by our radiology consultant that the dosage we used and the amount of treatments we gave were perfectly safe."

Dewey was also asked for his opinion regarding a relationship between the radiation and cancer: "Q. All right. Do you have any opinion today as to whether there's a relationship between radiation and the subsequent formation of cancer? A. With my patients I have a very definite opinion. Q. Okay. A. There's no relationship."

Throughout the deposition, Dewey was questioned as to whether he discussed with anyone the safety of the radiation treatments he was administering and whether this form of treatment was conventional:

Q. Did you ever make inquiry of anybody as to whether there was a safe form of treatment?

A. Not other than the people I've already mentioned.

Q. So we understand, that was Doctor Simon and Doctor Kelly sometime in the '50s?

A. I believe, yeah.

Q. Okay. Then is it fair to say you never conferred with anyone else about the safety of using radiation?

A. That's correct.

Q. And you never sought out any texts or journals or articles about the use of radiation?

A. No. Again, as I said, there was no reason to think I needed to.

Q. Did it ever occur to you, Doctor . . . that if you were the only allergist using this treatment, that there may be some reasons that others weren't using it?

Do you know of any other allergist that used this as an accepted method of treatment?

A. Yeah.

On October 12, 1995, the Schendts moved for a new trial. Their motions were overruled. The Schendts subsequently appealed. Pursuant to our power to regulate the caseloads of the Nebraska Court of Appeals and this court, on our own motion we removed this case to our docket. The cases filed by the Schendts have been consolidated on appeal.

On appeal, the Schendts assign the following errors: (1) The trial court erred in granting Dewey's motion for summary judgment because there existed a genuine issue of material fact concerning Dewey's fraudulent concealment and Dewey was not entitled to a judgment as a matter of law, and (2) the trial court erred in overruling the Schendts' motions for new trial.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. 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. *Bowling Assocs. Ltd. v. Kerrey, ante* p. 458, 562 N.W.2d 714 (1997).

When this court addressed the instant case in *Schendt I*, we decided that the actions against Dewey were to be brought no later than 10 years after July 1972, the effective date of § 25-222. We also recognized that a claim of fraudulent concealment would delay the running of this statute of repose as it pertained to a cause of action for malpractice. The petitions filed by the Schendts in 1992 failed to comply with the 10-year requirement. Therefore, the Schendts were obligated to establish a claim of fraudulent concealment against Dewey to toll the statute of repose.

The doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the malpractice. In addition, equitable estoppel arises from active or affirmative efforts to conceal the malpractice. It also arises from a failure to disclose material information when a fiduciary or confidential relationship exists between the physician and the patient. *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988); *Babcock v. Lafayette Home Hosp.*, 587 N.E.2d 1320 (Ind. App. 1992).

Failure of a physician to disclose material information that he knows, or in the exercise of reasonable care should have known, results in constructive fraudulent concealment. *Muller v. Thaut, supra*; *Babcock v. Lafayette Home Hosp., supra*. See *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976). Constructive fraud, and accordingly, the basis for estoppel, terminates when the physician-patient relationship terminates or when a patient learns of the malpractice or discovers information which would lead to the discovery of the malpractice through the exercise of reasonable diligence, whichever occurs first. *Umolu v. Rosolik*, 666 N.E.2d 450 (Ind. App. 1996).

In the instant case, there is simply no indication that Dewey took affirmative steps to conceal the risks of radiation treatment. Schendt herself testified that Dewey never spoke with her regarding the effects of radiation treatment. Therefore, we are to

conclude from the record presented to this court on summary judgment that Dewey did not make false statements concerning radiation treatment.

We need not address the remaining assignment of error.

For the foregoing reasons, we hold that the district court correctly sustained Dewey's motions for summary judgment.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CYNTHIA S. MAHLIN, RESPONDENT.

568 N.W.2d 214

Filed August 8, 1997. No. S-96-715.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney disciplinary proceeding, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
2. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.
3. **Disciplinary Proceedings: Rules of the Supreme Court: Contempt.** Failure to comply with Neb. Ct. R. of Discipline 16 (rev. 1996) places one in contempt of the Nebraska Supreme Court and constitutes an aggravating circumstance.

Original action. Judgment of suspension.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Cynthia S. Mahlin was admitted to the practice of law in the State of Nebraska on September 19, 1983. This action arises from four formal charges filed herein.

On April 11, 1995, Mahlin was convicted of third degree assault, in violation of Neb. Rev. Stat. § 28-310 (Reissue 1995), a Class I misdemeanor. The conviction stemmed from an incident in which Mahlin struck a credit representative from Lincoln Electric System who had gone to Mahlin's home to

disconnect the electric service unless the arrears were immediately paid.

Pursuant to an amended application for temporary suspension, this court entered an order for Mahlin to show cause why her license to practice law in this state should not be temporarily suspended. We ordered Mahlin suspended from the practice of law, effective July 2, 1996, until further order of the court.

Formal charges were filed by the Committee on Inquiry of the First Disciplinary District of the Nebraska State Bar Association on October 23, 1996. The committee charged that Mahlin's acts which resulted in the above conviction were violations of Canon 1, DR 1-102, of the Code of Professional Responsibility, which provides as follows:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

On November 4, 1996, the Nebraska State Bar Association, by and through its Special Counsel for Discipline, filed three additional formal charges pursuant to Neb. Ct. R. of Discipline 10(F) (rev. 1996).

The first additional formal charge states that upon being suspended, Mahlin failed to comply with Neb. Ct. R. of Discipline 16 (rev. 1996). Rule 16 requires a member suspended from the practice of law to notify the member's clients and opposing counsel, in writing, of such suspension and to file an affidavit with the court stating full compliance with the requirements of rule 16. No evidence in the file of the Clerk of the Supreme Court indicates that Mahlin complied with rule 16 as a result of her suspension on July 2, 1996. The charge states that the foregoing acts were a violation of the following provisions of DR 1-102:

> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

The second additional formal charge states that Mahlin called and left three harassing and threatening messages on the answering machine at the home of Dennis G. Carlson, Counsel for Discipline of the Nebraska State Bar Association, also in violation of DR 1-102(A)(1), (5), and (6).

The third additional formal charge relates to a federal lawsuit filed by Mahlin and her husband against the city attorney of Lincoln, Nebraska; the city of Lincoln; and 24 other defendants. On September 13, 1995, U.S. District Judge Richard G. Kopf dismissed the action and imposed sanctions against the Mahlins, including a warning not to again violate Fed. R. Civ. P. 11 by filing and maintaining frivolous lawsuits. The charge states that the Mahlins nevertheless maintained the action against the city attorney and the city of Lincoln. The action was again dismissed on May 15, 1996. This charge states that the aforesaid harassing and frivolous litigation or procedures maintained by Mahlin constituted violations of her oath of office as an attorney; DR 1-102(A)(1), (5), and (6); and Canon 7, DR 7-102, of the Code of Professional Responsibility, which states in relevant part:

> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his or her representation of a client, a lawyer shall not:
>
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Mahlin did not file an answer to the formal charges stated above. The Nebraska State Bar Association subsequently moved for judgment on the pleadings pursuant to Neb. Ct. R. of

Discipline 10(I) (rev. 1996), requesting that this court impose an appropriate disciplinary sanction. We served Mahlin with an order to show cause as to why judgment on the pleadings should not be entered, and Mahlin did not respond.

We point out that the failure of a respondent to answer to the formal charges subjects the respondent to a judgment on the formal charges filed. Pursuant to rule 10(I), if no answer is filed within the time limited therefor, or if the answer raises no issue of fact or of law, the matter may be disposed of by the court on its own motion or on a motion for judgment on the pleadings. Under Neb. Ct. R. of Discipline 10(H) (rev. 1996), the respondent has 30 days from the date of receipt of the formal charges to file an answer. We determine that the requirements of rule 10(I) have been satisfied. Therefore, we grant the Nebraska State Bar Association's motion for judgment on the pleadings.

We next proceed to determine the extent to which discipline should be imposed. To determine whether and to what extent discipline should be imposed in an attorney disciplinary proceeding, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Malcom, ante* p. 263, 561 N.W.2d 237 (1997); *State ex rel. NSBA v. Zakrzewski, ante* p. 40, 560 N.W.2d 150 (1997).

Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances. See, *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996); *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995). Here, none of Mahlin's acts constituted a crime of moral turpitude or involved the misappropriation of client funds. An act of moral turpitude by an attorney is an act that is contrary to honesty and good morals. *State ex rel. NSBA v. Caskey*, 251 Neb. 882, 560 N.W.2d 414 (1997). The offenses with which Mahlin has been charged are related solely to her personal life and did not cause injury to any client. See *State ex rel. NSBA v. Gleason, supra.* In addition, the actions taken by Mahlin occurred on the heels of a particularly tragic

event in which she was severely injured while representing a client in a personal property dispute. See, *Mahlin v. Goc, ante* p. 238, 561 N.W.2d 220 (1997); *Mahlin v. Goc*, 249 Neb. 951, 547 N.W.2d 129 (1996). While this event in no way exonerates Mahlin for her subsequent actions as an attorney, it constitutes a mitigating factor for purposes of this disciplinary proceeding.

Nevertheless, Mahlin's misconduct and her failure to respond to the charges against her indicate that Mahlin's ability to practice law at a responsible and adequate level of fitness has been significantly undermined. Particularly troubling is Mahlin's failure to respond to the charges. See *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996).

In addition, Mahlin was ordered to comply with rule 16, which required her to notify her clients and opposing counsel, in writing, of her suspension and to file an affidavit of compliance with the court within 30 days of the order of suspension. Mahlin has not complied with this rule. We have held that the failure to comply with rule 16 places one in contempt of this court and constitutes an aggravating circumstance. See *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997).

Each of the six factors that we consider in determining whether and to what extent discipline should be imposed weighs against Mahlin. Therefore, we find that an appropriate level of discipline is a suspension from the practice of law, effective immediately, for an additional period of 3 years from and after the date on which Mahlin complies with the provisions of rule 16.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

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