# KUOL THACH, APPELLEE, V. QUALITY PORK INTERNATIONAL AND LIBERTY MUTUAL INSURANCE GROUP, APPELLANTS.

570 N.W.2d 830

Filed December 12, 1997. No. S-97-183.

1. **Workers' Compensation: Appeal and Error.** Pursuant to 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. ____: ____. In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
4. **Workers' Compensation: Judgments: Time.** Every order and award of a single judge of the Workers' Compensation Court shall be binding upon each party at interest unless an application for review has been filed with the compensation court within 14 days following the date of rendition of the order or award.
5. **Workers' Compensation: Judgments: Time: Appeal and Error.** The Workers' Compensation Court may, on its own motion, modify or change its findings, order, award, or judgment at any time before appeal and within 10 days from the date of such findings, order, award, or judgment for the purpose of correcting any ambiguity, clerical error, or patent or obvious error.
6. **Workers' Compensation: Judgments: Courts: Jurisdiction.** While it is true that in civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term in which it was rendered, that rule does not apply to statutory tribunals such as the compensation court, for it is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
7. **Workers' Compensation.** The compensation court may prescribe the procedure to be followed if an injured worker desires to obtain the benefit of rehabilitation services. Where such a procedure had been prescribed, the right to rehabilitation services, including the right to compensation for temporary total disability while undergoing rehabilitation, depends upon compliance with the procedure prescribed.
8. ____. An employee, unless he or she is otherwise qualified to receive temporary total disability benefits, is entitled to such benefits only while undergoing rehabilitation which has been ordered by the court.
9. ____. The employee shall be entitled to compensation from his or her employer for temporary total disability while undergoing rehabilitation whether the rehabilitation is voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court.

Appeal from the Nebraska Workers' Compensation Court. Reversed.

Thomas D. Wulff and Kevin L. Flynn, of Welch, Wulff & Childers, for appellant Quality Pork International.

Trinh P. Tran for appellee.

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

MCCORMACK, J.

This is an appeal from the Nebraska Workers' Compensation Court review panel which upheld a decision of a single judge of the Workers' Compensation Court granting temporary total disability benefits to appellee, Kuol Thach, for the time period from January 22, 1996, when appellee was self-enrolled in English as a second language (ESL) classes, through May 20, 1996, when the court-approved plan of vocational rehabilitation took effect. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of the Nebraska Court of Appeals and this court. We reverse.

## STATEMENT OF FACTS

The original claim in this action was heard by the single judge of the compensation court on October 18, 1995. The parties stipulated that appellee suffered injuries to his hands in the course of his employment at Quality Pork International. The parties further stipulated that at the time of the injury, appellee's average weekly wage was $432.85. An award was entered by the single judge on January 22, 1996, awarding temporary total disability benefits from September 24, 1993, through February 3, 1994, and again from March 9, 1994, through September 20, 1994, the date at which appellee reached maximum medical improvement. The single-judge court also awarded permanent partial disability benefits at a rate of 10 percent for each hand. The single-judge court further determined that the appellee was entitled to vocational rehabilitation services, including retraining and job placement. Important to note is the award's discussion of ESL classes as they related to vocational rehabilitation. The single-judge court found:

> Mr. Thach's final vocational objective cannot be determined until he can be adequately evaluated. The plan must necessarily be in phases, as originally designed. The nature of remedial course work in phase II and career training in phase III cannot logically be determined until after completion of ESL level III classes when plaintiff can be vocationally evaluated. The court awards a two year period of vocational rehabilitation after completion of ESL level III classes and evaluation necessary to determine the course of plaintiff's vocational rehabilitation.

(Emphasis in original.) We note the emphasis that the single-judge court placed on the term "after" prior to discussing the ESL level III classes. In its award on January 22, 1996, the single-judge court emphasized that vocational rehabilitation would only be approved by the court following the completion of credit ESL classes. The award further provided that

> if the plaintiff desires to be evaluated as to his suitability for rehabilitation services, he should either by letter, telephone, or in person, contact the Rehabilitation Specialist of the Nebraska Workers' Compensation Court, at the Capitol Building in Lincoln, Nebraska, within 30 days after the date of this Award . . . if the plaintiff fails or declines, without reasonable cause to indicate his desire for rehabilitation services in the manner and within the time above specified, he shall be deemed to have waived any and all right to such services.

Seven days after the award was entered, counsel for appellee wrote the single-judge court requesting a "Non Protunc [sic] Order to address a possible ambiguity regarding an award [the court] entered on January 22, 1996." The letter requested that the single-judge court "advise [appellee's counsel] whether Mr. Thach is entitled to benefits for the time he was enrolled in ESL courses prior to this completion." The correspondence also requested clarification regarding the award's silence as to attorney fees and penalties. No order nunc pro tunc was ever issued by the single-judge court and neither side appealed the January 22, 1996, award.

On May 10, 1996, appellee filed a motion for indemnification of costs, benefits due, and attorney fees in which he sought

the payment of benefits for the time period during which he attended noncredit ESL classes of his own volition, but at the suggestion of his vocational rehabilitation counselor. Appellants, Quality Pork International and Liberty Mutual Insurance Group, answered by alleging that appellee's motion was procedurally defective in that there was no provision for such a motion under the Nebraska Workers' Compensation Act (Act); that to the extent that appellee's motion could be construed as an appeal or a request for review of the single-judge court's earlier award, such appeal or request was untimely; and that to the extent the motion sought benefits for temporary total disability for a time period from the date of the accident to the date of the trial, the matter would have been previously adjudicated and thus barred under res judicata. Appellants further alleged that all benefits had been paid and that appellee was not entitled to further benefits unless and until a plan of vocational rehabilitation had been approved by the parties.

A hearing was held on this motion, and the single-judge court entered an order compelling appellants to pay temporary total disability benefits from January 22, 1996, the date of the initial award, through May 20, 1996, the day prior to appellee's enrollment in the court-approved plan of vocational rehabilitation. Appellants then filed an application for review, and in an order filed on January 22, 1997, the review panel affirmed the order entered by the single-judge court, finding (1) that a vocational rehabilitation plan was provided for in the single-judge court's original award and that any objection to a plan of vocational rehabilitation should have been filed within 14 days of that award, and (2) that the issue of whether appellee actively participated in an approved vocational rehabilitation plan was a question of fact and that the single-judge court's determinations in that regard were not clearly erroneous. Because appellants filed an appeal of the order of the single-judge court and because the appeal failed to secure a reduction in payments, attorney fees in the amount of $1,500 were awarded to appellee.

## ASSIGNMENTS OF ERROR

Appellants assign as error: (1) The review panel erred in affirming the single-judge court's award of temporary total dis-

ability for the period from January 22, 1996, through May 20, 1996, to appellee who was not participating in an approved rehabilitation program, and (2) the review panel erred in affirming the single-judge court's conclusion that appellee was actively participating in vocational rehabilitation, thus entitling appellee to temporary total disability benefits under Neb. Rev. Stat. § 48-162.01 (Reissue 1993).

## STANDARD OF REVIEW

Pursuant to 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. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997); *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997); *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997); *Winn v. Geo. A. Hormel & Co., supra.*

As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Ira v. Swift-Eckrich*, 251 Neb. 411, 558 N.W.2d 40 (1997); *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996); *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995).

## ANALYSIS

The Act is clear that "[e]very order and award of a single judge of the Nebraska Workers' Compensation Court shall be binding upon each party at interest unless an application for review has been filed with the compensation court within fourteen days following the date of rendition of the order or award." Neb. Rev. Stat. § 48-170 (Reissue 1993). The Act further states:

> The Nebraska Workers' Compensation Court may, on its own motion, modify or change its findings, order, award, or judgment at any time before appeal and within ten days from the date of such findings, order, award, or judgment for the purpose of correcting any ambiguity, clerical error, or patent or obvious error.

Neb. Rev. Stat. § 48-180 (Reissue 1993). These sections of the Act are clear that if the court fails to modify its order within 10 days and the parties fail to file an application for review within 14 days of the original order, such order becomes final and binding upon the parties.

Appellants argue that the single-judge court was without jurisdiction to modify its award of January 22, 1996, in its order dated August 28, 1996. Appellants further claim that appellee failed to properly appeal the original award to the review panel and that the court failed to modify on its own motion within the statutory time period. As such, appellants argue, the original award of the single-judge court became final and could not later be modified by the court in its order of August 28. We agree and reverse the decision of the review panel which affirmed the decision of the single-judge court in the first hearing.

This case is controlled by our recent decisions in *Dougherty v. Swift-Eckrich, supra*, and *Ira v. Swift-Eckrich, supra*, and the above-cited portions of the Act. In *Dougherty*, an injured employee filed a proper petition for the receipt of benefits under the Act and was given an award on February 24, 1993. In October 1994, the employee filed a petition in the same case in which the foregoing award was entered seeking to extend the completion date of the February award. The compensation court entered an award in March 1995 extending the completion date to December 22, 1994, and the employer timely appealed. We held:

> While it is true that in civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term in which it was rendered, that rule does not apply to statutory tribunals such as the compensation court, for it is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984).

> What was involved here was an effort of the compensation court, upon Dougherty's application more that 19 months after the fact, to correct an error in the February 1993 award, which had become final. No statute empowers the compensation court to so do.

*Dougherty v. Swift-Eckrich*, 251 Neb. 333, 336, 557 N.W.2d 31, 33 (1996). We went on to hold that the compensation court had clearly acted in excess of its statutorily granted powers and upheld the reversal of the award by the Court of Appeals.

Likewise, in *Ira v. Swift-Eckrich*, 251 Neb. 411, 558 N.W.2d 40 (1997), an employee filed a compensation claim and received an award. Nearly 2 years later, a second award was made in the same action modifying the original award and obligating the former employer for the duration of a vocational rehabilitation plan. Two years after the second award was made, the court entered a third order upon further petition by the former employee. The employer filed an application for review, alleging a lack of jurisdiction in the compensation court to alter the second award, and appealed the affirmance by the review panel. In reversing the compensation court review panel's decision, we stated:

> The compensation court is a tribunal of limited and special jurisdiction, and it possesses only that authority which is conferred upon it by the Nebraska Workers' Compensation Act. . . . More specifically, the compensation court's power to modify is governed by Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1993). As in *Dougherty*, the compensation court in this case was not authorized to alter a prior award by virtue of either modification provision. Therefore, the compensation court erred in modifying the August 17, 1993, award entitling appellee to vocational rehabilitation.

(Citations omitted.) *Id.* at 414, 558 N.W.2d at 43.

The *Ira* and *Dougherty* cases are directly on point to the present case. Although the original award in this case provided for a plan of vocational rehabilitation, appellee enrolled in noncredit ESL classes on his own, prior to the approval of any plan by the court. Particularly disturbing is the emphasis placed by the single-judge court on the need for appellee to finish ESL

level III classes prior to any approval of vocational rehabilitation. The classes attended by appellee were not the ones mentioned by the single-judge court in its original award. As such, the modification of the January 1996 award by the August order was clearly improper under the statutory jurisdiction outlined in the Act. The "Motion for Indemnification of Costs Benefits Due, and Attorney's Fees" is not a recognized method to request a review of the court's award; thus, appellee did not effectively appeal the single-judge court's original award to the review panel within the 14-day time limit prescribed by § 48-170. Nor did the single-judge court, on its own motion, modify the award within the 10-day time limit prescribed by § 48-180. As such, the award of January 22, 1996, clearly became final.

In both *Ira* and *Dougherty*, we quoted our decision in *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 828, 401 N.W.2d 679, 682 (1987), wherein we stated " ' "[l]itigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding.". . .' " The original order of the court is final, and res judicata as it relates to the issues involved in this action and the later modification by the court is a nullity.

According to the terms of the January 22, 1996, order, appellee is eligible for vocational rehabilitation; however, appellants only become liable for the payment of temporary total disability benefits upon the approval by the court of the vocational rehabilitation plan. Such a holding is clearly consistent with our holdings in *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985), and *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990).

In *Aldrich v. ASARCO, Inc., supra*, an employee injured his back after slipping and falling at work. In the original award by the compensation court, the method for becoming eligible for vocational rehabilitation was clearly laid out and the record indicated that the injured employee did not follow the required method. We held:

> The compensation court may prescribe the procedure to be followed if an injured workman desires to obtain the benefit of rehabilitation services under the statute. . . .

> Where such a procedure had been prescribed, the right to rehabilitation services, including the right to compensation for temporary total disability while undergoing rehabilitation, depends upon compliance with the procedure prescribed.

(Citation omitted.) *Id.* at 131, 375 N.W.2d at 153. Clearly, if a procedure by which the injured employee may apply for vocational rehabilitation and temporary total disability is prescribed by the compensation court in its order, such procedure must be followed. The January 22, 1996, award of the single-judge court was clear that appellee needed to complete ESL level III classes before a vocational rehabilitation plan would be approved. With this in mind, appellee's attendance of nonqualifying classes would qualify him for neither vocational rehabilitation nor temporary total disability benefits during such attendance.

In *Bindrum v. Foote & Davies, supra*, an employee sought temporary total disability benefits for two separate time periods: (1) while he was undergoing a voluntary rehabilitation plan offered by his employer and (2) while he was undergoing rehabilitation pursuant to a court order. We held in *Bindrum* that under Neb. Rev. Stat. § 48-121(5) (Reissue 1988),

> an employee, unless he or she is otherwise qualified to receive temporary total disability benefits, is entitled to such benefits only while undergoing rehabilitation which has been ordered by the compensation court.
>
> Under this rule, Bindrum is not entitled to the temporary total disability benefits the compensation court awarded him for the 7 days in 1989, prior to the award of rehabilitation, on which days Bindrum was undergoing testing for purposes of determining an appropriate vocational rehabilitation plan.

235 Neb. at 912, 457 N.W.2d at 835. In the years since our decision in *Bindrum,* the Legislature amended § 48-121(5) to read:

> The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing rehabilitation whether the rehabilitation is voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court.

Neb. Rev. Stat. § 48-121(5) (Reissue 1993). Appellee would have us believe that this change means that an injured employee may undertake rehabilitation on his or her own without approval from either the court or his former employer and receive temporary total disability benefits. A plain reading of this section of the Act shows the folly in such reasoning. An employer must first offer, and the employee accept, vocational rehabilitation, or such rehabilitation must be court-ordered before an employee becomes eligible for temporary total disability. In the case at bar, the single-judge court set the requirements appellee needed to meet in order for him to become eligible for vocational rehabilitation and temporary total disability benefits. By taking noncredit ESL classes, appellee failed to meet those requirements. The action of the single-judge court in granting temporary total disability benefits in a later award not only went beyond the court's statutorily granted authority, but was clearly erroneous in light of appellee's lack of conformity to the requirements of the original award. Once appellee has completed ESL level III classes, temporary total disability benefits may be awarded from the point of the approval of the plan onward, consistent with the January award, but not before.

We reverse the judgment of the review panel of January 22, 1997, and the orders of the single-judge court of January and August 1996. In so doing, we also reverse the order of the compensation court review panel regarding attorney fees taxed against appellants. Because we reverse the single-judge court's decision and hold that appellants are not obligated to pay temporary total disability benefits during appellee's voluntary vocational rehabilitation training, there exists a reduction in appellee's overall award. Therefore, appellee is not entitled to an award of attorney fees.

## CONCLUSION

It is readily apparent from a plain reading of the statutes at issue that the single-judge court had no authority to modify its original award after the running of the statutory time period. Furthermore, there was no plan of vocational rehabilitation in place, from either the employer or the court, when appellee voluntarily undertook to enroll in noncredit ESL classes. The January 1996 award of the single-judge court was clear that no

court-approved plan of vocational rehabilitation would be enacted until after appellee completed a credit-level ESL class. As such, there was no approved plan in place at the time appellee attended noncredit ESL classes, and no temporary total disability benefits may be awarded during that time. Pursuant to § 48-185, 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 single-judge court do not support the order or award. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). The single-judge court's award of August 28, 1996, violated subsection (1) of the above portion of the Act, and we, therefore, reverse that award, along with that portion of the review panel's decision taxing attorney fees to appellants.

REVERSED.

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FRED H. BAUERMEISTER AND DOROTHY L. BAUERMEISTER, HUSBAND AND WIFE, AND ROBERT A. BAUERMEISTER, INDIVIDUALLY, APPELLEES AND CROSS-APPELLANTS, V. TIMOTHY J. MCREYNOLDS, APPELLANT AND CROSS-APPELLEE, RONALD B. ROOTS AND RESOURCE RECYCLING, INC., APPELLEES AND CROSS-APPELLEES, AND RICHARD P. DEAVER AND CLARA E. DEAVER, HUSBAND AND WIFE, APPELLEES.

571 N.W.2d 79

Filed December 19, 1997. No. S-94-1088.

1. **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.
2. **Attorney and Client.** A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty.
3. **Equity: Rescission: Fraud: Undue Influence: Proof.** In an equitable rescission action based on fraud, undue influence, misrepresentation, or business coercion, the proponent bears the burden of proving each element by clear and convincing evidence.

4. **Trial: Judges: Presumptions.** It is presumed in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.
5. **Contracts: Rescission: Parties.** The purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract.
6. **Contracts: Rescission: Fraud: Time.** A party seeking rescission of a contract on the grounds of fraud, misrepresentation, or business coercion must do so promptly upon the discovery of the facts giving rise to the right to rescind.
7. **Attorney and Client.** Due to the fiduciary nature of the attorney-client relationship and because of the very real risk that self-interest will interfere with the lawyer's exercise of judgment on behalf of the client, a lawyer may enter into a business transaction with a client only under limited conditions.
8. **Disciplinary Proceedings: Attorney and Client: Conflict of Interest: Proof.** To establish a violation of Canon 5, DR 5-104(A), of the Code of Professional Responsibility, it is necessary to show (1) that the attorney and the client had differing interests in the transaction, (2) that the client expected the lawyer to exercise his or her professional judgment for the protection of the client, and (3) that the client consented to the transaction without full disclosure.
9. **Attorney and Client.** A lawyer who represents a business entity owes his or her allegiance to the entity, not to an individual shareholder.
10. **Attorney Fees.** A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded with directions.

William Jay Riley, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellant.

Charles H. Wagner, of Edstrom, Bromm, Lindahl, Wagner & Miller, for appellees Bauermeister.

Steven E. Achelpohl for appellee Roots.

John C. Wieland and Monica Green Kruger, of Raynor, Rensch & Pfeiffer, for appellee Resource Recycling.

CAPORALE, CONNOLLY, and GERRARD, JJ., and REHMEIER, D.J., and FAHRNBRUCH, J., Retired.

GERRARD, J.

The plaintiffs-appellees, Fred H. Bauermeister and Dorothy L. Bauermeister and their son, Robert A. Bauermeister, filed a

suit in equity against attorney Timothy J. McReynolds; Clara E. Deaver and Richard P. Deaver, Fred's sister and her husband; Resource Recycling, Inc., the Bauermeisters' joint venture business entity; and Ronald B. Roots, their joint venture partner. Among the theories of recovery pled were fraud, undue influence, business coercion, concealment and misrepresentation of facts, conflict of interest, and failure to disclose. As for relief, the Bauermeisters prayed for rescission of an agreement and restitution of all amounts paid to McReynolds, Roots, and Resource Recycling in regard to their share of royalties pursuant to the operation of a landfill by Waste Management of Nebraska, Inc., on the Bauermeisters' and the Deavers' property.

The Deavers answered by joining in the Bauermeisters' prayer for relief and cross-claiming against McReynolds seeking rescission and reformation of the agreement, as well as a declaration of rights should the court order restitution with respect to payments received by McReynolds.

Roots answered by denying the substance of the allegations and asserting the affirmative defenses of laches, ratification, and equitable estoppel. Roots also cross-claimed against the Bauermeisters, seeking a declaration of rights and reformation of the agreement should restitution be ordered with respect to McReynolds. In addition, Roots filed a separate cross-petition for declaratory relief against the Deavers and a separate cross-petition against McReynolds, alleging a breach of fiduciary duty and legal malpractice.

Resource Recycling answered, as did Roots, by denying the substance of the allegations and asserting the affirmative defenses of laches, ratification, and equitable estoppel.

McReynolds answered all petitions and cross-petitions by denying the substance of the allegations and asserting the affirmative defenses of laches, of equitable estoppel, and that certain actions were barred by the applicable statutes of limitation.

After a 14-day bench trial, the district court denied the Bauermeisters' prayer for rescission and restitution of all money paid to the defendants. The district court also denied the Deavers' prayer for relief. However, the district court concluded that McReynolds' attorney fees in this matter were clearly excessive and ordered reformation of the agreement in that

regard. McReynolds timely appealed, and the Bauermeisters cross-appealed and successfully petitioned to bypass the Nebraska Court of Appeals. For the reasons that follow, we affirm in part, and in part reverse and remand with directions.

## FACTUAL BACKGROUND

Roots had considerable experience in the field of solid waste disposal and in siting and operating landfills in Nebraska. McReynolds had represented Roots since about 1976 in regard to his business transactions. The Bauermeisters owned and farmed 200 acres of land along the northern boundary of western Douglas County. The Bauermeisters also farmed an adjoining 80 acres owned by the Deavers. In the early 1980's, Roots recognized that the existing Douglas County landfill was quickly approaching its capacity. Roots thought that if he could site a private landfill in Douglas County before the county's current landfill reached capacity, he would be in a favorable position to contract with Douglas County for the provision of landfill services once its current landfill was filled.

Roots recognized that the Bauermeister-Deaver property was suitable for just such a project. On August 31, 1985, Fred and Robert Bauermeister entered into an agreement with Roots to form a joint venture for the purpose of bidding a private landfill contract with Douglas County, as well as pursuing other private landfill projects on the Bauermeister-Deaver property. The joint venture agreement provided that rent would be paid to the Bauermeisters for land actually used for landfill purposes and that all capital costs, liabilities, and profits from the operation of the landfill would be shared equally between the Bauermeisters and Roots.

During the negotiations preceding the formation of the joint venture entity, Roots was represented by McReynolds, and the Bauermeisters were represented by their family attorney, Seymour Katz. Katz advised the Bauermeisters that once formed, the joint venture should be represented by McReynolds due to his considerable expertise in this area. Accordingly, the joint venture hired the law firm of Croker, Huck & McReynolds to represent it on an hourly fee basis.

From 1985 to 1987, the joint venture worked to obtain approval for the operation of a private landfill on the

Bauermeister-Deaver property. This effort was unsuccessful in siting a landfill; however, the joint venture did obtain composting and recycling permits. During this period, Robert Bauermeister was primarily involved in pursuing the joint venture's interest on behalf of the Bauermeister family. Further, the joint venture agreement contemplated the formation of a corporation, Resource Recycling, to facilitate the operation of any landfill sited.

In early 1988, Douglas County's need for landfill space had become more acute. In January, Roots again approached McReynolds and his partner, Robert Huck, but this time with the idea of siting a public landfill on the Bauermeister property operated by Resource Recycling. McReynolds and Huck were hesitant to assist Roots in his renewed attempt to site a landfill on the Bauermeister property, as the joint venture still owed Croker Huck $42,000 in legal fees from the previous effort. Furthermore, substantial legal assistance would be needed to site a public landfill on the Bauermeister property, and Roots and the Bauermeisters were unwilling and unable to pay for continuing legal services on an hourly fee basis.

In May or June 1988, Roots approached McReynolds and Huck with a proposal he termed a "lean forward" fee agreement. Roots characterized this agreement as simply an incentive system: if successful, everyone profits; if not, then they all lose together. Roots proposed that the joint venture pay McReynolds $1 per ton of the gate fee if, and only if, the joint venture succeeded in siting the landfill. McReynolds thought that the project had a 5- to 10-percent chance of succeeding, but, nonetheless, eventually agreed to represent the joint venture on this "lean forward" contingency basis.

However, based on Roots' estimate of 300,000 tons of garbage per year, McReynolds thought a fee of $1 per ton was clearly excessive. After considering various factors, such as the chance of success, the volume of anticipated waste per year, the life of the landfill, the costs of obtaining the necessary approvals, the costs of landing a contract with Douglas County, the costs of litigation if successful, and the present value of all expenditures, McReynolds proposed a fee of 30 cents per ton for county waste and 50 cents per ton for Omaha waste.

Roots testified that he discussed his "lean forward" concept with Fred Bauermeister, who at this time had assumed primary responsibility for the Bauermeister family interest in the joint venture. After consulting with his family, Fred Bauermeister agreed to the "lean forward" proposal. On August 5, 1988, Roots, both individually and on behalf of Resource Recycling, signed an agreement with McReynolds memorializing the agreed-upon fee structure. Fred Bauermeister's signature appears on this document as a witness.

About this same time, Katz, the Bauermeister family attorney, joined Croker Huck on an "of counsel" basis. The circumstances which led to Katz' joining the firm were unrelated to the joint venture. Roots, Katz, and McReynolds testified that immediately prior to the signing of the fee agreement, McReynolds discussed with Fred Bauermeister and Roots the potential conflict of interest created by Katz' joining the Croker Huck law firm. McReynolds testified that he told Fred Bauermeister and Roots that if they wanted the Croker Huck law firm to represent the joint venture, both he and Katz could no longer represent either of them in an individual capacity should a conflict arise between them.

McReynolds also told them they were free to bring in another attorney at any stage of the negotiations and free to take representation of the joint venture to another attorney. McReynolds said he specifically told Fred Bauermeister that any advice Katz gave him in this matter was not as his personal attorney, but as counsel for the joint venture. McReynolds, Katz, and Roots testified that after this potential conflict of interest was explained to Fred Bauermeister, he consented to the continued representation of the joint venture by Croker Huck.

Fred Bauermeister, on the other hand, testified that he was never informed of a potential conflict of interest by either McReynolds or Katz. Fred Bauermeister also testified that he merely witnessed the execution of the fee agreement and that the fee agreement was between McReynolds and Roots in conjunction with Resource Recycling. Fred Bauermeister said that Roots never discussed his "lean forward" concept with him and that at all times, he thought Katz was his personal lawyer and that he relied on Katz' advice in executing all documents.

From June through September 1988, Roots, McReynolds, and Huck lobbied members of the Douglas County board, as well as other governmental officials, in support of the joint venture initiative. In late September, Huck was contacted by counsel for Waste Management of North America, Inc. (Waste Management), inquiring as to whether the joint venture would be interested in working with Waste Management to bid the Bauermeister-Deaver site. This was not an unexpected development, as Roots had anticipated that Browning-Ferris, the current operator of the Douglas County landfill, might seek to bid the joint venture's site.

Waste Management initially proposed to either purchase or lease the Bauermeister land so that Waste Management could then bid the site. McReynolds proposed an arrangement where Waste Management would lease the Bauermeister-Deaver property, pay a royalty from the gate fee, and grant recycling rights to Resource Recycling. Fred Bauermeister and Roots agreed to pursue negotiations with Waste Management on these terms.

On October 31, 1988, Waste Management agreed to lease the site for $36,000 per year, pay a gate fee royalty of $1 per ton, and grant recycling rights to Resource Recycling. The recycling rights allowed Resource Recycling to pull all recyclable materials from the waste stream and to reserve for itself the gate fee attributable to this waste.

The landfill bid deadline was set for December 6, 1988, and Waste Management wanted the necessary agreements signed and submitted for its approval by Thanksgiving Day, November 24. On November 18, McReynolds and Katz met with Fred and Dorothy Bauermeister and Clara and Richard Deaver to discuss the proposed agreements. The facts and circumstances of what occurred at the November 18 meeting, as well as two subsequent November meetings, are under considerable dispute.

The principal agreement in dispute is one titled "Assignment and Allocation of Various Provisions Contained in Agreement for Lease of Real Estate" (assignment and allocation). This agreement proposed to allocate the $3,000 monthly rental income in proportion to the contribution of land: $2,250 for the Bauermeisters and $750 for the Deavers. Consistent with the August 5, 1988, fee agreement, the assignment allocated to

McReynolds 30 cents per ton of the gate fee royalty for non-Omaha waste and 50 cents per ton for Omaha waste. Consistent with the August 31, 1985, joint venture agreement, the Bauermeisters and Roots were to share equally in the profits from the operation of the landfill, that being the remainder of the gate fee royalty and the recycling rights. The Deavers were to receive no part of the profits. McReynolds testified that Richard Deaver objected to this proposed division of profits and that the Bauermeisters, particularly Dorothy, were adamant that the Deavers take nothing of the gate fee.

In an effort to overcome Richard Deaver's objection, McReynolds suggested to Fred Bauermeister that the Deavers receive a percentage of their recycling rights. On November 21, 1988, a meeting was held to explain the new terms which allocated 50 percent of Resource Recycling to Roots and divided the Bauermeisters' share of Resource Recycling, 37.5 percent to the Bauermeisters and 12.5 percent to the Deavers if, and only if, the Waste Management bid was accepted. There is some dispute as to whether Richard Deaver agreed to accept the recycling percentage in lieu of a portion of the gate fee; however, the evidence reveals that Deaver asked to have an attorney review the agreement before signing. McReynolds and Katz testified that they told Deaver that would be a good idea, but that he must have another attorney review the agreement quickly as they were under a time deadline. Toward this end, McReynolds and Katz said that the amended agreement was left at the front desk of the Croker Huck office, and it was retrieved by somebody the next day.

Fred Bauermeister was unable to specifically recall the November 18 and 21 meetings with the Deavers, but did not dispute that such meetings had occurred. Bauermeister agreed that sometime prior to November 30, meetings were held in which the division of the rent and royalty payments was discussed. Richard and Clara Deaver testified that they had no specific recollection of the November 18 meeting and that at the November 21 meeting, the proposed lease and assignment agreements were discussed, but that the gate fee split was not mentioned.

Because of the delay necessitated by Deaver's objection, the deadline with Waste Management was postponed until

November 30. On November 30, the parties met again at the Croker Huck office to execute the lease and assignment and allocation documents. McReynolds and Katz testified that the documents were read out loud or gone over word for word with the Bauermeisters and the Deavers. The Deavers testified that they did not recall whether the documents were read to them on November 30 prior to signing. Fred Bauermeister said he had some memory that some of the documents were read before signing.

McReynolds testified that Richard Deaver asked whether another attorney was required to review the documents and that McReynolds told him there was no such requirement. The Bauermeisters and the Deavers both testified that Katz and McReynolds pressured them to sign the documents or the deal would not get done. Fred Bauermeister testified that McReynolds and Katz told him the deal was fair.

Richard Deaver testified that when he told Katz he would like to take the documents to another lawyer, Katz told him that would not be necessary. Furthermore, Richard Deaver claimed that he first learned that his wife would not share in the gate fee split after the November 30 meeting when, upon returning home, he read the relevant provision of their copy of the assignment and allocation agreement. Richard Deaver said he telephoned Katz and objected shortly thereafter. Clara Deaver said that when her husband asked to have someone else look at the documents, Katz said, "No, we will take care of it." Fred Bauermeister testified that when Richard Deaver suggested or questioned whether another attorney should look at the assignment and allocation agreement, Katz and McReynolds said that would not be a good idea because it could blow the whole deal.

Robert Bauermeister testified that he, as well as his father and mother, indicated they would like more time before signing the agreements, but that Katz told them it was in their best interests to sign the agreements and that if they did not sign that day, the deal with Waste Management would not come about. Robert Bauermeister said that he indicated to Katz that he thought his family was giving up too much and that Katz responded by saying he thought the deal was fair and equitable.

The documents were eventually executed that day and sent express delivery to Waste Management in Chicago. Because

Waste Management had bid another site in addition to the Resource Recycling site, Huck, McReynolds, and Roots continued to lobby county officials in support of Resource Recycling's bid with Waste Management. On December 20, the county board selected the Waste Management bid of the joint venture site. During the next year, six lawsuits in regard to the proposed landfill were filed. Croker Huck participated in the successful defense of those suits in which Fred Bauermeister or Resource Recycling was a named defendant. At some point, the county required Waste Management to own the landfill site. McReynolds drafted a purchase agreement which incorporated the prior assignment and allocation agreement and, in effect, provided the Bauermeisters and the Deavers with the same income as the prior lease agreement, with the option to buy back their land for $1 at the end of the landfill contract. This document was executed on March 22, 1989.

The landfill opened on August 31, 1989, and its operation has resulted in a roughly one-third split of the $1 gate fee royalty. Between September 1989 and October 1993, the Bauermeisters, Roots, and McReynolds individually received monthly royalty payments ranging between $9,000 and $21,000. By the time of trial, each had received around $700,000 in income from the gate fee split. It is estimated over the life of the landfill, the fee split could provide each with as much as $4,000,000. Resource Recycling, however, has not produced any income pursuant to its recycling rights due to the fact that an unexpectedly low gate fee bid by Waste Management made recycling unprofitable at the time of trial.

Prior to the operation of the landfill, the Bauermeisters' annual income from farming was about $12,000. Notwithstanding, following a conversation with Richard Kogler, a Waste Management vice president, the Bauermeisters became dissatisfied with the amount of income accruing to Roots and McReynolds. According to Fred Bauermeister, Kogler indicated that he thought the fees received by McReynolds and Roots were excessive. Kogler denies having such a conversation with Fred Bauermeister. On January 23, 1992, the Bauermeisters filed their suit in equity seeking rescission of only the assignment and allocation agreement and restitution of the gate fee income paid Roots and McReynolds. The

district court upheld the assignment and allocation agreement in all respects except as to McReynolds' contingency fee.

The trial court concluded that McReynolds and Katz failed to fully disclose to the Bauermeisters the extent of the conflict of interest created by Katz' joining the Croker Huck law firm and that Katz, while representing the joint venture, advised the Bauermeisters in an individual capacity that it was in their best interests to sign the agreements. In addition, the court concluded that McReynolds' potential fee of $4 million was unconscionable and that the $900,000 fee already realized was clearly excessive.

Under the authority of the court to determine the reasonableness of attorney fees, the trial court allowed McReynolds to keep the royalty payments already received, but cut off all further payments to him by rescinding that part of the assignment and allocation agreement which provided for McReynolds' fee. Finding rescission inappropriate as to the remainder of the agreement, the court reformed the agreement as to the Bauermeisters and Roots, splitting evenly the $1 gate fee.

## ASSIGNMENTS OF ERROR

McReynolds assigns that the district court erred in finding (1) that his attorney fees were clearly excessive and reforming the contract to reduce these fees and (2) that the Bauermeisters had standing or a right to contest McReynolds' attorney fees and that the claims of excessive fee were not barred by the statute of limitations for professional malpractice or by laches.

The Bauermeisters cross-appeal and assign that the trial court erred in (1) affirming and enforcing the assignment and allocation agreement as to Roots and Resource Recycling, (2) awarding McReynolds a fee in excess of $800,000 by allowing him to retain that portion of the gate fee already received, and (3) not assessing costs of the action in favor of the Bauermeisters.

## STANDARD OF REVIEW

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. *Midlands Rental & Mach. v. Christensen Ltd.*, 252 Neb. 806, 566 N.W.2d 115 (1997); *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997).

## ANALYSIS

### STANDING

McReynolds first contends that the Bauermeisters do not have standing to assert their claims. McReynolds argues that only the client, Resource Recycling, has a right to contest the reasonableness of his fee and that because the Bauermeisters were never his clients individually, they are without standing in this matter.

However, this argument does not properly characterize the Bauermeisters' cause of action. The Bauermeisters have, in essence, pled and attempted to prove at trial that they were duped by McReynolds, Katz, and Roots into signing the November 30, 1988, assignment and allocation agreement due to fraud, undue influence, misrepresentation, and business coercion. The Bauermeisters' cause of action is predicated not on a right appurtenant to the joint venture, but on a right due all parties to the assignment and allocation agreement: that their assent was validly obtained. Thus, McReynolds' standing argument is without merit.

### STATUTE OF LIMITATIONS

McReynolds argues that all of the Bauermeisters' claims, including the claim of excessive fees, are based on his alleged professional misconduct or lack of fidelity arising out of an attorney-client relationship. As such, because the Bauermeisters' malpractice cause of action arose more than 2 years before suit was filed, their cause of action is barred by Neb. Rev. Stat. §§ 25-208 and 25-222 (Reissue 1995).

McReynolds relies on *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995), wherein we held that although an attorney-client relationship rests in contract, an attorney's alleged professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action.

In *Gravel v. Schmidt, supra*, the plaintiff, Tim Gravel, was promised by William Tomek, an attorney representing Gravel's deceased father's estate, that he would inherit somewhere between $50,000 and $100,000 upon final settlement of the estate. Relying on Tomek's promise, Gravel entered into a contract to purchase real property. Gravel eventually received around $15,000 from the estate and subsequently defaulted on the land purchase contract. Gravel sued, claiming that Tomek had breached a contract between Gravel and Tomek when Gravel inherited substantially less than what Tomek had promised. Although we held that a contract cause of action such as Gravel's was really a professional negligence cause of action, we expressly assumed without deciding the issue before us now.

A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty. *Id.*; *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994). There was never an attorney-client relationship between McReynolds individually and the Bauermeisters. McReynolds' professional duty goes only to the joint venture, Resource Recycling. In fact, McReynolds asserts this very argument in claiming that the Bauermeisters do not have standing to bring their claims. Further, we see no special facts in this record that would allow us to conclude that McReynolds individually owed a duty to the Bauermeisters separate and distinct from the duty he owed to Resource Recycling. Thus, the Bauermeisters' cause of action is not for professional negligence, and McReynolds' statute of limitations claim is without merit.

### EQUITABLE RESCISSION

In an equitable rescission action based on fraud, undue influence, misrepresentation, or business coercion, the proponent bears the burden of proving each element by clear and convincing evidence. See, *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996); *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994); *McCubbin v. Buss*, 180 Neb. 624, 144 N.W.2d 175 (1966). In its order, the trial court did not expressly state that it utilized this heightened evidentiary standard. However, it is presumed in a bench trial that the judge was familiar with and

applied the proper rules of law unless it clearly appears otherwise. *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).

In regard to the Bauermeisters' claims against appellees Roots and Resource Recycling, the trial court concluded that the Bauermeisters had failed to prove fraud, either actual or constructive, on Roots' part, and that Roots was not guilty of business coercion, nor did he exert undue influence on the Bauermeisters. We agree. The evidence establishes that the Bauermeisters, in executing the assignment and allocation agreement, did not rely on Roots, but, instead, relied on Katz. Roots and the Bauermeisters were unable and unwilling to pay attorney fees on an hourly fee basis in August 1988. Moreover, in the joint venture agreement, executed at a time when each was individually represented by counsel, Roots and the Bauermeisters agreed to split equally all profits from the operation of a landfill on the Bauermeister property. Thus, the trial court correctly concluded that the assignment and allocation agreement should be enforced as written in regard to Roots and Resource Recycling.

We note that the Bauermeisters did not assign as error in their cross-appeal the district court's failure to rescind the assignment and allocation agreement on the grounds of misconduct with respect to McReynolds or Katz. Thus, this issue is not before us.

Notwithstanding, the Bauermeisters argue that the assignment and allocation agreement was a modification of the prior fee agreement and that McReynolds therefore had an affirmative duty to make a full and fair disclosure of all material facts affecting the transaction at issue, and ensure that the transaction in question was fair.

Whatever merit there may be to the Bauermeisters' argument, it nonetheless does not address the determinative issue, that being the remedy requested by the Bauermeisters. The purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990). The trial court concluded that it was impossible for equity to substantially restore the parties to the positions they held prior to the execution of the assignment and allocation agreement. We agree.

The land at issue has been conveyed to Waste Management for use as a landfill. No one wants this conveyance rescinded or this use terminated. Further, the joint venture business opportunity to bid for the Douglas County landfill is forever lost. McReynolds relied on his share of the royalties to compensate Katz and Huck for their services. The Bauermeisters have entered into an agreement for the division of their income pursuant to the agreement. Roots has sold his share of Resource Recycling in reliance on the agreement. Clearly, it would be impossible to return these parties to a status quo.

Moreover, a party seeking rescission of a contract on the grounds of fraud, misrepresentation, or business coercion must do so promptly upon the discovery of the facts giving rise to the right to rescind. See, *McCubbin v. Buss*, 180 Neb. 624, 144 N.W.2d 175 (1966); *Mazanec v. Lincoln Bonding & Ins. Co.*, 169 Neb. 629, 100 N.W.2d 881 (1960); *Wegner v. West*, 169 Neb. 546, 100 N.W.2d 542 (1960). The parties executed the assignment and allocation agreement on November 30, 1988. Robert Bauermeister testified that the Bauermeisters executed the agreements because they felt as though they had a financial gun to their head. Nonetheless, the Bauermeisters ratified their actions on March 22, 1989, when they executed the purchase agreement which expressly incorporated the assignment and allocation agreement. It was not until nearly 3 years later, on January 23, 1992, that the Bauermeisters filed their petition. At that time, the Bauermeisters had received over $425,000 of income from the operation of the landfill.

We conclude that the Bauermeisters' 3-year delay, all the time claiming a financial gun had been placed at their head, and the acceptance of over $425,000 in benefits pursuant to the contract, forecloses the Bauermeisters' opportunity to claim that their assent to the contract was invalid. " '[One] who seeks equity must do equity.' " *Kracl v. Loseke*, 236 Neb. at 304, 461 N.W.2d at 76. Plainly, the Bauermeisters have failed to do equity.

## ATTORNEY FEES

McReynolds next contends that the trial court erred when it found that McReynolds had received a clearly excessive fee

and, thereafter, reformed the contract to reduce that fee. The trial court concluded that McReynolds' fee was a contingency fee and that by any standard, it was clearly excessive and totally unconscionable. The trial court, pursuant to its inherent power to regulate the bar and determine the reasonableness of a contingent fee, cut off all royalty payments to McReynolds accruing after February 28, 1994.

On de novo review, two issues are presented for our consideration: whether the fee agreement was a permissible transaction and, if so, whether the fee received was excessive.

McReynolds had initially characterized the August 5, 1988, fee agreement as a contingent fee. However, at trial, McReynolds' expert, Lawrence Raful, dean of the Creighton University School of Law, offered a different view. Raful testified that the fee agreement was not a contingent fee agreement, but, instead, was a business association between the attorney and his client. We agree.

A contract for contingent attorney fees is one which provides that the lawyer shall receive a fee, usually a percentage of the recovery, if and only if the plaintiff recovers from the defendant in litigation or settlement. See Charles W. Wolfram, Modern Legal Ethics § 9.4.1 (West 1986).

In the instant appeal, although recovery by McReynolds was contingent on a successful result, recovery was not pursuant to litigation or settlement of a disputed claim. Instead, McReynolds' fee has more characteristics of a business relationship between an attorney and a client than it does of a contingency fee. Due to the fiduciary nature of the attorney-client relationship and because of the very real risk that self-interest will interfere with the lawyer's exercise of judgment on behalf of the client, a lawyer may enter into a business transaction with a client only under limited conditions. *People v. Bennett*, 810 P.2d 661 (Colo. 1991). Those conditions are delineated in Canon 5, DR 5-104(A), of the Code of Professional Responsibility: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

To establish a violation of DR 5-104(A), it is necessary to show (1) that the attorney and the client had differing interests in the transaction, (2) that the client expected the lawyer to exercise his or her professional judgment for the protection of the client, and (3) that the client consented to the transaction without full disclosure. *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991).

Prof. William Hodes of Indiana University School of Law testified on behalf of the Bauermeisters concerning the issue of full disclosure. Professor Hodes concluded that McReynolds, Katz, and Huck had failed to fully disclose to the Bauermeisters the extent of the potential conflicts in regard to McReynolds' representation of the joint venture and in regard to Katz' joining the Croker Huck law firm.

However, much of Professor Hodes' analysis is predicated on an assumption not supported by the record. Hodes assumes that when the joint venture was formed in 1985, McReynolds represented both Roots and the Bauermeisters individually. This is simply not accurate. When Roots and Robert and Fred Bauermeister formed the joint venture, they were represented by separate counsels. Katz represented the Bauermeisters, and McReynolds represented Roots. Katz was not "of counsel" for Croker Huck at this time. After the joint venture agreement was signed, it was the joint venture, not the Bauermeisters or Roots individually, that sought representation from Croker Huck.

A lawyer who represents a business entity owes his or her allegiance to the entity, not to an individual shareholder. Canon 5, EC 5-18, of the Code of Professional Responsibility. Thus, at the time the assignment and allocation agreement was executed, McReynolds and Katz owed their allegiance to the joint venture and its business entity, Resource Recycling.

McReynolds and Katz shared a common interest with the joint venture, that being the siting of the landfill. If the joint venture succeeded, then McReynolds and Katz would profit. However, if the joint venture failed, then McReynolds and Katz would get nothing. Moreover, McReynolds and Katz were powerless to influence the contribution of waste into the landfill and thus alter the proportion of royalty payments. The trial court concluded that the assignment and allocation agreement gave

McReynolds substantially more in fees than did the August 5, 1988, fee agreement. This conclusion is not supported by the evidence. The assignment and allocation agreement provided the identical compensation schedule with respect to McReynolds as did the fee agreement.

At all times, McReynolds and Katz exercised their professional judgment for the protection of the joint venture. The most obvious example of this is McReynolds' refusal of Roots' initial "lean forward" compensation offer of $1 per ton. McReynolds testified that Roots' proposed fee was clearly excessive, based on Roots' annual tonnage estimate. After considering all the relevant factors, McReynolds offered to provide services for what turned out to be one-third of the amount proposed by Roots.

Furthermore, not only did the client, Resource Recycling, consent to all transactions concerning the landfill after full disclosure of any interest on the part of the Croker Huck law firm, but on appeal to this court, Resource Recycling argues that the assignment and allocation agreement as written reflects the intent of the parties at the time of execution.

The trial court found that although the evidence was in great conflict, neither McReynolds nor Katz ever told the Bauermeisters that they could get another attorney, discussed the potential conflicts of interest that could arise once Katz joined Croker Huck, or told Fred Bauermeister that Katz could not represent him. Even giving deference to the fact that the trial judge heard and observed the witnesses, we are unable to reach the same conclusion as the trial court in our de novo review of the record.

The testimony of McReynolds, Katz, and Roots unambiguously asserts that Fred Bauermeister was apprised of the potential conflict of interest created by Katz' joining the law firm, was told he was free at any time to see another attorney, and was specifically told that Katz could no longer represent him in an individual capacity regarding joint venture matters. Although Fred Bauermeister testified that he was not informed of the potential conflict of interest, his testimony must be viewed in its proper perspective.

At the time of trial, Fred Bauermeister had significant memory lapses and problems recalling details of crucial events.

During cross-examination and in his depositions, Bauermeister testified that he did not have a specific recollection of the majority of the frequent meetings, telephone calls, and discussions which occurred during this period in regard to the joint venture. Much of the time, when questioned in detail, Bauermeister would admit that he simply did not recall a particular event or conversation, not that the event or conversation did not in fact occur.

Most telling is the fact that the record is silent as to any occasion where the Bauermeisters sought advice from McReynolds or Katz concerning their individual interests vis-a-vis the joint venture or Roots. Furthermore, it was only after the seed of discontent was sown by Waste Management's vice president Kogler that Fred Bauermeister even began to question the fairness of the assignment and allocation agreement.

Accordingly, we conclude that the fee agreement in this matter was a business relationship between an attorney and a client wherein the interests of the attorney and the client did not differ, the client expected the attorney to exercise his professional judgment for the client's protection, and the client consented to the transaction with full disclosure. Thus, the fee agreement was not a prohibited transaction.

The remaining issue is whether McReynolds' fee was clearly excessive. Canon 2, DR 2-106, of the Code of Professional Responsibility provides:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

See, also, *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1983).

Our de novo review of the record compels the conclusion that McReynolds' fee was not clearly excessive. Never before had a privatized public landfill been sited in Nebraska. When McReynolds agreed to Roots' "lean forward" proposal, he thought the joint venture had a 5- to 10-percent chance of success. McReynolds initially estimated he would spend $100,000 in billable hours working on the landfill project. In fact, $250,000 of Croker Huck time was spent in pursuit of the landfill contract. McReynolds testified that because of his commitment to the joint venture project, he lost two large clients that normally required a significant portion of his time.

Over the years, McReynolds and Huck had established a close working relationship with members of the Douglas County Board of County Commissioners and other governmental officials. There was no question that these relationships greatly benefited the joint venture. Further, the only way that the joint venture could possibly take advantage of these relationships was to convince McReynolds and Huck to provide their services on a "lean forward" basis, as Roots and the Bauermeisters were unwilling and unable to pay hourly attorney fees which, in this case, eventually reached in excess of $250,000.

If Roots and the Bauermeisters were to benefit at all, they needed to convince McReynolds to accept a great deal of risk in exchange for a greater reward than his usual hourly fee. The results obtained by McReynolds and Huck were excellent, and the benefit to the client was extraordinary. By the time of trial,

the joint venture profit, split evenly by the Bauermeisters and Roots, had reached nearly $1.4 million; and this is without capitalizing on the recycling rights reserved.

We conclude, in light of all the facts, that McReynolds' fee is not one where a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Therefore, we reverse that portion of the district court order reforming the assignment and allocation agreement in regard to the gate fee royalty payable to McReynolds and hold that the November 30, 1988, assignment and allocation agreement should be upheld as written in all respects.

## CONCLUSION

For the foregoing reasons, we affirm the district court's denial of the Bauermeisters' prayer for rescission of the assignment and allocation agreement, and reverse that portion of the district court order reforming the assignment and allocation agreement in regard to the gate fee royalty payable to McReynolds. Thus, we affirm in part, and in part reverse and remand with directions to the trial court to enter judgment consistent with this opinion, reinstating and upholding the November 30, 1988, assignment and allocation agreement as written with respect to all parties. Having so held, we need not address the Bauermeisters' remaining assigned error concerning costs.

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

WHITE, C.J., and WRIGHT, J., not participating.

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# NORWEST CORPORATION, A DELAWARE CORPORATION, ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF INSURANCE, APPELLEE, AND NEBRASKA LAND TITLE ASSOCIATION, INTERVENOR-APPELLEE.

571 N.W.2d 628

Filed December 19, 1997. No. S-96-108.

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. **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. **Insurance.** Under Neb. Rev. Stat. § 44-102 (Reissue 1993), the definition of insurance contains the following elements: (1) the existence of a contract whereby, (2) for a consideration, (3) one party (the insurer) promises to pay money or perform a valuable act for the benefit of the other party (the insured), (4) upon the happening of a stated hazard or peril that results in a loss to the insured.
4. **Contracts: Time.** Instruments made in reference to and as part of the same transaction are to be considered and construed together, and the fact that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction.

Appeal from the District Court for Lancaster County: PAUL D. MERRIT, JR., Judge. Affirmed.

Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellants.

Don Stenberg, Attorney General, and Timothy J. Texel for appellee.

William M. Lamson, Jr., Michael J. Dugan, and Michael S. Degan, of Kennedy, Holland, DeLacy & Svoboda, for intervenor-appellee.

Robert J. Hallstrom, of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

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

MCCORMACK, J.

This case involves a determination of whether certain contractual undertakings by Norwest Mortgage, Inc. (NMI); American Land Title Company, Inc., doing business as ATI Title Company (ATI); and Norwest Corporation (Norwest) (collectively referred to as "appellants") relating to the status of mortgages securing residential mortgage loans originated by NMI and sold to secondary market purchasers such as the Federal Home Loan Mortgage Corporation ("Freddie Mac") are insurance contracts and therefore subject to regulation under Nebraska law. The Nebraska Department of Insurance

(Department), upon a hearing, issued a cease and desist order, finding that appellants were engaged in the unauthorized business of insurance by marketing and selling a program called Title Option Plus (TOP) to mortgage loan applicants. The Nebraska Land Title Association entered this matter before the Department as intervenor. The district court for Lancaster County, Nebraska, concluded that TOP constitutes insurance as defined in Neb. Rev. Stat. § 44-102 (Reissue 1993) and title insurance as defined in Neb. Rev. Stat. § 44-201(15) (Reissue 1993) and that there was sufficient evidence in the record to support the Department's finding that TOP was designed to evade the insurance laws and was marketed in a misleading fashion. The district court ordered appellants to replace, at no cost to the borrowers, all title condition reports for properties located in Nebraska issued subsequent to June 1, 1995, with lender's title policies, each policy to be effective the date of the title condition report it replaces. Appellants timely appealed. We granted the Department's and the Nebraska Land Title Association's petitions to bypass and transferred the case to our docket. We now affirm.

## BACKGROUND

Appellants are three corporate entities. Norwest, a Delaware corporation, is a bank holding company with its principal place of business in Minneapolis, Minnesota. NMI is a wholly owned subsidiary of Norwest engaged in banking activities and is a California corporation with its principal place of business in Des Moines, Iowa. ATI is a wholly owned subsidiary of NMI engaged in the business of performing title searches on real property and is a Nebraska corporation with its principal place of business in Omaha, Nebraska. This dispute arises primarily from the sale of TOP by NMI to Nebraska mortgage borrowers.

The TOP program is embodied in three interrelated contractual agreements as described by the order of the Lancaster County District Court dated January 4, 1996:

> The first contract, the Master Agreement, is a "warranty" by NMI to Freddie Mac that those mortgages NMI sells to Freddie Mac are secured by a first lien. NMI's contractual undertakings under the Master Agreement protect Freddie

Mac against any title claims or problems, including non-record risks, that may affect Freddie Mac's interest in the loans it has purchased. If a defect appears and cannot be cured, NMI agrees to repurchase the loan, if the claim cannot be otherwise resolved. (It is noted that NMI only warrants the title and priority of a lien, when the title search and title report is performed by ATI.[)]

The second contract is a title condition report prepared by ATI and furnished to NMI to verify that, as a matter of public record, NMI's mortgage is secured by a first lien. ATI remains liable to NMI for any on-record defects that are missed in the title search, while NMI assumes the risk of off-record defects.

The third contractual arrangement is the Guarantee Agreement from Norwest to Freddie Mac under which Norwest guarantees NMI's title-related obligations to Freddie Mac. Freddie Mac normally requires that the seller's warranty (in this case, NMI's) of the first-lien status be backed up by a third-party title insurance policy. Under the Guarantee Agreement between Norwest and Freddie Mac, however, Norwest takes the place of a third-party title insurance company and backs up the warranty agreement between NMI and Freddie Mac. NMI's warranty standing alone was not sufficient to relieve NMI of Freddie Mac's traditional requirement that the seller of the mortgage obtain a lender's title insurance. Thus, absent the guarantee from Norwest, NMI's warranty in regard to TOP would not satisfy Freddie Mac's requirement of a third-party title insurance policy.

Appellants did not attempt to obtain the approval of the Department for marketing TOP. One of appellants' goals was to implement TOP so that it would be "grandfathered" if in fact there was future adverse legislation.

In 1994, NMI began soliciting TOP as an alternative to title insurance. TOP was sold to borrowers by and through NMI loan officers. The TOP program works essentially as follows: When a prospective borrower comes to an NMI branch office to obtain a mortgage loan, the borrower is given the option of purchasing TOP to satisfy a lender's title insurance requirement, rather than

purchasing the lender's title insurance policy. NMI sets aside a reserve for losses of 2 percent of the amount expected under the TOP program based on data compiled by title insurance companies. NMI pays ATI the entire fee paid by the borrower, and no part of the fee is applied to the reserve fund. NMI and ATI, however, held a contest among NMI loan officers to sell TOP, which awarded the winner of the contest a trip from a selection of various places. After the borrower pays the TOP premium, ATI completes a title search on the property for which the borrower is obtaining a mortgage and issues a preliminary title report indicating the search results. ATI then issues a final title condition certificate at closing reflecting that NMI has first-lien status. Norwest, through its subsidiary NMI, then packages and sells these mortgages with TOP protection to Freddie Mac.

Before it will purchase any mortgages from lenders, Freddie Mac requires either (1) a fully paid mortgage title insurance policy or (2) an attorney's title opinion or certificate. In February 1994, however, NMI reached an agreement with Freddie Mac (the master agreement) that Freddie Mac would purchase mortgages with TOP protection instead of the traditionally required lender's title insurance policy or attorney's title opinion. Pursuant to the terms of the master agreement, NMI agrees to defend any and all claims against a title securing a TOP-backed mortgage sold to Freddie Mac and further agrees to take all necessary steps to secure title. If the claim or defect cannot be remedied, NMI agrees to repurchase the loan. The master agreement between NMI and Freddie Mac requires NMI to hold Freddie Mac harmless from any and all claims against the title to underlying property. Under the guarantee agreement between Norwest and Freddie Mac, Norwest takes the place of a third-party title insurance company and backs the warranty agreement between NMI and Freddie Mac. Absent the guarantee from Norwest, NMI's warranty regarding TOP would not satisfy Freddie Mac's third-party title insurance requirement.

On August 26, 1994, the Department issued to appellants an order to cease and desist, along with an order to show cause and notice of hearing. The order was entered because of information the Department received indicating that appellants were engaged in the unauthorized business of insurance and in an

unfair insurance trade practice regarding the solicitation of TOP. The Department concluded that TOP constituted the "substantive equivalent" of title insurance within the meaning of Neb. Rev. Stat. § 44-1942 (Reissue 1993). The Department also found that TOP was created to evade Nebraska insurance laws.

Appellants filed an application for stay with the Department pending judicial review. The Department denied this motion. Appellants then filed a petition for review in the district court for Lancaster County, alleging that TOP is not insurance and was not created to evade Nebraska insurance laws. Appellants also filed a motion for stay in district court. The district court granted the motion on the condition that a bond be filed by the presidents of Norwest, NMI, and ATI.

The district court concluded that TOP constitutes an attempt by appellants to evade Nebraska insurance laws. The district court concluded, based upon the record created before the Department, that TOP constitutes insurance within the meaning of § 44-102, that appellants are not licensed to transact the business of insurance, and that appellants are therefore engaged in the unauthorized business of insurance. The district court also found that the manner in which TOP was marketed and sold to consumers was misleading. From the decision of the district court, appellants timely appeal.

## ASSIGNMENTS OF ERROR

Summarized and restated, appellants assign as error the district court's determination that (1) the opinion rendered by the Department should be given deference and a presumption of validity, (2) TOP was insurance as defined in Nebraska statutes, (3) TOP was designed to evade insurance laws and was marketed in a misleading fashion, (4) the district court had jurisdiction to regulate these activities, (5) the warranty given to Freddie Mac by NMI was insurance rather than a sales warranty, (6) TOP involves a transfer of risk, (7) the fee paid to ATI for title condition reports was an insurance premium, and (8) the three contractual undertakings constituted one, not three, agreements.

## 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. *McGuire v. Department of Motor Vehicles, ante* p. 92, 568 N.W.2d 471 (1997); *Piska v. Nebraska Dept. of Soc. Servs.*, 252 Neb. 589, 567 N.W.2d 544 (1997); *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997); *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997); *Val-Pak Of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996).

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. *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997); *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997); *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997); *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997).

## ANALYSIS

The issue in this case is whether any of the three contractual undertakings involved in TOP constitutes a contract of insurance pursuant to § 44-102.

### JURISDICTION

The threshold inquiry is whether the Department had jurisdiction to regulate the activities involved in the instant case. Appellants argue that the Department lacked jurisdiction because neither the master agreement nor the guarantee agreement was executed in Nebraska. The appellants claim that only those acts defined in Neb. Rev. Stat. § 44-2002(2) (Reissue 1993) performed in the State of Nebraska via mail and taking effect in Nebraska are deemed to constitute the transaction of insurance business in Nebraska. Appellants further argue that Nebraska's only connection with the TOP program is the records search performed by ATI in preparation of title reports for NMI. Therefore, appellants claim, because the contract between NMI and Freddie Mac does not concern Nebraska, such activity is beyond the regulation and control of the Department. We disagree.

Neb. Rev. Stat. § 44-101.01 (Reissue 1993) provides: "The Department of Insurance shall have general supervision, control, and regulation of insurance companies, associations, and societies and the business of insurance in Nebraska . . . ." Section 44-102 defines insurance as

> a contract whereby one party, called the insurer, for a consideration, undertakes to pay money or its equivalent or to do an act valuable to another party, called the insured, or to his or her beneficiary, upon the happening of the hazard or peril insured against whereby the party insured or his or her beneficiary suffers loss or injury.

In addition, Neb. Rev. Stat. § 44-2004 (Reissue 1993) specifies when personal jurisdiction attaches to any insurer:

> Any act of transacting an insurance business as set forth in section 44-2002 by any unauthorized insurer shall constitute sufficient contact with this state for the exercise of personal jurisdiction over such insurer in any action, suit, or proceeding in any court by the Director of Insurance or by the state or in any proceeding before the director and which arises out of transacting an insurance business in this state by such insurer.

Section 44-2002(2) provides:

> Any of the following acts in this state effected by mail or otherwise by or on behalf of an unauthorized insurer shall constitute the transaction of an insurance business in this state. The venue of an act committed by mail shall be at the point where the matter transmitted by mail is delivered and takes effect. For purposes of this section, unless the context otherwise requires, insurer shall include all corporations, associations, partnerships, and individuals engaged as principals in the business of insurance and shall also include interinsurance exchanges and mutual benefit societies:
>
> (a) The making of or proposing to make, as an insurer, an insurance contract;
>
> (b) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;

(c) The taking or receiving of any application for insurance;

(d) The receiving or collection of any premium, commission, membership fees, assessments, dues, or other consideration for any insurance or any part thereof;

(e) The issuance or delivery of contracts of insurance to residents of this state or to persons authorized to do business in this state;

(f) Directly or indirectly acting as an agent for or otherwise representing or aiding on behalf of another any person or insurer in the solicitation, negotiation, procurement, or effectuation of insurance or renewals thereof or in the dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, a fixing of rates or investigation or adjustment of claims or losses or in the transaction of matters subsequent to effectuation of the contract and arising out of it, or in any other manner representing or assisting a person or insurer in the transaction of insurance with respect to subjects of insurance resident, located, or to be performed in this state. This subsection shall not operate to prohibit full-time salaried employees of a corporate insured from acting in the capacity of an insurance manager or buyer in placing insurance in behalf of such employer;

(g) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance; or

(h) The transacting or proposing to transact any insurance business in substance equivalent to any of the provisions of subdivisions (a) through (g) of this subsection in a manner designed to evade the provisions of the statutes.

An administrative agency has the power specifically conferred by statute to enforce laws, *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); therefore, subject matter jurisdiction can properly be asserted when the action of a defendant in a forum state is specifically regulated by statute. For reasons more fully set out below, we determine that TOP is regulated by

statute as insurance or in substance equivalent to insurance. Therefore, appellants have engaged in activities which create jurisdiction over them in Nebraska, and the Department properly asserted jurisdiction in the instant case.

### PRESUMPTION OF VALIDITY OF DEPARTMENT OPINION

Appellants next assert that the district court erred in giving the Department's opinion a presumption of validity and therefore failed to apply the appropriate standard of review. This argument is without merit. Pursuant to Neb. Rev. Stat. § 84-917(5) (Reissue 1994), the district court's review of the decision of the Department is de novo on the record. Appellants cite *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995), for the proposition that an administrative determination of a question of law is not entitled to a presumption of correctness or validity. In *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995), however, we recognized that the de novo standard of review which must be applied by the district court when reviewing administrative agency decisions is not inconsistent with the proposition that a rebuttable presumption of validity attaches to the actions of administrative agencies. Therefore, the district court did not err in according a presumption of validity to the Department's determination.

### INSURANCE

We now turn to the pivotal issue in the present case: whether TOP constitutes insurance or the substantive equivalent of insurance. Under § 44-102, the definition of insurance contains the following elements: (1) the existence of a contract whereby, (2) for a consideration, (3) one party (the insurer) promises to pay money or perform a valuable act for the benefit of the other party (the insured), (4) upon the happening of a stated hazard or peril that results in a loss to the insured. See *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982). Appellants contend that TOP is not insurance or its substantive equivalent because it is a sales warranty, no transfer of risk is involved, no premium is paid, and it consists of three separate and distinct contractual undertakings. We disagree.

To make a determination on this issue, we must first look to appellants' contention that TOP constitutes three separate and distinct agreements, not one contractual agreement. This contention is without merit. Appellants concede that the three contractual undertakings at issue "are collectively called the Title Option Plus ('TOP') program," brief for appellants at 2, but argue that none of these agreements individually satisfies the statutory definition of insurance when viewed alone. This court has held that instruments made in reference to and as part of the same transaction are to be considered and construed together, and the fact that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996); *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995); *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). In the instant case, each of the contracts for TOP contemplates the others. The district court stated:

> TOP is an integrated concept comprised of several individual transactions. TOP is effectuated when a borrower, applying for a property loan, elects TOP rather than traditional title insurance policies. When the borrower elects TOP, ATI conducts the title search and NMI provides a warranty to Freddie Mac. NMI's warranty to Freddie Mac is contingent on ATI performing the title search. Additionally, Freddie Mac requires that the warranty be backed up by a guarantee from Norwest; however, Norwest's guarantee is given only when the borrower elects TOP. As such, the entire TOP concept is comprised of the three transactions. If one of the transactions was omitted, the TOP concept would virtually be nonexistent.

Therefore, each of the three agreements is part of the same transaction, and they must be construed together as one contractual undertaking. Thus, TOP meets the first requirement of § 44-102 requiring the existence of a contract.

The next element required for a determination as to whether TOP is insurance is consideration. Appellants contend that the fee paid to ATI for title condition reports does not constitute an insurance premium. We disagree. When a mortgage borrower

elects to purchase TOP to satisfy the lender's title insurance requirement, the borrower pays the TOP fee. TOP is a for-profit concern. An interoffice memorandum from NMI's executive vice president in charge of TOP to all branch managers indicates the profitability of TOP: "[NMI branches] will also increase revenue by the soft dollars that you receive by selling TOP!" While appellants state that NMI and Norwest receive no part of the consideration paid to ATI, we note that NMI and ATI are both wholly owned subsidiaries of Norwest. Therefore, funds may flow between all three entities. Further, unlike the fee for an attorney's title opinion, the TOP fee is not a flat rate, but, rather, varies with the amount of the loan. The charge made for the product produced by ATI, therefore, is much more akin to the charge for title insurance, which is based on the value of the property being insured, than to the charge for a simple title or lien search, which is a flat fee. Based on the foregoing, we conclude that the district court's determination that the TOP fee constituted an insurance premium was supported by competent evidence.

The third element required for a finding of insurance is a promise by one party to perform a valuable act for the benefit of the other party. This requirement is met when NMI, in the master agreement, promises to protect Freddie Mac against title claims or problems that may affect Freddie Mac's interest in the loans it has purchased. This requirement is also met when Norwest guarantees NMI's obligations to Freddie Mac.

The final element required for a determination of whether TOP is insurance is the requirement that the above promise by one party to another occurs upon the happening of a stated hazard or peril which results in a loss to the insured. This requirement has also been met. Here, both NMI's and Norwest's promises occur in the event that it is discovered that the loans sold by NMI to Freddie Mac do not have first-lien status or are subject to a third-party claim. This discovery could result in a loss to Freddie Mac when it tries to collect on the obligation. By promising to protect Freddie Mac from such an event, Norwest and NMI act as insurers against Freddie Mac's loss if a loan does not have first-lien status. The district court stated:

> TOP operates in the same fashion as title insurance in that it provides protection for all risks, including off-

> record risks. As the TOP literature makes clear, TOP was designed to provide the same level of protection as loan title insurance. It is helpful to note that under a traditional lender's title insurance policy, an assignment of the policy to a secondary mortgage market is anticipated as part of the original mortgage transaction; thus, the assignee (in this case, Freddie Mac) would be described from the outset of the transaction so that the policy would remain effective to the benefit of the assignee. BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE § 27B.02 (1992). In TOP, the risks and perils insured against for the benefit of Freddie Mac are the same as those insured against if Freddie Mac was the assignee in a traditional lender's title insurance policy. As such, the function of TOP and a lender's title insurance policy is to provide title protection to secondary market purchasers.

We now turn to appellants' contention that TOP does not constitute insurance because there is no transfer of risk. This contention is without merit. We first note that Nebraska law does not define insurance in terms of transfer of risk. In the area of risk, however, businesses can self-insure themselves against certain risks they would have otherwise insured against with a third-party insurer. In *United States v. Newton Livestock Auction Market, Inc.*, 336 F.2d 673, 676 (10th Cir. 1964), the Tenth Circuit stated that self-insurance is defined as "the assumption of risk of his own loss by one having an insurable interest." The present case does not involve self-insurance. The district court found that when NMI owns the mortgage, it bears the risk. When NMI sells the mortgage to Freddie Mac, however, it no longer owns the mortgage and does not have an insurable interest. Therefore, Freddie Mac, the owner of the mortgage, bears the risk. We find this reasoning to be persuasive. For appellants' actions to be considered self-insurance, NMI would have to retain an insurable interest in the mortgages sold to Freddie Mac. Instead, Freddie Mac assumes the risk once it purchases the mortgages and looks to NMI and Norwest only to indemnify it from such a risk. Further, the primary obligation in the present case is the promissory note for the mortgage given by the borrower to NMI. The borrower is thus the

primary obligor. When NMI sells the loan with TOP protection to Freddie Mac, however, NMI now assumes the risk of loss. In deposition testimony, NMI stated that it was Norwest's "policy" not to go against the borrower in the event of a problem with a lien. The problem with this "policy" of Norwest's is that the borrower who paid the premium or charge is not contractually protected. Norwest's "policy" could change, and the borrower would have no recourse or protection against the change in "policy."

Next we turn to appellants' contention that TOP is not insurance but merely a warranty given to Freddie Mac. We do not agree. In *Ollendorf Watch Co. v. Pink*, 279 N.Y. 32, 17 N.E.2d 676 (1938), the court illustrated the distinction between a warranty and insurance. In that case, the court found that a certificate issued by a watch manufacturer which agreed to replace a watch if lost or stolen within 1 year from the date of insurance constituted insurance, even though no consideration in addition to the purchase price was paid. The court stated that this certificate went beyond mere warranty because it protected against hazards which had nothing to do with the make or quality of the watch.

The distinction between a warranty and an insurance policy was also discussed in *Rayos v. Chrysler Credit Corp.*, 683 S.W.2d 546 (Tex. App. 1985). In that case, the court held that "a warranty is issued to provide protection against defects and failures in a product, whereas an insurance policy is issued to provide reimbursement or indemnity based on an accident or occurrence unrelated to any defect or failure in the product." *Id.* at 548. In the present case, however, appellants provide no authority that a lien constitutes a product. The case law, to the contrary, indicates that a mortgage given on land to secure the payment of a debt is held to be a lien and nothing more. See *R. L. Sweet Lumber Company v. E. L. Lane, Inc.*, 513 S.W.2d 365 (Mo. 1974). Even assuming that a mortgage is a product, the product in the instant case is a first-lien mortgage of record. Under the *Rayos* and *Ollendorf Watch Co.* holdings, NMI can warrant the first-lien mortgage only to the extent of an adverse claim because of a negligently prepared title search. In indem-

nifying Freddie Mac from unrecorded risks, NMI goes beyond a simple warranty on the product and in fact provides insurance.

Further support for the proposition that TOP is insurance is found in *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997), wherein this court defined title insurance. In *Tess*, we stated that "title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs." *Id.* at 511, 557 N.W.2d at 703. In the present case, before NMI sells mortgages to Freddie Mac, a title search is conducted by ATI. When a TOP mortgage is sold to Freddie Mac, the record prepared by ATI indicates that Freddie Mac has first-lien position. If it is determined at a later date that there was an unrecorded title problem unable to be uncovered by the title search, appellants agree to defend Freddie Mac's title or buy the mortgage back. Because appellants are obligated to indemnify the insured against losses sustained in the event that a specific contingency occurs (an off-record claim), this agreement clearly constitutes indemnification of Freddie Mac. Appellants argue that the scope of the title search performed by ATI has nothing to do with the nature of the title sold by NMI. Under this analysis, however, Freddie Mac would not have required that the mortgages have first-lien position and would not have required Norwest to guarantee NMI's performance.

Finally, appellants urge us to follow the ruling by the Virginia State Corporation Commission and its bureau of insurance in Commonwealth of Virginia ex rel. State Corporation Commission v. Norwest Corporation, Norwest Mortgage, Inc. and American Land Title Company, Inc., case No. INS950079 (Oct. 28, 1996). We do not find this ruling persuasive. In that case, the commission found that TOP is not insurance. The commission, however, noted that there is no definition of insurance in Virginia. In Nebraska, there is a definition of insurance in § 44-102, which is set out in the "Jurisdiction" subsection above. The commission itself noted that Nebraska statutes define insurance to include the "equivalent" of specified activities that could cause TOP to be considered insurance and stated that Virginia has no comparable statutes. Because § 44-2002(2)

does provide for the transacting of the substantive equivalent of insurance, we conclude that because TOP looks like insurance and is sold like insurance, it is insurance.

This court is aware of the recent decision of the Virginia Supreme Court in the case *Lawyers Title Insurance Corporation v. Norwest Corporation, et al.*, No. 970385, 1997 WL 688667 (Va. Oct. 31, 1997). In this case, the Virginia Supreme Court affirmed the 1996 final order and opinion of the state corporation commission and its bureau of insurance which, in turn, reversed the findings of the hearing examiner, who found that the sale of TOP was transacting the business of title insurance in the commonwealth without first obtaining a license from the commission. The Virginia decision is distinguishable, however, from the decision we announce today in several respects.

First, the Virginia Supreme Court decision was not based on a de novo review, as was our decision. The standard of review in the Virginia case was that the commission's final order and opinion were presumed to be just, reasonable, and correct.

Second, the Virginia Supreme Court reached a 4-3 decision, focusing on the time when the TOP transaction occurs between the borrower (NMI customer) and the lender (NMI) and not on the time when the lender sells the loan to the secondary market such as Freddie Mac. The majority of the court reasoned that when NMI lends its money it assumes the risk that its lien is not first in priority and retains the risk, as opposed to transferring the risk to a title company. The three-judge dissent, however, said that the majority looks merely at the facade of Norwest's TOP program without considering its substance. The dissent asked the question, If there is no transfer of risk, what is the borrower getting for his premium? The dissent further states that the oral representations made by NMI employees to induce buyers to purchase TOP are sufficient to provide the terms of an oral contract, that these oral contracts were sufficient to indicate NMI had orally agreed to the shifting of some of the risk assumed by the borrower in the execution of the deed of trust, and that the oral contracts were contracts of insurance.

However, we do not find this shifting of risk analysis persuasive for two reasons: (1) Nebraska law does not define insurance in terms of transfer of risk and (2) as set out above, we find

that at the time NMI sells a mortgage to Freddie Mac, NMI no longer has an insurable interest after the sale, and that the owner of the mortgage, Freddie Mac, bears the risk. The three dissenting judges in the Virginia case stated that although the ultimate risk of a title defect remains with the borrower under the deed of trust, considering the substance of NMI's undertaking, its obligation to defend the title claim shifts a part of a TOP borrower's risk to NMI in return for the borrower's payment of the TOP fee.

Third, the Virginia Supreme Court majority found that TOP is a warranty, citing *Ollendorff Watch Co. v. Pink*, 279 N.Y. 32, 17 N.E.2d 676 (1938), because the representation by NMI that its loan is secured by a first mortgage represents the character and quality of the loan (product), and it is the status that is being warranted. We disagree and, in our opinion, find that in indemnifying Freddie Mac from unrecorded risk, NMI goes beyond a simple warranty on the product and in fact provides insurance. As pointed out in the three-judge dissent in the Virginia case, the warranty runs from NMI to the secondary market purchasers such as Freddie Mac and does not relate to the borrower, whose rights against NMI are created in the TOP agreement.

Finally, while *Lawyers Title Insurance Corporation, supra*, does not address the issue, we noted that in Commonwealth of Virginia ex rel. State Corporation Commission v. Norwest Corporation, Norwest Mortgage, Inc. and American Land Title Company, Inc., case No. INS950079 (Oct. 28, 1996), there is no statutory definition of insurance in Virginia. Nebraska's statutory definition of insurance, § 44-102, does not define insurance in terms of transfer of risk, which is the linchpin of the majority opinion of the Virginia Supreme Court.

## CONCLUSION

Having found that TOP is insurance or the substantive equivalent thereof, we find that the district court's ruling that TOP was marketed in a misleading manner to evade Nebraska insurance laws is supported by competent evidence. The judgment of the district court is therefore affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

# STATE OF NEBRASKA, APPELLEE, V. FREDDY GIOVANNI CHOJOLAN, APPELLANT.

571 N.W.2d 621

Filed December 19, 1997. No. S-96-511.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska rules of evidence commit the evidentiary question at issue to the discretion of the trial court.
3. **Trial: Evidence: Juries: Appeal and Error.** In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.
4. **Trial: Evidence: Proof.** The state has the burden to prove beyond a reasonable doubt that the admission of a statement was harmless.
5. **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.
6. **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.
7. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.
8. **Miranda Rights.** Statements made after *Miranda* rights are given are required to be made voluntarily.
9. **Confessions: Proof.** The state has the burden to establish that a defendant's statement was voluntary and not coerced.
10. **Confessions: Appeal and Error.** The determination of voluntariness of a defendant's statement is based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made, and the determination made by the trial court will not be disturbed on appeal unless clearly wrong.
11. **Confessions: Minors.** While an accused's minority is a factor to consider when determining the voluntariness of a confession, it is not determinative.

Petition for further review from the Nebraska Court of Appeals, HANNON, MUES, and INBODY, Judges, on appeal thereto from the District Court for Adams County, BERNARD SPRAGUE, Judge. Judgment of Court of Appeals affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

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

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

MCCORMACK, J.

The appellee, State of Nebraska, charged the appellant, Freddy Giovanni Chojolan, with murder in the first degree and use of a weapon to commit a felony. Pursuant to verdict, Chojolan was found guilty of manslaughter and not guilty of the weapons charge. The district court for Adams County, Nebraska, thereafter sentenced him to 15 to 20 years in the custody of the Department of Correctional Services. The Nebraska Court of Appeals affirmed Chojolan's conviction and sentence. *State v. Chojolan*, 97 NCA No. 6, case No. A-96-511 (not designated for permanent publication). Chojolan petitioned this court for further review, which was granted. We affirm the judgment.

## BACKGROUND

On February 17, 1995, 14-year-old Carol Alarcon was at Chojolan's house with several of their friends, including Gerardo Soto. Alarcon had previously dated Chojolan, but the two had "broken up" in approximately January 1995. One of the witnesses present at the house, Armando Rodriguez, testified that after seeing Alarcon dance with Soto, Chojolan broke a window. Rodriguez indicated that Chojolan stated that he was upset because Alarcon no longer loved him and that he broke the window because he was "very bitter" about Alarcon. Chojolan left the house and returned to find Alarcon and Soto kissing.

Later that evening, Alarcon and Soto were passengers in the back seat of a car driven by Chojolan. While driving, Chojolan saw Alarcon and Soto kissing in the back seat. Alarcon died shortly thereafter. Chojolan contends that Alarcon died after jumping out of the moving vehicle while traveling on U.S. Highway 6. The State maintains that Alarcon died after Chojolan struck her in the head with a tire iron.

Thomas Petersen testified that he was driving west on Highway 6 on the evening in question and observed brake lights

come on in from of him. As he approached the area where he had seen the lights, he observed a vehicle on the highway, a man standing in the middle of the road, and a girl lying face down behind the car. He testified that the man was trying to drag the girl into the car. After stopping briefly, Petersen went to get help. After he left, Alarcon was put into Chojolan's vehicle to be taken to the hospital, with Soto driving. On the way to the hospital, the car hit a median. Two of its tires went flat, and it came to rest on Highway 6 in front of Andy's Cafe.

Kenneth Carter testified that while driving east on Highway 6 near Andy's Cafe, a man flagged him down and asked for a ride to the hospital because "she is hurt." As Chojolan and Soto started to remove Alarcon from Chojolan's vehicle, a woman leaving a local establishment and identifying herself as a paramedic told them to leave Alarcon on the highway. Alarcon was pronounced dead at the scene.

Walter Eley was the first Hastings police officer to arrive at the scene. He testified that Chojolan told him Alarcon had jumped out of the car. Eley testified that he spoke to Chojolan in English and had no difficulty understanding Chojolan. Investigators Paul Weber and Glenn Kemp of the sheriff's office arrived together, and Weber began to talk to Chojolan. Weber testified that he asked Chojolan what had happened and was told by Chojolan that Chojolan, Soto, and Alarcon had been driving around and that Alarcon had jumped from the car while it was traveling between 50 and 55 miles per hour. Chojolan then took Weber and Kemp to the location of the alleged jump, near mile marker 210 on Highway 6, where Weber found some small blood drops on the pavement. After Kemp informed Chojolan that the physical evidence was inconsistent with his statement that Alarcon jumped from the car, Chojolan began to lower the speed at which Chojolan claimed Alarcon jumped from the vehicle until he was down to a speed of less than 5 miles per hour. Kemp removed a tire iron from Chojolan's trunk. Kemp testified that the blood at the scene had fallen straight down with no forces pushing on it in any direction. Kemp also testified that Chojolan spoke perfect English to him.

Weber testified that there was virtually no damage to Alarcon's clothing, that her leather boots were not scuffed up,

and that her clothing was not torn. He noted that the only scrape marks on Alarcon were some small abrasions on her buttocks. Weber testified that Alarcon's body and clothing were inconsistent with those of a person who had rolled from a car. Another officer at the scene, John Schakat, also testified that Alarcon had no scrapes or markings on her clothing or body.

Dr. Blaine Roffman performed an autopsy on Alarcon and testified that she died from a blow to the head caused by a broad-base-type instrument, possibly a tire iron. According to Roffman, the likelihood of Alarcon's sustaining this injury from jumping from a vehicle traveling 50 miles per hour was "nil to none." He testified that one would anticipate skin abrasions even if a person jumped from a vehicle traveling at only 5 miles per hour.

Kathy Schmitz, the limited-English-proficiency teacher at Hastings public schools, testified that Chojolan had participated in her classes and was "above average" and "very bright," with high basic interpersonal communication skills.

### Statements of Chojolan and Soto

Both Soto and Chojolan were taken to the police station and interrogated by Investigator Vincent Hernandez. Soto was first questioned at 5:55 a.m. on February 18, 1995. After being given his *Miranda* rights in Spanish, Soto indicated that he understood his rights and signed a waiver form. At this interview, Soto gave a statement similar to that given at the scene, namely, that Alarcon was injured after jumping out of Chojolan's vehicle. Chojolan was first questioned at 8 a.m. on February 18. Chojolan was also given his *Miranda* rights in Spanish, and he also indicated that he understood his rights and signed a waiver form. Chojolan also maintained that Alarcon had jumped from his vehicle. Both Chojolan and Soto were then taken to Mary Lanning Hospital to be examined.

Hernandez questioned Soto a second time at approximately 1:05 p.m. on February 18. Soto was again given his *Miranda* rights, indicated that he understood them, and waived them. During this interview, Soto gave a different version of Alarcon's death. He stated that Chojolan was driving very fast and that he and Alarcon asked him to stop the car. After Chojolan stopped the car, he and Alarcon began arguing outside of the car.

Chojolan then grabbed a "ferreo," meaning "iron" in Spanish, and swung at Alarcon. Soto stated that he caught the tire iron and pushed Alarcon out of the way. He stated that Chojolan swung the iron again and struck Alarcon, who instantly fell to the ground. Soto stated that Chojolan then got scared and wanted to take Alarcon to the hospital.

Chojolan was questioned a second time at approximately 2:35 p.m. on February 18. Chojolan was again given his *Miranda* rights, indicated that he understood them, and waived them. During this interview, Hernandez informed Chojolan that the "jumping" story did not fit the physical evidence and told him that Soto had turned Chojolan in. Chojolan began to cry and indicated that he had hit Alarcon with a tire iron and that it was an accident. Chojolan drew a picture of the tire iron he had used. Hernandez testified that during the interview he told Chojolan he thought Chojolan was lying, but denied raising his voice to Chojolan.

Kemp then transported Chojolan to the scene so that Chojolan could tell police where he had thrown the tire iron. No tire iron other than the one removed from Chojolan's trunk was ever found. The tire iron removed from Chojolan's trunk had no traces of blood on it. On his return to the station, however, Chojolan once again changed his story and again stated that Alarcon had jumped from the vehicle.

Soto was questioned for a third time at 5 p.m. on Friday, February 18. He gave basically the same information as in the second interview, but added that Chojolan told him to tell the police that Alarcon had jumped and that Chojolan was 16 years old, or Chojolan would "kick his ass."

Chojolan was interviewed a third time at approximately 5:45 p.m. on February 18. Again, Chojolan was given his *Miranda* rights, indicated that he understood his rights, and waived them. Chojolan stated that while in the car, Alarcon had told Chojolan that she loved him and that this upset him because he knew that it was not true. Chojolan again admitted to hitting Alarcon with a tire iron and told substantially the same story he had previously given to the police. He then provided a written statement.

Hernandez testified that he never threatened Soto with prosecution or told him that Chojolan was accusing him. He also

testified that he interviewed both Soto and Chojolan in English unless they had a question, at which point he would repeat the question in Spanish. He testified that both men napped between interviews and that neither appeared tired. Both men appeared to understand and comprehend what was happening.

John Rust, chief deputy with the sheriff's office, questioned both Chojolan and Soto on February 20, 1995. Both were again read their *Miranda* rights, both indicated they understood them, and both waived those rights. Soto conveyed substantially the same information and described the tire iron used by Chojolan as gold in color. When shown two tire irons, Soto specifically identified the one taken from Chojolan's trunk. Chojolan also gave substantially the same information and also demonstrated how he had struck Alarcon. When Chojolan was shown the two tire irons, he also selected the one taken from his trunk as similar to the murder weapon, but stated the one he had actually used was gray in color.

Chojolan was charged by information on March 17, 1995, with first degree murder and use of a weapon to commit a felony.

## District Court's Decision

Chojolan made a motion to suppress statements given to police, but his motion was denied on September 22, 1995, after a hearing. Another hearing was held on Chojolan's motion to transfer the case to juvenile court. Chojolan testified that he was 16 years old when Alarcon was killed, although all of his U.S. documentation indicates that he was 19 years old at the time. This motion was also denied. During the trial, Soto, who was called and sworn, invoked his Fifth Amendment privileges upon the advice of his attorney and refused to testify at trial. Over defense counsel's timely objections, the district court, despite the fact Soto was in the courtroom, ruled that Soto was unavailable and admitted his statements as an exception to the hearsay rule pursuant to Neb. Rev. Stat. § 27-804(2)(c) (Reissue 1995). Following a jury trial, Chojolan was found guilty of manslaughter and not guilty of use of a weapon to commit a felony. His motion for a new trial was denied. Chojolan was sentenced to 15 to 20 years' incarceration and was given credit for 426 days served.

## COURT OF APPEALS' DECISION

Chojolan appealed to the Court of Appeals, contending that the trial court erred in overruling his motion to suppress, in overruling his motion to transfer to juvenile court, in finding a witness unavailable, in admitting hearsay evidence, in denying a proposed jury instruction, in overruling his motion for a directed verdict, in overruling his motion for a new trial, and in imposing an excessive sentence. The Court of Appeals affirmed the district court's decision, specifically finding that the admission of Soto's statements, if erroneous, was harmless beyond a reasonable doubt.

## ASSIGNMENTS OF ERROR

In his petition for further review, Chojolan assigns as error the Court of Appeals' (1) finding the admission of statements of Soto was harmless error, (2) failing to reverse his conviction because of the admission of the statements of Soto, (3) finding that Chojolan's statements were voluntary and were properly admitted at trial, and (4) finding that the sentence imposed on Chojolan was not excessive.

## STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997); *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997); *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska rules of evidence commit the evidentiary question at issue to the discretion of the trial court. *State v. Allen, supra*; *State v. Earl, supra*; *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995).

In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *State v. Merrill, supra*; *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995); *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994).

The state has the burden to prove beyond a reasonable doubt that the admission of the statement was harmless. *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Schultz*, 252 Neb. 746, 566 N.W.2d 739 (1997); *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997); *State v. Earl, supra*; *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. Merrill, supra*; *State v. Earl, supra*; *State v. Cook, supra*; *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).

## ANALYSIS

Chojolan's first and second assigned errors in his petition for further review challenge the admission of certain statements made by Soto and attested to by police officers. The trial court found that Soto's statements were admissible as an exception to the hearsay rule pursuant to § 27-804(2)(c). After an appeal in which Chojolan asserted that (1) the trial court erred in finding Soto's statements were admissible as an exception to the hearsay rule based on unavailability and (2) that the admission of the statements violated his constitutional right of confrontation, the Court of Appeals found that the admission of Soto's statements, if erroneous, was harmless error.

### HARMLESS ERROR

The Court of Appeals held that the admission of Soto's statements, even if erroneous, was harmless error. Without deciding whether the admission of Soto's statements was error, we agree with the Court of Appeals that any error in the admission of the statements was harmless.

Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact. *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Based upon a reading of the entire record, we conclude that Soto's statements are cumulative and that the evidence properly admitted at trial supports the finding of guilt beyond a reasonable doubt. In this case, Chojolan, during two different interviews, admitted hitting Alarcon with the tire iron as opposed to stating she jumped from the vehicle. The pathologist testified that the fatal wounds suffered by Alarcon were from a blow to the head with a broad-base-type instrument; that the likelihood of sustaining the injuries from jumping from a car going only 5 miles per hour was "nil to none"; and that skin abrasions would be expected, which Alarcon did not have, if she had jumped from a car. Weber testified that there was virtually no damage to Alarcon's clothing, that her leather boots were not scuffed, and that her clothes were not torn. Schakat testified there were no scrapes or markings on Alarcon's clothing and body. Kemp testified that the blood at the scene fell straight down with no force pushing it in any direction. It is these facts which we hold overwhelmingly establish Chojolan's guilt beyond a reasonable doubt, and therefore, the admission of Soto's statements was harmless error. Therefore, Chojolan's first and second assignments of error are without merit.

We now turn to Chojolan's contention that the Court of Appeals erred in finding that his statements were voluntary and were properly admitted. This contention is also without merit.

Statements made after *Miranda* rights are given are required to be made voluntarily. *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996). The state has the burden to establish that a defendant's statement was voluntary and not coerced. *Id.* The determination of voluntariness is based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made, and the determination made by the trial court will not be disturbed on appeal unless clearly wrong. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

The evidence in the present case indicates that Chojolan was given his *Miranda* rights in both English and Spanish prior to each interview with the police. It is also clear from the record that Chojolan waived these rights. Chojolan does not assert that his confession was the result of promises, threats, or inducements, but, rather, that it was involuntary due to his age, 16 at the time of the incident, and the 14 hours spent in custody.

While the accused's minority is a factor to consider when determining the voluntariness of a confession, it is not determinative. *State v. Johnson,* 242 Neb. 924, 497 N.W.2d 28 (1993). In the present case, while Chojolan testified to being 16 at the time of the accident, all of his U.S. documentation indicated he was 19 years old. Further, testimony from Hernandez indicated that Chojolan did not appear tired and appeared to understand and comprehend what was happening. After considering all of the circumstances surrounding the confession, we determine that the district court was not clearly wrong in its finding that Chojolan's confession was voluntary. Therefore, we determine that the statements of Chojolan were properly admitted.

Finally, we turn to Chojolan's contention that the Court of Appeals erred in its finding that the sentence imposed on him was not excessive. Chojolan was found guilty of manslaughter, a Class III felony punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. §§ 28-305 (Reissue 1995) and 28-105 (Reissue 1989). He was sentenced to a term of 15 to 20 years in prison.

Chojolan argues that this sentence is excessive given his age and the fact that he has no prior criminal history. We have stated 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. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997); *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996); *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995); *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993).

We have also stated, however, that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Schultz*, 252 Neb. 746, 566 N.W.2d 739 (1997); *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997); *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. Cook, supra*. 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. Merrill, supra*; *State v. Earl, supra*; *State v. Cook, supra*; *State v. Orduna, supra*.

While we acknowledge Chojolan's age and lack of a criminal record, he was convicted of a violent act resulting in the death of a 14-year-old girl. His sentence of 15 to 20 years in prison is not clearly untenable, nor does it deprive him of a just result. We conclude, therefore, that the trial court did not abuse its discretion.

## CONCLUSION

Having determined that Chojolan's assigned errors are without merit, we affirm the judgment of the Court of Appeals.

AFFIRMED.

WHITE, C.J., concurs in the result.

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STATE OF NEBRASKA, APPELLEE, V.
THOMAS E. CRAVEN, APPELLANT.
571 N.W.2d 612

Filed December 19, 1997. No. S-96-598.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence obtained through a warrantless search, an appellate court conducts a de novo review of determinations of reasonable suspicion and probable cause. Once this has been done, the appellate court reviews the trial court's findings of fact, giving due weight to the inferences drawn from those facts by the trial judge. In making this determination, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject

only to a few specifically established and well-delineated exceptions which must be jealously and carefully drawn and applied only where there is a showing that the exigencies of the situation made that course imperative.

3. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
4. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Weapons.** Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot, the officer may briefly stop the suspicious person and make reasonable inquiries aimed at dispelling his suspicions. If, after identifying himself and making initial inquiries which do not dispel his reasonable suspicions, the officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon.
5. **Search and Seizure.** If a pat-down search goes beyond what is necessary to determine if a suspect is armed, it is no longer valid and its fruits will be suppressed.
6. ____. An officer may make a warrantless seizure of nonthreatening contraband detected during a pat-down search permitted by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), so long as the search stays within the bounds marked by *Terry*.
7. **Search and Seizure: Police Officers and Sheriffs.** If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.
8. **Probable Cause: Words and Phrases.** Probable cause means a fair probability that contraband or evidence of a crime will be found.
9. **Probable Cause.** Probable cause is determined by a standard of objective reasonableness, i.e., whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found.

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, ROBERT V. BURKHARD, Judge. Judgment of Court of Appeals affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Scott C. Sladek for appellant.

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

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

PER CURIAM.

Thomas E. Craven seeks further review of a decision of the Nebraska Court of Appeals affirming his conviction for possession of a controlled substance. See *State v. Craven*, 5 Neb. App. 590, 560 N.W.2d 512 (1997). We find no reversible error and therefore affirm the judgment of the Court of Appeals.

## FACTS

At 10:25 a.m. on August 27, 1995, two Omaha police officers patrolling an Omaha neighborhood observed a motorcyclist drive into the parking lot of a bar. The officers observed that the motorcycle did not have a license plate and that the operator was not wearing a helmet. Based upon these observed violations of the traffic code, the officers initiated a traffic stop. After obtaining the motorcyclist's operator's license, the officers identified him as Craven.

One of the officers advised Craven that he would conduct a pat-down search for weapons and proceeded to do so. The officer did not feel anything which he perceived to be a weapon. However, when he placed his hand on the outside of a front pocket of Craven's jeans, the officer felt something which he believed to be a pipe used to smoke marijuana, possession of which is unlawful in Nebraska. See Neb. Rev. Stat. §§ 28-439 through 28-444 (Reissue 1995).

The officer testified that

> the most prevalent [type of marijuana pipe] that [he had] seen is something that is homemade or home fashioned, and it consists of brass or metal pipe fittings that are screwed together, so the diameter of the pipe varies somewhat from the end, which is the bowl, to the actual portion that you put in your mouth.

He testified that based upon this experience, he immediately perceived the object in Craven's pocket to be a marijuana pipe as he slid his hand over the pocket during the pat down, and that he did not manipulate the object in order to identify it.

Because the object which he believed to be a marijuana pipe was at the bottom of Craven's pocket, the officer had to remove

other items from the pocket in order to gain access to it. He initially removed what he had perceived during the pat down to be, and what turned out to be, two disposable lighters which were on top of the suspected pipe. As he did so, an object which appeared to be, and was later confirmed to be, crack cocaine came out of Craven's pocket with the lighters. The item the officer believed to be a marijuana pipe was, in fact, a spark plug. Following the discovery and seizure of the crack cocaine, the officers arrested Craven.

On September 18, 1995, the State charged Craven by information filed in the district court for Douglas County with the crime of possession of a controlled substance other than marijuana, to wit, cocaine. See Neb. Rev. Stat. § 28-416(3) (Reissue 1995). Craven filed a motion to suppress the physical evidence obtained as a result of the pat-down search. At the hearing on that motion, the officer who conducted the search testified regarding the traffic stop, the pat-down search, and the search of Craven's pocket during which the cocaine was discovered and seized. He stated that the purpose of the pat down was to detect weapons, which were not found, and that prior to beginning the pat down, he had no reason to believe that Craven was in possession of drugs or drug paraphernalia.

The district court found that the officers had a legitimate reason to stop and detain Craven based upon their observations that he was operating a motorcycle without a license plate and was not wearing a helmet. The district court also found that because the officer had received a "caution indicator" from the police dispatcher, he had a reason to believe that Craven was dangerous and was therefore justified in conducting the pat-down search. The district court then concluded:

> And the fact that this item that he thought was a — I think a marijuana pipe — turned out to be something else, a spark plug, I don't think that is relevant. It appears that the police officer used — certainly acted appropriately and had reason to believe that it was a marijuana pipe. It isn't a case where he felt around and twisted and moved it and everything else to determine exactly what it may be.

Based on these findings, the district court overruled Craven's motion to suppress the physical evidence discovered during the

pat-down search. Following a bench trial on stipulated facts, during which Craven preserved his objection to the evidence obtained as a result of the pat-down search, he was convicted of possession of cocaine and sentenced to a term of incarceration of not less than 3 nor more than 4 years at hard labor. Craven perfected a timely appeal to the Court of Appeals, assigning as error the overruling of his motion to suppress.

The Court of Appeals found that the case presented an issue of first impression in this state, i.e., the application of the "plain-feel" doctrine announced by the U.S. Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). See *State v. Craven*, 5 Neb. App. 590, 560 N.W.2d 512 (1997). After concluding that the plain-feel doctrine represented a legal extension of principles announced in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), the Court of Appeals determined that because the officer concluded immediately, without manipulation or examination, that the object he felt during the pat-down search was contraband, the seizure of objects including crack cocaine from inside the pocket was constitutionally permissible despite the officer's mistaken tactile identification of the object which proved to be a spark plug.

We granted Craven's petition for further review.

## ASSIGNMENT OF ERROR

Craven contends that the Court of Appeals erred in determining that the district court properly overruled his motion to suppress the crack cocaine discovered and seized by police as they attempted to gain access to the object which they mistakenly suspected to be a marijuana pipe.

## STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to suppress evidence obtained through a warrantless search, an appellate court conducts a de novo review of determinations of reasonable suspicion and probable cause. *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Once this has been done, the appellate court reviews the trial court's findings

of fact, giving due weight to the inferences drawn from those facts by the trial judge. In making this determination, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. See, *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997); *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996).

## ANALYSIS

Craven contends that the warrantless seizure of crack cocaine from his pocket during the traffic stop violated his rights under U.S. Const. amend. IV, which protects citizens against unreasonable searches and seizures by the government. See, *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990). While searches and seizures conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable, warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few "'"specifically established and well-delineated exceptions"'" which must be "'"jealously and carefully drawn" . . .'" and applied only where there is a showing that "'"the exigencies of the situation made that course imperative."'" *State v. Newman*, 250 Neb. at 236, 548 N.W.2d at 748, quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *State v. Newman, supra.*

In this case, the State contends that the seizure of crack cocaine was justified under exceptions to the warrant requirement recognized in *Terry v. Ohio, supra*, and *Minnesota v. Dickerson, supra.* In *Terry*, the Supreme Court held that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot, the officer may briefly stop the suspicious person and make reasonable inquiries aimed at dispelling his suspicions. In addition, the Court held that if, after identifying himself and making initial inquiries which do not dispel his reasonable suspicions, the officer "is justified in believing that

the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon." *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). However, if the pat-down search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and its fruits will be suppressed. *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). We have followed the rule established in *Terry*. See, *State v. Williams*, 249 Neb. 582, 544 N.W.2d 350 (1996); *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990).

The Court of Appeals correctly characterized the holding in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993), as evolving from *Terry*. In *Dickerson*, the Supreme Court held that an officer may make a warrantless seizure of nonthreatening contraband detected during a pat-down search permitted by *Terry*, so long as the search stays within the bounds marked by *Terry*. The Court reached this conclusion by drawing an analogy to the previously recognized "plain-view" doctrine, which permits police officers to seize an object without a warrant if they are lawfully in a position from which they can view the object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object. *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). See *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). The Court stated in *Dickerson:*

> The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

508 U.S. at 375-76. Rejecting an argument that the plain-view analogy was inappropriate because the sense of touch is less

immediate and reliable than the sense of sight, the Court noted that the sense of touch is deemed sufficiently reliable to justify a seizure of weapons following a *Terry* pat down, and added:

> Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.

*Minnesota v. Dickerson*, 508 U.S. at 376.

Having thus recognized what has become known as the plain-feel doctrine, the Court in *Dickerson* held that it could not be used to justify the seizure at issue in that case. In *Dickerson*, a police officer conducting a pat-down search for weapons felt a "small lump" in the defendant's pocket, which he manipulated with his fingers and concluded to be crack cocaine wrapped in cellophane. The officer then reached inside the pocket and extracted the cocaine. Noting that the defendant did not challenge the lower courts' finding that police were justified under *Terry* in stopping him and conducting a pat-down frisk for weapons, the Court framed the dispositive question as "whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband." *Minnesota v. Dickerson*, 508 U.S. at 377. The Court answered this question in the negative, based upon the factual finding of the lower courts that the officer did not "'"immediately"'" recognize the lump as crack cocaine, but came to that conclusion only after "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon." 508 U.S. at 378. The Court concluded that the officer's "continued exploration" of the defendant's pocket after determining that it did not contain a weapon was unrelated to the sole justification of the search under *Terry*, namely, " 'the protection of police officers and others nearby,' " *Minnesota v. Dickerson*, 508 U.S. 366 378, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993), quoting *Terry*

*v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); and it therefore "amounted to the sort of evidentiary search that *Terry* expressly refused to authorize . . . and that we have condemned in subsequent cases. . . ." *Minnesota v. Dickerson*, 508 U.S. at 378.

Although this court recently discussed and distinguished *Dickerson* in *State v. Williams*, 249 Neb. 582, 544 N.W.2d 350 (1996), we have not previously adopted and applied the plain-feel doctrine. Because a warrantless seizure of nonthreatening contraband under *Dickerson* cannot occur in the absence of an investigative stop and pat-down search permissible under *Terry*, we must begin our determination of the applicability of *Dickerson* in this case with the traffic stop which occurred when officers observed that there was no license plate on the motorcycle operated by Craven and that he was not wearing a helmet.

In *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996), we held that a police officer's observation of a vehicle being operated without license plates or in-transit tags is a sufficient basis for a brief investigatory stop. We note in this case that Craven has not challenged the justification for either the initial traffic stop or the pat-down search which followed. Craven concedes:

> In the case at hand the facts indicate that the appellant was driving with out [sic] a helmet or license plates and was lawfully stopped and provided identification. After the appellant was identified as a felon the police officer took the proper precautions to ensure his own safety and conducted a frisk as allowed by *Terry v. Ohio* . . . .

Brief for appellant in support of petition for further review at 2. Thus, for purposes of resolving this appeal we assume without deciding that the initial stop and pat down for weapons were permissible under *Terry*.

The facts of this case do not fall squarely within the plain-feel doctrine articulated in *Dickerson*. It is undisputed that the police officer did not feel and therefore did not identify the crack cocaine in Craven's pocket when he performed the pat-down search. He initially perceived the controlled substance by observation while removing items from Craven's pocket in order to retrieve the metallic object which he identified by touch during the pat down as a marijuana pipe, but which

proved to be a spark plug. The visual identification of the substance occurred before the officer had ascertained that the object at the bottom of Craven's pocket was not contraband as he had suspected.

Thus, the issue on which the legality of the seizure rests is whether the officer was legally justified in placing his hand in Craven's pocket and extracting the objects which it contained. We have held that under *Terry* a search must be carefully limited to a search for weapons and that a search for both weapons and controlled substances is beyond the scope permitted under *Terry*. *State v. Williams, supra*. See, also, *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992); *State v. Evans*, 223 Neb. 383, 389 N.W.2d 777 (1986). It is undisputed that by the time the officer reached into Craven's pocket, he had satisfied himself that it did not contain a weapon. However, we agree with the Court of Appeals that there is nothing in the record to indicate that the officer was searching for anything other than weapons when he conducted the pat down and that there is no evidence that the pat down itself was conducted outside the scope permitted by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), in that there was no manipulation or other examination of the objects perceived by touch. In our view, therefore, the legality of what transpired after the pat down depends upon whether the officer's tactile perception of what he believed to be a marijuana pipe contained at the bottom of Craven's pocket constituted probable cause to place his hand inside the pocket in order to retrieve the object.

"Probable cause means ' "a fair probability that contraband or evidence of a crime will be found." ' " *State v. Konfrst*, 251 Neb. 214, 229, 556 N.W.2d 250, 262 (1996), quoting *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Accord *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Probable cause is determined by a standard of objective reasonableness, i.e., whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found. *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). *Terry* established that touching the outside of a person's clothing may provide

probable cause to believe that the person has a concealed weapon, thereby permitting an officer to reach inside the clothing to retrieve the weapon without first obtaining a warrant. *Dickerson* established that the same degree of touching permitted under *Terry* may provide sufficient probable cause to believe that the person has concealed nonthreatening contraband, thereby permitting the officer to reach inside the clothing to seize the contraband. To that extent, we adopt the rule stated in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

Neither the parties' briefs nor our research has revealed a post-*Dickerson* case with facts precisely parallel to those in this case. However, two decisions by the U.S. Court of Appeals for the District of Columbia Circuit are instructive. In *U.S. v. Gibson,* 19 F.3d 1449, 1451 (D.C. 1994), the court held that an officer who felt a " 'hard,' 'flat,' 'angular' object" in a suspect's pocket during a pat down did not have probable cause for the ensuing search which revealed cocaine in a second pair of trousers worn by the suspect. The officer testified that the object which he touched "did not feel like anything a person might normally carry in his pocket," *id.*, but the officer did not testify how often he had encountered such an object or relate anything from his experience to correlate such objects to criminal activity. Noting the government's difficulty in "explaining how a hard, flat, angular object in someone's pocket would lead a law enforcement officer of reasonable caution to believe an offense had been or is being committed," the court stated that such an object "does not correspond with rocklike crack cocaine, or the twigs and leaves of marijuana, or capsules containing prescription drugs." *Id.*

In *U.S. v. Ashley*, 37 F.3d 678 (D.C. 1994), the same court held that probable cause for seizure of drugs from a suspect's underwear existed where an officer experienced in the packaging and transportation of narcotics testified that when he felt a hard object under the suspect's trousers while patting down his groin area, he immediately associated the object with crack cocaine even though he was not absolutely certain that the object was cocaine until conducting a more invasive search.

Craven contends that because the object which the officer believed to be a marijuana pipe proved to be a spark plug, the intrusion into his pocket cannot be justified. We agree with the Court of Appeals that the mistaken identification is not controlling as to whether there was probable cause for the officer to remove items from Craven's pocket in order to seize the suspected contraband. Rather, we believe the question must be determined on the basis of whether, given the historical facts, a reasonable person in the officer's position would have believed that Craven had concealed contraband on his person. In resolving this issue, we accept the trial court's findings of historical fact because we find that they are not clearly erroneous, but we make a de novo determination of the existence of probable cause, as did the Court of Appeals.

When the officer slid his hand over the outside of Craven's jeans pocket during the pat down, he immediately perceived an object composed of metal fittings which was wider at one end than the other. Based upon his training and experience, and without manipulation or further examination, he was able to correlate an object having these contours to an object of criminal activity, namely, a pipe used to smoke marijuana. In the same pocket, the officer felt two objects which he perceived to be, and were in fact, disposable lighters. Based upon our de novo review, we conclude that these facts would cause a reasonable law enforcement officer to believe that Craven's pocket contained a pipe used to smoke marijuana, the possession of which is unlawful under § 28-441. The officer was therefore justified in placing his hand in Craven's pocket in order to retrieve what he reasonably believed to be contraband. Because the rock of crack cocaine was discovered while the officer was acting on the basis of probable cause in seizing the suspected contraband and before he discovered that it was actually a spark plug, the warrantless seizure of the controlled substance was also justified, and the motion to suppress was properly denied.

For the reasons discussed, we agree with the decision of the Court of Appeals and affirm the judgment of conviction.

AFFIRMED.

# IN RE INTEREST OF ARTHARENA D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RENETTA D., APPELLEE, AND CALVIN D. WASHINGTON, APPELLANT.

571 N.W.2d 608

Filed December 19, 1997. No. S-96-1174.

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. 1996), are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law in such proceedings, the appellate court reaches a conclusion independent of the lower court's ruling.
2. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Standing: Jurisdiction: Appeal and Error.** An appellate court may, on its own motion, examine and determine whether the appellant has satisfied the requirements for appellate jurisdiction, including the requirement of standing.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Appeal dismissed.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellant.

Linda Porter, Deputy Lancaster County Attorney, for appellee State.

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

STEPHAN, J.

Calvin D. Washington appeals from an adjudication by the separate juvenile court of Lancaster County that Artharena D. was a minor falling within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) and should therefore be placed in the temporary legal custody of the then Nebraska Department of Social Services (DSS) pending final disposition. We conclude that Washington did not have standing to appeal and that this court therefore lacks appellate jurisdiction.

## FACTS

Artharena was born on April 11, 1994. Her natural mother is Renetta D. The record is unclear as to the identity of her biological father. On May 17, Renetta executed a handwritten and notarized document stating:

> To whom it may concern I [Renetta] am giving gaurdingship [sic] to one C.D. Washington this gaurdingship [sic] is to provide for my two daughters one [Franseca D.] Born 10-10 and one [Artharena] born 4-11-94 this gaurdingship [sic] is to last only as long as I'm incarsarated [sic].

On or about May 10, 1996, DSS received a report from the Lincoln Police Department that a man dressed in female attire had invited an undercover police officer to enter a vehicle parked in a lot for the purpose of engaging in a sex act and that Artharena and Washington were present in the vehicle at the time of this incident. Bill Allen, a protective services worker employed by DSS, was assigned to investigate this report. On May 16, Allen contacted Washington and spoke with him regarding the incident in the parking lot. Washington told Allen that the name of the child in the vehicle during the incident was Artharena. He said that the child's mother was Renetta and that she was in prison in Kansas. Washington informed Allen that the child had been in his care since soon after her birth and that he had guardianship of the child.

Allen was unable to determine the whereabouts of Artharena from Washington and therefore requested the assistance of law enforcement authorities in locating the child. On May 22, 1996, Lincoln police learned that Washington was confined in the Lancaster County jail on unrelated charges. He had been incarcerated since May 17 and was subsequently released on bond on May 31.

Allen located Renetta at a halfway house for parolees in Kansas City, Missouri. In a telephone conversation with Renetta on May 23, 1996, Allen advised her of his investigation and Washington's incarceration. Renetta confirmed that she had given Washington permission to care for Artharena during her incarceration and said that she had had no contact with Washington for several weeks. She was uncertain as to the whereabouts of the child. Renetta also told Allen that she

planned to clean herself up, find an apartment, and reunite with her children. Allen gave Renetta his address and telephone number and asked her to contact him if she learned anything about the whereabouts of Artharena. On the following day, Allen learned that Renetta left the halfway house without permission, and he had no further communication with her.

Unable to find Artharena, authorities issued a press release and photograph which was aired by Lincoln and Omaha television stations on May 29, 1996. Shortly thereafter, Artharena was surrendered to Omaha police by a couple who reported that Washington had left the child with them approximately 2 weeks earlier. Allen returned the child to Lincoln where she was placed in foster care.

The State filed a petition on May 30, 1996, in the separate juvenile court of Lancaster County seeking adjudication that Artharena was a juvenile as defined by § 43-247(3)(a) in that she lacked "proper parental care by reason of the fault or habits of her custodian, Calvin D. Washington, and is homeless or destitute in Lancaster County, Nebraska, and/or in a situation dangerous to life or limb or injurious to the health or morals of such juvenile . . . ." The juvenile court entered an order on May 31, placing Artharena in the temporary legal custody of DSS.

Washington appeared at a hearing on June 5, 1996, and, at his request, the court appointed an attorney to represent him. At a hearing on July 9, Washington appeared with his appointed counsel, waived formal reading of the petition, and entered a denial of the allegations contained in the petition. On August 29, Washington filed a motion to discharge his appointed counsel which was heard and denied by the juvenile court on September 12.

A formal adjudication hearing was held on September 25 and 27 and October 4, 1996. On October 10, the juvenile court entered an adjudication order finding that Artharena was "a child as defined by Neb. Rev. Stat. §43-247(3a) by reason of the lack of proper parental care" and that she was "without proper support through the fault or habits of her custodian, Mr. Calvin D. Washington." The court continued final disposition pending completion of a predisposition report and plan. Washington appealed from this order. Pursuant to our authority to regulate

the dockets of the Nebraska Court of Appeals and this court, we removed the case to our docket on our own motion.

## ASSIGNMENTS OF ERROR

Restated, Washington contends that the separate juvenile court erred in adjudicating Artharena as a juvenile as defined by § 43-247(3)(a). Washington also asserts that the separate juvenile court erred in overruling his motion to discharge his attorney and refusing to appoint substitute counsel. Finally, Washington contends that he received ineffective assistance of counsel prior to and during the adjudication hearing.

## STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 1993 & Cum. Supp. 1996), are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997), *modified* 252 Neb. 864, 566 N.W.2d 782; *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996). In reviewing questions of law in such proceedings, the appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Tabatha R., supra; In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996). A jurisdictional question which does not involve a factual dispute is a matter of law. *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996); *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995).

## ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997); *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997); *Trew v. Trew*, 252 Neb. 555, 567 N.W.2d 284 (1997). An appellate court may, on its own motion, examine and determine whether the appellant has satisfied the requirements for appellate jurisdiction, including the requirement of standing. See, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993).

We addressed the issue of standing to appeal under the Nebraska Juvenile Code in *In re Interest of S.R.*, 217 Neb. 528, 352 N.W.2d 141 (1984). In that case, the grandparents of a juvenile who had cared for him since birth sought to appeal from an order of the county court sitting as a juvenile court terminating parental rights of the child's mother and placing the child in the custody of an adoption agency. The statute then in effect permitted the "parent, custodian, or guardian" of the juvenile to appeal a decision of a county court sitting as a juvenile court. We construed the word "custodian" in that statute as "the person or entity given custody of a child by appropriate court order." *Id.* at 535, 352 N.W.2d at 145. We stated: "Mere 'placement with' a person, or 'possession of' a child, does not constitute the persons given such placement or possession as custodians." *Id.* We concluded that because the grandparents did not meet this definition of "custodian," they lacked standing to appeal. *Id.*

After our decision in *In re Interest of S.R., supra*, and before Washington filed his notice of appeal in this case, the statute governing appeal in juvenile proceedings was amended by the Legislature. The relevant statutory language now provides that for the purposes of appeal, a "custodian or guardian shall include, but not be limited to, the Department of Health and Human Services, an association, or an individual to whose care the juvenile has been awarded pursuant to the Nebraska Juvenile Code." § 43-2,106.01(2)(c) (Cum. Supp. 1996).

Unless it appears to the contrary, it is presumed that in enacting amendatory legislation, the Legislature knew the preexisting state of the law, including the decisions of this court. See, *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995); *In re Hilbers Property Freehold Transfer*, 211 Neb. 268, 318 N.W.2d 265 (1982). Thus, if in a subsequent enactment on the same or similar subject the Legislature uses different terms in the same connection, a court must presume that the Legislature intended a change in the law. *Jeter v. Board of Education*, 231 Neb. 80, 435 N.W.2d 170 (1989). Moreover, in the absence of anything indicating the contrary, words used in a statute are to be given their ordinary meaning. See, *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997); *In re Estate of*

*Muchemore*, 252 Neb. 119, 560 N.W.2d 477 (1997); *Central Park Pharm. v. Nebraska Liq. Cont. Comm.*, 216 Neb. 676, 344 N.W.2d 918 (1984). Although the term "custodian," as ordinarily understood, includes one entrusted officially with guarding and keeping, it is also ordinarily understood to mean one that guards and protects or maintains. Webster's Third New International Dictionary, Unabridged 559 (1993).

Since we must assume that the Legislature was aware of our holding in *In re Interest of S.R.* and intended that the term "custodian" be given its ordinary meaning, we conclude that by providing that "custodian . . . shall include, *but not be limited to*, . . . an individual to whose care the juvenile has been awarded pursuant to the Nebraska Juvenile Code," (emphasis supplied) § 43-2,106.01(2)(c), the Legislature expressed an intention to expand the definition of "custodian" beyond the restrictive meaning we gave it in *In re Interest of S.R.* and to extend the right of appeal to individuals having the care of a juvenile by means other than an award under the Juvenile Code.

It is therefore necessary to determine the scope of the term "custodian" under § 43-2,106.01(2)(c). The U.S. Supreme Court has long recognized that natural parents have a fundamental liberty interest in the care, custody, and management of their children which is protected by the 14th Amendment and gives the parents the freedom to make personal choices in matters of family life. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). It would seem that the right of a parent to authorize another to assume temporary care of a child is part of the bundle of fundamental rights which composes the constitutionally protected liberty interests parents have in raising their children. While the State need not stand aside when presented with evidence of neglect or abuse, one empowered by parental authority to care for a child should have standing to appeal the State's interference with that parentally created relationship with the child.

In this case, Renetta authorized Washington to have custody of Artharena only as long as she was incarcerated. This was explicitly stated in the document signed by Renetta on May 17, 1994, and was subsequently confirmed by Renetta in her telephone conversation with Allen on May 23, 1996, approximately

1 week before the petition was filed in this case. Insofar as we can determine from the record, Renetta has not been subject to any form of incarceration since she left the halfway house within a day after her conversation with Allen. Thus, Washington had neither judicial nor parental authority to act as the "custodian" of Artharena at any time during the pendency of this action. He therefore lacked statutory standing to appeal the order of the separate juvenile court. Accordingly, we dismiss the appeal without reaching Washington's assignments of error because of the absence of appellate jurisdiction.

APPEAL DISMISSED.

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STATE OF NEBRASKA, APPELLEE, V.
SHANNON E. WILLIAMS, APPELLANT.
573 N.W.2d 106

Filed December 19, 1997. No. S-97-029.

1. **Extradition and Detainer: Pretrial Procedure: Motions to Dismiss.** In ruling on a motion to dismiss with prejudice based on alleged violations of the interstate Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1995), it is proper for the trial court to hold a pretrial evidentiary hearing to determine whether a detainer was filed against the defendant and, if a detainer was filed, to determine whether the provisions of the agreement were violated.
2. **Extradition and Detainer: Pretrial Procedure: Appeal and Error.** When a trial court makes pretrial factual determinations regarding the application of provisions of the interstate Agreement on Detainers, its findings of fact will not be disturbed on appeal unless clearly wrong.
3. **Extradition and Detainer.** The interstate Agreement on Detainers provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences, in order to avoid prolonged interference with rehabilitation programs.
4. **Federal Acts: Extradition and Detainer: Courts.** Because the interstate Agreement on Detainers is a congressionally sanctioned interstate compact, it is a federal law subject to federal construction, and, thus, U.S. Supreme Court interpretations of the Agreement on Detainers are binding on state courts.
5. **Extradition and Detainer: Time.** Articles IV and V of the interstate Agreement on Detainers provide the procedures by which the authorities in the state where the charges are pending, the receiving state, may initiate the process whereby a prisoner is transferred to the receiving state for trial on the pending charges. The trial on the pending charges must be commenced within 120 days from the date of the prisoner's

arrival in the receiving state; however, for good cause shown, a court is authorized to grant any necessary or reasonable continuance. If the trial is not commenced within 120 days, absent a continuance, the court is required to enter an order dismissing the charges with prejudice.

6. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
7. **Extradition and Detainer: Motions to Dismiss: Time: Final Orders.** A ruling denying a motion to dismiss with prejudice for failure to bring an individual to trial within 120 days from the date of his arrival in the receiving state pursuant to the interstate Agreement on Detainers is a final, appealable order.
8. **Extradition and Detainer: Speedy Trial.** The speedy trial provisions of the interstate Agreement on Detainers are triggered only when a detainer is filed with the state where an individual is a prisoner by the state having untried charges pending against the individual.
9. **Extradition and Detainer: Words and Phrases.** A detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction. More specifically, a detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency after his release or to notify the agency when release of the prisoner is imminent.
10. **Extradition and Detainer: Habeas Corpus: Words and Phrases.** A state writ of habeas corpus ad prosequendum, seeking the immediate delivery of a prisoner for trial on criminal charges, does not constitute a detainer within the meaning of the interstate Agreement on Detainers.
11. **Habeas Corpus: Words and Phrases.** A writ of habeas corpus ad prosequendum is a common-law writ issued by a court, ordering the immediate removal of a prisoner from incarceration so that he can be brought to another jurisdiction to stand trial on charges for crimes committed within that jurisdiction.
12. **Habeas Corpus.** In Nebraska, writs of habeas corpus ad prosequendum have been and continue to be a traditional way of securing the presence of a prisoner located in another jurisdiction.
13. ____. Federal prisons are authorized to consider a request made on behalf of a state or local court that an inmate be transferred to the physical custody of state or local agents pursuant to a state writ of habeas corpus ad prosequendum.
14. **Extradition and Detainer.** Mere notice of pending criminal charges is insufficient to invoke the provisions of the interstate Agreement on Detainers.
15. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court is to be affirmed.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Steven J. Lefler and Frederick D. Franklin, of Lefler & Franklin Law Office, for appellant.

Robert Francis Cryne, Deputy Douglas County Attorney, for appellee.

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

GERRARD, J.

On April 11, 1994, the U.S. District Court for the District of Nebraska sentenced Shannon E. Williams to 168 months in the U.S. penitentiary at Leavenworth, Kansas, for conspiracy to distribute and possession with intent to distribute cocaine base. On December 12, 1995, while Williams was serving his sentence, a sealed arrest warrant was issued in Nebraska for his arrest. Williams was transferred from the federal penitentiary to Nebraska on January 12, 1996. On February 1, an information was filed in Douglas County District Court, charging Williams with first degree murder, use of a firearm to commit a felony, possession of a firearm by a felon, and conspiracy to commit first degree murder. On May 29, Williams filed a motion to dismiss with prejudice, alleging that the State had failed to bring him to trial within 120 days from the date of his arrival in Nebraska, pursuant to the interstate Agreement on Detainers (Agreement), Neb. Rev. Stat. § 29-759 (Reissue 1995). Following an evidentiary hearing on the matter, the district court on December 9 overruled the motion, finding that Williams was transferred to Nebraska pursuant to a writ of habeas corpus ad prosequendum, rather than a detainer, and that, as a consequence, the 120-day speedy trial provision of the Agreement was inapplicable. Despite this conclusion, the district court further found that Williams' right to a speedy trial under the Agreement had not been violated. Because we determine that the district court was not clearly wrong when it concluded that a detainer was never filed with the federal prison and that only a writ of habeas corpus ad prosequendum was issued to secure Williams' presence in Nebraska, we affirm the judgment of the district court.

## FACTUAL BACKGROUND

On December 12, 1995, while Williams was serving a 168-month sentence in the U.S. penitentiary at Leavenworth,

Kansas, a sealed arrest warrant was issued in the State of Nebraska. To initiate the transfer of Williams to Nebraska from the federal penitentiary, the State, on December 29, completed documents entitled "Evidence of Agents' Authority to Act for Receiving State" and "Prosecutor's Certification." The State sent the documents by facsimile transmission on January 2, 1996, to Shari McKee, the inmate systems supervisor at the federal penitentiary. Within the body of the "Evidence of Agents' Authority to Act for Receiving State," it was noted that three particular officers of the Omaha Police Division would take Williams into custody at the federal penitentiary on or between January 5 and 8, 1996, to appear as a defendant in a trial in Nebraska, and a reference was made to article V(b) of the Agreement.

On January 3, 1996, the Douglas County District Court issued a writ of habeas corpus ad prosequendum, which was subsequently forwarded to the penitentiary. Two days later, Joe White, the inmate systems manager at the federal penitentiary, wrote a memorandum to the warden requesting permission to release Williams to Nebraska on a state writ ad testificandum to appear as a defendant in a trial. The warden approved the release, and White, on January 11, completed a "Release Authorization" form for the release of Williams on January 12, pursuant to a state writ. The box on this form marked "Detainer" was specifically checked "No." On January 12, an officer from the Omaha Police Division signed the "Release Authorization," took custody of Williams, and transferred him to Nebraska. The State filed an information in Douglas County District Court on February 1, charging Williams with first degree murder, use of a firearm to commit a felony, possession of a firearm by a felon, and conspiracy to commit first degree murder.

On May 29, 1996, Williams filed a motion to dismiss with prejudice, alleging that the State had failed to bring him to trial within 120 days from the date of his arrival on January 12 in Nebraska, pursuant to the Agreement. At the evidentiary hearing on the matter, McKee, the inmate systems supervisor, testified that Williams was transferred to Nebraska pursuant to a state writ, rather than a detainer. McKee further testified that

she had a telephone conversation with the Deputy Douglas County Attorney, who was acting on behalf of the State, about the procedures that needed to be followed to obtain a prisoner on a state writ, which included completing the document entitled "Evidence of Agents' Authority to Act for Receiving State." McKee stated that federal prison officials require the document to inform the prison of the names of the officers who would be transferring the prisoner. The Deputy Douglas County Attorney also testified at the hearing that he did not file a detainer with the penitentiary because he and the Omaha Police Division did not want Williams to have the benefit of a notice requirement, as mandated by the Agreement, for fear he would make efforts to contact potential witnesses to threaten, intimidate, or harm them.

Following the evidentiary hearing, the district court, on December 9, 1996, overruled Williams' motion to dismiss, finding that Williams was transferred to Nebraska pursuant to a writ of habeas corpus ad prosequendum, rather than a detainer, and that, as a result, the 120-day speedy trial provision of the Agreement was inapplicable. Nevertheless, the district court went on to conclude that Williams' right to a speedy trial under the Agreement was not violated. Williams appeals directly from the denial of his motion to dismiss.

## SCOPE OF REVIEW

In ruling on a motion to dismiss with prejudice based on alleged violations of the Agreement, it is proper for the trial court to hold a pretrial evidentiary hearing to determine whether a detainer was filed against the defendant and, if a detainer was filed, to determine whether the provisions of the Agreement were violated. See *United States v. Eaddy*, 563 F.2d 252 (6th Cir. 1977). When the trial court makes pretrial factual determinations regarding the application of provisions of the Agreement, its findings of fact will not be disturbed on appeal unless clearly wrong. See, e.g., *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995).

## ASSIGNMENTS OF ERROR

Williams assigns that the district court erred in finding that (1) Williams was transferred to Nebraska pursuant to a writ of

habeas corpus ad prosequendum, rather than a detainer, and that, as a result, the 120-day speedy trial provision of the Agreement was inapplicable and (2) Williams' right to a trial within 120 days from the date of his arrival in Nebraska, pursuant to the Agreement, was not violated.

## ANALYSIS

The Agreement provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences, in order to avoid prolonged interference with rehabilitation programs. Article I of the Agreement; *State v. Harper*, 2 Neb. App. 220, 508 N.W.2d 584 (1993). Because the Agreement is a congressionally sanctioned interstate compact, it is a federal law subject to federal construction. *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981). Thus, U.S. Supreme Court interpretations of the Agreement are binding upon state courts.

Articles IV and V of the Agreement, the provisions at issue in the instant case, provide the procedures by which the authorities in the state where the charges are pending, the receiving state, may initiate the process whereby a prisoner is transferred to the receiving state for trial on the pending charges. See *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984). Pursuant to article IV(c) of the Agreement, the trial on the pending charges must be commenced within 120 days from the date of the prisoner's arrival in the receiving state; however, for good cause shown, a court is authorized to grant any necessary or reasonable continuance. Article V(c) of the Agreement provides that if the trial is not commenced within 120 days, absent a continuance, the court is required to enter an order dismissing the charges with prejudice.

Williams asserts that he was transferred to Nebraska pursuant to a detainer on January 12, 1996, and that he was not brought to trial within 120 days from the date of his arrival in Nebraska. Williams claims that either the issuing of the sealed arrest warrant on December 12, 1995, or the sending of the document entitled "Evidence of Agents' Authority to Act for Receiving

State" to the federal penitentiary on January 2, 1996, constituted a filing of a detainer and that, thus, the 120-day speedy trial provision of the Agreement is applicable. Conversely, the State contends, as the district court found, that it never filed a detainer with the penitentiary; rather, Williams was transferred to Nebraska pursuant to a writ of habeas corpus ad prosequendum, and that, as a result, the 120-day speedy trial provision of the Agreement is inapplicable. Therefore, we must determine whether the arrest warrant or the "Evidence of Agents' Authority to Act for Receiving State" constitutes a detainer within the purview of the Agreement, thereby rendering applicable the 120-day speedy trial provision of the Agreement.

Before addressing Williams' assignments of error, we must decide whether the district court's order overruling Williams' motion to dismiss with prejudice is a final, appealable order, since it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. See *State v. Gibbs, ante* p. 241, 570 N.W.2d 326 (1997).

## FINAL ORDER

While we have never directly addressed the question of whether a ruling on a motion to dismiss with prejudice based on an alleged violation of a criminal accused's speedy trial rights under the Agreement constitutes a final, appealable order, we recently held in *State v. Jacques, ante* p. 247, 570 N.W.2d 331 (1997), and *State v. Gibbs, supra*, that a denial of a motion for absolute discharge for failure to provide a speedy trial under the Nebraska Speedy Trial Act, Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 1995), is a final, appealable order. In so holding, we reasoned in *State v. Gibbs, ante* at 245, 570 N.W.2d at 326, that

> [i]nasmuch as § 29-1207 confers a right to a speedy trial and § 29-1208 authorizes a special application to a court to enforce it, a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable.

Similarly, article IV(c) of the Agreement confers upon a criminal accused the substantial right to a speedy trial within

120 days, and article V of the Agreement authorizes a special application to a court to enforce that right by requiring a court to dismiss the charges with prejudice. Based on our reasoning in *State v. Gibbs, supra*, we likewise hold that a ruling denying Williams' motion to dismiss with prejudice for failure to bring him to trial within 120 days from the date of his arrival in Nebraska pursuant to the Agreement is a final, appealable order. See, also, *State v. Nearhood*, 2 Neb. App. 915, 518 N.W.2d 165 (1994) (holding that ruling with regard to 180-day speedy trial provision in article III of Agreement was final, appealable order). Accordingly, we have jurisdiction over this appeal.

## METHOD OF TRANSFER

The speedy trial provisions of the Agreement are triggered only when a detainer is filed with the state where an individual is a prisoner by the state having untried charges pending against the individual. *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984). Although the Agreement does not define "detainer," it is generally recognized that a detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction. *United States v. Mauro*, 436 U.S. 340, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978); *State v. Reynolds, supra*. More specifically, a detainer is "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency [after his release] or to notify the agency when release of the prisoner is imminent." *Carchman v. Nash*, 473 U.S. 716, 719, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985).

A state writ of habeas corpus ad prosequendum, seeking the immediate delivery of a prisoner for trial on criminal charges, does not constitute a detainer within the meaning of the Agreement. See *United States v. Mauro, supra* (holding that federal writ of habeas corpus ad prosequendum, seeking delivery of state prisoner for trial on criminal charges, was not detainer). A writ of habeas corpus ad prosequendum is a common-law writ issued by a court, ordering the immediate removal of a prisoner from incarceration so that he can be brought to another jurisdiction to stand trial on charges for crimes com-

mitted within that jurisdiction. See *Carbo v. United States*, 364 U.S. 611, 81 S. Ct. 338, 5 L. Ed. 2d 329 (1961); 39 Am. Jur. 2d *Habeas Corpus* § 2 (1968) (citing *State v. Heisler*, 95 Ariz. 353, 390 P.2d 846 (1964)). In Nebraska, writs of habeas corpus ad prosequendum have been and continue to be a traditional way of securing the presence of a prisoner located in another jurisdiction. See *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1949), *cert. denied* 339 U.S. 923, 70 S. Ct. 612, 94 L. Ed. 1346 (1950). Federal prisons, such as the prison in Leavenworth, Kansas, are authorized to "consider a request made on behalf of a state or local court that an inmate be transferred to the physical custody of state or local agents pursuant to state writ of habeas corpus *ad prosequendum* . . . ." 28 C.F.R. § 527.30 (1997).

The factual determination of whether Williams was transferred to Nebraska pursuant to a detainer or a writ of habeas corpus ad prosequendum depends upon whether the State intended to lodge a detainer, as evidenced by the testimony of the Deputy Douglas County Attorney and the documents he prepared to secure Williams' presence in Nebraska, as well as the subsequent actions of the federal penitentiary in releasing Williams into the custody of Nebraska officials. The evidence establishes that the State did not intend to lodge a detainer when transferring Williams to Nebraska. First, at the evidentiary hearing on the motion to dismiss, the Deputy Douglas County Attorney testified that he did not intend to file a detainer with the penitentiary on behalf of the State because he did not want Williams to have the benefit of a notice requirement, as mandated by the Agreement, for fear he would make efforts to contact potential witnesses to threaten, intimidate, or harm them.

In addition, the federal penitentiary's inmate systems supervisor, McKee, testified that Williams was transferred to Nebraska pursuant to a state writ of habeas corpus ad prosequendum, rather than a detainer. McKee further testified that she had a telephone conversation with the Deputy Douglas County Attorney about the procedures that needed to be followed to obtain a prisoner on a state writ, which included completing the document entitled "Evidence of Agents' Authority to Act for Receiving State." Even though the document made ref-

erence to article V(b) of the Agreement, McKee testified that federal prison officials require the document when releasing a prisoner pursuant to either a state writ or detainer in order to inform the prison of the names of the officers who would be transferring the prisoner. Indeed, as codified in the federal regulation, one of the requirements that must be satisfied before the warden can authorize the transfer of a federal inmate to a state agent pursuant to a state writ of habeas corpus ad prosequendum is that the state agency must inform the federal prison of the names of the state agents who will be assuming custody of the prisoner. 28 C.F.R. § 527.31(f) (1997).

It is evident that Leavenworth prison officials treated the "Evidence of Agents' Authority to Act for Receiving State" as a request for custody of Williams pursuant to a state writ, rather than a detainer. White, the inmate systems manager at the federal penitentiary, requested the warden's permission to release Williams to Nebraska on a state writ ad testificandum. After the warden approved the release, White completed a "Release Authorization" form which stated that Williams would be released to Nebraska officials pursuant to a state writ. Significantly, the box on this form marked "Detainer" was specifically checked "No." Furthermore, there is no evidence that the Leavenworth prison officials ever notified Williams that Nebraska had lodged a detainer against him on felony charges. Nor is there evidence that the prison officials advised Williams of his right to request a speedy and final disposition of these charges or provided Williams with the information and forms necessary to make such a request, as required by the Agreement. Rather, the evidence supports the conclusion that the prison officials were releasing Williams to Nebraska law enforcement officers pursuant to a state writ of habeas corpus ad prosequendum.

Although the State did not intend to file a detainer against Williams, Leavenworth prison officials nevertheless gained notice that charges were pending against Williams in Nebraska, prior to the issuance of the writ of habeas corpus ad prosequendum, when the State transmitted by facsimile the document entitled "Evidence of Agents' Authority to Act for Receiving State" to prison officials at Leavenworth. This document stated that Williams

> [would] be taken into custody at [the Leavenworth penitentiary] on or between January 5, 1996[,] and January 8, 1996[,] for the return to the County of Douglas, State of Nebraska, for trial. In accordance with Article V(b), of said Agreement . . . [names of three officers] . . . [are designated] as [a]gents to return the prisoner.

However, mere notice of pending criminal charges is insufficient to invoke the provisions of the Agreement. *Tucker v. U.S.*, 569 A.2d 162 (D.C. App. 1990) (citing *United States v. Bamman*, 737 F.2d 413 (4th Cir. 1984), *cert. denied* 469 U.S. 1110, 105 S. Ct. 789, 83 L. Ed. 2d 783 (1985), and *State v. Bronkema*, 109 Idaho 211, 706 P.2d 100 (Idaho App. 1985)). Moreover, as required to constitute a detainer, this document did not request the penitentiary either to hold Williams for Nebraska after his release or to notify Nebraska when his release was imminent. See *Carchman v. Nash*, 473 U.S. 716, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985).

Finally, Williams' assertion that the issuing of the sealed arrest warrant on December 12, 1995, prior to the issuance of the writ of habeas corpus ad prosequendum, constituted a lodging of a detainer is also without merit. Williams relies on *Tucker v. U.S., supra*, for the proposition that an arrest warrant will serve as a detainer if (1) it is based on an untried information, indictment, or complaint; (2) it is filed by a criminal justice agency; (3) it is filed directly with the facility where a prisoner is incarcerated; (4) it notifies prison officials that a prisoner is wanted to face pending charges; and (5) it asks the institution where the prisoner is incarcerated either to hold the prisoner at the conclusion of the prisoner's sentence or to notify agency officials when the prisoner's release is imminent.

Assuming without deciding that an arrest warrant can serve as a detainer, in applying the foregoing five criteria to the instant case, we are unable to conclude that the trial court was clearly wrong in determining that the issuing of the sealed arrest warrant did not constitute a lodging of a detainer. Even though the record reveals that the trial court did take judicial notice of the files and records of the pending case, as requested by defense counsel, the sealed arrest warrant was not made a part of the record before us on appeal. Thus, we cannot determine

whether the arrest warrant was filed directly with the federal penitentiary or whether the arrest warrant asked the federal penitentiary to hold Williams at the conclusion of his sentence or to notify Nebraska when Williams' release was imminent. It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed. *Allphin v. Ward, ante* p. 302, 570 N.W.2d 360 (1997); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997). Therefore, in the absence of a record that supports Williams' assertions, we affirm the district court's determination that the issuing of the sealed arrest warrant did not constitute a lodging of a detainer in the instant case.

## CONCLUSION

For the foregoing reasons, we conclude that the trial court was not clearly wrong in finding that Williams was transferred to Nebraska pursuant to a writ of habeas corpus ad prosequendum, rather than a detainer, and that, as a result, the 120-day speedy trial provision of the interstate Agreement on Detainers was inapplicable. Thus, both of Williams' assigned errors are without merit. The judgment of the district court is affirmed.

AFFIRMED.

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DENISE E. WACKER, APPELLEE, V. TIMOTHY A. WACKER, APPELLEE, WILLIAM P. NEUBAUER, GUARDIAN AD LITEM, APPELLANT, AND BOX BUTTE COUNTY, NEBRASKA, APPELLEE.

573 N.W.2d 113

Filed January 2, 1998. No. S-96-283.

1. **Judgments: Appeal and Error.** In connection with a question of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Guardians Ad Litem: Fees.** If the action of a guardian ad litem is reasonable and within the guardian's duties in protecting the best interests of the minors or incompetents whom the guardian was appointed to represent, the guardian is entitled to reimbursement for expenses and to an allowance of fees for services rendered.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded for further proceedings.

William P. Neubauer, guardian ad litem, for appellant.

M. Roger Schneekloth, Box Butte County Attorney, for appellee Box Butte County.

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

CAPORALE, J.

This is an appeal from the district court's denial of the motion of the appellant guardian ad litem, attorney William P. Neubauer, for an order requiring the appellee, Box Butte County, to pay attorney fees he incurred in defending himself in an action instituted against him and others in the U.S. District Court for the District of Colorado by Denise E. Marsh, formerly Denise E. Wacker, the petitioner-appellee mother, in this dissolution action between her and the respondent-appellee father, Timothy A. Wacker. The guardian thereafter appealed to the Nebraska Court of Appeals, asserting the aforesaid ruling as error. Under our authority to regulate the caseloads of this court and the Court of Appeals, we, on our own motion, removed the appeal to our docket. We reverse, and remand for further proceedings.

The dispositive question presents a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Salazar v. Nemec, ante* p. 298, 570 N.W.2d 366 (1997).

Without indicating whether it was doing so under its inherent powers, *Nye v. Nye*, 213 Neb. 364, 329 N.W.2d 346 (1983), or on some other basis, the district court appointed Neubauer "Guardian ad litem for the children" on April 14, 1993. In November 1993, he, in his capacity as such guardian, traveled to Colorado to facilitate visitation between the children and the father.

In April 1994, the mother, individually and as next friend of the two minor children, filed the aforedescribed federal action

against the guardian, the father, and the father's parents. The mother alleged therein that the guardian had traveled to Colorado in an attempt to persuade the children to visit the father against their will and that when the children objected, the guardian "belittled the [children], yelled at [them], and threatened to 'drag [them] out on [their] hands and knees' and 'stick [them] in a foster home.' "

In that same month, the guardian retained the services of attorney Kenneth A.B. Roberts, Jr., of the Colorado bar, to defend him in that lawsuit. On May 3, 1994, the guardian sent a letter to the Box Butte County Attorney requesting that the county take financial responsibility for his defense in the federal suit. On January 19, 1995, the federal court dismissed the action for the mother's failure to show personal jurisdiction over the defendants. Roberts billed the guardian $13,496.76 for services and expenses.

On July 13, 1995, the guardian filed the subject motion, asserting that as he had

> been sued in his capacity of Guardian ad Litem, and the events giving rise to the lawsuit [arose] out of the [guardian's] performance of those duties, [who] was acting at the behest of the District Court, and as [an] employee of the County for the purpose of this litigation.

The district court found that the guardian "did request counsel" from the county, that "the County was notified in regard [to] the lawsuit," and that the guardian's "actions in retaining a counsel in Colorado to represent him were necessary" to avoid a default judgment. Nonetheless, the district court denied the motion, finding:

> At no time was this court advised that the guardian ad litem was expending or obligating this court for costs to represent the guardian ad litem in Federal Court in Colorado.
>
> The court finds that the request for payment of the Colorado attorney's fees was not authorized by the court and therefore that said request is denied.

However, while it might be good practice to do so when feasible, we find no requirement in the law that a guardian ad litem obtain prior authorization before incurring necessary expenses

in the course of fulfilling the duties imposed by being appointed such a guardian. On the contrary, in considering a guardian ad litem's entitlement to reimbursement for fees and expenses, we have written:

> If the action of a guardian ad litem is reasonable, and within the duties of a guardian ad litem in protecting the best interests of the minors or incompetents whom he was appointed to represent, he is entitled to reimbursement for expenses and to an allowance of fees for services rendered. A guardian ad litem who acts in good faith in the performance of his duty will not ordinarily be hindered by the fear that he will be charged with expenses and nonpayment for services rendered.

*White v. Ogier*, 175 Neb. 883, 897, 125 N.W.2d 68, 77 (1963). Thus, we have held that the guardian of a protected person was entitled to attorney fees necessarily incurred in preparing the final account and in defending it. *In re Guardianship of Bremer*, 209 Neb. 267, 307 N.W.2d 504 (1981). Those fees must, of course, not only be reasonably necessary, their amount must be fair and reasonable. See *McGreevy v. Bremers*, 205 Neb. 554, 288 N.W.2d 490 (1980) (absent proof of unreasonableness, surety entitled to fees, costs, and expenses incurred seeking indemnification by guardian).

There can be no disputing that the guardian here acted reasonably in obtaining defense counsel in Colorado. As the district court itself observed, he was in no "position to let his answer day run and be faced with a possible default in regard to this case . . . ." In addition, the guardian's November 23, 1993, report to the district court suggests that he was acting within the duties of a guardian ad litem in protecting the best interests of the children when he visited Colorado in November 1993.

Since the district court wrongly concluded that the guardian was required to obtain the court's authority prior to engaging counsel, it did not reach the other factual issues presented, and we therefore cannot determine whether its decision is otherwise correct. Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBBIE L. JOHNSON, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, LYNN JOHNSON, APPELLEE, V. SCHOOL DISTRICT OF MILLARD, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

573 N.W.2d 116

Filed January 2, 1998. No. S-96-401.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced 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. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Negligence.** The proper standard of care regarding negligent supervision is whether the defendant acted as a reasonably prudent person would in a similar circumstance.
5. **Negligence: Proximate Cause: Proof.** There are three basic requirements that must be met to establish causation: (1) that "but for" the defendant's negligence, the injury would not have occurred; (2) that the injury is the natural and probable result of the negligence; and (3) that there is no efficient intervening cause.
6. **Trial: Rules of Evidence: Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Brien M. Welch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Michael A. Nelsen and, on brief, Kenneth P. Kula, of Dixon & Jessup Ltd., L.L.P., for appellee.

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

WRIGHT, J.

The plaintiff commenced this negligence action pursuant to the Nebraska Political Subdivisions Tort Claims Act, alleging

that the defendant, through its employee, was negligent in that the employee failed to properly supervise students who were under her care. The defendant appeals from an award to the plaintiff in the amount of $21,226.10.

## SCOPE OF REVIEW

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

## FACTS

On September 15, 1993, Robbie L. Johnson, a first grader at Willa Cather Elementary School, was injured while attending his music class. On this day, the teacher of the music class, Nancy Patton, taught her class the song and accompanying game of "London Bridge." London Bridge is a game in which two children, while singing a song, form a "bridge" by linking their arms. The children's linked arms are then lowered around a third child who is rocked back and forth. The children were taught how to sing the song, and then the teacher used two children to demonstrate how the accompanying game was played. The teacher picked two children at random and instructed them to link their arms together, explaining that they were to rock a third child within their linked arms. The teacher warned the children not to act silly and told them not to yell, scream, or swing their arms too much. After giving these instructions, the teacher allowed the children to play the game on their own. It was undisputed that this was the first time the students had played the game and that Johnson was the first child who was caught and rocked between the children's linked arms.

Johnson testified that he was swung "fast and hard" while caught in his classmates' arms. While swinging Johnson, the

two children accidentally released their hands and threw Johnson into a bookcase at the end of the room, cutting his head above his right eyebrow. Johnson testified that he told the children swinging him to stop at least three times and asked for help twice before the accident occurred. He testified that he was trying to yell over the music, but everyone was talking, and some of the children were laughing and singing.

It is undisputed that the teacher was not watching Johnson when he was injured. Johnson testified that the teacher was writing on the blackboard, and he and another student testified that she had her back to the children when the accident occurred. The teacher testified that she saw Johnson caught within the children's arms but did not witness him being swung because she was aiding another child.

Johnson required 50 stitches to close the cut above his right eye. The cut extended to the bone and divided the muscle throughout its length. Johnson suffered blurred vision for a short period of time and continues to suffer headaches as a result of his injury.

The trial court held that the teacher's mere instruction to first grade children on how to play the game without direct supervision during at least the early portions of the game was negligent supervision. The court found that as a result of the accident, Johnson sustained an injury and damages, and awarded him $1,226.10 for medical expenses, $15,000 for permanent disfigurement, and $5,000 for pain and suffering. The School District of Millard appeals from the judgment.

## ASSIGNMENTS OF ERROR

Summarized and restated, the school district asserts that the trial court erred (1) in holding the school district to a standard of care that required direct supervision of a nondangerous activity, rather than the standard of care of an ordinary prudent person; (2) in finding the school district negligent without requiring the use of expert testimony or other evidence to show that the school district was negligent; and (3) in finding that the school district's negligence proximately caused Johnson's injury.

## ANALYSIS

The school district argues that we should reverse the judgment of the trial court because the court failed to give proper weight to the testimony of the teacher, the only adult that testified, and therefore made findings of fact which are clearly wrong. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996). This court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong.

The school district asserts that the trial court was clearly wrong in relying upon Johnson's testimony, since some of the estimates given by him appear to be in error. Johnson testified that his classmates swung him violently for 3 minutes before the accident occurred and that he was off the ground for 10 seconds before hitting the bookcase. In contrast, another student and the teacher testified that the incident occurred in 5 seconds or less, and the teacher testified that the London Bridge song takes only 7 to 12 seconds to sing.

Although Johnson's estimate regarding the length of time he was off the ground is not possible, we cannot say that the trial court was clearly wrong in relying upon other aspects of his testimony. The court's determination of liability was not based upon Johnson's estimate of how long he was off the ground before striking the bookcase and was not based upon his estimate of how long he was swung by his classmates before the accident. Liability was predicated on the court's finding that the teacher was in the blackboard area with her back to Johnson at the time of the accident, that Johnson was swung "fast and hard" by his classmates, and that this was the first time the children had played London Bridge in class. The court found that under these circumstances, the teacher was negligent in failing to directly supervise the students during at least the early portions of the game and in failing to stop the aggressive swinging of Johnson. The court found that under all of the attendant circumstances, the accident and injury were foreseeable, and that the negligence of the teacher was the proximate cause of

Johnson's injury. Thus, the school district's claim that the court improperly weighed the evidence and made findings of fact which are clearly wrong is without merit.

Likewise, the school district's claim that the trial court gave too much weight to Johnson's testimony is without merit. In a bench trial, the court, as the trier of fact, is the sole judge of the weight to be given the testimony. See *id.* Thus, we will not review the amount of weight which the trier of fact gave to either the teacher's or Johnson's testimony.

The proper standard of care regarding negligent supervision is whether the defendant acted as a reasonably prudent person would in a similar circumstance. See *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995). The trial court found that the teacher was negligent in not directly supervising the children during at least the early portions of the game. The question is whether the teacher had a duty to directly supervise her students at this time.

The school district argues that the trial court incorrectly required the teacher to provide direct supervision, which imposed a higher standard of care than that of a reasonably prudent person. The cases cited by the school district imply that constant supervision of students at all times is not required by a teacher acting as a reasonably prudent person and that direct supervision is needed only when children are engaged in dangerous activities. See, *Narcisse v. Continental Ins. Co.*, 419 So. 2d 13 (La. App. 1982); *Clark v. Furch*, 567 S.W.2d 457 (Mo. App. 1978); *Simonetti v. School Dist. of Philadelphia*, 308 Pa. Super. 555, 454 A.2d 1038 (1982); *Ballard v. Polly*, 387 F. Supp. 895 (D.D.C. 1975). By analogy, the school district argues that since London Bridge is not a dangerous activity, the court should not have required the teacher to provide constant and direct supervision.

We conclude that the trial court did not require the teacher to provide constant and direct supervision because the court's order states that the teacher needed to provide direct supervision to the children during only the "early portions of the game." The court did not hold the teacher to a higher standard of care than that of a reasonably prudent person. Instead, the court found that a reasonably prudent person would have given

direct supervision to first graders during at least the early portions of a game which they were playing for the first time. We cannot say that the trial court was clearly wrong.

The school district claims that the teacher would not have had enough time to assist Johnson even if she had supervised him more closely and that, therefore, she is not responsible for Johnson's injury. We disagree. The trial court found that the teacher was in the blackboard area with her back to Johnson just prior to the injury and that Johnson did not trip and fall into the bookcase, but, rather, was propelled by the "fast and hard" swinging of the two children composing the bridge. The court found that Johnson told his classmates to stop and cried for help before the accident. The court found that the teacher was negligent in failing to stop the aggressive swinging by the two students making up the bridge and that this negligence was the proximate cause of Johnson's injury. As each of these findings is supported by the evidence, we cannot say that the trial court was clearly wrong.

We next address whether the school district's negligence was the proximate cause of Johnson's injury or whether the act of the other children constitutes an intervening cause which defeats causation. There are three basic requirements that must be met to establish causation: (1) that "but for" the defendant's negligence, the injury would not have occurred; (2) that the injury is the natural and probable result of the negligence; and (3) that there is no efficient intervening cause. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996). The school district argues that the act of Johnson's classmates, who released their hands and propelled Johnson into the bookcase, is an intervening cause which defeats causation.

In order for the children's accidentally releasing their hands to be an intervening cause, this court must find that the children's act was unforeseeable. See *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). We conclude that it is reasonably foreseeable that children playing London Bridge might swing another child in such a manner that the sudden release of their hands could cause an accident. Therefore, the fact that the children released their hands and caused Johnson to hit his head is not an intervening cause.

Finally, the school district argues that the trial court erred in determining liability without the use of expert testimony regarding the teacher's standard of care. Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise."

Scientific evidence is not needed to understand whether the teacher was negligent when she failed to watch a group of first graders play a game for the first time. There is nothing technical or scientific about a common children's game such as London Bridge. Accordingly, an expert witness would have been of little use to the trier of fact. The trial court was not clearly wrong when, without the use of expert testimony, it found that the teacher was negligent and that her negligence was a proximate cause of Johnson's injury.

## CONCLUSION

Finding all of the school district's assignments of error to be without merit, we affirm the judgment of the trial court.

AFFIRMED.

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DENNIS M. RATIGAN, APPELLANT, V. K.D.L., INC., DOING BUSINESS AS SUNDOWNER BAR, APPELLEE.

573 N.W.2d 739

Filed January 2, 1998. No. S-96-415.

1. **Summary Judgment.** Summary judgment is proper 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 summary judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** When reviewing an order granting a motion for 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. The question on such review is not how a factual issue is to be decided, but whether any real issue of genuine fact exists.

3. **Summary Judgment: Evidence: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that it is entitled to a judgment if the evidence were uncontroverted at trial. If such a showing is made, the opposing party has the burden to produce evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. However, if a prima facie showing is not made, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition.
4. **Negligence: Proof.** In order to succeed in a negligence case, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
5. **Negligence: Invitor-Invitee: Liability.** The proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
6. ____: ____: ____. Whether a business proprietor is liable for the adverse actions of a third party against an invitee depends primarily upon whether those actions were reasonably foreseeable to the proprietor.
7. **Negligence: Assault.** Whether a history of criminal activity makes an assault foreseeable is a question of fact.
8. **Negligence: Liability.** If the likelihood of an intervening act was one of the hazards that made a defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then the defendant will generally be liable for the consequences.

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

William J. Pfeffer and Jeff T. Courtney, of Pfeffer Law Offices, for appellant.

J. Joseph McQuillan and Scott A. Calkins, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

STEPHAN, J.

Shortly after midnight on September 15, 1993, Michael Ray Smith shot Dennis M. Ratigan, Sr., during an altercation in the parking lot of the Sundowner Bar. Both men had been in the

tavern prior to the incident. Ratigan brought this personal injury action against K.D.L., Inc., the owner of the Sundowner Bar, claiming that it was negligent in failing to take measures to prevent the shooting and to protect him from harm. The district court for Sarpy County granted summary judgment in favor of K.D.L., and Ratigan appealed. Pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court, we removed this case to our docket on our own motion. We determine that there are genuine issues of material fact which preclude summary judgment and, therefore, reverse, and remand to the district court for further proceedings.

## BACKGROUND

In his petition, Ratigan alleged that he was "assaulted and battered" by Smith while on the premises of the Sundowner Bar in Sarpy County, Nebraska, on September 15, 1993. He alleged K.D.L. was negligent in (1) failing to warn him of the "dangerous propensities" of Smith and his companion, (2) failing to protect him from assault by Smith despite actual or constructive knowledge that the assault would occur, (3) failing to summon police in sufficient time to prevent the assault, (4) failing to employ adequate security personnel, (5) retaining incompetent employees, and (6) failing to establish or implement safety precautions. Ratigan alleged that as a direct and proximate result of this negligence, he received serious and permanent injuries. In its answer, K.D.L. admitted that the assault occurred on its premises, but denied that it was negligent and alleged that Ratigan's injury was "caused by the intentional unforeseen criminal conduct of Michael Ray Smith."

In support of its motion for summary judgment, K.D.L. offered the depositions of Ratigan; his wife, Micheline Ratigan; Brian C. Champion; Donald Finley; and Kenneth Pokorny. Ratigan did not object to any of the depositions and offered no additional evidence.

*Deposition Testimony of Ratigan.*

Ratigan and his wife arrived at the Sundowner Bar at approximately 11 p.m. on September 14, 1993. There were 10 to 15 other patrons in the tavern when they arrived, including their son, Dennis Ratigan, Jr. (Ratigan Jr.), and his friend, Danny Lee,

who were playing pool with Michael Ray Smith and his companion. Ratigan and his wife sat down at the bar, which was 20 to 25 feet away from the pool table. They were served beer by the bartender, Champion. Ratigan accepted his son's invitation to join him in a pool game against Smith and his companion.

When the game was over, Smith placed Ratigan Jr. in a headlock and rubbed his hair with his knuckles, stating that he would "teach the young punk about the game." Sensing that the contact between Smith and Ratigan Jr. was "getting out of hand," Ratigan offered to buy Smith and his companion a drink in order to diffuse the situation. At about the same time, Champion approached the pool table and told Smith and Ratigan Jr. to "knock it off." After paying Champion for the drinks, Ratigan sat down with his wife at the bar.

Ten to fifteen minutes later, Ratigan asked Champion where Ratigan Jr. was and Champion replied that he was uncertain, but he thought that Ratigan Jr. had left. Curious as to why his son would have left without saying goodby, Ratigan walked to a window at the front of the tavern and observed Smith and his companion "beating on" Ratigan Jr. in the parking lot of the tavern. After asking Champion to call the police, Ratigan went through the front door and ran toward the fight. He first threw Smith aside and then fought with Smith's companion. After 2 to 3 minutes, Ratigan heard someone shout, "He's got a gun." Ratigan stood up and began walking back toward the front door of the tavern. He observed Smith standing near a pickup truck with a gun in his hand, and he heard Smith say, "I'm going to kill you, Old Man." He then felt a bullet strike him in the stomach. Ratigan then walked back into the tavern and asked Champion to call an ambulance.

After the incident, Ratigan learned from various sources that Smith had at one time been "barred" from the Sundowner Bar because he was a "troublemaker."

*Deposition Testimony of Micheline Ratigan.*

Micheline Ratigan is married to Ratigan and is the mother of Ratigan Jr. Lee and Ratigan Jr. were already present at the Sundowner Bar when she and Ratigan arrived on the evening of September 14, 1993.

While seated at the bar, Micheline Ratigan watched her husband and son play pool with Smith and his companion. During the game, Smith was loud and obnoxious and appeared to Micheline Ratigan to be "intoxicated or on drugs. Just very weird." When the game was over, she observed Smith place her son "in a headlock" and tease him, calling him a "young punk." She thought that Smith's actions were hurting her son physically. She observed Ratigan intercede and buy a drink for Smith and his companion in order to calm things down; Ratigan then returned to the bar and sat down next to her.

Sometime later, Ratigan and Micheline Ratigan realized that their son was no longer in the tavern. Ratigan got up from the bar and walked out the front door of the tavern to look for him. Approximately 2 minutes later, Micheline Ratigan walked to the front door and looked outside. She observed her son fighting with Smith's companion. She did not immediately see her husband, but called his name and then observed him running to the aid of their son. The next thing she recalled was hearing a gunshot and observing her husband come into the tavern, stating that he had been shot. She testified that "minutes" transpired from the time she first observed the fight through the window until her husband returned to the tavern and that Champion was standing behind the bar during this period.

*Deposition Testimony of Champion.*

Champion estimated that Ratigan Jr. arrived at the Sundowner Bar at approximately midnight or 12:30 a.m. and that his parents were already there when Ratigan Jr. arrived. With regard to Smith, Champion testified as follows:

> Q. . . . Do you recall Mike Smith coming in that night?
>
> A. Yes.
>
> Q. Do you know approximately what time he came in?
>
> A. He was in there probably twelve-thirtyish. It was close to being last call, so I wasn't really going to mess with him because he's not — he wasn't supposed to be in there in the first place.
>
> Q. Why is that?
>
> A. Back when — when was it we opened the bar, September? Let's say in mid September is when we took over the bar, and he had been in there a couple of months

after we opened, so it'd probably be November or December, and he got in a fight or whatnot, and the bar owner, Keith, was there that night and had kicked him out. We didn't find out until a couple months later who [sic] his name was and what he was. I mean, we didn't know who he was then.

Q. That was probably almost a year before the shooting incident?

A. Yes. So I never really knew who he was. It was just that a girl that goes in there all the time, his wife or ex-wife — she says ex-wife, but they're still married, as far as I know. She said, "Well, yeah, that guy that got kicked out of here last month or whatever is my ex-husband, and he's trouble" and this and that. So he's out of here now. We don't have to worry about him anymore.

Q. You hadn't seen him in the bar until the night the shooting occurred?

A. I'd seen him in there. See, he's the kind of guy that don't take — you know, I'm not going to cause trouble. When he comes in, he comes in and — he'd only been in probably two or three times where I'd just glance over there and see him over there. He wouldn't even order a beer. Half the time he'd come in and just talk to a buddy and then leave. I don't know. He'd never really do nothing.

Q. He wasn't one of the regular customers?

A. Oh, no.

Champion observed the pool game involving Ratigan, Ratigan Jr., Smith, and Lee. After the game, he noticed Smith "just antagonizing and messing with Denny, Jr." Champion described what transpired next:

> It was something I was just waiting for — I was like — it finally got to the point where I'm like — I can see Denny is getting sick of it, and I had enough of it, and I didn't want anything happening in the bar, and that's about when I stepped in and said, "All right. It's 1:00. Everybody get out."

He testified that Ratigan Jr. and Lee left the tavern, while Smith and his companion finished their beers and left 2 to 3 minutes later. Champion testified that at that point that "I was happy they were all gone. You know, nothing happened in the bar.

That's my main concern. Nothing happens in the bar. If it happens outside, it isn't as much a concern as what happens inside. So once they're outside, I was fine, you know."

Champion testified that he remained inside the tavern picking up drinks and announcing "last call" to the remaining patrons. Then, four persons entered the tavern and said there was a fight in the parking lot. Champion then walked to the door and observed Ratigan Jr., Lee, Smith, and Smith's companion fighting in the parking lot, and Ratigan attempting to break up the fight. He locked the door and told the tavern patrons to remain inside. He then resumed picking up drinks, but then became "worried" about the fight in the parking lot and returned to the front door and looked outside. Champion described what he then saw:

> I don't know where Danny Lee was. Denny, Jr., I didn't see him, but I seen Smitty getting in his truck. Now, I knew exactly what he was doing because he wasn't getting in to sit down. He was reaching, and I just kind of yelled at him. I said, "Hey, I called the cops." But I hadn't yet.

Champion acknowledged that he "should have probably" called the police prior to this point, but had not done so because the fight "didn't seem too major, you know, and it was breaking up." He then observed Smith waving a gun and heard him say "All right. Now who's tough now." He also observed Ratigan standing nearby. He again told Smith that he had called the police, although he had not. Champion then closed and locked the front door again and called the police from inside the tavern. He returned to the front door and observed Ratigan Jr. and Smith on the ground fighting, with Smith still in possession of the gun. He then observed Ratigan approach the other two men and stop approximately 2 feet away from where Champion was standing. Smith then stood up and shot Ratigan at a range of 4 to 5 feet. Champion went out to the parking lot and brought Ratigan back into the tavern.

*Deposition Testimony of Finley.*

Finley, Pokorny, and another man arrived at the Sundowner Bar at approximately 8:30 p.m. on September 14, 1993. Ratigan Jr. and Lee were already present when they arrived; Ratigan and his wife came in a short time later. At approximately 11 p.m.,

Finley observed Ratigan Jr. and Smith arguing about a pool game. He observed Ratigan Jr. and Lee walk outside the tavern immediately after the argument. Between 10 and 30 minutes later, he saw Smith's companion walk out the door, followed approximately a minute later by Smith.

Finley and Pokorny left the tavern 5 to 10 minutes later, just as Ratigan was leaving. Finley observed Ratigan Jr., Lee, Smith, and Smith's companion fighting in the parking lot. Ratigan entered the fight to assist his son, resulting in a "free-for-all" involving the five men which lasted for several minutes until it was broken up by Finley, Pokorny, and others. Smith walked to his vehicle and returned about 2 minutes later with a gun in his hand. Smith waved the gun at those present and shouted threats. Approximately 4 minutes after Smith first appeared with the gun, Finley saw Smith point it toward where Ratigan was standing near the front door of the tavern and fire.

*Testimony of Pokorny.*

Pokorny arrived at the Sundowner Bar at approximately 11 p.m. on the night of the shooting, accompanied by Finley and another man. Pokorny observed Ratigan Jr. arguing with Smith, followed by Champion asking Ratigan Jr. to leave the premises. He then observed Ratigan Jr. and Lee leave the tavern "right before last call." Five to ten minutes later, he saw Smith and another man leave the tavern. A short time later, Pokorny looked out the window and "noticed there was a brawl outside" involving Ratigan Jr. and Smith. Pokorny immediately went outside, grabbed Ratigan Jr., and attempted to wrestle him into a vehicle. At that point, he observed Smith standing nearby with a gun, pointing it first at him and Ratigan Jr., and then waving it in the direction of other individuals nearby and shouting, "[W]hich one of you degenerates want to die first." Ratigan Jr. then attempted to take the gun away from Smith but was unsuccessful and fell to the ground. Ten to fifteen seconds later, Smith shot Ratigan.

## ASSIGNMENT OF ERROR

Ratigan alleges that because of the existence of genuine issues of material fact, the district court erred in entering summary judgment in favor of K.D.L.

## SCOPE OF REVIEW

Summary judgment is proper 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 summary judgment as a matter of law. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas., ante* p. 177, 569 N.W.2d 436 (1997); *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997).

When reviewing an order granting a motion for 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. *Tracy v. City of Deshler, ante* p. 170, 568 N.W.2d 903 (1997); *Schendt v. Dewey, supra*. The question on such review is not how a factual issue is to be decided, but whether any real issue of genuine fact exists. *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997); *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997).

## ANALYSIS

A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that it is entitled to a judgment if the evidence were uncontroverted at trial. If such a showing is made, the opposing party has the burden to produce evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. However, if a prima facie showing is not made, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition. *Melick v. Schmidt, supra*; *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). K.D.L. offered five depositions in support of its motion for summary judgment and Ratigan offered no evidence in response. Therefore, we review the record to determine whether the evidence offered by K.D.L., when viewed in a light most favorable to Ratigan, is sufficient to entitle K.D.L. to judgment as a matter of law.

In order to succeed in a negligence case, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Sacco v. Carothers, ante* p. 9, 567 N.W.2d 299 (1997); *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997). Ratigan alleges that as the owner of the Sundowner Bar, K.D.L. breached its duty to protect him from harm caused by a third party while on the premises. The nature and scope of that duty are not in dispute.

Our law is well settled that the owner of a business establishment which is open to the public does not ensure the safety of its patrons, but does owe them a duty of reasonable care. See *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996). We first articulated this duty in *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946), in which we adopted Restatement of Torts § 348 (1934), now Restatement (Second) of Torts § 344 (1965). We stated in *Hughes:*

> The modern general rule, summarized in its simplest terms, is that the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.

147 Neb. at 833, 25 N.W.2d at 408.

Under this standard of care, the duty owed by the business owner is not absolute but " 'is graduated according to the danger attendant upon the activities of the business pursued and depends upon the facts and circumstances surrounding each particular case.' " *Hulett v. Ranch Bowl of Omaha*, 251 Neb. at 193-94, 556 N.W.2d at 27, quoting *Hughes, supra*. We have consistently applied this standard of care to claims that the owner or proprietor of a restaurant, tavern, or similar establishment is liable to a patron for injury caused by another patron

while on the premises. See, *Hulett v. Ranch Bowl of Omaha, supra*; *Schroer v. Synowiecki*, 231 Neb. 168, 435 N.W.2d 875 (1989); *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982); *Welsh v. Zuck*, 192 Neb. 1, 218 N.W.2d 236 (1974); *Crane v. Whitcomb*, 160 Neb. 527, 70 N.W.2d 496 (1955); *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949). Whether a business proprietor is liable for the adverse actions of a third party against an invitee depends primarily upon whether those actions were reasonably foreseeable to the proprietor. *Hulett v. Ranch Bowl of Omaha, supra.*

We have recognized that a history of violent conduct, or the absence of such a history, is an important factor in determining whether a proprietor should have foreseen a particular violent act on its premises. For example, in *Hughes v. Coniglio, supra*, the patron of a restaurant was injured during a fight between two other patrons. We cited general authority holding that an innkeeper may be liable if " 'he admits to his place, or permits to remain there, as a guest, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guests . . . .' " 147 Neb. at 833, 25 N.W.2d at 408. However, we held as a matter of law that the restaurant owner was not negligent because there was no evidence of previous fights or disorderly conduct at the restaurant and no evidence that the owner had any notice that the patrons involved in the fight "had quarrelsome, violent, or disorderly propensities." *Id.* at 832, 25 N.W.2d at 408.

Similarly, in *Welsh v. Zuck, supra*, we held as a matter of law that a tavern owner was not liable for an accidental shooting injury which occurred when one patron pointed a gun at another, notwithstanding the fact that the owner knew that the gun was in the possession of the patron. We noted that the patron originally brought the weapon into the tavern to be " 'target[ed] in' " at a range located in the basement of the establishment and that the tavern owner believed the weapon to be unloaded at the time of the incident. *Id.* at 7, 218 N.W.2d at 240. We held that these facts afforded no basis for the tavern owner to anticipate an altercation involving the gun, particularly "in view of the undisputed evidence that [the gun owner] had never

been quarrelsome or in any way obnoxious or obstreperous at prior occasions as a regular patron of the bar." *Id.*

In this case, however, there is evidence that Champion knew that Smith had been ejected from the Sundowner Bar for fighting less than a year prior to Ratigan's injury. While it is not clear whether this was intended as a permanent ban from the premises, a jury could reasonably infer that it was and that Champion failed to enforce it. It is also reasonable to conclude that if Smith had been denied admission to the tavern, Ratigan's injury would not have occurred.

We recently examined the relationship between prior criminal conduct at a drinking establishment and the foreseeability of similar conduct in *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996). In that case, the plaintiff was assaulted with a beer mug by another guest during an after-hours party. We held that while the proprietor had no reason to expect an attack by that particular individual, the forseeability of harm was established by other evidence, including the routine occurrence of fights during similar events at the establishment. Quoting our prior holding in *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994), that "'many occasions of "similar" criminal activity in one fairly contiguous area in a limited timespan may make further such acts sufficiently foreseeable to create a duty to a business invitee,'" we concluded that "[w]hether a history of criminal activity makes an assault foreseeable is a question of fact." 251 Neb. at 195, 556 N.W.2d at 28. This case differs factually from *Hulett* in that there was only one prior instance of assaultive behavior on the premises, but it involved the same assailant who injured Ratigan. We conclude that this is sufficient to create a genuine issue of material fact as to foreseeability.

This case is distinguishable from *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982), in which we held as a matter of law that despite knowledge that a regular patron had been involved in prior assaults, a tavern owner could not have reasonably foreseen that he would suddenly enter the tavern and assault another patron without warning. Here, it is undisputed that Champion was aware of the confrontation between Smith

and Ratigan Jr. following the pool game and was sufficiently concerned that he asked both men to leave the premises. More importantly, there is evidence that Champion was aware of the fight in the parking lot involving Smith and both Ratigan and Ratigan Jr. for some period of time before he called police, and he admits that he "should have probably" called police earlier. K.D.L. offered no evidence to negate Ratigan's allegations that it failed to employ adequate security personnel and establish or implement safety precautions. Viewing the evidence in a light most favorable to Ratigan, we conclude that K.D.L. did not meet its burden of presenting evidence to establish as a matter of law that it met its duty to exercise reasonable care to prevent Ratigan's injury.

K.D.L. argues that even if its negligence were established, Smith's actions constituted an efficient intervening cause which would preclude its liability as a matter of law. We recently addressed a similar argument in *Sacco v. Carothers, ante* p. 9, 10, 567 N.W.2d 299, 302 (1997), where a dispute between patrons in a tavern culminated in a fight in the parking lot after the men had been told by the bartender to "'take it outside.'" One of the patrons who was seriously injured in the incident contended that the owner of the tavern should have taken steps to prevent his injury. The owner argued that the assaultive behavior of the other patron constituted an efficient intervening cause, and the jury was so instructed. We held that the giving of this instruction was error, based upon the principle that "if the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then the defendant will generally be liable for the consequences." *Id.* at 15, 567 N.W.2d at 304. We held that because the specific risk against which the tavern owner allegedly failed to exercise due care was the likelihood that another patron would assault the plaintiff, the assault by that patron could not be an independent act that would break the causal connection between the owner's negligence and the plaintiff's injury. On the record before us, where Ratigan alleges that K.D.L. was negligent in failing to protect him from the assaultive behavior of Smith, the assault of Ratigan by Smith cannot be considered an efficient intervening

cause operating to break the causal connection between the alleged negligence of K.D.L. and Ratigan's injury.

For these reasons, we conclude that the evidence presented by K.D.L. was insufficient to establish a prima facie showing that it was entitled to judgment as a matter of law, and the district court therefore erred in granting summary judgment. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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STATE OF NEBRASKA, APPELLEE,
v. EUSEBIO L. BECERRA, APPELLANT.
573 N.W.2d 397

Filed January 2, 1998. No. S-96-1025.

1. **Convictions: Appeal and Error.** 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. 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 the jury's province for disposition.
2. **Constitutional Law: Effectiveness of Counsel: Proof.** To state a claim of ineffectiveness of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
3. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Kidnapping: Words and Phrases.** In the absence of a statutory definition, terrorize means to fill with terror or scare. Terrorize is a synonym for frighten, which means to markedly disturb with fear, throw into a state of alarm, make afraid, or terrify.
5. **Intent.** Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct.
6. **Constitutional Law: Effectiveness of Counsel.** The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel.

7. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
8. **Kidnapping.** Kidnapping as a Class II felony is not a separate offense from kidnapping as a Class IA felony.
9. **Kidnapping: Sentences.** The provisions of Neb. Rev. Stat. § 28-313(3) (Reissue 1995) are only mitigating circumstances which may reduce the penalty for kidnapping, and the existence or nonexistence of the mitigating circumstances is a matter properly considered by the court at sentencing, not the jury.
10. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
11. **Lesser-Included Offenses.** In determining whether an offense is a lesser-included one, a court looks initially not to the evidence in a particular case, but, rather, to the elements of the criminal offense.
12. **Kidnapping: False Imprisonment: Intent.** It is the intent to terrorize which distinguishes kidnapping from false imprisonment in the first degree.
13. **Kidnapping: Lesser-Included Offenses: False Imprisonment.** First degree false imprisonment is a lesser-included offense of kidnapping.
14. **Kidnapping: Lesser-Included Offenses: False Imprisonment: Case Overruled.** To the extent that the Nebraska Court of Appeals has held that first degree false imprisonment is not a lesser-included offense of kidnapping in *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), that holding is expressly overruled.
15. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Glenn A. Shapiro, 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.

GERRARD, J.

## I. INTRODUCTION

Pursuant to verdict, defendant-appellant, Eusebio L. Becerra, was adjudged guilty of kidnapping and of use of a firearm in the

commission of a felony. Becerra appeals, asserting that (1) there was insufficient evidence adduced at trial to support the kidnapping conviction and (2) he received ineffective assistance of counsel at trial. Because we determine that Becerra's claims are not supported by the record, we affirm the judgment of the district court.

## II. FACTUAL BACKGROUND

On January 5, 1996, at approximately 6:30 p.m., the victim, Melvin Washington, Jr., left work at Rotella's Bakery and saw a red two-door Blazer occupied by three men, one of whom was Becerra. Washington testified that he owed Becerra money for drugs that Becerra had recently supplied to Washington.

According to Washington, Becerra exited the Blazer holding a 9-mm handgun and asked Washington, "Where is the money?" Becerra held the gun in his right hand and showed Washington that he also had bullets. At that time, Becerra inserted the bullets into a clip and placed the clip into the gun while again asking Washington about the money. After Washington indicated that he was just about to retrieve the money, Becerra told Washington that his "time was up."

Becerra then engaged in conversation with Daniel Gonzalez, another occupant of the Blazer. Becerra and Gonzalez discussed what they were going to do with Washington. Gonzalez and the third individual from the Blazer, who has never been identified, reentered the Blazer, and Becerra and Washington entered Washington's sister's vehicle. Becerra continued to hold the gun in his hand and kept telling Washington that Washington had "fucked up."

Becerra instructed Washington to follow Gonzalez, while Becerra continued to hold the gun in full view of Washington. Becerra told Washington that they wanted Washington's Jeep as collateral for the drug debt. Washington's father was in possession of the Jeep that evening, so Washington was unable to comply with the demand.

Washington testified that he knew he had no choice but to do as Becerra instructed. Washington followed the Blazer, driving toward 108th and Harrison Streets, onto 84th Street, then onto the Interstate, and eventually ended up on 10th Street at a steak

house. Becerra kept telling Washington that Washington had "messed up."

As Becerra and Washington waited in the parking lot on 10th Street, the Blazer left the parking lot and went further up the street. About 10 minutes later, Gonzalez and the third individual returned in an Oldsmobile. Becerra then took Washington's keys, and Washington got into the back seat of the Oldsmobile. Gonzalez also got into the back seat of the Oldsmobile, and he held an AK-47 rifle, which he kept pointed toward Washington's feet.

The group left 10th Street, getting back onto the Interstate, and then stopped at a gas station. From there, the group took Washington to a warehouse somewhere in the vicinity of 62d Street. Washington testified that he believed they were looking for a place to execute him because Becerra exited the car, checked the warehouse, and told Gonzalez that there were too many cars going back and forth and that it was not a good spot.

At that point, the four drove to Lake Manawa in Iowa. At the lake, Becerra told Washington to take off his clothes. Washington removed his pants and shoes, leaving him wearing only his T-shirt, boxer shorts, and socks. The temperature outside that evening was below freezing, with a windchill factor below zero.

Becerra told Washington to get out of the car and to stand in front of the vehicle. Becerra and Gonzalez were still carrying their weapons. At that time, Becerra instructed Washington to come toward them and to open his mouth so that Becerra could stick his gun into Washington's mouth. Washington did not comply with Becerra's request.

Becerra kept telling Washington, "you messed up, mother fucker." Gonzalez and Becerra followed Washington as he walked away from them and began kicking him and beating him. Becerra beat Washington in the face with the handgun, and Gonzalez hit Washington in the back with the rifle. Finally, Washington turned around, hit both Becerra and Gonzalez, and then ran across the frozen lake and dove into the snow. Noticing that the ice was cracking, Becerra and Gonzalez returned to their vehicle. Other cars were driving in the area at that time as well. After they returned to the vehicle, Becerra and Gonzalez

began to leave. Seeing Washington get up out of the snow, however, Becerra attempted to get Washington to return to the car, saying "[C]ome here, Melvin," and "I am not going to do that."

Becerra and Gonzalez eventually did leave. After making sure that the Oldsmobile was gone, Washington ran across the lake, crossed the street, and crossed a canal to get help on the other side, where he had observed houses. Washington knocked on a door, seeing that a television was on in the house, but no one answered. Washington then went to the next house, noting that people were there, and knocked on the door and the window. A woman opened the door and let Washington inside. The Council Bluffs, Iowa, police arrived, and Washington was transported to a hospital.

Lynda Bergeron, the woman who aided Washington, testified that Washington was bleeding from his mouth and that Washington fell down upon entering her house. Bergeron, who happened to be a nurse, further testified that Washington was "somewhat losing consciousness," due to exposure to the cold.

Becerra was charged by information with kidnapping with intent to terrorize, in violation of Neb. Rev. Stat. § 28-313(1) (Reissue 1995), and with use of a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1995). A jury convicted Becerra of the two felonies, and on September 6, 1996, Becerra was sentenced in the district court. At the sentencing hearing, Becerra's attorney requested that the judge consider sentencing Becerra to "[a] period of probation, minimal incarceration so that [Becerra] will have a chance to get his life on track and become a decent citizen." The trial judge responded by noting that kidnapping is a Class IA felony and that life imprisonment is the only possible sentence allowed by statute. Becerra was sentenced to life imprisonment for kidnapping and to a consecutive term of imprisonment of 2 to 5 years for use of a firearm to commit a felony.

## III. ASSIGNMENTS OF ERROR

Becerra asserts that the evidence adduced at trial was insufficient to support a finding of guilt on the charge of kidnapping. Becerra also claims that he was denied the effective assistance of counsel at trial, and, therefore, his Sixth Amendment rights were abridged.

## IV. STANDARD 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. 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 the jury's province for disposition. *State v. Freeman, ante* p. 385, 571 N.W.2d 276 (1997).

To state a claim of ineffectiveness of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

## V. ANALYSIS

### 1. Sufficiency of Evidence

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Stubbs*, 252 Neb. 420, 562 N.W.2d 547 (1997); *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

The evidence presented at trial, taking the view most favorable to the State, reveals that Becerra forced Washington, using the threat of a 9-mm handgun, to follow the Blazer across town. Once at the parking lot on 10th Street, Becerra forced Washington to get into the back seat of the Oldsmobile. The group then drove around seeking a suitable place presumably for Washington's execution.

While inside the Oldsmobile, Washington was exposed to the threat of an AK-47 rifle and Becerra's 9-mm handgun. At Lake Manawa, Becerra was forced to remove almost all of his clothing and was ordered outside in below-freezing temperatures. Once outside the car, Becerra asked Washington to open his mouth so that Becerra could insert his gun into it. Becerra and Gonzalez then beat Washington in the face and back with their weapons, and both Becerra and Gonzalez kicked Washington.

Although the evidence described above was adduced primarily from the testimony of the victim, and Becerra presented contradictory testimony that he was acting under physical duress and served merely as a translator between Gonzalez and Washington, it is not within the province of this court to resolve conflicts in the evidence or to pass on the credibility of the witnesses at trial. Rather, we must determine whether the evidence described above is sufficient to support Becerra's conviction.

Becerra was convicted of kidnapping, in violation of § 28-313. Section 28-313(1) defines kidnapping as follows:

> A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> (a) Hold him for ransom or reward; or
>
> (b) Use him as a shield or hostage; or
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony; or
>
> (e) Interfere with the performance of any government or political function.

"Abduction" is defined as restraining a person with intent to prevent his liberation by (1) secreting or holding him in a place where he is not likely to be found or (2) endangering or threatening to endanger the safety of any human being. Neb. Rev. Stat. § 28-312(2)(a) and (b) (Reissue 1995). "Restrain," in turn, is defined in relevant part as restricting a person's movement in such a manner as to interfere substantially with his liberty by means of force, threat, or deception. § 28-312(1)(a).

It is clear that evidence was presented which supports the jury's conclusion that Becerra both abducted and restrained Washington during the course of events that occurred on

January 5, 1996. Washington testified that he was taken at gunpoint from his place of employment, driven around while an AK-47 rifle was pointed in his direction, and eventually taken to Lake Manawa by Becerra and others.

The question, then, is whether the evidence supports a conclusion that Becerra had the requisite intent either when Washington was abducted or while Washington was being restrained. The jury was instructed that Becerra must have had the intent to terrorize Washington, to inflict serious bodily injury on Washington, or to kill Washington. This instruction comports with the requirements of § 28-313(1)(c) and (d) and, therefore, was proper.

We have recently defined what "terrorize" means within the context of § 28-313. See *State v. Robbins, ante* p. 146, 570 N.W.2d 185 (1997). In *Robbins*, we held that in the absence of a statutory definition, terrorize means to fill with terror or scare. Terrorize is a synonym for frighten, which means to markedly disturb with fear, throw into a state of alarm, make afraid, or terrify. Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct. *Id.* Becerra abducted Washington at gunpoint, then Becerra forced Washington to strip down to his underwear at gunpoint at Lake Manawa in freezing temperatures, told Washington to open his mouth so that he could insert his gun into it, and beat Washington with the gun. There can be no serious dispute that the evidence regarding Washington's abduction and continued restraint, when taking the view most favorable to the State, sufficiently establishes Becerra's intent to terrorize Washington. Becerra's first assignment of error is wholly without merit.

### 2. Ineffective Assistance of Counsel

Next, Becerra claims that he received ineffective assistance of counsel during trial. Becerra bases his claim on his trial counsel's failure (1) to object to the admission into evidence of surveillance videotapes of the parking lot of Rotella's Bakery (exhibits 3 and 4), (2) to object to leading questions from the prosecutor, and (3) to offer jury instructions on the lesser-included offenses of false imprisonment or kidnapping as a Class II felony.

The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel. *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994). To state a claim of ineffectiveness of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). However, where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991).

Becerra raises his ineffective assistance of counsel claim for the first time before this court. Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

(a) Failure to Object to Exhibits 3 and 4

Becerra claims that his counsel's failure to object to the admission into evidence of exhibits 3 and 4 constituted deficient performance on the part of trial counsel that prejudiced Becerra. However, as previously noted, where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *State v. Morley, supra*. Exhibits 3 and 4 are surveillance videotapes of the parking lot of Rotella's Bakery. Exhibit 4 is a slow-motion version of exhibit 3 that isolates a few minutes shown in exhibit 3. Exhibit 3 is a high-speed, time-lapsed video that is nearly

impossible to decipher, thereby necessitating the use of the slowed version seen in exhibit 4. The entirety of exhibit 4 shows a Blazer backing out of a parking stall, turning in front of the video camera, and then exiting from view. None of the persons involved in this matter can be seen in exhibit 4. The only information that can be distilled from exhibit 4 is that a Blazer was present in the parking lot at approximately the same time that Washington was abducted. Becerra himself testified on cross-examination that he was in the parking lot at that time and that a Blazer was also present. Therefore, Becerra has failed to demonstrate sufficient prejudice as a result of the admission into evidence of exhibits 3 and 4 such that results of the trial would have been different but for trial counsel's allegedly deficient performance.

(b) Failure to Object to Leading Questions

Becerra also claims that his trial counsel was ineffective in repeatedly failing to object to leading questions posed by the State during the presentation of its case in chief. The record establishes that while Becerra's counsel did not object to some leading questions by the prosecution, he did object to leading questions on several occasions at trial. In *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992), the defendant argued that his counsel provided ineffective assistance because he failed to request an instruction that the jury disregard certain evidence after the trial court sustained objections thereto because the evidence was procured through leading questions. We held that counsel's failure to request instructions that the jury disregard the evidence was not prejudicial because after counsel's objection was sustained, the State rephrased the question and elicited the exact same response. See *id.* We noted that if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, any error in receiving the inadmissible evidence is harmless error and not grounds for a reversal. *Id.* In the instant case, when Becerra's counsel did object to leading questions, the State was able to rephrase the questions and elicit the sought-after responses from the witnesses.

Therefore, even if it could be shown that Becerra's trial counsel was deficient in failing to object to certain leading questions

by the prosecution, a matter we do not decide, Becerra has not demonstrated that he was prejudiced or that the results of the trial would have been different but for counsel's allegedly deficient performance.

(c) Failure to Offer Jury Instruction on Lesser-Included Offense

Next, Becerra claims that his trial counsel was ineffective in failing to offer a jury instruction on a lesser-included offense of false imprisonment or kidnapping as a Class II felony. The record before this court is insufficient to adequately review the question. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994). Even though the record indicates that Becerra's trial counsel did submit two proposed instructions to the court, the proposed instructions have not been made a part of the record on this appeal. At the instruction conference, the trial court asked Becerra's counsel if he had any objections to the court's instructions. Counsel replied by saying, "No. I accept them. I did submit two proposed instructions." The court then stated, "To the extent they are included in these they are granted. To the extent they are not included they are denied."

As previously noted, Becerra did not raise his claim of ineffective assistance of counsel at the trial court level. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.* Without evidence of what instructions were tendered by Becerra's trial counsel, we cannot determine whether the tendered instructions were warranted by the evidence and a correct statement of the law.

The State argues that, in any event, Becerra's trial counsel would not have been ineffective for failing to submit to the trial court proposed instructions on first degree false imprisonment or kidnapping as a Class II felony because those offenses were not supported by the evidence presented at trial. Section 28-313(3) states that "[i]f the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony." Initially, we point out that kidnapping as a Class II felony is not a separate offense from kid-

napping as a Class IA felony. *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). The provisions of subsection (3) are only mitigating circumstances which may reduce the penalty for kidnapping, and the existence or nonexistence of the mitigating circumstances is a matter properly considered by the court at sentencing, not the jury. See *id.* Therefore, as a matter of law, Becerra was not entitled to a jury instruction on kidnapping as a Class II felony. Moreover, there was no evidence that would support a finding by the trial court at sentencing that Washington was *voluntarily* released or liberated alive by Becerra. Washington's escape was made possible only through his own efforts and a measure of good fortune.

However, given the state of the record, we cannot be as conclusive with regard to a possible instruction on first degree false imprisonment as a lesser-included offense of kidnapping. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Howard, ante* p. 523, 571 N.W.2d 308 (1997); *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994); *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994). In determining whether an offense is a lesser-included one, a court looks initially not to the evidence in a particular case, but, rather, to the elements of the criminal offense. *State v. Howard, supra.*

The threshold question, therefore, is whether a person can commit the offense of kidnapping without at the same time committing the offense of first degree false imprisonment. A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person (1) *under terrorizing circumstances* or under circumstances which expose the person to the risk of serious bodily injury or (2) with intent to hold him in a condition of involuntary servitude. Neb. Rev. Stat. § 28-314(1) (Reissue 1995). A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to (a) hold him for ransom or reward, (b) use him as a shield or hostage, (c) terrorize him or a third

person, (d) commit a felony, or (e) interfere with the performance of any government or political function. § 28-313(1). We cannot envision a situation in which a person abducts another and continues to restrain him with the intent to either terrorize him, commit a felony, use him as a shield or hostage, hold him for ransom or reward, or interfere with the performance of a government or political function where the circumstances would not simultaneously be "terrorizing" *or* "expose the person to the risk of serious bodily injury."

Stated another way, it is impossible to commit the greater offense of kidnapping without at the same time having committed the lesser offense of first degree false imprisonment. See, *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). It is the *intent to terrorize* which distinguishes kidnapping from false imprisonment in the first degree. *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). See, also, *State v. Miller*, 216 Neb. 72, 341 N.W.2d 915 (1983) (holding that kidnapping requires proof of specific intention, which is not element of false imprisonment). Therefore, first degree false imprisonment is a lesser-included offense of kidnapping. To the extent that the Nebraska Court of Appeals has held that first degree false imprisonment is not a lesser-included offense of kidnapping in *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), that holding is expressly overruled.

Ordinarily, the analysis would now shift to the second prong of the test, that is, whether the evidence presents a rational basis to support a possible verdict for acquittal of kidnapping and conviction of first degree false imprisonment. However, without evidence of what instructions were tendered by Becerra's trial counsel, we cannot determine whether the tendered instructions were warranted by the evidence and a correct statement of the law. It is also not possible, given the state of the record, to determine with reasonable probability whether any failure on the part of Becerra's trial counsel at the instruction conference prejudiced Becerra such that, but for his counsel's alleged failure to object to the court's instructions or to offer alternative jury instructions warranted by the evidence and the law, the result of the trial would have been different. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

Because this issue was not raised or ruled on by the trial court and the matter may necessitate an evidentiary hearing, if an appropriate motion is filed containing facts which properly allege an infringement of Becerra's rights under the Nebraska or federal Constitution, we will not address the issue on direct appeal. See *id.*

(d) Trial Counsel's Request for Probation

Finally, we note that in the "Nature of the Case" subsection of appellant's brief, Becerra discusses his trial counsel's unfamiliarity with the penalty for kidnapping, as allegedly demonstrated during the sentencing hearing. Becerra's counsel requested that the sentence be probation. The trial judge stated that kidnapping is a Class IA felony, which carries a mandatory sentence of life in prison. Becerra again mentions the alleged deficiency in the "Conclusion" section of his brief. An appellate court does not consider errors which are argued but not assigned. *State v. McBride, supra*; *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996). Not only did Becerra fail to assign his trial counsel's statements at the sentencing hearing as evidence of error, Becerra did not actually argue the issue, or the nature of the alleged prejudice, in the body of his brief. Rather, Becerra merely mentioned his trial counsel's statements at sentencing in the "Nature of the Case" subsection of his brief, and then extrapolated that it was evidence of the deficient performance of trial counsel in the conclusion of his brief. Because the issue was neither assigned as an error nor properly argued on appeal, we decline to consider the issue.

## VI. CONCLUSION

For the foregoing reasons, we conclude that all of Becerra's assigned errors are without merit and affirm the judgment of the district court.

AFFIRMED.

# CATALINO VARELA, APPELLEE AND CROSS-APPELLANT, V. FISHER ROOFING CO., INC., AND UNION INSURANCE COMPANY, APPELLANTS AND CROSS-APPELLEES.

572 N.W.2d 780

Filed January 2, 1998. No. S-96-1069.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
2. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. **Workers' Compensation.** Under the provisions of the Nebraska Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury.
4. **Appeal and Error.** Not only must a claimed prejudicial error be assigned, it also must be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.
5. **Workers' Compensation.** Injuries resulting from horseplay may be within the scope of employment; such injuries are within the scope of employment and compensable if (1) the deviation is insubstantial and (2) the deviation does not measurably detract from the work.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and MUES, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Dallas D. Jones, Thomas B. Wood, and Darin J. Lang, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant Fisher Roofing Co.

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

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

WHITE, C.J.

Fisher Roofing Co., Inc., and its insurance carrier, Union Insurance Company, appeal an award to Fisher's employee, Catalino Varela, from a review panel of the Nebraska Workers' Compensation Court. The award arose out of a foot injury

Varela sustained while engaged in, or preparing to engage in, an arm-wrestling match with a coworker. The Nebraska Court of Appeals affirmed the award to Varela. We granted further review.

Varela was working as a laborer for Fisher on September 28, 1994, when he injured his right foot during working hours on a jobsite.

Varela and other crew members were on the roof of a school in Harrisburg, Nebraska, preparing to do work on the roof. Varela was carrying a bucket of paint when a coworker, Pastor "Tony" Gonzales, asked Varela why he chose to carry the lightest bucket. Upon hearing this, Varela put the bucket down and, in a good-natured manner, challenged Gonzales to an arm-wrestling match. Gonzales initially declined the challenge because he knew that such conduct was against Fisher's rules. Varela continued to challenge Gonzales to arm-wrestle, calling him "chicken." Gonzales apparently accepted the challenge, and as they either prepared to arm-wrestle or actually started, Varela put his right foot on the edge of a raised skylight. Varela's foot slipped off the skylight, causing him to fall and injure his right foot.

Fisher's employee handbook prohibits "[b]oisterous or disruptive activity in the workplace." Prior to the incident, Varela had signed an employee acknowledgment form which stated that he had received the handbook, which was written in English, and that he was responsible for reading it and following the policies contained therein. Varela does not read English.

On September 20, 1995, a hearing was held in the Nebraska Workers' Compensation Court. On December 28, the court found that Varela had suffered a compensable accident and was entitled to indemnity benefits and the payment of medical expenses. The court further found that Varela's injury occurred either during or in preparation for arm-wrestling, that Varela's act of engaging in arm-wrestling constituted a deviation from his employment, that Fisher's employee handbook specifically prohibited arm-wrestling, and that the arm-wrestling did not create a formidable independent hazard of injury.

Fisher and Union appealed the court's findings to a review panel of the Workers' Compensation Court, which found that

the trial court was not clearly wrong in finding that the injury arose out of and in the course of the employment.

Fisher and Union then appealed the review panel's decision to the Court of Appeals, generally asserting that the compensation court erred (1) in finding that Varela's injury occurred in an accident arising out of and in the course of his employment, (2) in not finding that the arm-wrestling constituted willful negligence on the part of Varela, and (3) in finding that the arm-wrestling did not create a formidable independent hazard of injury. Varela cross-appealed, alleging that the compensation court erred in failing to award attorney fees, interest, and costs.

The Court of Appeals affirmed the review panel's decisions to uphold the compensation award to Varela and to uphold the ruling that since there was a reasonable controversy, an award of attorney fees, interest, and costs was precluded. See *Varela v. Fisher Roofing Co.*, 5 Neb. App. 722, 567 N.W.2d 569 (1997). However, since Fisher and Union appealed to a review panel and did not obtain a reduction in the award and pursued a second appeal to the Court of Appeals, again without reduction, the Court of Appeals affirmed the $2,000 attorney fee awarded by the review panel and awarded Varela further attorney fees for the appeal in that court. *Id.* The case is now before this court for further review.

Fisher and Union claim that the Court of Appeals erred (1) in crafting a vague rule which provides that injuries occurring during "horseplay" may be compensable under the Nebraska Workers' Compensation Act; (2) in applying the analysis adopted in workplace assault cases such as *Myszkowski v. Wilson and Company, Inc.*, 155 Neb. 714, 53 N.W.2d 203 (1952); (3) in affirming a finding that Varela suffered an accident on September 28, 1994, which arose out of and in the course of his employment with Fisher; (4) in concluding that a deviation from employment is compensable if its origin can be traced to employment; (5) in affirming a finding that Fisher is liable for temporary total disability benefits, permanent partial disability benefits, and medical expenses as a result of injuries sustained by Varela as a result of his act in arm-wrestling or preparing to arm-wrestle while on top of a roof on September 28; and (6) in affirming a finding that the arm-wrestling, or

preparation for arm-wrestling, in which Varela engaged and which caused his injury, did not constitute willful negligence.

Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997); *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Acosta v. Seedorf Masonry, Inc., ante* p. 196, 569 N.W.2d 248 (1997); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

Under the provisions of the Nebraska Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury. Neb. Rev. Stat. § 48-101 (Reissue 1993); *Winn v. Geo. A. Hormel & Co., supra.*

Not only must a claimed prejudicial error be assigned, it also must be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997); *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996).

In their brief to this court, Fisher and Union do not argue that Varela's actions constitute willful negligence, and therefore that issue will not be considered here.

In their first assignment of error, Fisher and Union argue that the Court of Appeals erred in crafting a vague rule which provides that workplace injuries occurring during horseplay may be compensable under the Nebraska Workers' Compensation Act. Fisher and Union claim that "the Court of Appeals never made clear the actual 'test' it was adopting." Brief for appellants in support of petition for further review at 5-6.

The Court of Appeals characterized the arm-wrestling incident between Varela and Gonzales as "horseplay" and found that "certain incidents of horseplay, resulting in injury, may be within the scope of employment and arise out of it." *Varela v.*

*Fisher Roofing Co.*, 5 Neb. App. 722, 732, 567 N.W.2d 569, 576 (1997). In holding that Varela's injury was compensable, the Court of Appeals adopted Professors Larson and Larson's theory that " 'horseplay participation . . . should have the benefit of the general rule that trifling and insubstantial deviations, which do not measurably detract from the work, should not be treated as departures from the scope of employment.' 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 23.66 at 5-233 (1996)." *Varela*, 5 Neb. App. at 732, 567 N.W.2d at 576. The court concluded that the arm-wrestling was an insubstantial deviation and did not measurably detract from the work. In affirming the compensation award to Varela, the Court of Appeals used the above-quoted language from 1A Larson & Larson, *supra*, § 23.66, as its test for compensability in cases involving workplace injuries as a result of horseplay. The test essentially states that injuries resulting from horseplay may be within the scope of employment; such injuries are within the scope of employment and compensable if (1) the deviation is insubstantial and (2) the deviation does not measurably detract from the work. In holding that Varela's injury was compensable, the Court of Appeals stated:

> We believe that Larson and Larson's proposed test for compensability is appropriate and that certain incidents of horseplay, resulting in injury, may be within the scope of employment and arise out of it. We look to whether the deviation was substantial because, obviously, Varela and Gonzales were not directly working when the injury occurred. We find that the work stoppage was of momentary duration, the injury happened at the very outset of the horseplay, this was not the sort of incident which carried a significant risk of serious injury, and the incident was a trifling matter, at least in its intention by the two employees. These factors lead to the conclusion that the arm-wrestling was an insubstantial deviation and did not measurably detract from the work (but for the injury).

*Varela*, 5 Neb. App. at 732, 567 N.W.2d at 576-77.

We concur in the rationale of 1A Larson & Larson, *supra*, as a standard in horseplay cases. We also agree with the Court of Appeals' analysis in concluding that the arm-wrestling incident

between Varela and Gonzales was an insubstantial deviation and did not measurably detract from the work. Accordingly, we hold that the Court of Appeals did not err in crafting a rule which allows compensation under the Nebraska Workers' Compensation Act for certain workplace injuries resulting from horseplay.

In their second assignment of error, Fisher and Union claim that the Court of Appeals erred as a matter of law in applying the analysis adopted in workplace assault cases such as *Myszkowski v. Wilson and Company, Inc.*, 155 Neb. 714, 53 N.W.2d 203 (1952).

While there is no horseplay case in Nebraska, the Court of Appeals analogized the issue to cases involving assault injuries in the workplace. In doing so, the court relied on *Myszkowski, supra*, where difficulties in a work relationship between two employees escalated to the point where one employee assaulted the other. In finding the resulting injury compensable, we held: " 'Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment.' " *Id.* at 718, 53 N.W.2d at 207.

Fisher and Union assert that the instant case cannot be compared to workplace assault cases because of two distinctions: (1) There was no "dispute" in this case, and (2) in all compensable workplace assault cases, "the injury arose out of a spontaneous, unpremeditated 'explosion' or flaring of tempers." Further brief on appeal for appellants at 8. While there was no argument or dispute in the instant case, there was some good-natured teasing about whether Varela was carrying his share of the workload. This in turn led to the arm-wrestling challenge as a test of strength and manhood. We are inclined to agree with the Court of Appeals' assessment that "[a]ll of the evidence shows that their arm-wrestling match arose spontaneously out of work-related banter. It was an accidental slip during the course of this momentary horseplay which caused Varela's injury." *Varela*, 5 Neb. App. at 729, 567 N.W2d at 575.

Rather than relying on the rule in *Myszkowski, supra*, Fisher and Union urge that the proper test to determine compensation in this case is that espoused in *Simon v. Standard Oil Co.*, 150 Neb. 799, 36 N.W.2d 102 (1949). In *Simon*, the claimant

worked in the "wash room," which was next to the "paint room." After having completed all of his duties for the day, the claimant went about 30 feet from his station to the paint room, where a new ventilation fan had been installed. The claimant, in order to satisfy his curiosity as to how much air the fan was pulling, got his hand too close to the fan and was injured. In finding that the injury was not compensable, this court held that

> "the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard."

*Id.* at 804, 36 N.W.2d at 105. We further held that an injury is compensable "when it takes place within the period of the employment, at a place where the employee has a right to be, and while he is engaged in performing the duties of the employment or something reasonably incidental thereto." *Id.* at 806, 36 N.W.2d at 106. We denied compensation in *Simon* because the accident was found not to be in the course of the claimant's employment, since (1) he had completed all of his work for that day and (2) he had no duty or obligation to be in the area of the fan.

While the general principles of the test in *Simon* may apply here, the instant case can be distinguished factually in that the claimant in *Simon* had finished his duties for the day and needed only to leave the premises. Instead, he relocated to an area where he had no concern, duty, or responsibility.

On oral argument, Fisher and Union assert that Varela had similarly relocated by moving toward the skylight and thus had deviated from his employment. However, the record indicates that Varela remained on the roof at the time of his injury, which is where he was required to be to perform the work he was doing. The record in the instant case also shows that Varela was engaged in horseplay during working hours while preparing to do roofing work. It does not appear that Varela relocated from his work station to satisfy his personal curiosity outside working hours, as was the case in *Simon*.

The facts in *Myszkowski v. Wilson and Company, Inc.*, 155 Neb. 714, 53 N.W.2d 203 (1952), appear to be more analogous

to those in the instant case than to those in *Simon, supra*. This court concluded that the claim in *Myszkowski* was compensable because "[the] claimant did not leave his line of duty under his employment for purposes of his own." 155 Neb. at 720, 53 N.W.2d at 208. Our decision in *Simon, supra*, is analyzed in 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 23.66 at 5-240 (1997), wherein it is concluded that the claim for compensation in *Simon* "is weakened both by the size of the deviation and by the fact that it occurred outside working hours and not in connection with a normal coming or going trip." We agree. Therefore, we decline to apply the rule in *Simon* to the instant case. Accordingly, we hold that the Court of Appeals did not err in applying the analysis in *Myszkowski* to this case.

Having found that the incident of horseplay engaged in by Varela was not so substantial a deviation as to remove him from the scope of his employment, we affirm the decision of the Nebraska Court of Appeals.

AFFIRMED.

STEPHAN, J., dissenting.

I respectfully dissent. The trial judge made a specific finding that while unloading roofing supplies on a wet roof, Varela responded to verbal "mocking" by coworkers by challenging one of them to an arm-wrestling contest and that his injury occurred "in preparation or during the arm-wrestling contest." Based on these findings, I regard the determination that Varela's injury occurred as a result of conduct arising out of his employment to be clearly erroneous.

Whether an accident arose "out of" and "in the course of" employment, as those terms are used in the workers' compensation law, must be determined from the facts of each case. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995). The claimant has the onus of proving that the injury arose both "out of" and "in the course of" his or her employment. *Cords v. City of Lincoln, supra*; *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965).

The phrase "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from risks arising within the scope or sphere of the employee's job. The

phrase "in the course of" refers to the time, place, and circumstances surrounding the accident. *Cords v. City of Lincoln, supra*; *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). The test to determine whether an act or conduct of an employee which is not a direct performance of his work "arises out of" his employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard. *Cords v. City of Lincoln, supra*; *Cannia v. Douglas Cty.*, 240 Neb. 382, 481 N.W.2d 917 (1992). We stated in *Schademann v. Casey*, 194 Neb. 149, 155, 231 N.W.2d 116, 121 (1975):

> "All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, *not in conflict with specific instructions, as an employee may normally be expected to indulge in,* under the conditions of his work, are regarded as being within the scope or sphere of the employment."

(Emphasis supplied.)

I agree that Varela's injury occurred at his assigned place of work at a time when he should have been working, but in my view the evidence clearly establishes that his activity at the time of his injury was not reasonably incident to the performance of his duties. When Varela laid down his work and challenged a coworker to an arm-wrestling contest, he was no longer serving his employer's interest; he was acting contrary to work rules which specifically prohibited "[b]oisterous or disruptive activity in the workplace." I would not regard Varela's conduct as a "trifling and insubstantial deviation" from his duties, but, rather, a deliberate act done with complete disregard of those duties and the employer's legitimate expectation that workers perform their assigned tasks in compliance with rules governing workplace conduct. If initiating an arm-wrestling contest while standing on a slippery roof under construction is not so substantial a deviation from the work of a roofer as to create a "formidable independent hazard," the statutory requirement that an injury must arise out of employment in order to be compensable becomes essentially meaningless.

Neither am I convinced by the rationale of the Court of Appeals that Varela's injury should be compensable because it

occurred during a work stoppage of "momentary duration . . . at the very outset of the horseplay." *Varela v. Fisher Roofing Co.*, 5 Neb. App. 722, 732, 567 N.W.2d 569, 576 (1997). The focus should be on what the employee was doing, not how long he did it before he was injured. If the nature of Varela's conduct at the time of his injury was a consciously deliberate and substantial deviation from his employment, as I believe it was, the injury should not be compensable whether it occurred 1 minute or 1 hour after the conduct commenced.

I respectfully disagree with the attempt of the majority to distinguish this case from *Simon v. Standard Oil Co.*, 150 Neb. 799, 36 N.W.2d 102 (1949). In that case, an employee walked approximately 30 feet from his work area after completing his shift and was injured while examining a newly installed exhaust fan, which was not a part of his duties. In holding the injury noncompensable, we stated that if Simon had remained in his work area "or if he had not yielded to his curiosity as to the operation of the fan," he would have received no injury. 150 Neb. at 807, 36 N.W.2d at 106. Here, if Varela had continued to do his work instead of setting it aside and yielding to his belief that he could defeat his coworker in an arm-wrestling contest in violation of his employer's rules, he would not have been injured either. I would reverse with directions to dismiss the petition.

CAPORALE, J., joins in this dissent.

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STATE OF NEBRASKA, APPELLEE, V.
DAMIAN J. MARSHALL, APPELLANT.
573 N.W.2d 406

Filed January 2, 1998. No. S-96-1100.

1. **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.
2. **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.

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 Neb. Const. art. I, § 11, 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. **Effectiveness of Counsel: Proof.** 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.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. **Judgments: Jurisdiction: Final Orders: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1931 (Reissue 1995), proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within 30 days after the making of the final order complained of. To vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order.
7. **Pleadings: Final Orders.** A ruling on a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1995).
8. **Pleadings.** An issue presented regarding a denial of a plea in bar is a question of law.
9. **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.
10. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity.
11. **Legislature: Courts: Jurisdiction: 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. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James Walter Crampton for appellant.

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

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

WHITE, C.J.

Damian J. Marshall was charged with second degree murder, attempted second degree murder, and two counts of using a

firearm to commit a felony. He was tried before a jury on June 25, 1996. After the presentation of all evidence in the trial, the district court overruled Marshall's request for a jury instruction on self-defense as to the second degree murder charge. On July 1, 1996, Marshall was convicted on all charges. On October 15, he was sentenced to life in prison on the second degree murder conviction, and he received consecutive sentences for the other charges totaling 14 to 18 years. Marshall now appeals.

On May 13, 1995, at approximately 11:30 a.m., Tchalla Renfrow backed the vehicle he was driving into the driveway at 6315 North 51st Avenue in Omaha, Nebraska. Ricky Booth was a passenger in the vehicle. Renfrow intended to retrieve a necklace from Tanya Straughn, Renfrow's former girl friend, who lived at the address. Renfrow testified that neither he nor Booth had any weapons at that time.

Renfrow got out of the car, went to the house, and knocked on the door. A child answered, and Renfrow asked to see Straughn. Straughn came out, and Renfrow told her he wanted the necklace. Straughn went back into the house and returned moments later with the necklace. She gave the necklace to Renfrow, and Renfrow got back into the car.

Once inside the car, Booth, sitting in the passenger seat, asked to see the necklace. Renfrow handed Booth the necklace, and then Renfrow grabbed his door to pull it shut. Before closing the driver's-side door, Renfrow noticed Marshall standing on a small hill outside the house.

Marshall, who also lived at 6315 North 51st Avenue, said to Renfrow, "Blood, you've got the nerve to come over to my house." Marshall testified that both Renfrow and Booth then reached under the seat of the car. Renfrow put his foot on the ground, presumably to get out of the car. Marshall testified that he saw a gun in Renfrow's hand at that point. Marshall then pulled a .32-caliber revolver out of his pocket and began shooting at the car. Marshall fired five or six shots. Booth and Renfrow fled the vehicle after the shooting, and Marshall ran around to the back of the house and headed toward his aunt's house.

Lawanda Littlejohn, who lived across the street from Marshall, witnessed the shooting from her window. She

observed that the two individuals who fled the vehicle had no guns in their hands. Straughn was still in the driveway behind the vehicle at the time of the shooting. She testified that she saw Booth stumble or fall out of the car after the shots were fired and that he had a gun in his right hand. Renfrow testified that he did not have anything in his hands when Marshall began shooting.

Renfrow was struck by Marshall's gunshot and required surgery for his wounds. Booth died of a gunshot wound to the chest.

Marshall was charged with second degree murder in the death of Booth, attempted second degree murder in the shooting of Renfrow, and two counts of use of a firearm to commit a felony.

Following a jury trial, Marshall was convicted of all four counts on July 1, 1996. On October 15, he was sentenced to life in prison for the second degree murder conviction, 8 to 10 years' imprisonment for attempted second degree murder, and 3 to 4 years' imprisonment on each of the two use of a weapon convictions, with all sentences to run consecutively.

Two mistrials were declared before Marshall was convicted. After each mistrial, Marshall filed a plea in bar motion. He claimed that in each case the district court inappropriately excused certain jurors and declared a mistrial after the jury was seated and sworn. Marshall argued that the court should have chosen an alternate juror instead of granting a mistrial. Marshall claimed that the improper grant of a mistrial violated his constitutional protection against double jeopardy.

The district court summarily overruled both motions on June 25, 1996. The district court also denied Marshall's request for a self-defense instruction as to the charge involving Booth.

Marshall asserts 10 assignments of error, which can be summarized as follows: (1) The district court erred in granting two mistrials, as the court abused its discretion in excusing jurors after they were sworn and seated when alternates were available; (2) the district court erred in refusing to give the jury a self-defense instruction on the second degree murder charge; (3) the district court erred in refusing to allow evidence of alleged gang affiliation of the victims; and (4) Marshall was denied his right to effective assistance of counsel.

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. *State v. Kinser*, 252 Neb. 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. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *Kinser, supra*; *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996).

Neb. Rev. Stat. § 28-1409 (Reissue 1995) provides in pertinent part:

> (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 . . . .

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. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, 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. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). The two prongs of the test stated in *Strickland, supra*, 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, supra*; *Boppre, supra*.

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Gibbs, ante* p. 241, 570 N.W.2d 326 (1997); *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997).

Under Neb. Rev. Stat. § 25-1931 (Reissue 1995), proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within 30 days after the making of the final order complained of. To vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order. *State v. Jacques, ante* p. 247, 570 N.W.2d 331 (1997); *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996). A ruling on a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1995). *State v. Trevino, supra*; *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996); *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

An issue presented regarding a denial of a plea in bar is a question of law. *Trevino, supra*; *Sinsel, supra*. Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Williams, ante* p. 111, 568 N.W.2d 246 (1997); *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

Because a plea in bar is a final order, Marshall had 30 days from its denial to file his notice of appeal. See Neb. Rev. Stat. § 25-1912(1) (Reissue 1995). Timeliness of an appeal is a jurisdictional necessity. *Sinsel, supra*; *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. An appellate court may not consider a case as within its jurisdiction unless its authority to act

is invoked in the manner prescribed by law. *Sinsel, supra*; *State v. Kelly*, 200 Neb. 276, 263 N.W.2d 457 (1978).

Consequently, this court does not have jurisdiction to review the district court's order overruling Marshall's plea in bar motions, as Marshall failed to timely appeal said ruling.

Marshall's second assignment of error is that the trial court refused to give the jury an instruction on self-defense as to the second degree murder charge in the death of Booth. The State counters that Marshall was not justified in the use of force because he voluntarily placed himself in a position of danger by leaving his house and confronting Renfrow and Booth. The State contends that Marshall knew that such a confrontation would likely result in violence. Instead, the State argues, Marshall could have remained safely in his house.

Marshall testified in his own defense as follows:

> Q. Did you know [Renfrow] was the person out there in your driveway?
>
> A. When I looked out the window.
>
> Q. So you knew he was there?
>
> A. Yes. . . .
>
> Q. . . . Is there any question in your mind that [Renfrow and Booth] came to do you harm?
>
> A. Yeah, they did.

When asked why he thought Renfrow would pull a gun on him, Marshall responded, "[Renfrow] was mad. He — you know, you see, we already said something to each other. You know, and he already spoke to my poeple [sic] and said he going to deal with me. So I already knew we was going to end up fighting."

Marshall's own testimony indicates that he knew Renfrow was outside his house before the two confronted each other. Marshall's testimony also shows that he was aware that such a confrontation with Renfrow and Booth would likely result in violence. We agree with the State's argument that Marshall voluntarily put himself in a position of danger by going outside to confront the two men. There is no evidence that anything was preventing Marshall from remaining safely in his home, thereby avoiding any necessity on his part to use force.

The facts here are very similar to those in *State v. Allison*, 238 Neb. 142, 469 N.W.2d 360 (1991), where the defendant fired shots into a car because he thought he saw the victim reaching under the seat for something and assumed it was a gun. We stated:

> As to whether the defendant was justified in using deadly force by shooting into the car, the evidence is that the defendant was not surrounded by members of the [victim's] group, and there was nothing to prevent him from retreating . . . . No witness saw [the victim] with a gun, and no one saw guns coming from the car, including the defendant.
>
> . . . .
>
> The evidence in this case, when examined in the light most favorable to the State, shows that the defendant could have avoided shooting into the car by retreating from the scene. He was not justified in that use of deadly force, and his argument to the contrary is without merit.

*Id.* at 146, 469 N.W.2d at 363.

Since we find no evidence in support of a legally cognizable theory of self-defense as to Booth, we hold the trial court did not err in refusing Marshall's request for an instruction on self-defense regarding the charge of second degree murder in the killing of Booth.

Marshall next claims that the trial court erred in refusing Marshall's counsel the opportunity to explore gang-related evidence and testimony in this case to demonstrate Marshall's state of mind and reasonable fears, in support of his self-defense argument. Marshall urges that such testimony would be "extremely probative and relevant to Mr. Marshall's reasonable fear of immediate harm from both Mr. Renfrow and his companion, Mr. Booth." Brief for appellant at 54.

Marshall's counsel's attempts to elicit testimony regarding possible gang affiliations of Renfrow and Booth were met with sustained objections. The trial court indicated that the victims' being gang members was not necessarily relevant in and of itself. We agree.

Marshall's final argument is that he was denied effective assistance of counsel at trial. Specifically, Marshall alleges his

trial counsel was ineffective because he (1) failed to adequately prepare for trial and failed to interview key witnesses prior to trial, (2) failed to clearly object on the record to the trial court's decision to grant the second mistrial, (3) failed to fully develop Marshall's fear of the victims, and (4) undermined Marshall's self-defense argument by suggesting in closing argument that Booth was killed as the result of an accident.

Marshall argues that his trial counsel failed to locate and interview Tracy Harris, a witness to the incident. This argument is without merit, as the fact that Harris actually testified in this case is plainly evident from the record. Harris was called by Marshall's counsel after he had rested. Marshall states that his "[trial counsel] failed in his duty to his client to find [Harris], interview her, and prepare her for cross-examination." Brief for appellant at 61. However, Marshall says nothing as to how the proceedings would have been different had his trial counsel interviewed Harris before she testified. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Marshall also claims his trial counsel was ineffective in failing to fully develop Marshall's fear of the victims. As we stated previously, the effect of Marshall's fear of the victims would be of little probative value in support of his self-defense argument, since Marshall chose to place himself in a position of danger by confronting the two men. This argument is without merit.

Marshall claims that his trial counsel's failure to object to the second mistrial also rendered his counsel's assistance ineffective. Once again, Marshall fails to demonstrate a reasonable probability as to how the proceeding would have been different had counsel objected. See *id.* This argument also is without merit.

Marshall finally contends that his trial counsel was ineffective in not arguing to the jury a self-defense theory as to Booth in his closing argument. Marshall's trial counsel instead argued to the jury that Booth's killing was accidental. Marshall now contends: "[Trial counsel] completely removes any credibility whatsoever for [Marshall's] argument that Mr. Booth was killed in self-defense by suggesting to the jury that Mr. Booth was accidentally killed." Brief for appellant at 67.

As we held earlier, the trial court properly refused a jury instruction on self-defense as to the charge involving Booth. As the jury was not allowed to consider self-defense in the killing of Booth, Marshall's trial counsel could not properly argue such a defense to the jury. As such, this argument also is without merit.

For the foregoing reasons, we conclude that Marshall has failed to show that he received ineffective assistance of counsel during his trial.

For the above-stated reasons, the judgment of the district court is affirmed.

AFFIRMED.

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## IN RE INTEREST OF KAYLE C. AND KYLEE C., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MICHELLE C. AND DONALD Y., APPELLEES, AND DANNY Y. AND LOUISE Y., APPELLANTS.

574 N.W.2d 473

Filed January 2, 1998. No. S-97-013.

1. **Juvenile Courts: Appeal and Error.** Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 1993), are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
2. **Juvenile Courts: Judgments: Appeal and Error.** In reviewing questions of law arising in juvenile proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Interventions.** The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 1995) is a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
4. **Interventions: Pleadings.** A person seeking to intervene in an action must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.
5. **Interventions.** For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations are true.
6. **Parental Rights: Interventions.** Under Nebraska law, grandparents have a sufficient legal interest in dependency proceedings involving their biological or adopted minor grandchildren to entitle them to intervene in such proceedings prior to final disposition.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Reversed and remanded for further proceedings.

James Walter Crampton for appellants.

James S. Jansen, Douglas County Attorney, and Vernon Daniels for appellee State.

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

STEPHAN, J.

Danny Y. and Louise Y. (hereinafter the grandparents) appeal from an order of the separate juvenile court of Douglas County denying their motion for leave to intervene. We determine, as a matter of first impression, that grandparents of a juvenile who is the subject of a dependency proceeding have a direct legal interest in the subject matter of the action which entitles them to intervene as a matter of right, and we therefore reverse the judgment and remand the cause to the juvenile court for further proceedings.

## BACKGROUND

On November 9, 1994, the Douglas County Attorney, on behalf of the State of Nebraska, filed a petition in the separate juvenile court of Douglas County alleging that the court had jurisdiction over sisters Kayle C. and Kylee C., pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), because they lacked proper parental care by reason of the faults or habits of their mother. The State alleged that "[o]n or about November 6, 1994 said children were dropped off by their mother at the home of Barbara Ross, and since that date, [the mother's] whereabouts are unknown." The court granted the State's motion for temporary custody pending adjudication as a matter of "immediate and urgent necessity for the protection of said children" and ordered the then Nebraska Department of Social Services (DSS) to retain custody of the children for placement in foster care or other appropriate placement with DSS. On November 10, 1994, the State filed an amended petition naming Donald Y. as the father of Kayle. He was subsequently permitted to intervene in the action as the father of Kayle. The identity of the father of Kylee does not appear in the record.

After conducting a detention hearing on November 22, 1994, the juvenile court ordered the children to remain in the temporary custody of DSS. At a pretrial hearing on December 13, 1994, the children's mother appeared and admitted the allegations in the amended petition. Based on this admission, the juvenile court adjudicated the children to be within its jurisdiction pursuant to § 43-247(3)(a) and ordered them to remain in the temporary custody of DSS.

On January 19, 1995, the juvenile court held a disposition hearing and ordered the children to remain in the temporary custody of DSS while the parents took steps necessary to comply with a plan designed to correct the conditions which led to the adjudication. Review hearings were conducted on April 18 and October 17, 1995, and April 29, 1996. DSS retained custody of the children, but the parents were granted visitation.

The grandparents attended the detention and disposition hearings held by the juvenile court and are identified in the orders entered by the court following those hearings as "Grandfather" and "Grandmother." On November 19, 1996, the grandparents filed a motion for leave to intervene in which they alleged that they were the paternal grandparents of Kayle and Kylee, that they had a "stable and positive relationship" with the children, and that they wished to have custody of them. The grandparents requested that "they be granted leave to intervene so that they may present evidence in support of their allegations that custody or placement of the minor children with them would be in the best interests of the children."

At a hearing on November 26, 1996, the juvenile court denied the grandparents' motion based upon a finding that there was "no legal basis" upon which it could grant the motion. The grandparents perfected a timely appeal. Pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals, we removed this matter to our docket on our own motion.

## ASSIGNMENT OF ERROR

The grandparents contend that the juvenile court erred in holding, as a matter of law, that they had no right to intervene in this proceeding.

## SCOPE OF REVIEW

Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 1993), are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. See, *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997); *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997); *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996).

## ANALYSIS

The Nebraska Juvenile Code defines "parties" as the juvenile over which the juvenile court has jurisdiction under § 43-247 and his or her parent, guardian, or custodian. § 43-245(2). The State argues that since grandparents are not included within this statutory definition, they are precluded from intervening in dependency proceedings. We do not read § 43-245(2) so narrowly. The language of the statute is not exclusive; it merely identifies necessary parties to a juvenile proceeding. See *In re E.I.*, 653 N.E.2d 503 (Ind. App. 1995).

The question of whether the grandparents have a right to intervene in this action is governed by Neb. Rev. Stat. § 25-328 (Reissue 1995), which provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

The interest required as a prerequisite to intervention under this statute is a direct and legal interest of such character that the

intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992); *Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board*, 186 Neb. 615, 185 N.W.2d 671 (1971). A person seeking to intervene in an action must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. See *Noble v. City of Lincoln*, 158 Neb. 457, 63 N.W.2d 475 (1954). For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations are true. *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

We have not previously addressed the issue of whether the grandparents of a juvenile who is the subject of proceedings under the Nebraska Juvenile Code possess a legal interest in such proceedings sufficient to permit them to intervene as a matter of right pursuant to § 25-328 prior to final disposition. We have examined grandparents' rights in juvenile proceedings following termination of parental rights. In *In re Interest of Ditter*, 212 Neb. 855, 859, 326 N.W.2d 675, 677 (1982), we held that "once parental rights of a child have been terminated as to a natural parent, the natural parents of such parent whose rights have been terminated are not entitled to continue visitation as a matter of right." We reasoned that since the intent of terminating parental rights was to divest any tie between the parent and child so that placement with an adoptive family could occur as quickly as possible, "little purpose would be served in continuing family ties between the grandparents and the child to be adopted." *Id.* at 857, 326 N.W.2d at 676. We specifically limited our holding to the facts of the case, noting that "[h]ad termination [of parental rights] not occurred, we would be confronted with a different question which we do not now decide." *Id.* at 859, 326 N.W.2d at 677.

Relying upon *In re Interest of Ditter*, we held in *In re Interest of S.R.*, 217 Neb. 528, 352 N.W.2d 141 (1984), that grandparents who had temporary custody during dependency proceedings lacked standing to challenge an order placing the juvenile for adoption after parental rights were terminated. We stated:

> The grandparents in this case have no rights beyond the rights of any foster parents utilized to take physical possession of a juvenile while the courts attempt to, first, rehabilitate the natural parents so that they may become fit parents, and, second, if that rehabilitation effort fails and the natural parents' rights are terminated, to place the child in a home where the child may be adopted and thus regain parents to aid the child in his course through life. To argue custody as against adoption is to miss the whole point of the statutes providing for termination of parental rights and then the establishment of new parents through adoption in an effort to give the abandoned child real parents. We hold that grandparents, as such, do not have standing to interfere with the process of termination of parental rights and the adoptive procedures provided by our statutes. In so holding we do not in any way say or intimate that in appropriate circumstances and after appropriate legal consents and pursuant to proper court hearings and orders grandparents may not legally adopt their grandchildren.

*Id.* at 534-35, 352 N.W.2d at 144.

Courts in other states have reached differing results in determining the right of grandparents to intervene in juvenile dependency and termination of parental rights proceedings. Some courts have held that grandparents seeking custody of their grandchildren have no direct legal interest in the determination of whether the child will be reunited with his or her natural parents or whether parental rights will be terminated, even where their visitation rights could be affected by such termination, and therefore have no right to intervene. See, e.g., *In re Ryan V.*, 46 Conn. App. 69, 698 A.2d 371 (1997); *Ruth L. v. State*, 830 S.W.2d 528 (Mo. App. 1992); *Wilson & Walker v. State*, 230 Kan. 49, 630 P.2d 1102 (1981). Other courts have recognized grandparents' right to intervene in juvenile proceedings where they have a statutory right to be considered for temporary or permanent custody. *In Interest of A.G.*, 558 N.W.2d 400 (Iowa 1997); *People, Int. of C.P.*, 34 Colo. App. 54, 524 P.2d 316 (1974). In *Bechtel v. Rose In and For Maricopa County*, 150 Ariz. 68, 722 P.2d 236 (1986), a dependency proceeding in

which the child's mother had died and his father had relinquished parental rights, the Arizona Supreme Court focused primarily upon the basic relationship between grandparents and their grandchildren in holding that the maternal grandmother should be permitted to intervene. The court stated:

> We are convinced that the best interest of a parentless child is usually served by allowing his grandparents to intervene in a dependency hearing. If a child is adjudged dependent by a juvenile court, the juvenile court acquires the power to place the child in a wide range of statutorily prescribed homes outside the family. . . . It is therefore apparent that grandparents, who are invested with a natural and abiding love for their grandchildren, should be allowed to intervene in the dependency process unless a specific showing is made that the best interest of the child would not be served thereby.

(Citations omitted.) *Id.* at 73, 722 P.2d at 241. The court concluded that "[a]lthough no explicit statutory standing to intervene is granted to grandparents *qua* grandparents, the tenor of Arizona's legislative and judicial decisions, as well as sound public policy, demands that grandparents be accorded this right." *Id.* at 74, 722 P.2d at 242.

We are persuaded that under Nebraska law, grandparents have a sufficient legal interest in dependency proceedings involving their biological or adopted minor grandchildren to entitle them to intervene in such proceedings prior to final disposition. In 1986, the Legislature enacted a law specifically recognizing the right of grandparents to seek visitation rights with their minor grandchild where the child's natural parents are deceased, where marriage dissolution proceedings involving the parents are pending or concluded, and where the parents of the child have never married but paternity has been legally established. See Neb. Rev. Stat. §§ 43-1801 to 43-1803 (Reissue 1993). This legislation permits a court to grant "[r]easonable rights of visitation" to grandparents

> when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship

> continue, and that such visitation will not adversely interfere with the parent-child relationship.

§ 43-1802(2). This statutory right of grandparents to obtain court-ordered visitation upon a showing that they have a "significant beneficial relationship" with their minor grandchild demonstrates the public policy of this state to recognize and foster such relationships.

Moreover, although grandparents do not have explicit statutory standing to be heard on custody issues during the disposition phase of a dependency proceeding, we find such standing to be implicit in the juvenile code. Section 43-284 provides in pertinent part:

> When any juvenile is adjudged to be under subdivision (3) of section 43-247, the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to the (1) care of some suitable institution, (2) care of some reputable citizen of good moral character, (3) care of some association willing to receive the juvenile embracing in its objects the purpose of caring for or obtaining homes for such juveniles, which association shall have been accredited as provided in section 43-296, (4) care of a suitable family, or (5) care and custody of the Department of Social Services.

We have held that the liberal use of the word "may" in this statute authorizes the juvenile court "to exercise broad discretion in its disposition of children who have been found to be abused or neglected." *In re Interest of Amber G. et al.*, 250 Neb. 973, 981-82, 554 N.W.2d 142, 148 (1996). Under this statute, the juvenile court would have discretionary authority to award temporary custody to the grandparents of a juvenile upon a finding that they qualify as "reputable citizen[s] of good moral character" or "suitable family." § 43-284(2) and (4).

In this case, temporary custody was awarded to DSS, which has statutory "authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it." § 43-285(1). DSS must file periodic reports with the court "stating the location of the juvenile's placement" and must file a report and notice of any change in placement,

which the court may review on its own motion or upon the filing of an objection by an "interested party." § 43-285(3). In addition, if the juvenile court finds that the placement selected by DSS is not in a child's best interests, the court has authority under § 43-284 to remove the child from the temporary custody of DSS and award custody to another qualified person or entity where the child's needs will be better met. See *In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988). Thus, in this case, the juvenile court would have authority to remove Kayle and Kylee from the temporary custody of DSS and grant temporary custody to the grandparents if it were to find from an evidentiary showing that such a change in custody would be in the children's best interests. However, the grandparents have no means of presenting this issue to the juvenile court for determination unless they are permitted to intervene and offer evidence.

If a dependency proceeding is finally resolved by a termination of parental rights pursuant to § 43-292, the relationship between grandparent and grandchild would also be terminated under our holding in *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982). This factor places grandparents in a position to realize significant loss by direct operation of judicial determinations made in a dependency proceeding. We conclude that this factor and the public policy and temporary custody considerations discussed above establish that grandparents have a direct legal interest in the subject matter of a juvenile dependency proceeding which entitles them to intervene as a matter of right under § 25-328.

The right of grandparents to intervene in a dependency proceeding which we recognize today does not confer any special entitlements or priorities upon them with respect to temporary custody, placement, or any other issue before the juvenile court. Exercising their right of intervention simply enables those grandparents wanting to keep abreast of dependency proceedings to receive notice and have an opportunity to be heard with respect to actions taken by a juvenile court which could significantly affect their relationship with their grandchildren. We view this result as consistent with the general law and public policy of this state and in furtherance of the foremost objective

of the Nebraska Juvenile Code—to promote and protect the best interests of the juvenile. See, *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995).

For the above reasons, we conclude that the juvenile court erred in denying the grandparents' motion for leave to intervene and remand for further proceedings consistent with this opinion. To the extent that any language in our opinion in *In re Interest of S.R.*, 217 Neb. 528, 352 N.W.2d 141 (1984), is inconsistent with our holding in this case, it is specifically disapproved.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## STATE OF NEBRASKA EX REL. THOMAS J. GARVEY, PUBLIC DEFENDER OF SARPY COUNTY, NEBRASKA, APPELLEE, V. COUNTY BOARD OF COMMISSIONERS OF SARPY COUNTY, NEBRASKA, APPELLANT.

573 N.W.2d 747

Filed January 2, 1998. No. S-97-148.

1. **Statutes.** Interpretation of a statute presents a question of law.
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. **Statutes.** If there is a conflict between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes.
4. **Counties: Public Officers and Employees.** The county has the authority to set salaries for assistants of a public defender under Neb. Rev. Stat. § 23-3403 (Reissue 1991).
5. **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 law.

Appeal from the District Court for Sarpy County: JOHN P. MURPHY, Judge. Reversed.

Michael L. Munch, Sarpy County Attorney, and Michael A. Smith for appellant.

Eugene L. Hillman and Patricia McCormack, of McCormack, Cooney, Hillman & Elder, for appellee.

Dennis R. Keefe for amici curiae Nebraska Criminal Defense Attorneys Association, National Association of Criminal Defense Lawyers, National Legal Aid & Defender Association, Lancaster County Public Defender, and Douglas County Public Defender.

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

CONNOLLY, J.

This appeal presents the question, How much discretion does a county board have in reducing or disapproving a public defender's budget request? The elected public defender of Sarpy County brought an action seeking a writ of mandamus after his budget request seeking appropriations for additional staff was reduced by the Sarpy County Board of Commissioners. The district court for Sarpy County granted the writ of mandamus, and the county board appeals. We conclude that the instant case is controlled by our decision in *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985), in which we determined that a specific statute similar to Neb. Rev. Stat. § 23-3403 (Reissue 1991), the statute applicable to the public defender, acted to transfer the authority to set salaries to the county board. Accordingly, because we conclude that § 23-3403 transfers the authority to set the salaries of assistants of the public defender to the county board, a writ of mandamus is inappropriate in the instant case, and we reverse.

## BACKGROUND

Thomas J. Garvey, the appellee in this case, is the elected public defender of Sarpy County. The appellant is the Sarpy County Board of Commissioners. As part of the annual budget process, Garvey submitted budget request forms that were ultimately forwarded to the county board. In his request, Garvey asked for an increase from $173,862 for fiscal year 1996 to

$251,087.20 for fiscal year 1997, an increase of approximately 44 percent. Garvey justified the increase because of the need to hire both an additional full-time and an additional part-time deputy public defender, to hire an additional secretary, and to provide for a 4-percent salary increase for the remaining deputy public defenders.

As a continuing part of the budget process, Garvey next appeared at a hearing before the county board's budget committee where he provided information regarding caseloads and his need for additional personnel. Garvey stated that additional personnel were necessary because, due to the explosive population growth of Sarpy County, two additional judges had been appointed for that area. As a result of the new judges, Garvey stated that he needed to have an attorney for each of the new courtrooms in order to carry out his duties. Garvey also provided the county board with documents showing an estimated increase in caseloads.

Following a review of the budget request documents provided by Garvey and a comparison of those documents with the Sarpy County Attorney's budget request, the committee reduced Garvey's request. However, the committee did provide Garvey with an increase of approximately 13 percent by providing Garvey with an additional $15,000 for a part-time deputy public defender and $8,000 to pay for additional administrative help. Part of the committee's reasoning in reducing Garvey's request was that the Sarpy County Attorney's budget request indicated that while he did anticipate an increase in caseloads due to the appointment of two new judges, he did not anticipate that those increases would require additional staff.

After being informed of the changes to his budget request, Garvey asked to appear before the budget committee. At this meeting, Garvey repeated the information he had previously provided to the committee and did not provide any new information. The committee did not change its decision. A public hearing regarding the 1997 budget was subsequently held by the entire county board. Garvey did not appear at the public hearing, nor did he appear at the county board meeting in which the budget was adopted. Several days following the adoption of the budget, Garvey filed a mandamus action with the district court.

At the bench trial, both the fiscal administrator for Sarpy County and Garvey testified that Garvey hired the minimum amount of attorneys necessary to run his office and that the office was handling a caseload per attorney in excess of national standards. The record reflects that the Sarpy County Attorney's office did not anticipate the need for more personnel due to the addition of the two new judges. However, Garvey testified that the county attorney's office had more staff than the office of the public defender and presented evidence indicating that the county attorney might not require additional staff for this reason. Garvey further testified that he would not be able to provide public defenders to represent defendants in the two new courtrooms if he did not have additional personnel and that if additional public defenders were not hired, it would be difficult or impracticable for the courts to rearrange schedules in order to ensure that the public defender's clients were represented.

The county board provided testimony indicating that Garvey could ask for additional appropriations at a later date pursuant to Neb. Rev. Stat. § 23-918 (Cum. Supp. 1996). However, Garvey testified that such a process would not work well for hiring people because he would have to return to the county board every month to request salaries for his staff. Garvey had gone ahead and hired an additional attorney and would run out of funds to pay him in February 1997. It was unclear from the testimony how the county board decided on the amount it did appropriate to Garvey's office, although some testimony indicated that the county board appropriated funds for enough assistant public defenders to cover each courtroom on a part-time basis. The county board did not introduce evidence to show that Garvey's request was unreasonable.

Following trial, the district court determined that the rationale used by this court in *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960), applied, and, therefore, because the expenses and salaries set by Garvey for additional personnel were not unreasonable, arbitrary, or capricious, the county board was without authority to disapprove Garvey's budget request. Thus, the district court determined that judgment for a writ of mandamus should be entered, directing the county board to approve Garvey's budget to fully fund the office of the pub-

lic defender and to include funds for the additional personnel Garvey had requested. The court also ordered the county board to pay costs and attorney fees.

## ASSIGNMENTS OF ERROR

The county board asserts that the district court erred in (1) finding that a writ of mandamus was the proper remedy in the case; (2) finding that Garvey did not have an adequate remedy at law; (3) finding that under the facts, the county board had a duty to approve Garvey's budget request; (4) finding that Garvey clearly and conclusively showed that his action was not arbitrary, capricious, or unreasonable and that he was entitled to the relief requested; (5) finding that Garvey showed that the county board acted in an arbitrary, capricious, and unreasonable manner in the action concerning Garvey's budget request; and (6) finding that the application of the Sixth Amendment to the U.S. Constitution required the county board to fund the public defender at the level requested.

## STANDARD OF REVIEW

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Four R Cattle Co. v. Mullins, ante* p. 133, 570 N.W.2d 813 (1997); *Richardson v. Mast*, 252 Neb. 114, 560 N.W.2d 488 (1997).

Interpretation of a statute presents a question of law. *Pig Pro Nonstock Co-Op v. Moore, ante* p. 72, 568 N.W.2d 217 (1997). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

## ANALYSIS

The case most commonly cited when dealing with the setting of salaries for county officials is *Bass v. County of Saline, supra.* In *Bass*, a county judge set the salary for the clerk of the county court at $225 per month and the county board reduced this figure to $190. It was not disputed that the clerk was competent and efficient and that her services were worth $225. This court examined the language of Neb. Rev. Stat. § 23-1111 (Reissue 1991) and noted a conflict between the ability of the official and the county board to set salaries.

Section 23-1111 states: "The county officers in all counties shall have the necessary clerks and assistants for such periods and at such salaries as they may determine with the approval of the county board, whose salaries shall be paid out of the general fund of the county."

Section 23-1111 provides that a county officer shall have the necessary clerks, with salaries determined by the officer. However, this authority is subject to the approval of the county board.

We stated that the amount of work involved in the rendering of services and the value of compensation for those services are matters particularly within the knowledge of the county official. *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960), citing *State, ex rel. Johnson, v. Tilley*, 137 Neb. 173, 288 N.W. 521 (1939). We determined that while the statutory language regarding the approval of the county board limited the authority of the officer in setting salaries, the limitation certainly did not mean that the county board could arbitrarily ignore the salary as fixed by the official. This court stated that to hold otherwise would vest the county board with full power to fix salaries contrary to the express intent of the Legislature and would render nugatory the provision of § 23-1111, granting the ability to fix salaries to the county official. Accordingly, we interpreted § 23-1111 to mean that a county board could not act arbitrarily, capriciously, or unreasonably in approving the salary of the clerk of the county court. We further held that "[i]n the absence of evidence that the salary fixed by the county judge is unreasonable, capricious, or arbitrary, the county board is without authority to disapprove it." *Bass v. County of Saline*, 171 Neb. at 543, 106 N.W.2d at 864.

We have also said it is clear that § 23-1111, requiring the approval of salaries by the county board, does not allow the county board to arbitrarily reduce the salaries recommended by the elected officer. *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979), citing *Bass v. County of Saline, supra*. Such an issue relates to the independence and discretion which are to be afforded an elected officer. *Id.* Likewise, the power of the county board to reduce requests submitted by the various offices, which power is provided in Neb. Rev. Stat. § 23-908

(Reissue 1991), does not give the county board the authority to budget a particular office out of existence or to unduly hinder the officer in the conduct of his duties. *Meyer v. Colin, supra.*

The county board contends that the district court wrongly applied the rationale of *Bass* to this case. The county board argues that because there are differences in language between § 23-1111, the statute this court examined in *Bass*, and § 23-3403, the statute which applies to public defenders, the county board has greater discretion to reduce or disapprove the salary request of the public defender than it has with other county officials, which are covered by the statutory sections examined in *Bass*.

Section 23-3403 states:

> The public defender may appoint as many assistant public defenders, who shall be attorneys licensed to practice law in this state, secretaries, law clerks, investigators, and other employees as are reasonably necessary to permit him or her to effectively and competently represent the clients of the office subject to the approval and consent of the county board which shall fix the compensation of all such persons as well as the budget for office space, furniture, furnishings, fixtures, supplies, law books, court costs, and brief-printing, investigative, expert, travel, and other miscellaneous expenses reasonably necessary to enable the public defender to effectively and competently represent the clients of the office.

The county board points to differences between the language of §§ 23-1111 and 23-3403 to argue that the county board has greater discretion to disapprove the salary requests of the public defender. Specifically, the statute in *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960), allowed an official to set salaries with the approval of the county board, while § 23-3403 requires the "approval and consent" of the county board. The county board contends that the addition of the word "consent" and language allowing the county board to "fix" salaries gives the county board greater discretion to reduce salaries in the instant case. Garvey contends that *Bass* applies to this case, and thus, the county board must approve his salary request because it was not unreasonable, arbitrary, or capricious.

Neither party, however, addresses how our decision in *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985), should apply to the instant case. We believe that *Sarpy Co. Pub. Emp. Assn.* is helpful to our analysis. In *Sarpy Co. Pub. Emp. Assn.*, we examined the question of who among various elected county officials and the county board itself was the employer of the official's employees for purposes of collective bargaining. In deciding the issue, we determined that the entity authorized to set the employees' salaries was the appropriate party to speak on behalf of the county board in collective bargaining because the person who sets salaries, by implication, also sets working conditions for the employees. Accordingly, we determined that under our holding in *Bass*, absent a specific statute to the contrary, elected officials were the appropriate people to speak on behalf of the county board in the collective bargaining process because under § 23-1111, such officials were free to set salaries, subject only to the approval of the county board. However, we also stated that in the case of the county assessor, the authority to set salaries had been transferred to the county board by a specific statute.

A basic rule of statutory construction is that if there is a conflict between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994); *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993).

Neb. Rev. Stat. § 77-401.01 (Reissue 1981), the statute applying to the county assessor, has since been repealed. The statute stated:

> The county assessor with the consent of the county board, may appoint, without reference to precinct lines, a deputy and such assistants as may be necessary to enable him to properly discharge the duties of his office. The salary of the deputy and assistants of the county assessor shall be fixed by the county board unless otherwise fixed by law.

In the instant case, § 77-401.01 examined in *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy, supra*, is like § 23-3403 in that both are specific statutes dealing with county officeholders.

Thus, although *Sarpy Co. Pub. Emp. Assn.* did not provide a specific analysis of the issue, we held that a statute with language similar to § 23-3403 acted to transfer the authority to set salaries from the elected official to the county board. Section 23-3403 specifically deals with public defenders. Therefore, § 23-3403 controls, and our determination is made under § 23-3403 and not under § 23-1111, which applies generally to county officers. Like § 77-401.01, § 23-3403 specifically provides that it is the county board that shall fix the compensation of the assistants and secretaries of that specific office. Accordingly, the county board has greater discretion under the provisions of § 23-3403 to reduce Garvey's budget request than it would have with other county officials under § 23-1111.

Having determined that the county board has the ability to set salaries for the public defender's office under § 23-3403, we now address whether mandamus is appropriate. In *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997), we held that 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.

We conclude there is no clear duty imposed by law on the county board to accept Garvey's budget request. Therefore, a writ of mandamus is not appropriate. In light of our decision, we do not reach the county board's other assignments of error.

## CONCLUSION

Section 23-3403 is a specific statute. Under our previous decision in *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985), the provisions of § 23-3403 control over those found in § 23-1111. Accordingly, the ability to set salaries for assistants of the public defender has been transferred to the county board, making a writ of mandamus inappropriate. The decision of the district court is reversed.

REVERSED.

McCORMACK, J., not participating.

# JAMES A. ROTH, APPELLEE, V. SARPY COUNTY HIGHWAY DEPARTMENT, APPELLANT.

572 N.W.2d 786

Filed January 2, 1998. No. S-97-366.

1. **Workers' Compensation: Appeal and Error.** Pursuant to 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. However, as to questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations.
2. **Workers' Compensation: Time.** Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes a 50-percent penalty payment for waiting time where the employer fails to pay compensation after 30 days' notice of the disability and where no reasonable controversy exists regarding the employee's claim for benefits.
3. **Workers' Compensation: Final Orders: Time.** Waiting-time penalties, as provided in Neb. Rev. Stat. § 48-125 (Reissue 1993), apply to final adjudicated awards.
4. **Workers' Compensation: Final Orders.** In the absence of the filing of an application for review, an award entered by a single judge of the Workers' Compensation Court is final on the date that the award is entered.
5. **Workers' Compensation: Time: Attorney Fees.** The purpose of the 30-day waiting-time penalty and the provision for attorney fees, as provided in Neb. Rev. Stat. § 48-125 (Reissue 1993), is to encourage prompt payment by making delay costly if the award has been finally established.
6. **Workers' Compensation.** The only legitimate excuse for delay in the payment of workers' compensation benefits is the existence of a genuine dispute from a medical or legal standpoint that any liability exists, and the fact that an employer is considering filing an application for review with no such application actually filed is not a sufficient reason to sustain a finding of genuine medical or legal doubt as to liability.
7. ____. In order to refrain from paying workers' compensation benefits and to avoid the penalty assessable under Neb. Rev. Stat. § 48-125 (Reissue 1993), the employer must demonstrate that he or she has an actual basis, in law or fact, for disputing the employee's claim.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

David A. Dudley and Darin J. Lang, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Christopher D. Jerram, of Kelley, Lehan & Hall, P.C., for appellee.

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

GERRARD, J.

On June 17, 1996, a single judge of the Nebraska Workers' Compensation Court determined that James A. Roth was entitled to an award of workers' compensation benefits as a result of an injury he sustained while employed by the Sarpy County Highway Department (Department). The Department did not file an application for review of the award and paid benefits to Roth on July 19 and on August 14. On August 2, Roth filed a motion to assess a 50-percent waiting-time penalty and attorney fees against the Department for its failure to pay benefits within 30 days of the June 17 award. A single judge assessed a 50-percent penalty and attorney fees against the Department for its untimely August 14 payment of benefits. Roth, however, then filed an application for review of this determination, contending that a 50-percent penalty and attorney fees should have also been assessed on the July 19 payment of benefits. Agreeing with Roth, a three-judge review panel of the compensation court assessed a 50-percent penalty and attorney fees against the Department for its untimely July 19 payment. The Department appeals. Because we conclude that the 30-day period for the payment of benefits commenced on the date the award was rendered on June 17, rather than on the date the 14-day statutory time for application for review of the award expired, we affirm the order of the Workers' Compensation Court assessing a 50-percent penalty and attorney fees against the Department for its untimely July 19 payment of benefits.

## PROCEDURAL BACKGROUND

On November 22, 1995, Roth filed an action in the Workers' Compensation Court, seeking compensation benefits for injuries he sustained on April 4, 1993, while employed by the Department. After a hearing on the matter, a single judge of the Workers' Compensation Court determined that Roth was entitled to compensation benefits and entered an award on June 17, 1996. The Department elected not to file an application for review of the award and paid Roth benefits in the amount of $16,579.20 on July 19. Due to a miscalculation by the

Department, this amount was not the total amount of benefits due and owing to Roth, and the Department subsequently made an additional payment to Roth in the amount of $9,790.13 on August 14.

On August 2, 1996, Roth filed a motion to assess a 50-percent waiting-period penalty and attorney fees against the Department for its failure to pay compensation benefits within 30 days of the award that was rendered on June 17. The compensation court trial judge determined that the Department's August 14 payment was delinquent and, thus, assessed a 50-percent penalty and attorney fees against the Department. Roth, however, filed an application for review of that determination, contending that the Department's payment on July 19 was also delinquent and should also have been subject to a 50-percent penalty and attorney fees. Agreeing with Roth, a three-judge review panel of the compensation court assessed a 50-percent penalty and attorney fees against the Department. The review panel found that the 30-day period for the payment of compensation benefits commenced on the date the award was rendered on June 17, rather than on the date the 14-day statutory time for application for review of the award expired, and thus, the July 19 payment of benefits was untimely. The Department appeals.

## SCOPE OF REVIEW

Pursuant to 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. *Acosta v. Seedorf Masonry, Inc., ante* p. 196, 569 N.W.2d 248 (1997); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). However, as to questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Sheridan v. Catering Mgmt., Inc., supra*; *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997).

## ASSIGNMENT OF ERROR

The Department's sole assignment of error is that the three-judge review panel of the Workers' Compensation Court erred in determining that the 30-day period for the payment of workers' compensation benefits commenced on the date the award was rendered, rather than on the date the 14-day statutory time for application for review of the award expired.

## ANALYSIS

The Department asserts that an award is not final and enforceable until after the 14-day statutory time for application for review of the award expires, whether or not an application for review is actually filed. Thus, the Department claims that the 30-day period for the payment of compensation benefits commences on the date the 14-day statutory time for application for review of the award expires, which effectively provides the Department 44 days to pay the compensation benefits. Roth, however, contends that the payment of compensation benefits is due 30 days from the date of the award because the Department elected not to file an application for review of the award and an award is final when issued, not 14 days later when the right to seek review expires. Therefore, we must determine the date an award of compensation benefits becomes final, in the absence of the filing of an application for review, for the purposes of commencing the 30-day period for the payment of workers' compensation benefits.

Neb. Rev. Stat. § 48-125(1) (Reissue 1993) provides in pertinent part that

> all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice

> has been given of the obligation for medical payments, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award.

Section 48-125 authorizes a 50-percent penalty payment for waiting time where the employer fails to pay compensation after 30 days' notice of the disability and where no reasonable controversy exists regarding the employee's claim for benefits. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

As provided in § 48-125, waiting-time penalties apply to final adjudicated awards. *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992). An "award of a single judge of the Nebraska Workers' Compensation Court shall be binding upon each party at interest *unless* an application for review has been filed with the compensation court within fourteen days following the date of rendition of the . . . award." (Emphasis supplied.) Neb. Rev. Stat. § 48-170 (Reissue 1993). In other words, in the absence of the filing of an application for review, an award entered by a single judge of the Workers' Compensation Court is final on the date that the award is entered. See, *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 827, 401 N.W.2d 679, 681 (1987) ("award [entered by the compensation court] on rehearing became a final judgment in the absence of an appeal"); *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984) (holding that decree or award rendered by compensation court is final judgment).

In the instant case, no application for review was filed within 14 days from the date that the award was rendered. Therefore, the award was final on June 17, 1996, and the 30-day period for the payment of workers' compensation benefits commenced on June 17. Because more than 30 days elapsed from the date the award was rendered, June 17, and the date the Department paid workers' compensation benefits to Roth, July 19, the three-judge review panel correctly found that the payment was untimely and, thus, properly assessed a 50-percent penalty and attorney fees against the Department.

The purpose of the 30-day waiting-time penalty and the provision for attorney fees in § 48-125 is to encourage prompt payment by making delay costly if the award has been finally established. See, *Smith v. University of Nebraska Medical Center*, 201 Neb. 730, 271 N.W.2d 852 (1978), *modified on rehearing* 202 Neb. 493, 276 N.W.2d 86 (1979); *McCrary v. Wolff*, 109 Neb. 796, 192 N.W. 237 (1923). We have previously stated that the only legitimate excuse for delay in the payment of compensation benefits is the existence of a genuine dispute from a medical or legal standpoint that any liability exists. *Grammer v. Endicott Clay Products*, 252 Neb. 315, 562 N.W.2d 332 (1997); *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989). The Department's assertion that it was considering filing an application for review, but its not actually filing such an application, is not a sufficient reason to sustain a finding of genuine medical or legal doubt as to liability, thereby excusing the Department's delay in the payment of compensation benefits. See *Jensen v. Workers' Comp. Appeals Bd.*, 170 Cal. App. 3d 244, 216 Cal. Rptr. 33 (1985) (holding that 45-day appeal period within which employer was considering appeal of award was not sufficient evidence as to genuine doubt regarding medical or legal liability, and thus, employer was not justified in delaying benefit payments to injured employee for 50 days). See, also, 8 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 83-41(c) at 15-1561 through 15-1564 (1997) ("[t]he pendency of an appeal may form an excuse [for the delay in the payment of benefits], but failure to pay within the period allowed for appeal is not excused if no appeal is in fact taken"). Furthermore, requiring payment within 30 days, rather than within 44 days, after the rendition of the award is in accord with the purpose behind the penalty provision, which is to ensure the prompt payment of benefits to the injured employee.

Finally, the Department claims that if the 30-day period for the payment of a penalty commences when the award is issued in the absence of an appeal, there is "a tremendous incentive for employers to appeal ***every*** award, as this would be the only way to preserve the entire 30-day statutory period for payment of benefits." Brief for appellant at 15. We disagree. In order to

refrain from paying compensation benefits and to avoid the penalty assessable under § 48-125, the employer must demonstrate that he or she has an actual basis, in law or fact, for disputing the employee's claim. *Grammer v. Endicott Clay Products, supra*; *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). Therefore, if an employer does not have an actual basis, in law or fact, for disputing the employee's claim and, thus, is not justified in appealing the award, the employer will not be excused from paying compensation benefits to the injured employee within 30 days following the date the award was issued, notwithstanding the fact that an application for review was filed. See, e.g., *Mendoza v. Omaha Meat Processors, supra* (finding that no reasonable controversy existed as to cause of injured employee's disability, and thus, employer was subject to 50-percent penalty and attorney fees for delay in payment of compensation benefits). Thus, contrary to the Department's assertion, an employer cannot simply file an application for review of an award for the purpose of preserving the entire 30-day statutory period for the payment of benefits as the employer must also have an actual basis, in law or fact, for disputing the employee's claim.

## CONCLUSION

We conclude that the three-judge review panel of the Workers' Compensation Court correctly found that the Department's July 19, 1996, payment of workers' compensation benefits was untimely and, thus, properly assessed a 50-percent waiting-time penalty and attorney fees against the Department. Accordingly, we affirm the judgment of the three-judge review panel of the Workers' Compensation Court.

AFFIRMED.

# ROBERT J. DARRAH, APPELLANT, V. BRYAN MEMORIAL HOSPITAL, APPELLEE.

571 N.W.2d 783

Filed January 9, 1998. No. S-95-1391.

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. ____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but, rather, whether any real issue of material fact exists.
3. ____. Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
4. **Summary Judgment: Negligence.** When the doctrine of res ipsa loquitur is utilized, the examination of whether there is a genuine issue of material fact must be related solely to the issues under the required elements of the doctrine. If the doctrine of res ipsa loquitur is applicable, the inference of negligence itself presents a question of material fact, and summary judgment is improper. If, however, the doctrine of res ipsa loquitur is inapplicable as a matter of law and there is no material question of fact regarding actionable negligence, summary judgment is proper.
5. **Negligence: Evidence.** When an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as a result of the alleged wrongdoer's negligence.
6. **Negligence.** The exclusive control requirement is satisfied if the injury resulted from an external force applied while the plaintiff was in the control of the defendants, even though, by subsequent explanation, some of the defendants are exonerated from the charge of negligence.
7. **Negligence: Proof.** Control is exclusive if it is shown that there was no possibility that a third party—not a defendant—could have caused the injury.
8. **Health Care Providers: Negligence: Liability: Agents.** Hospitals are generally responsible for the acts of their agents via vicarious liability and respondeat superior.
9. **Malpractice: Physicians and Surgeons: Negligence: Liability.** During surgery, the head surgeon has a nondelegable duty to provide health care and assumes exclusive control of the patient.
10. **Malpractice: Physicians and Surgeons: Health Care Providers: Negligence: Liability.** Surgeons are not liable for the failure of hospital employees to execute reasonable instructions left for the treatment of the patient.
11. **Pleadings.** Amendment to a petition is not a matter of right.
12. ____. A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.
13. **Pleadings: Summary Judgment.** Absent some mitigating factor which justifies raising new issues by a party after a motion for summary judgment has been heard and submitted, denying a motion to amend pleadings is not an abuse of discretion.

14. **Pleadings: Evidence.** Unless evidence or testimony exists in the record indicating that a proposed claim or defense was newly discovered or that counsel was unaware of the claim or defense prior to the pending action, the proposed amendment is merely a belated effort to inject issues of material fact into a proceeding where previously the pleadings revealed none.

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

Denzel R. Busick, of Luebs, Leininger, Smith, Busick & Johnson, and Robert J. Parker, Jr., of Brock, Seiler & Parker, for appellant.

Brett W. Berg and, on brief, Kenneth C. Stephan, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and MCCORMACK, JJ., and FAHRNBRUCH, J., Retired.

WHITE, C.J.

This is a medical malpractice action brought by Robert J. Darrah against Bryan Memorial Hospital (BMH) for injuries he allegedly sustained while hospitalized at BMH. The district court granted BMH's motion for summary judgment and dismissed Darrah's petition. Darrah appealed, and we removed this case to our docket pursuant to our power to regulate the caseload of the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

In January 1991, Darrah injured his lower back while attempting to push a disabled vehicle. Darrah's family physician diagnosed the injury as a "ruptured disc" and recommended back surgery. On March 27, Dr. Eric Pierson, a neurologist; Dr. Samuel Smith, an orthopedic surgeon; and Dr. Richard Petersen, Jr., an anesthesiologist, performed surgery on Darrah's back. The record reflects that all three doctors had staff privileges at BMH, but none were considered agents or employees of BMH.

Darrah asserts that while he was recovering from surgery, an intravenous line (IV) was inserted into his right arm to supply him with various medications. Darrah alleges the nurse had difficulty transferring and inserting the IV from his right to his left

arm, and claims the nurse made several unsuccessful attempts to insert the IV and eventually had to contact a supervising nurse. Darrah conceded he was uncertain whether the IV was switched to his right or his left arm. In addition, Darrah's medical chart indicates the IV was started in the left arm and later moved to the right, not right to left as Darrah contends. Moreover, the evidence does not reflect that any specific problems occurred with Darrah's IV.

The record reflects that neither arm pads nor arm boards were used before, during, or after surgery. Darrah's arms were not strapped down but were merely lying at his sides on the bed or gurney. The record is also devoid of any evidence indicating Darrah was dropped or that his ulnar nerve was exposed to overflexion.

Darrah remained hospitalized at BMH until April 4, 1991. Several days after surgery, Darrah noticed "tingling" and numbness in his left hand and arm. After leaving the hospital, Darrah experienced pain and loss of strength in his left hand and arm. On May 3, Darrah's family physician diagnosed him as having "ulnar neuritis."

As a result of the ulnar neuritis or ulnar neuropathy allegedly sustained at BMH, Darrah brought a medical malpractice action against BMH based on res ipsa loquitur. In response, BMH filed a motion for summary judgment. In ruling on the motion, the district court noted that the doctrine of res ipsa loquitur applies only when an instrumentality under the exclusive control of the alleged wrongdoer produces an injury which would not ordinarily occur in the absence of negligence by the alleged wrongdoer. The district court found that the damage to Darrah's ulnar nerve could have occurred during or after surgery while he was hospitalized at BMH. The district court stated:

> Putting aside the particular nature of the injury, it is clear that the requirement of exclusive control cannot be satisfied in view of the absence of the operating surgeons and the anesthesiologist as party defendants. These are parties who control the activities during surgery and they are neither agents [n]or employees of the defendant hospital.

Accordingly, the district court granted BMH's motion for summary judgment. Darrah filed a motion for reconsideration

and new trial or leave to amend, which was also overruled by the district court. Darrah filed a notice of appeal on October 31, 1996.

Darrah contends the district court erred in (1) sustaining BMH's motion for summary judgment, (2) incorrectly analyzing the law governing hospitals' nondelegable duty of care to patients, (3) incorrectly analyzing the law governing joint tortfeasors and concurrent causes of injury, and (4) denying Darrah the opportunity to amend his petition.

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. *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997); *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997). On a motion for summary judgment, the question is not how a factual issue is to be decided, but, rather, whether any real issue of material fact exists. *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997); *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997). Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

Darrah initially argues that merely pleading res ipsa loquitur precludes summary judgment. Motions for summary judgment have been repeatedly granted in cases based on res ipsa loquitur. See, *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996); *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969). When the doctrine of res ipsa loquitur is utilized, the examination of whether there is a genuine issue of material fact must be related solely to the issues under the required elements of the doctrine. *McCall, supra*. If the doctrine of res ipsa loquitur is applicable, the inference of negligence itself presents a question of material fact, and summary judgment is improper. *Anderson, supra*. If, however, the doctrine of res ipsa loquitur is inapplicable as a matter of law and there is no material question of fact regarding actionable negligence,

summary judgment is proper. *Id.* Therefore, merely pleading res ipsa loquitur does not preclude this court, or any other, from granting summary judgment.

Darrah further argues that summary judgment should not be granted unless the issue is "clear beyond all doubt." Brief for appellant at 12. We have expressly disapproved "clear beyond all doubt" as the standard for summary judgment. See, *Dowis v. Continental Elev. Co.*, 241 Neb. 207, 486 N.W.2d 916 (1992); *Anderson, supra.* To the extent that *Andreasen v. Gomes*, 244 Neb. 73, 504 N.W.2d 539 (1993), holds to the contrary, it is disapproved.

Darrah's second and third assignments of error attempt to surmount the "exclusive control" requirement of res ipsa loquitur. Darrah claims BMH had exclusive control because hospitals have a nondelegable duty to render health care and because BMH and the operating team were joint tort-feasors. We find neither argument persuasive.

Darrah filed his claim against BMH under the doctrine of res ipsa loquitur. The doctrine provides that

> when an instrumentality under the exclusive control and management of the alleged wrongdoer produces an occurrence which would not, in the ordinary course of things, come to pass in the absence of the negligence of the one having such management and control, the occurrence itself, in the absence of explanation by the alleged wrongdoer, affords evidence that the occurrence arose as a result of the alleged wrongdoer's negligence.

*Widga v. Sandell*, 236 Neb. 798, 803, 464 N.W.2d 155, 158 (1991). Three factors must be demonstrated to trigger the application of res ipsa loquitur. First, the instrumentality causing the injury must be under the exclusive control of the defendant. Second, the injury must be one that would not ordinarily occur in the absence of negligence. Finally, the defendant cannot have an explanation/defense which precludes liability. See *id.*

Generally, the exclusive control requirement is satisfied if the injury resulted from an external force applied while the plaintiff was in the control of the defendants, even though, by subsequent explanation, some of the defendants are exonerated from the charge of negligence. *McCall, supra.* "[C]ontrol is exclusive

if it is shown that there was no possibility that a third party, *not a defendant*, could have caused the injury." (Emphasis in original.) *Id.* at 6, 165 N.W.2d at 89. Therefore, Darrah's cause of action fails if a third party, other than BMH or BMH's agents, could have caused Darrah's injuries.

Determining when Darrah's injuries were sustained will identify the entity that owed Darrah a duty of care. Determining who owed Darrah a duty of care concomitantly affects which entity could have been in exclusive control of the instrumentalities causing his injuries. For example, hospitals are generally responsible for the acts of their agents via vicarious liability and respondeat superior. See *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991). See, also, *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988). During surgery, however, the head surgeon has a nondelegable duty to provide health care and assumes exclusive control of the patient. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Swierczek, supra.* In addition, surgeons are not liable for the failure of hospital employees to execute reasonable instructions left for the treatment of the patient. *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986).

In the instant case, Darrah allegedly sustained ulnar nerve damage while hospitalized at BMH. Ulnar neuritis, or ulnar neuropathy, is a disorder of the peripheral nervous system which may be caused by compression or entrapment of the ulnar nerve in the ulnar groove of the elbow. Ulnar neuropathy can be caused in several different ways.

BMH submitted the affidavits of James Bobenhouse, M.D., a board-certified neurologist; Edward Schima, M.D., a board-certified neurologist; and Helen Connors, Ph.D., a registered nurse. Drs. Schima, Bobenhouse, and Connors stated that one way ulnar neuropathy can be caused is by improperly inserting an IV into the arm. The doctors stated that a second way ulnar neuropathy can be caused is by pressure being placed on the ulnar nerve from prolonged and unadjusted placement of the arm while the patient is anesthetized during surgery and in the postsurgery recovery room. Dr. Connors further acknowledged that inserting an IV improperly and incorrectly positioning the body can both simultaneously contribute to ulnar neuropathy.

Dr. Schima stated that a third possible cause of ulnar neuropathy is overflexion of the ulnar nerve. Drs. Schima and Bobenhouse agreed, however, that some patients are predisposed to ulnar neuropathy and that such nerve damage can occur in the absence of negligence, especially during lower back surgery.

Drs. Schima and Bobenhouse agreed that incorrectly inserting an intravenous needle into Darrah's arm was an unlikely cause of his injuries, and agreed that Darrah's injuries were probably caused by pressure placed on the ulnar nerve during or after surgery, while Darrah was anesthetized. However, Dr. Connors stated that it was more probable that both improper positioning or incorrect IV insertion contributed to Darrah's ulnar neuropathy.

Dr. Bobenhouse noted that ulnar nerve damage can usually be prevented by appropriate elbow padding, body positioning, and arm movement. Dr. Bobenhouse admitted, however, that the need for such precautions varies from patient to patient and the type of surgery being performed. Dr. Schima stated that in some cases ulnar neuropathy can occur regardless of how the patient's body is positioned. In addition, Dr. Schima testified that based on the neurological findings, Darrah was likely to be predisposed to ulnar neuropathy. Moreover, Drs. Schima and Bobenhouse acknowledged that establishing how much of Darrah's injuries were caused before, during, or after surgery would be nearly impossible to determine.

Dr. Schima concluded that Darrah's ulnar neuropathy developed despite the exercise of reasonable care. Dr. Bobenhouse agreed and stated that nothing in Darrah's medical records indicated anything unusual occurred during Darrah's surgery to cause the ulnar nerve damage.

The record is unclear as to when and where Darrah's injuries occurred. As a result, the court is unable to determine who owed Darrah a duty of care and who was in exclusive control of the instrumentalities causing his injuries. In light of this uncertainty, we cannot say, as a matter of law, that there is no possibility a third party, other than BMH, could have caused Darrah's injuries. See *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969). As such, the district court was correct in

granting summary judgment because Darrah did not satisfy the first element of the doctrine of res ipsa loquitur—exclusive control. See, *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996); *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *McCall, supra.*

Nonetheless, we recognize that the underlying purpose of res ipsa loquitur is to assist plaintiffs with the often difficult task of producing facts sufficient to prove negligence. *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991). As we stated in *Swierczek*:

> "The very purpose of the doctrine of res ipsa loquitur is to allow a plaintiff who may have been unconscious or incapacitated during an operation the opportunity to establish negligence and causation by circumstantial evidence. A plaintiff who is under anaesthesia or otherwise incapacitated can identify neither the instrumentality nor the person(s) in control of the instrumentality. To place this burden of proof upon a plaintiff is to require the impossible."

*Id.* at 481, 466 N.W.2d at 519 (quoting *Dalley v. Utah Regional Med. Ctr.*, 791 P.2d 193 (Utah 1990)). Our holding does not impose any greater evidentiary burden upon plaintiffs utilizing the doctrine of res ipsa loquitur. However, "[i]t is never enough for the plaintiff to prove merely that the plaintiff has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39 at 248 (5th ed. 1984).

In Darrah's final assignment of error, Darrah claims the district court erred in denying his motion to amend his petition. In Darrah's motion, he urged the district court to permit him to amend his petition, yet he alleged no new facts other than his desire to "amend his Petition to allege specific acts of negligence."

Amendment of a petition is not a matter of right. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993); *Omaha Nat. Bank v. Koliopoulos*, 204 Neb. 752, 285 N.W.2d 496 (1979). Rather, a decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *Nebraska*

*Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 471 N.W.2d 398 (1991). Absent some mitigating factor which justifies raising new issues by a party after a motion for summary judgment has been heard and submitted, denying a motion to amend pleadings is not an abuse of discretion. *Yunghans v. O'Toole*, 199 Neb. 317, 258 N.W.2d 810 (1977); *Ogallala Fertilizer Co. v. Salsbery*, 186 Neb. 537, 184 N.W.2d 729 (1971). Unless evidence or testimony exists in the record indicating that a proposed claim or defense was newly discovered or that counsel was unaware of the claim or defense prior to the pending action, the proposed amendment is merely a belated effort to inject issues of material fact into a proceeding where previously the pleadings revealed none. *Yunghans, supra.*

The assignment is not meritorious. The judgment of the trial court is affirmed.

AFFIRMED.

GERRARD and STEPHAN, JJ., not participating.

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TERRY LANGE, APPELLEE, V. CROUSE CARTAGE COMPANY, APPELLANT, AND LIBERTY MUTUAL INSURANCE COMPANY, APPELLEE.

572 N.W.2d 351

Filed January 9, 1998. No. S-95-1392.

1. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
2. **Supreme Court: Courts: Appeal and Error.** The Supreme Court, upon granting further review which results in the reversal of a decision of the Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
3. **Jury Instructions: Records: Appeal and Error.** It is the duty of an appellant to direct the clerk to include in the transcript any tendered instruction refused by the court if the appellant intends to assign error to such refusal.
4. **Expert Witnesses: Appeal and Error.** An appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider.
5. **Expert Witnesses: Testimony.** 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. The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess.

6. **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.
7. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, EARL J. WITTHOFF, Judge. Judgment of Court of Appeals reversed.

Jay L. Welch and Douglas E. Baker, of Welch, Wulff & Childers, for appellant.

Steven E. Guenzel, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellee Lange.

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

MCCORMACK, J.

Appellant, Crouse Cartage Company, was found liable for injuries sustained by appellee Terry Lange due to Crouse's negligence. Appellee Liberty Mutual Insurance Company has a subrogation interest via Lange's prior workers' compensation claim. The Nebraska Court of Appeals found that the issue of Crouse's negligence properly went to the jury. However, in its memorandum opinion filed June 16, 1997, the Court of Appeals then reversed the jury verdict which awarded Lange $53,000 and remanded the cause on the grounds that the trial court should have given Crouse's requested instruction on Lange's contributory negligence. We granted Lange's petition for further review in order to determine whether Crouse's request for a contributory negligence instruction could be inferred to be a request that the trial court reconsider its previous directed verdict on this issue. The granting of that directed verdict was not assigned as error. We reverse the Court of Appeals' holding that it was error for the trial court to fail to instruct the jury on the issue of Crouse's contributory negligence and the granting of a new trial on this matter.

## BACKGROUND

On December 10, 1990, James Prince, an employee of Crouse, was to deliver two steel fire doors that were 4 feet wide and 10 feet in length, each weighing approximately 225 pounds, to Vince Kess, Inc., where Lange was employed as a purchasing manager. The doors were loaded in the rear of the Crouse truck that Prince was driving, along with other goods Prince was to deliver that day. The doors were lying on their long edges and leaning upright against the passenger side of the truck. When Prince arrived at Kess, he informed someone at Kess that he had a delivery.

Prince and Lange disagreed regarding the events thereafter which led to Lange's injury. According to Lange, he got into the rear of the truck to help rearrange other goods in the back of the truck upon Prince's request. Lange and Prince then proceeded to slide the doors, one at a time, toward the rear of the truck. At the rear of the truck, there was a ¼-inch lip on the floor of the truck preventing Lange and Prince from sliding the doors out without lifting them up over the lip. After they slid the doors to the lip, Lange got out of the truck and prepared to receive a door after Prince got it over the lip and to then help Prince lay the door on the floor of the truck. Prince then used a two-wheel dolly to lift and twist the door over the lip. As Prince was lifting the door in this manner, "he lost control of the door and it went and fell down on [Lange's] wrist," but the door remained in the truck. Lange testified that he was not attempting to catch the door as it fell; rather, he was merely waiting to help guide the door once it was over the lip. Despite the fact that he was not trying to catch the door, it struck his wrist. Lange testified that prior to Lange's being taken to the hospital, Prince told Lange that the door had pushed Prince against the wall of the truck, causing the door to fall. As a result of the above incident, Lange's wrist was broken.

Prince does not remember requesting Lange's help or Lange's getting into the truck. However, he testified he did expect help from a Kess employee after the doors were positioned flat on the floor of the truck. Prince was unsure whether he even knew Lange was at the back of the truck until after the accident. Prince testified that he did not accidentally let go of

either door, but, rather, he lowered both doors together to a certain point and then let them both fall to the floor of the truck. Prince testified that this was his standard procedure to unload doors. Prince did not see the doors hit Lange's arm or see Lange try to catch the doors.

Lange's case in chief included, in addition to Lange's testimony, the testimony of two employees of Kess, who stated they had never seen doors such as those involved herein intentionally dropped. Lange's case in chief also included the testimony of James Rogers, a vocational rehabilitation counselor. In Rogers' opinion, Lange had suffered a 15- to 20-percent loss in earning capacity. It was brought out on cross-examination that Rogers understood Lange to have been earning $12 per hour at the time of the accident, when he was actually earning $9 per hour. Rogers explained that this did not change his opinion because Rogers' information was correct in that it was based upon Lange's *weekly* wage at the time of the accident, which included overtime. Based on his consideration of Lange's ability to earn wages, ability to perform various tasks, and access to the job market due to his impairments, Rogers testified that his opinion was unchanged.

After Lange rested, Crouse moved to strike Rogers' testimony, arguing it was based on insufficient foundation. The motion was overruled. Crouse also moved for a directed verdict, arguing that there was no evidence of Prince's negligence, that Lange's negligence was the sole proximate cause, and that Lange's recovery was barred due to his contributory negligence and assumption of the risk. This motion was also overruled.

After the presentation of Crouse's case, Lange moved for a directed verdict on Crouse's affirmative defenses. Lange argued that there was no direct evidence to support any of the allegations of contributory negligence, among which were Lange's failing to look out, putting his arm in the way of a door, trying to move a door that was too heavy, failing to warn Prince that he was there, and putting himself in a position where he was outside of Prince's range of vision. Lange further argued that Crouse's contributory negligence defense relied on the inference that Lange must have stuck his hand in the truck because it got hit by the door. Lange concluded that the defense is enti-

tled to such an inference only if it is the only reasonable inference that may be drawn from the evidence, which Lange felt it clearly was not. After making this motion, Lange testified in rebuttal. Following consideration of the matter, the district court sustained Lange's motion for a directed verdict as to Crouse's affirmative defenses.

During the jury instruction conference, the court indicated it would not give Crouse's tendered instruction on contributory negligence. Crouse renewed its motion for a directed verdict, and the motion was denied. The case was submitted to the jury, which returned a verdict of $53,000 in favor of Lange and against Crouse. Thereafter, Crouse filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial, which was overruled.

Crouse appealed to the Court of Appeals, alleging as error that the trial court improperly submitted the issue of Crouse's negligence to the jury, that the trial court improperly denied Crouse's request to instruct the jury as to Lange's contributory negligence, and that the trial court improperly allowed evidence from Lange's expert Rogers.

The Court of Appeals held that the issue of Crouse's negligence properly went to the jury; however, the majority of the Court of Appeals held that the trial court improperly denied Crouse's tendered jury instruction and reversed the verdict on those grounds without reaching Crouse's assigned error that Rogers' testimony should have been stricken because it was based on incorrect facts and proved confusing to the jury. Citing no authority, the Court of Appeals ruled that Crouse's request for a jury instruction amounted to a request that the trial court reconsider its ruling on Lange's motion for a directed verdict on Crouse's affirmative defenses. Important to note is the cursory dismissal of the absence of the requested jury instruction from the record by the Court of Appeals. The Court of Appeals' dissent points out that the trial judge had already granted Lange's motion for a directed verdict with respect to Crouse's affirmative defenses, and therefore, the denial of the jury instruction regarding contributory negligence would have been proper. The dissent further points out that the assignment of error was not properly framed around the question of the propriety of grant-

ing Lange's motion for a directed verdict, but instead was framed around the argument that Crouse's proposed jury instruction should have been given. Lange then filed a petition for further review, which we granted.

## ASSIGNMENTS OF ERROR

In Lange's petition for further review, he assigns as error (1) that the Court of Appeals failed to apply, and in fact ignored, the rule of law that circumstantial evidence will not support a verdict unless that verdict is the only one that can fairly and reasonably be drawn therefrom; and (2) that the majority of the Court of Appeals failed to apply the rule that errors not properly raised on appeal should not be allowed to form the basis of a reversal.

## STANDARD OF REVIEW

To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996); *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995).

This court, upon granting further review which results in the reversal of a decision of the Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995); *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994).

## ANALYSIS

The majority of the Court of Appeals stated in its opinion: "We view the request for the instruction as an implied, but nonetheless obvious request, that the court reconsider and reverse its earlier ruling, via Lange's motion for directed verdict on the affirmative defenses," that plaintiff was not guilty of contributory negligence. The Court of Appeals majority then concluded that on the facts recited, there seemed to be enough evidence to support the giving of a contributory negligence instruction. We disagree.

The record contains no tendered jury instruction regarding contributory negligence. The rules of appellate procedure articulated by this court are clear that the burden is on the appellant to direct the clerk to

> include in the transcript such additional parts of the record as he or she shall specify in the praecipe, including the instructions given by the trial court, if the appellant intends to assign error in the giving of any instruction, *and any tendered instruction refused, if the appellant intends to assign error to such refusal.*

(Emphasis supplied.) Neb. Ct. R. of Prac. 4(A)(2) (rev. 1996). See, also, *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990) (affirming decision of trial court due to appellant's failure to include allegedly erroneous jury instructions in record on appeal); *Neece v. Severa*, 5 Neb. App. 556, 560 N.W.2d 868 (1997) (Court of Appeals refused to consider party's assigned error based upon jury instructions when instructions not made part of record). The dissent in the Court of Appeals' opinion points out that without the tendered instruction it is left to the appellate court to divine the propriety of the instruction from those fragments of the instruction which are found in conversations between the court and counsel.

The propriety of the trial court's granting of Lange's motion for directed verdict on the issue of contributory negligence was not assigned as error. The request for an instruction on the issue of contributory negligence after there has been a directed verdict on this issue does not constitute a request to the trial court to reconsider the initial granting of the motion for directed verdict.

This court has adopted specific rules for addressing alleged errors of the lower courts. These rules are designed not only to allow the parties to be apprised of the issues to be raised on appeal, but also to allow for clarity in the decisions of, and precedent set by, this court. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996); *McArthur v. Papio-Missouri River NRD, supra*; *Ford Motor Credit Co. v. All Ways, Inc., supra*; *Standard Fed. Sav. Bank v. State Farm, supra*. We do not consider those

errors which are not assigned, and as such, the propriety of the trial court's granting of Lange's motion for a directed verdict is not before us.

ROGERS' TESTIMONY

This court, upon granting further review which results in the reversal of a decision of the Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *State v. Neujahr, supra*; *Coppi v. West Am. Ins. Co., supra*. As we have reversed the decision of the majority of the Court of Appeals, before the verdict may be reinstated it becomes necessary to resolve Crouse's third assignment of error at the Court of Appeals level regarding Lange's expert testimony at trial. Crouse alleges that Rogers' testimony should have been stricken because it was shown on cross-examination that Rogers based his testimony on an erroneous assumption regarding Lange's hourly wage. An appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994). We have previously held:

> "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. . . . *The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess. . . .*"

(Emphasis supplied.) *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 832, 566 N.W.2d 110, 114 (1997). On redirect, Rogers pointed out that his opinion was based upon Lange's *weekly income* and not his hourly wage. He further testified that his opinion as to Lange's lost earning capacity was unchanged by the fact that Lange's hourly wage was less than what he originally thought because he was considering Lange's weekly wages, which included overtime, as opposed to considering only the hourly rate. There clearly was a sufficient factual basis for Rogers' opinion. The admission of expert testimony is ordi-

narily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *Childers v. Phelps County*, 252 Neb. 945, 568 N.W.2d 463 (1997). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Greenwalt v. Wal-Mart Stores, ante* p. 32, 567 N.W.2d 560 (1997); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). The admission by the trial judge of the opinion testimony of Lange's expert was clearly not an abuse of discretion under the standard set out above.

## CONCLUSION

We disagree with the holding of the Court of Appeals that the request by Crouse for a contributory negligence instruction was, in effect, a request for the trial court to reconsider its directed verdict in favor of Lange on the issue of contributory negligence. Since the propriety of the granting of the directed verdict was not assigned as error, it was not before the Court of Appeals and is not before this court. It would be clear error for the trial court to instruct the jury as to an issue which it has already decided as a matter of law.

We find no abuse of discretion on the part of the trial court in allowing Lange's expert to testify as to Lange's lost earning power. Although Crouse pointed out that one of the figures relied upon by Rogers was inaccurate, Rogers maintained his opinion that Lange had a diminished earning capacity due to his injuries and that such opinion was based on Lange's *weekly*, not *hourly*, wages.

We, therefore, reverse the conclusion reached by the Court of Appeals that the district court should have submitted the issue of contributory negligence to the jury and the granting of a new trial on this matter.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
PAMELA A. FIEDLER, APPELLANT.
571 N.W.2d 789

Filed January 9, 1998. No. S-96-079.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, DONALD R. GRANT, Judge. Judgment of Court of Appeals affirmed.

Robert W. Kortus and Julie A. Frank, of Frank & Gryva, P.C., for appellant.

Connor L. Reuter, Assistant Lincoln City Attorney, for appellee.

Herbert M. Fitle, Omaha City Attorney, and Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for amicus curiae City of Omaha.

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

PER CURIAM.

The decision of the Nebraska Court of Appeals *State v. Fiedler*, 5 Neb. App. 629, 562 N.W.2d 380 (1997), is affirmed by an equally divided court.

AFFIRMED.

STEPHAN, J., not participating.

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STATE OF NEBRASKA, APPELLEE,
V. TRAVIS R. BUECHLER, APPELLANT.
572 N.W.2d 65

Filed January 9, 1998. No. S-96-1229.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under such rules when judicial discretion is a factor involved in the admissibility of evidence.

2. **Hearsay: Words and Phrases.** Prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive.
3. **Trial: Evidence: Waiver: Appeal and Error.** A party waives the right to assert on appeal prejudicial error concerning the admission of evidence received without objection.
4. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts may be admitted under the provisions of Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
5. **Trial: Evidence: Other Acts.** The admission of evidence of other wrongs or acts is within the trial court's discretion.
6. **Criminal Law: Trial: Juries: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when incorrect conduct by the trial court, on review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the defendant.
7. **Constitutional Law: Trial: Evidence: Confessions.** Independent of the issue as to whether a criminal defendant's confession was voluntary, such a defendant is denied his or her 6th and 14th Amendment right to present a defense if prohibited from presenting evidence about the physical and psychological environment in which the confession was obtained.
8. **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 absent an abuse of discretion.
9. **Trial: Expert Witnesses.** The four-part test for determining the admissibility of expert testimony is as follows: (1) Does the witness qualify as an expert? (2) Is the testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the expert's testimony be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence?
10. ____: ____. A court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact.
11. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Sioux County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Randall L. Lippstreu, of Harris & Lippstreu, P.C., and David Eubanks, of Van Steenberg Law Office, for appellant.

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

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

CAPORALE, J.

## I. STATEMENT OF CASE

Pursuant to verdict, the defendant-appellant, Travis R. Buechler, was adjudged guilty of murder in the first degree, in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1995), and of using a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). He was thereafter sentenced to life imprisonment for the murder conviction and to a consecutive sentence of not less than 5 nor more than 15 years' imprisonment for the use of a firearm conviction. Inasmuch as a sentence of life imprisonment was imposed, Buechler's appeal was docketed in this court pursuant to the provisions of Neb. Rev. Stat. § 24-1106 (Reissue 1995). Buechler asserts, in summary, that the district court erred in (1) making certain evidential rulings, (2) failing to grant a mistrial, and (3) improperly accounting for time served. We reverse, and remand for further proceedings.

## II. FACTS

On March 14, 1994, a ranch hand discovered the skeletal remains of a body in a little-used corral on an abandoned farmstead in Sioux County, Nebraska. The body was identified as that of Efrain Hernandez, who was last seen alive on June 15, 1993.

Buechler was arrested and jailed on September 23, 1995, and gave police authorities a videotape-recorded confession on September 27. Buechler was a daily heavy user of methamphetamine, cocaine, and marijuana right up to the time of his arrest.

In his recorded confession, Buechler stated that he and Andrew Requejo, a friend and local drug dealer, picked up the victim, who was actively involved in drug dealing in the Scottsbluff area, to complete a purchase of marijuana. After making a marijuana delivery at a business on the edge of

Morrill, Nebraska, they drove north into Sioux County. The victim had been verbally abusing Buechler for driving erratically, so Buechler stopped the automobile, pretending that something was wrong with a wheel. Buechler got out and pretended to check it. The victim also got out of the automobile, whereupon Buechler shot him several times in the face and, after the victim fell, in the back of the head. Buechler claimed to have seen two bullet holes in the victim's left eye, but denied having shot the victim in the body. After the shooting, Buechler and Andrew Requejo went to Mitchell, Nebraska, to get Andrew Requejo's younger brother, Richard Requejo. The three of them then moved the body to the corral, where it was later found.

During the trial, Buechler testified that immediately after the murder, Andrew Requejo warned that if Buechler told anyone about the murder, he, Andrew Requejo, would hurt Buechler or his family. Also influencing Buechler at the time of his recorded confession was a phone call from his girl friend, Kristine Kenzy, with whom he had been living and with whom he had sired a daughter, in which the girl friend told him that the police were threatening to take away the daughter and throw her, the girl friend, in jail if she did not tell them everything she knew about the murder.

Richard Requejo admitted that as part of his plea bargain, an accessory to murder charge which had been made against him was dismissed, and testified that after his brother and Buechler went to get him on the night of the murder, he drove them to the body and that they then took the body to the old corral. Richard Requejo also testified that on the night of the murder, Buechler admitted that he had done the shooting, and further testified that immediately after the body was discovered, Buechler told him that he, Buechler, had killed the victim for the marijuana. However, Buechler testified that during the period this second conversation supposedly took place, he was in jail.

The girl friend's mother testified that on April 25, 1995, because Buechler "wanted to get it out of his system," he told her and her husband that he had killed someone. The mother testified that in June 1995, Buechler told her his motive was that "[t]his fellow he kept after him and after him and he said that he thought he was too good for him and he made me mad," and at

a later date that "I was just mad." On cross-examination, the mother could not remember if she also told police authorities that Beuchler told her of the Requejos' involvement in the murder, although she did remember that Buechler said they were involved. The girl friend's father corroborated his wife's testimony; however, on cross-examination, he gave confusing testimony as to what information he and his wife had given police authorities. Buechler's testimony at trial was that while he told the girl friend's parents he had been involved in a murder, he never told them he did the shooting.

A former girl friend of Richard Requejo's testified that he told her that his brother, Andrew Requejo, had killed the victim.

Beuchler testified at trial that on the drive north from Morrill, Andrew Requejo ordered him to stop the automobile. Buechler got out of the automobile to check a wheel and heard shots. He stated that he was surprised and frightened by the shooting.

Buechler also testified that Andrew Requejo left the marijuana that had been purchased from the victim at Rein's Body Shop prior to the murder. Stuart Rein testified that a large marijuana delivery was made at his shop sometime in the summer of 1993.

While Buechler indicated in his recorded confession that he was angered by the verbal abuse concerning his driving, testimony indicated that Buechler spoke and understood very little Spanish. The victim was described as speaking very little English.

The drug dealer with whom the victim had been working, Martin Juarez, did not receive any payment for the marijuana Andrew Requejo had received and sold. After the victim's death, Andrew Requejo began making large drug deals directly with Juarez.

When found, the victim's body was in an advanced state of mummification, with the soft tissue dried out so that it was leathery or paper thin. On October 18, 1995, police authorities searched along a road adjacent to the farmstead at which the body was found and discovered a single shell casing. However, by that time, the road had been substantially graded, making it less likely that additional shell casings would be found.

During the course of autopsying the victim's body, a forensic pathologist discovered two bullets in the body and determined

the cause of death to be multiple gunshot wounds to the chest and neck. One bullet was removed from the left side of the chest. The other bullet was taken from the left side of the neck, lying very close to the surface of the skin, just above the midpoint of the left collarbone. Because the amount of skin remaining on the body was inadequate, entrance wounds could not be identified. As a result of the decomposed state of the body, neither could the pathologist determine whether other bullet wounds had been inflicted. There was no evidence of bullet wounds to the head itself.

## III. ANALYSIS

### 1. Evidential Rulings

In the first assignment of error, Buechler claims that the district court wrongly (a) excluded testimony concerning his pretrial denials of the killing, (b) permitted the plaintiff-appellee, State of Nebraska, to question him about prior bad acts, and (c) excluded testimony relating to the circumstances under which he confessed.

The analysis of each of these claims is controlled by the rule that in all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under such rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997).

#### (a) Pretrial Statements

Buechler desired to examine witnesses who would testify that he had denied killing the victim before he so claimed, while testifying on his own behalf at trial. He urges that contrary to the district court's basis for excluding such testimony, the testimony was not hearsay. Neb. Evid. R. 801(4)(a), Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1995), provides that a "statement is not hearsay if: (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication . . . ."

Contrary to his recorded confession, Buechler testified at trial not only that he did not kill the victim, but that he had no warning the shooting was about to take place. Thus, Buechler's trial testimony was dramatically different from the statements he made in the recorded confession the district court had received in evidence.

However, prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive. *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). Here, the State impeached Buechler's trial testimony by pointing out that during his recorded confession, Buechler made no mention of any threats from Andrew Requejo and by establishing that Buechler had not realized the confession was being videotape-recorded. Thus, the State clearly implied that Buechler's testimony at trial was not credible. The question, however, is whether that implication rises to the level of a charge that his trial testimony was a recent fabrication, as Buechler claims. Attempts at impeachment cannot be equated to charges of recent fabrication. As noted in *Thomas v. U.S.*, 41 F.3d 1109, 1119-20 (7th Cir. 1994): "One may impeach for lack of credibility without going so far as to charge recent fabrication. . . . We will not find abuse of discretion where, as here, the impeachment is susceptible of either interpretation." In the instant case, the State's cross-examination pointing out that Buechler "didn't know that videotape was on" and that he "never figured that would be in front of a jury" merely buttressed the credibility of the recorded confession.

There being no charge of recent fabrication, the district court was correct in excluding testimony concerning Buechler's prior statements.

(b) Prior Bad Acts

Buechler next urges that the district court erred by permitting the State to question him about certain prior bad acts.

Notwithstanding Buechler's objections and a pretrial ruling that the State would "not use any prior convictions or bad acts of [Buechler] for any purpose except impeachment," the State asked Buechler a series of questions concerning some of his

prior bad acts. The series of questions began with, "You were violent with [your girl friend], weren't you?" and continued to, "And on that day did you attack an officer by the name of Squires and grab him around the throat?" After that last question, the district court finally sustained Buechler's objection on the ground that the prior bad acts about which Buechler was being questioned had not been disclosed by the State prior to trial.

The State's first question concerning the girl friend was answered without objection. The State argues that Buechler's denial that he was violent with his girl friend opened the door to impeachment, at least on the subject of whether he had acted violently with her.

While this question may well have violated the pretrial order, a party waives the right to assert on appeal prejudicial error concerning the admission of evidence received without objection. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). Under that circumstance, the remaining questions concerning Buechler's violence toward the girl friend constituted proper impeachment.

The State also asked Buechler if he had ever threatened or become violent with his daughter. Although this line of questioning cannot be said to have been included within the impeachment of Buechler's denial of violent acts toward his girl friend, no objections were interposed. (At one point Buechler was granted a continuing objection to questions concerning violence toward his girl friend, but violence toward his daughter is a separate and different matter.)

Thus, the only series of questions that remains for consideration is the series that began, "In fact, you have a history of violence, don't you?" Buechler did object to this question. In this regard, the district court's ruling violates Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In applying § 27-404(2), we have said that evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984). See, also, *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). The inference that Buechler acted in this case in conformity with his character is the only reason for asking Buechler whether he had a general history of violence. Thus, the district court abused its discretion in permitting Buechler to be cross-examined about his general history of violence. See *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995) (admission of evidence of other wrongs or acts within trial court's discretion).

However, our analysis of this issue cannot end there, for the question at this point becomes whether the error prejudiced Buechler. If the improper admission of the evidence was harmless beyond a reasonable doubt, there was no prejudice. See *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996) (harmless error exists in jury trial of criminal case when incorrect conduct by trial court, on review of entire record, did not materially influence jury in verdict adverse to substantial right of defendant).

Given that the questions asked of Buechler about violence toward his girl friend and daughter were not objected to, we must conclude that when weighed against the totality of the evidence, the error in overruling Buechler's objections to the few questions concerning his general violent behavior was harmless beyond a reasonable doubt.

(c) Circumstances of Confession

Buechler further contends that the district court should not have excluded expert testimony concerning the circumstances under which he confessed, namely, testimony concerning his mental state and the effect thereof on his statements.

A clinical psychologist conducted a mental health evaluation of Buechler and viewed the recorded confession. The psychologist was prepared to testify that Buechler suffered from major depression disorder, attention deficit disorder, anxiety disorder,

and paranoid personality disorder. The psychologist was also prepared to testify that due to Buechler's incarceration prior to his recorded confession, he was, at the time of the confession, in the throes of methamphetamine withdrawal. The psychologist would also have testified that the psychological effects of withdrawal include severe depression, extreme feelings of hopelessness, difficulty concentrating, and high levels of distress and suggestibility. As a result, Buechler would have been very suggestible, would waiver in his attitudes and beliefs, would process information haphazardly, and would often reach faulty conclusions.

In the context of lay testimony, the U.S. Supreme Court, in *Crane v. Kentucky*, 476 U.S. 683, 684, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), held that a defendant is denied his 6th and 14th Amendment right to present a defense if prohibited from presenting evidence "about the physical and psychological environment in which the confession was obtained." Therein, a 16-year-old minor was arrested for a robbery and, while being questioned, confessed to a totally unrelated murder and robbery. The confession was inconsistent with the facts of the crime in a number of respects. The defense unsuccessfully attempted to introduce evidence concerning the duration of the interrogation or the individuals who were present in order to show that the minor's confession was not worthy of belief. In reversing the minor's conviction and remanding the cause for a harmless error analysis, the high court rejected the trial court's determination that the issue had been resolved by its earlier finding that the minor had confessed voluntarily. The high court explained that the Due Process Clause and the Confrontation Clause of the Sixth Amendment entitle a criminal defendant to " 'a meaningful opportunity to present a complete defense,' " *id.* at 690, "entirely independent" of the determination of the voluntariness of his or her confession, *id.* at 689. The high court observed that if a jury cannot hear evidence of the circumstances under which a confession is obtained, "the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689.

With those constitutional precepts before us, we turn our attention to whether the district court abused its discretion in

excluding the psychologist's testimony. See *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997) (admission of expert testimony ordinarily within discretion of trial court, and ruling will be upheld absent abuse of discretion).

Expert testimony is admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), if it assists the trier of fact to "understand the evidence or to determine a fact in issue . . . ." In *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), we laid out a four-part test for determining the admissibility of expert testimony: (1) Does the witness qualify as an expert? (2) Is the testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the expert's testimony be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence? In *Reynolds*, the trial court received expert psychological testimony concerning the defendant's impulsive personality, but excluded the experts' conclusions that the defendant's actions were not deliberate and premeditated. In ruling that the trial court had not abused its discretion in excluding the experts' conclusions, we wrote that "a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact," *id.* at 687- 88, 457 N.W.2d at 421, and observed that as the experts had described the defendant's personality, the jury was as qualified as the experts to draw the factual conclusion as to whether, as an impulsive person, the defendant deliberated and premeditated his act. In doing so, we recited the observation by McCormick that "an expert's contribution in litigation 'is the power to draw inferences from the facts which a jury would not be competent to draw. . . .' McCormick on Evidence § 13 at 33 (E. Cleary 3d ed. 1984)." *Id.* at 683, 457 N.W.2d at 418-19.

At least two federal courts have addressed whether it was error to exclude expert testimony relating to the circumstances under which a confession was obtained. The U.S. Court of Appeals in *U.S. v. Shay*, 57 F.3d 126 (1st Cir. 1995), reversed a trial court's decision to exclude expert testimony on

Munchausen's Disease, a mental disorder characterized by extreme pathological lying. The expert would have testified that the defendant's psychological condition would cause him to make statements similar to those in his confession. Holding the exclusion of that testimony erroneous, the *Shay* court wrote that the jury "plainly was unqualified to determine without assistance the *particular* issue of whether [the defendant] may have made false statements against his own interests because he suffered from a mental disorder." (Emphasis in original.) *Id.* at 133. In *U.S. v. Hall*, 93 F.3d 1337 (7th Cir. 1996), the trial court excluded psychiatric testimony that the defendant was easily led and had a propensity for giving false confessions on the ground that it would invade the prerogative of the jury to assess the credibility of witnesses. The appellate court vacated the defendant's conviction and remanded the cause, holding that the trial court "missed the point of the proffer. It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision." *Id.* at 1345.

A number of other states have also addressed the issue. For example, in *State v. Koskela*, 536 N.W.2d 625 (Minn. 1995), the Minnesota Supreme Court held that on the issue of the reliability of the defendant's confession, the trial court had not abused its discretion in ruling that a clinical psychologist could testify as to the nature of schizoid personality disorder, but could not testify as to whether the defendant fit the disorder, as that was a question for the jury. Subsequently, the Minnesota Court of Appeals in *Bixler v. State*, 568 N.W.2d 880 (Minn. App. 1997), held in a postconviction proceeding that if a witness was properly qualified as an expert, it was error for the trial court to exclude expert testimony concerning the defendant's susceptibility to coercion. The court wrote that a defendant must be allowed to challenge the truthfulness of a confession by presenting competent expert evidence demonstrating susceptibility to coercion, noting that such evidence may be crucial to the jury's consideration of why the defendant asserts innocence after having confessed. In *Carter v. State*, 697 So. 2d 529 (Fla. App. 1997), the Florida Court of Appeals reversed a conviction

because of the trial court's exclusion of psychiatric evidence relating to whether the defendant had the mental capacity to knowingly waive his *Miranda* rights. The reviewing court held the ruling to be an abuse of discretion, especially since the prosecution argued to the jury that the defendant " 'knew exactly what was going on' " when he waived his rights and made incriminating statements to police. *Id.* at 534. In a case with a slightly different twist, a Pennsylvania court upheld the admission of expert testimony by the prosecution to the effect that pain medication taken by the declarant while he was giving a statement to police did not affect his cognitive ability. *Com. v. Ellis*, 700 A.2d 948 (Pa. Super. 1997).

Although the Illinois Supreme Court noted in *People v. Gilliam*, 172 Ill. 2d 484, 512-13, 670 N.E.2d 606, 619 (1996), that once a confession is found to be admissible, "the defendant still has the right to present evidence to the jury that affects the credibility or weight to be given the confession," it nonetheless held that the trial court did not abuse its discretion in excluding the proffered testimony of a psychologist that the defendant's desire to protect his family made him especially susceptible to police pressure and created a form of psychological compulsion to confess. The *Gilliam* court reasoned that the concept of testifying falsely to protect one's family was not beyond the understanding of ordinary citizens and was not difficult to understand or explain.

Thus, we reach the question as to whether the district court here abused its discretion in rejecting the psychologist's proffered testimony, which undertook not to tell the jury how to decide the case or what result should be reached on any issue to be resolved by it, but, rather, to explain Buechler's mental state at the time of the recorded confession. While ordinary citizens might understand that drug withdrawal is uncomfortable, without expert evidence ordinary citizens would not be expected to understand that in Buechler's case, withdrawal, combined with his disorders, may have made him suggestible, may have caused him to process information haphazardly, and may have caused him to reach faulty conclusions. Under that state of the record, we must conclude that the district court abused its discretion in excluding the proffered testimony.

The ultimate question therefore becomes whether the erroneous exclusion of the psychologist's testimony was harmless beyond a reasonable doubt. While three witnesses testified that Buechler confessed killing the victim to them, the jury could well have questioned their credibility. Richard Requejo's testimony is particularly problematic, both because he testified in order to avoid being charged with being an accessory to the same murder and because the other suspect to the murder is his brother. Moreover, he described one of the confessions as occurring during an automobile ride with Buechler at a time when Buechler was incarcerated. The mother of Buechler's girl friend made it very clear that she did not like Buechler because of the way he mistreated her daughter.

As there was no physical evidence tying Buechler to the murder, the strongest element of the State's case was Buechler's recorded confession, which was not entirely consistent with the pathologist's findings. The autopsy findings belied Buechler's claims that he had shot the victim in the head and that he had not shot him in the body. The psychologist's testimony would have assisted the jury in determining a crucial issue, Buechler's credibility at trial. The district court's ruling handicapped Buechler in his attempt to adequately present to the jury his theory that the recorded confession was not worthy of belief. Had the jury heard the psychologist's testimony, it need not, but might well have concluded that Buechler falsely confessed.

In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). Given the state of the record, the exclusion of the psychologist's testimony cannot be said to have been harmless beyond a reasonable doubt.

### 2. Failure to Grant Mistrial

Buechler's contention in the second assignment of error that the district court should have sustained his motion for mistrial rests on the State's failure, contrary to a pretrial ruling, to excise from the recorded confession the reference to the fact that police authorities "told [Buechler] the questions [they] wanted to ask [him] on the polygraph."

Since the State cannot, in the new trial required by our conclusion in part III, subpart 1(c), above, again inadvertently fail to strike that reference, we need write no more on this topic.

### 3. Accounting for Time Served

The requirement of a new trial also obviates any need to discuss any error in accounting for the time Buechler served prior to sentencing.

## IV. JUDGMENT

Because of the district court's error in excluding the psychologist's testimony, its judgment is, as first noted in part I, reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## MARGIE CUNNINGHAM, APPELLEE, V. LEISURE INN AND USF&G COMPANY, APPELLANTS.

573 N.W.2d 412

Filed January 9, 1998. No. S-97-266.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. **Workers' Compensation: Rules of Evidence: Due Process: Appeal and Error.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; subject to the limits of constitutional due process, 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.
4. **Workers' Compensation.** The compensation court does not have the right to establish rules of evidence, procedure, or discovery that are more restrictive or onerous than the rules applicable to the trial courts in this state.
5. **Pretrial Procedure.** Before the ultimate sanction of prohibiting a party from introducing otherwise admissible evidence is imposed in civil cases, all affected parties must have received notice and an opportunity to be heard on the merits.

Appeal from the Nebraska Workers' Compensation Court. Reversed.

Ronald E. Frank and Kelly K. Brandon, of Sodoro, Daly & Sodoro, for appellants.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellee.

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

PER CURIAM.

This is an action filed in the Nebraska Workers' Compensation Court by the plaintiff, Margie Cunningham, against her employer, Leisure Inn, and its insurance carrier, USF&G Company. Cunningham sought compensation for personal injury she allegedly sustained while in the performance of her duties for Leisure Inn. The trial judge of the compensation court dismissed Cunningham's petition. A review panel of the compensation court reversed the trial judge's order dismissing Cunningham's petition. Leisure Inn and USF&G now appeal the decision of the compensation court's review panel.

In August 1995, Cunningham worked in housekeeping for Leisure Inn in Omaha, Nebraska. Her duties included cleaning guest rooms and making beds. On August 23, while she was at work, Cunningham was bending over to make a bed when she experienced a pain in her back which traveled down her right leg. Later that day, Cunningham went to the emergency room at Bergan Mercy Hospital where she was treated and released for her injury. Up to the date of trial, Cunningham had not returned to work for Leisure Inn.

Cunningham filed a petition in the Workers' Compensation Court on September 28, 1995, seeking compensation from Leisure Inn for her injury of August 23.

At trial, Cunningham offered exhibit 7, which contained two medical reports, one prepared by Dr. Daniel McKinney and the other prepared by Dr. Satish Mediratta. The reports contain statements by each doctor stating his belief that Cunningham's injuries were the result of her work with Leisure Inn on August

23, 1995. Leisure Inn and USF&G objected to exhibit 7 because it was not timely disclosed under Workers' Comp. Ct. R. of Proc. 4 and 10 (1997).

Rule 4D is a discovery rule which states, in pertinent part:

> No party will be allowed to introduce documentary evidence not timely identified or exchanged, or to amend forms, answers, medical reports or lists of witnesses within 30 days of the date of trial, unless the offering party shows good cause why the late offering of such evidence should be excused.

Rule 10 is an evidentiary rule which, in pertinent part, states:

> The Nebraska Workers' Compensation Court is not bound by the usual common law or statutory rules of evidence; and accordingly, with respect to medical evidence on hearings before a single judge of said court, written reports by a physician or surgeon . . . may, at the discretion of the court, be received in evidence in lieu of or in addition to the personal testimony of such physician or surgeon . . . .
>
> Each party shall serve all reports of a physician or surgeon . . . relevant to the case in possession of the party upon each opposing party. The service shall be received at least 30 days prior to the time set for hearing if the party intends to offer the report as evidence.

It is undisputed that Cunningham never disclosed the two reports to Leisure Inn and USF&G before trial. The trial judge sustained Leisure Inn and USF&G's objection to exhibit 7. Rather than request a continuance to comply with rules 4 and 10, Cunningham chose to proceed with trial. Nevertheless, the judge did offer a continuance to Cunningham, which was refused. After Cunningham's testimony had been heard, the court allowed her, pursuant to rule 4, to show "good cause" as to why exhibit 7 had not been timely exchanged. Cunningham stated that she did not have the funds available to pay for the report. The trial judge found Cunningham's reason for the delay insufficient to show "good cause" under rule 4.

The trial judge entered an order of dismissal on April 9, 1996, stating that Cunningham had failed to meet her burden of proof with respect to the issue of causation.

Cunningham filed an application for review to a review panel of the Workers' Compensation Court, alleging that the trial judge had abused his discretion in excluding exhibit 7. The review panel reversed the trial judge's order of dismissal and remanded the matter on February 7, 1997. The review panel, in light of our recent decisions in *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997), and *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997), ordered the trial court "to conduct such proceedings as are necessary to determine whether the requisites for due process have been met sufficient to admit Exhibits [sic] 7."

Leisure Inn and USF&G appealed the review panel's order to the Nebraska Court of Appeals. We granted Leisure Inn and USF&G's petition to bypass.

Leisure Inn and USF&G assign as error that the Workers' Compensation Court review panel abused its discretion and erred in its determination within the order dated February 7, 1997, providing that other proceedings need to be conducted on remand to determine whether the standards of due process were met with respect to exhibit 7.

Pursuant to 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. *Acosta v. Seedorf Masonry, Inc., ante* p. 196, 569 N.W.2d 248 (1997); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Acosta, supra*; *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997), *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997). With respect to questions of law in workers' compensation cases, the appellate court is obligated to make its own determination. *Acosta, supra*; *Sheridan, supra*; *Winn, supra.*

The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; subject to the limits of constitutional due process, 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. *Sheridan, supra*; *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). However, the compensation court does not have the right to establish rules of evidence, procedure, or discovery that are more restrictive or onerous than the rules applicable to the trial courts in this state. *Zessin, supra*; *Phillips, supra*.

The compensation court's review panel based its decision to remand upon its review and consideration of this court's rulings in *Zessin, supra*, and *Phillips, supra*. Both opinions were filed after the instant case was decided by the trial judge and during the pendency of review by the review panel. We will now review these decisions to assist us in the present matter.

In *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997), the trial judge of the compensation court sustained the employer's rule 4 objections to expert medical testimony of two doctors regarding causation of the employee's injury. The trial judge found that the doctors' depositions, which contained testimony of their opinions as to causation, were not timely disclosed under rule 4, and therefore, they were precluded from testifying as to causation at trial.

On appeal, we reversed and explained that before the ultimate sanction of prohibiting a party from introducing otherwise admissible evidence is imposed in civil cases, all affected parties must have received notice and an opportunity to be heard on the merits. See, e.g., Neb. Ct. R. of Discovery 37(a) (rev. 1996). *Phillips, supra*. We held that substantive sanctions regarding discovery and other pretrial procedural matters in the compensation court should be subject to at least the same procedural safeguards as comparable sanctions for alleged discovery and pretrial procedural violations in Nebraska's civil courts. *Id.* However, as we noted, rule 4D does not contain such a due process requirement before the compensation court may impose the sanction of prohibiting a witness' testimony based on a rule

4 objection by either party. We disapproved of the compensation court's application of rule 4D to prohibit expert testimony in the absence of adequate procedural safeguards equal to those utilized in the trial courts of this state. We therefore concluded that the compensation court " 'acted without or in excess of its powers' " in excluding the expert testimony regarding causation pursuant to rule 4 without the benefit of hearing both parties on the merits. *Phillips*, 251 Neb. at 597, 558 N.W.2d at 807.

In *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997), we relied on *Phillips* in upholding the compensation court's overruling of the employer's rule 4 objection to expert deposition testimony regarding causation offered by the employee. The employer claimed that the deposition testimony went beyond the scope of the opinions expressed in the expert's rule 10 report and should be excluded from trial. However, the trial court overruled the employer's rule 4 objection, finding that good cause existed for receiving the deposition testimony because of a prior agreement between the parties.

Leisure Inn and USF&G argue that Cunningham was afforded due process at trial with regard to exhibit 7. Cunningham asserts that in *Phillips, supra*, and *Zessin, supra*, we found rules 4 and 10 to be unconstitutional. In our review of those cases, we do not find any support for Cunningham's contention that rules 4 and 10 were held to be unconstitutional.

In determining whether to affirm, modify, reverse, or set aside a judgment of the compensation court review panel in the instant case, we review the findings of the single judge who conducted the original hearing. See, *Acosta v. Seedorf Masonry, Inc., ante* p. 196, 569 N.W.2d 248 (1997); *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997).

A review of the record plainly shows that the trial judge gave Cunningham an opportunity to show good cause as to why exhibit 7 was not timely disclosed. Having heard Cunningham's argument on the matter, the trial judge ruled that she had failed to show good cause for the delay in disclosure of exhibit 7 and allowed the previous ruling to stand. The record also shows that Cunningham did not request a continuance, knowing that she could have, in order that exhibit 7 would comply with the pretrial discovery requirements. Cunningham's counsel stated to

the compensation court, "I believe that some of the [Nebraska] Court of Appeals cases have said that when there's an objection on the disclosure requirements, the remedy for the Court is to get a continuance. I'm not asking for that today."

Courts in many jurisdictions, including Nebraska, have held that a continuance is ordinarily the proper method for dealing with a claim that there has been a failure to disclose in a timely manner. See, *Brown v. Hansen*, 1 Neb. App. 962, 510 N.W.2d 473 (1993); *Whitney v. Buttrick*, 376 N.W.2d 274 (Minn. App. 1985). See, also, *State v. Higginbotham*, 110 Wis. 2d 393, 329 N.W.2d 250 (Wis. App. 1982); *Gerhardt v. D.L.K.*, 327 N.W.2d 113 (N.D. 1982).

We find that the requirements of due process mandated by our decisions in *Phillips, supra*, and *Zessin, supra*, were sufficiently met by the trial judge regarding the exclusion of exhibit 7 in this case. Having found no abuse of discretion by the trial judge, we reverse the decision of the Workers' Compensation Court review panel and reinstate the order of dismissal of the compensation court trial judge in this matter.

REVERSED.

WHITE, C.J., dissenting.

The majority today denies appropriate compensation to Cunningham, an injured employee, because she did not have the money to pay a physician for a timely medical report.

The appropriate question to be decided by the trial court was whether the report was either prejudicial or a surprise to Leisure Inn and USF&G, and, if so, whether the relief, if any, would have been a continuance.

The denial of deserved relief because of a lack of funds is a shocking abuse of due process. I dissent.

# IN RE ESTATE OF HANS A. ANDERSEN, DECEASED. DONALD G. ANDERSEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF HANS A. ANDERSEN, DECEASED, APPELLANT, V. LYMAN-RICHEY CORPORATION, APPELLEE.

572 N.W.2d 93

Filed January 16, 1998. No. S-96-197.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from a trial court.
2. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.
3. **Judgments: Jurisdiction.** A ruling made in the absence of subject matter jurisdiction is a nullity.
4. **Federal Acts: Insurance: States.** The federal Employee Retirement Income Security Act preempts any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.
5. **Federal Acts: Insurance: Jurisdiction: Courts.** The district courts of the United States shall have exclusive jurisdiction of civil actions under the federal Employee Retirement Income Security Act brought by the Secretary of Labor or by a participant, beneficiary, or fiduciary.
6. **Federal Acts: Insurance: Words and Phrases.** A law "relates to" an employee benefit plan, within the meaning of the federal Employee Retirement Income Security Act preemption provision, if it has connection with or reference to such plan.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and INBODY, Judges, on appeal thereto from the County Court for Douglas County, JANE H. PROCHASKA, Judge. Affirmed.

Thomas F. Hoarty, Jr., and Robert C. McGowan, Jr., of McGowan & Hoarty, for appellant.

Jeffrey D. Toberer and Jennifer W. Jerram, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

WHITE, C.J.

Appellee, Lyman-Richey Corporation, petitions for further review of a memorandum decision of the Nebraska Court of

Appeals, filed May 20, 1997, which directed the Douglas County Court to dismiss Lyman-Richey's claim against the estate of Hans A. Andersen, holding that the county court lacked subject matter jurisdiction.

Hans A. Andersen (Andersen) and Lee Andersen were married in January 1956. Lee Andersen filed a petition for divorce from Andersen in Douglas County District Court in January 1958. The district court entered a decree of dissolution in February 1958. Shortly after the divorce decree was entered, Lee Andersen resumed living with Andersen. She testified that her attorney at the time told her that if she did so, the parties were still married, since 6 months had not passed since the decree. The two continued to live together for nearly 38 years.

In 1965, Andersen completed an application for employment with Lyman-Richey. On his application, Andersen checked a box indicating that he was divorced. In 1985, Andersen applied for health insurance benefits from a group plan through Lyman-Richey. Lyman-Richey offered health and accident coverage as well as prescription drug benefits to spouses and other dependents of its employees. The insurance plan is administered by Mutual of Omaha. Andersen listed Lee Andersen as his spouse and dependent on the application. Before Andersen retired on May 31, 1991, he filed a retirement benefits package application with Lyman-Richey on May 4, listing Lee Andersen as his spouse. Lee Andersen later elected to continue her health benefits coverage. From 1982 until the end of 1993, Lyman-Richey paid out a total of $156,431.56 in insurance benefits under the plan for Lee Andersen.

In April 1991, Andersen contacted attorney Robert Peterson to prepare a last will. Peterson wrote Andersen a letter that same month advising Andersen that his investigation revealed Andersen and Lee Andersen were no longer married. Peterson prepared a will for Andersen, executed May 8, 1991, which recited that Andersen was a single man, having been divorced in 1958. It was during income tax time in 1993 that Andersen told Lee Andersen for the first time that they were not married.

Andersen died February 7, 1995. His son, Donald G. Andersen (appellant), was appointed personal representative of the estate. On or about April 15, Lee Andersen informed

Lyman-Richey that she and Andersen were not married during the time Lyman-Richey paid her benefits. The claims bar date on Andersen's estate was April 17. Lyman-Richey filed an application for leave to file claim out of time on May 11. Following a hearing on July 20, the Douglas County Court granted Lyman-Richey leave to file a claim out of time against Andersen's estate.

Lyman-Richey filed a claim on July 26, 1995, for $151,964.83, the net amount in benefits it paid to Lee Andersen from 1982 through 1993. The claim was disallowed by appellant. Lyman-Richey then filed a petition for allowance of claim, wherein it alleged that Andersen had fraudulently misrepresented his marital status on his benefits application. Lyman-Richey also filed a motion for summary judgment on its claim. The county court granted summary judgment in favor of Lyman-Richey in the amount of $151,665.33, and appellant then appealed to the Court of Appeals.

On appeal, appellant claimed that the Douglas County Court lacked subject matter jurisdiction to adjudicate Lyman-Richey's claim. Both parties acknowledged that the benefits plan was governed by the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. (1994). In its memorandum opinion, the Court of Appeals found that Lyman-Richey's state-law tort claim of fraudulent misrepresentation was within the exclusive jurisdiction of the federal courts, since it related to the employee benefits plan. Thus, the Court of Appeals held that Lyman-Richey's claim was explicitly preempted by the language of ERISA at § 1144(a). Accordingly, the Court of Appeals remanded the cause to the Douglas County Court with directions to dismiss. We granted further review.

Lyman-Richey assigns as error the holding that the county court lacked subject matter jurisdiction over its claim against the estate and the dismissal of a claim based upon a fraudulent misrepresentation by an employee to obtain health insurance benefits from his employer.

The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from a trial court. *State v. Gibbs, ante* p. 241, 570 N.W.2d 326 (1997); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995).

Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *State v. Jacques, ante* p. 247, 570 N.W.2d 331 (1997); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). A ruling made in the absence of subject matter jurisdiction is a nullity. *Billups v. Scott, ante* p. 293, 571 N.W.2d 607 (1997); *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989).

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." § 1144(a). The federal act also states that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary [of Labor] or by a participant, beneficiary [or] fiduciary . . . ." § 1132(e)(1).

There is no dispute that the benefits plan in this case is governed by ERISA. Therefore, we are presented with a question of law as to jurisdiction, which requires us to reach a conclusion independent of the Court of Appeals. *Gibbs, supra*; *Chrysler Corp., supra.*

The question before us is whether Lyman-Richey's state common-law tort claim of fraudulent misrepresentation "relate[s] to" its employee benefit plan within the meaning of ERISA's preemption clause.

The U.S. Supreme Court has held that the "relate to" provision of ERISA's preemption clause has " 'a "broad scope," . . . and an "expansive sweep," . . . it is "broadly worded," . . . "deliberately expansive," . . . and "conspicuous for its breadth," . . . .' " (Citations omitted.) *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 117 S. Ct. 832, 837, 136 L. Ed. 2d 791 (1997) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)). A law "relates to" an employee benefit plan within the meaning of the ERISA preemption provision if it has connection with or reference to such plan. *Dillingham Constr., N.A., Inc., supra.*

Common-law tort and contract claims have been held to fall within ERISA's broad preemption provision. See, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 43, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (ERISA preempts "state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan"). See, also, *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436 (8th Cir. 1997) (state-law claim for tortious mishandling of benefit claim preempted); *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997) (fraudulent nondisclosure and misrepresentation of health benefits claim preempted); *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994) (state-law claim of fraudulent misrepresentation preempted), *aff'd* 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996).

A state common-law claim is preempted if the complaint makes specific reference to, and indeed is premised on, the existence of a plan. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). "Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan." 498 U.S. at 140.

The record shows that Lyman-Richey's petition for allowance of claim makes specific reference to the benefits plan and claims that Andersen fraudulently misrepresented his marital status in applying for benefits under the plan. Determining whether Andersen defrauded the plan inevitably will require the court to examine the terms of the plan. Therefore, Lyman-Richey's claim relates to the plan under the meaning of ERISA's preemption clause, and the county court is without jurisdiction to decide the merits of Lyman-Richey's claim.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

# STATE OF NEBRASKA, APPELLEE, V. RODNEY R. CHITTY, APPELLANT.

571 N.W.2d 794

Filed January 16, 1998. No. S-96-334.

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. **Motions to Suppress: Probable Cause: Appeal and Error.** In ruling on a motion to suppress, once the determinations of reasonable suspicion and probable cause have been reviewed de novo, an appellate court reviews the trial court's findings of fact, giving due weight to the inferences drawn from those facts by the trial judge.
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 all the circumstances.
4. **Police Officers and Sheriffs.** A court's determination as to whether compliance with an officer's request is voluntary is a question of fact.
5. **Search and Seizure: Duress.** To be effective, a consent to search must be a free and unconstrained choice and not the product of a will overborne. The consent must be given voluntarily and not as a result of duress or coercion, whether express, implied, physical, or psychological.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the District Court for Hall County, JAMES LIVINGSTON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

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

WRIGHT, J.

The State of Nebraska petitions for further review of a Nebraska Court of Appeals decision which reversed a district

court's conviction of Rodney R. Chitty for possession of a controlled substance (methamphetamine). See *State v. Chitty*, 5 Neb. App. 412, 559 N.W.2d 511 (1997).

## 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. 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. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997); *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 14, 1995, Officer Charles Headley of the Grand Island Police Department was called to investigate a burglary. Based upon the victim's complaint, one individual was later arrested in connection with the incident. The individual arrested admitted that he was with another person.

Following his first contact with the victim, Headley was called back to the victim's residence in response to the victim's report of a suspicious person in the area. The description from the record indicated a male wearing a jean jacket and blue jeans. A full description of the alleged coperpetrator had not been provided by the person arrested.

Between 12:47 and 12:50 p.m., Headley saw a person later determined to be Chitty walking north two blocks from the site of the occurrence of the burglary. Before making contact, Headley observed Chitty from Headley's patrol car for one block. As Chitty turned west, Headley approached from behind. Headley pulled his vehicle alongside Chitty without activating the vehicle's overhead lights or addressing Chitty over the vehicle's "P.A. system."

Headley exited the patrol car and approached Chitty at a normal pace. Headley did not display a weapon or baton. As he came up to Chitty, who was still walking, Headley said,

" 'Excuse me, sir. Do you have a minute?' " Headley then asked Chitty his name, and he responded, "Rodney Chitty." Chitty said that he did not have an identification card or driver's license.

Headley told Chitty that he was investigating a suspicious person who had burglarized a home in the area and that Chitty matched the description of the suspicious person given by the victim. Chitty responded that "he'd heard about it." Headley stated that he considered this a surprising response, given the recency of the burglary.

Headley testified at the suppression hearing that when he asked Chitty what he was doing, Chitty said he was visiting a girl friend. When asked the woman's name and address, Chitty "changed his story," saying he was coming from a friend's house. It was unclear whether Chitty said he was visiting "Larry" or "Jerry" or "Larry and Jerry," but the record does indicate that he did not have the friend's or friends' address and that he did not know the person's or persons' last names. When asked where Larry and/or Jerry lived, Chitty pointed west down the street, which was the direction he was headed and not the direction from which he had come. Headley stated that during the conversation, Chitty seemed "[n]ervous, a little jumpy."

Upon the arrival of two other officers, Headley told Chitty he was going to speak to the victim. As Headley left, Chitty sat on the sidewalk. When Headley returned, he explained to Chitty that he fit the description of the individual who was called in as a suspicious person and that the police had earlier arrested another person who had admitted that he had been with another individual. Due to the inconsistencies in Chitty's story, Headley asked Chitty if they could speak with his friend or friends to confirm that Chitty had visited. Headley did not stop Chitty from leaving and did not tell him he could not leave. Chitty did not ask to leave. Headley asked Chitty if they could get into the patrol car due to the fact that it was raining and make a quick trip and speak with Larry and/or Jerry. Chitty responded that he had no problem with the officer's request.

Prior to getting in the car, Headley informed Chitty that it was departmental policy that anybody who entered a patrol car must be patted down for the officer's safety. Headley then asked

Chitty if he had any weapons, and Chitty said no. Headley stated that he still needed to check, to which Chitty said that "this was bullshit." Headley believed that Chitty said this because he was "upset that I didn't believe him, when he said that he had no weapons on him." Chitty never refused the pat-down search.

Headley explained that as he conducted the pat-down search, he had to feel underneath the jean jacket Chitty was wearing because it was fairly thick and that he could not otherwise identify a weapon smaller than a gun. During the pat down of Chitty's shirt, Headley felt a pack of cigarettes in his shirt pocket and testified that he felt something under the pack of cigarettes but could not tell what it was. Upon detecting the object, he asked Chitty what was in his breast pocket. Chitty responded that it was cigarettes, to which Headley said, "Well, I feel the cigarettes, but there is something underneath the cigarettes that I'm feeling." Headley testified during direct examination at the suppression hearing that he then "asked [Chitty] if he could show [him] what was in his pocket where his cigarettes were located." On cross-examination, Headley testified as follows:

> A. I told him I was — you know, show me what that item is below his pack of cigarettes; I wanted to see it.
>
> Q. All right. You asked him what's in there; he says "Cigarettes," and you said, "Show me what's in your pockets?"
>
> A. Well, he responded by it was cigarettes, that is correct, but I knew that that item below the cigarettes was not a cigarette.
>
> Q. Okay. Then you said, "Show me what's in the pocket?"
>
> A. Yes, sir.

On redirect examination, Headley testified as follows:

> Q. Officer, [Chitty's attorney] had asked you on cross-examination and had alluded that you informed Mr. Chitty you wanted him to show you what he had inside his pocket. Did you demand that or did you ask him what was in the pocket?
>
> A. I just — I had asked him what was in the pocket.

Then, on recross-examination, Headley testified as follows:

Q. And then you said, "Take — take it out?" You wanted — you felt something below the cigarettes and you told him to take that out of his pocket?

A. Yes, sir.

Q. Okay. And he did so?

A. Or asked him to show it to me actually what that was.

During the trial, on direct examination, Headley again testified that he "asked [Chitty] if he could show" him the other object behind the cigarettes. On cross-examination, when asked if he had told Chitty to remove the item from his pocket, Headley responded that no, he had asked Chitty to do so. At that point, Chitty's attorney confronted Headley with his prior testimony on cross-examination at the suppression hearing:

Q. Do you recall making that testimony?

A. Asking him to show me the item.

Q. Do you recall the testimony I just read to you?

A. Yes.

Q. And in that testimony, you didn't say you asked; you said, "Show me what's in the pocket," is that correct?

A. Just show me.

Q. You said, "Show me what's in the pocket?"

A. That is correct.

Q. Okay. Those were your exact words, as you recall them? Those were your exact words, as you recall them?

A. To the best that I can recollect, sure.

Q. "Show me what's in the pocket?"

A. Show.

The district court denied Chitty's motion to suppress. The court's journal entry, filed following its order, stated:

1. The stop of the defendant by Officer Headley was permissible to converse with the defendant concerning a burglary occurring in the area. After conferring with the defendant concerning the burglary, suspicions were raised in the police officer's mind and the police officer's testimony was that in the rain the police officer requested the defendant come with him to a place to check out the defendant's "alibi" and the defendant concurred and the

officer, prior to placing the defendant in the police cruiser, pursuant to what the officer testified as police policy, conducted a frisk or pat-down of the defendant prior to the defendant entering the police cruiser. The defendant submitted to the pat-down, although he uttered a curse word, and in the pat-down, the officer did not detect any weapons but did detect a suspicious-feeling article in the shirt pocket of the defendant and asked the defendant what the object he felt was and asked the defendant to show him the object and the defendant became angry, threw cigarettes in the pocket on the sidewalk and then threw the other item in his pocket in the air and started walking off cursing and swearing. The item the police officer retrieved, which was thrown in the air, is the item in controversy on the motion to suppress.

2. As previously stated, the officer had probable cause to stop and talk to the defendant. When the officer was going to take the defendant to check his alibi, the officer requested the defendant to comply with a policy of being pat searched for weapons, which the defendant complied with. The request and policy of the police department and this police officer to pat search somebody for weapons prior to somebody entering the police cruiser is a valid policy for the officer's protection and safety. The defendant could have indicated to the police officer very easily that he did not wish to enter the police cruiser and be pat searched and the Court may only assume that that would not occur at that point.

3. After the pat search, the officer felt something suspicious and requested the defendant to show him the article. What the defendant did was show him the article. The question becomes whether at that point in time that the officer requested the defendant to show him the article whether the defendant was in police custody through either the application of physical force or the defendant's submission to an officer's assertion and [sic] authority. California v. Hodari D.[,] 499 U.S. 621[, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)]. If the defendant would have declined to show the police officer what the object was

and the police officer would have arrested the defendant or seized the object, the ruling would have been different than this ruling. The defendant, however, became upset and voluntarily took the object out of his pocket, threw it in the air, and walked off cursing and swearing according to the evidence. The defendant had the option of not producing what was in his pocket at the request of the officer. The question is what was the situation concerning defendant's submission to the authority of the police at that time and this Court feels that that is answered by the defendant's throwing the item up in the air and walking away cursing and swearing. The officers did not seize the item in the pocket from the defendant. The defendant voluntarily gave the officers the item contained in his pocket and walked away. By the defendant's walking away, it shows to this Court the thought of the defendant that he was not coerced but rather made a free choice, although it might ultimately be to the defendant's detriment.

4. This Court is aware of Minnesota v. Dickerson, [508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)], but in that case, the officer actually seized the item from the pocket of the defendant. In this particular case, the officer did not seize the item. Because the officer was in contact with and frisked the defendant for good reason and the defendant consented emptying his pockets, the motion to suppress is overruled.

On appeal, the Court of Appeals found that at the time that Headley offered to take Chitty to his friend's or friends' house to get Chitty's alibi information, Headley had a reasonable suspicion that Chitty was involved in some criminal activity. As a result, Headley was then engaged in an "investigative stop" pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and was permitted to pat down Chitty for the purpose of securing Headley's safety as an officer.

The Court of Appeals found that the stop itself was lawful as a voluntary police-citizen contact, at least in the infancy of the stop, and then as a *Terry* stop as it progressed. The court held that Headley's stop of Chitty, continuing through his request for a visit with Larry and/or Jerry, was lawful and concluded that in

the instant case, the evidence was such that it was police department policy to search a suspect before placing the suspect in a patrol car and that since Headley was going to have his back to Chitty while in the vehicle or at least be otherwise occupied with driving the vehicle, it was reasonable to conduct a brief pat-down search for weapons before placing Chitty in a police vehicle. Therefore, the court concluded that the pat-down search that was conducted was reasonable and did not offend the Fourth Amendment to the U.S. Constitution.

The Court of Appeals then found that there was no evidence that the object which Headley felt behind the pack of cigarettes was perceived to be a weapon, justifying its seizure under *Terry*, nor was it immediately discernible during the course of the pat-down search that it was contraband. Relying on Headley's testimony that he "couldn't tell what it was by feel," the court held that the seizure of the methamphetamine could not be sustained as a part of a *Terry* pat-down search and did not come within the "plain feel" exception to the restrictions of the *Terry* pat-down search as set forth in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The court stated:

> In the case at hand, the evidence shows that the officer felt the object, did not know what it was, and told Chitty: "'Show me what's in the pocket.'" This is clearly an assertion of the officer's authority. When Chitty removed the methamphetamine and threw it, he had submitted to the officer's authority. The legal conclusion that this was a consensual and voluntary "emptying [of] his pockets" rather than a seizure simply cannot be sustained.

*State v. Chitty*, 5 Neb. App. 412, 423-24, 559 N.W.2d 511, 519 (1997).

The Court of Appeals found that the district court should have suppressed the evidence of the methamphetamine and that without the evidence, there was no evidence upon which to sustain the conviction, and, therefore, the conviction was reversed. See *id.*

## ASSIGNMENTS OF ERROR

The State assigns as error that the Court of Appeals erred in resolving a conflict in the evidence and in making a factual determination that Headley demanded to see the contents of

Chitty's pocket, thereby misapplying the standard of review applicable to consensual searches.

## ANALYSIS

We granted further review to clarify the scope of review in this case. The issue decided by the trial court was whether Chitty voluntarily gave the officers the item contained in his pocket. This was a factual determination made by the trial court and as such was subject to our review as to whether this finding of fact was clearly erroneous.

In reversing the trial court's "legal conclusion" that Chitty had voluntarily emptied his pockets, the Court of Appeals relied on *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), which states that determinations of reasonable suspicion for investigative stops and probable cause to perform warrantless searches should be reviewed de novo by appellate courts. The Court in *Ornelas* "hasten[ed] to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." 517 U.S. at 699.

In *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997), we thus explained that 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. Once the determinations of reasonable suspicion and probable cause have been reviewed de novo, the appellate court reviews the trial court's findings of fact, giving due weight to the inferences drawn from those facts by the trial judge. In making this review, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and " '[v]oluntariness is a question of fact to be determined from all the circumstances.' " *Ohio v. Robinette*, 519 U.S. 33, 40, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.

Ct. 2041, 36 L. Ed. 2d 854 (1973)). See, also, *U.S. v. Payne*, 119 F.3d 637 (8th Cir. 1997) (voluntariness is reviewed for clear error). Likewise, a court's determination as to whether the compliance with an officer's request is voluntary is a question of fact. *S.L.R. v. State*, 652 So. 2d 978 (Fla. App. 1995). The trial court made a factual finding that pursuant to Headley's request, Chitty voluntarily took the methamphetamine out of his pocket and threw it in the air and that the act of revealing the methamphetamine was not coerced, but, rather, was Chitty's free choice. Because voluntariness is a question of fact, we review whether the trial court's finding is clearly erroneous. See *State v. Ready, supra.* In making this determination, 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 witnesses. *Id.*

In *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996), we considered whether the right to be free from an unreasonable search and seizure had been waived by a consent to a search. We held that to be effective, a consent must be a free and unconstrained choice and not the product of a will overborne. The consent must be given voluntarily and not as a result of duress or coercion, whether express, implied, physical, or psychological. 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. *Id.*

We conclude that the trial court's determination was not clearly erroneous. The evidence supports a finding that at the time of Headley's request, Chitty felt free to leave. As the trial court pointed out, the fact that Chitty later started to walk off without being stopped showed that Chitty thought he was not coerced and made a free choice. There is also evidence to support the trial court's finding that Headley's statement was a request rather than a demand.

Since we do not reweigh or resolve conflicts in the evidence and take into consideration that the trial court observed the witnesses, we find that it was not clearly erroneous for the trial court to find that Chitty's relinquishment of the methamphetamine was voluntary and not the product of a will overborne. We therefore reverse the decision of the Court of

Appeals, and the cause is remanded to that court with directions to reinstate the conviction and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., dissenting.

I respectfully dissent. The circumstances under which the defendant herein, Rodney R. Chitty, was inveigled into agreeing to enter the police vehicle and subsequently patted down rendered the search involuntary. See *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996) (questioning of defendant while being transported to hospital in police vehicle after being told accident had to be investigated rendered such questioning custodial interrogation).

As a consequence, the trial court's finding that Chitty voluntarily reached inside his shirt pocket to produce the contraband is clearly wrong. I would therefore affirm the judgment of the Court of Appeals.

WHITE, C.J., and STEPHAN, J., join in this dissent.

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## HALL COUNTY PUBLIC DEFENDERS ORGANIZATION (HCPDO), APPELLEE, V. COUNTY OF HALL, A POLITICAL SUBDIVISION, AND THE HALL COUNTY BOARD OF SUPERVISORS, APPELLANTS.

571 N.W.2d 789

Filed January 16, 1998. No. S-96-594.

1. **Commission of Industrial Relations: Appeal and Error.** The standard of review by the Nebraska Supreme Court of orders and decisions of the Nebraska Commission of Industrial Relations is whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
3. **Employer and Employee: Words and Phrases.** Neb. Rev. Stat. § 48-801(4) (Reissue 1993) of the Industrial Relations Act defines employer as "the State of Nebraska or any political or governmental subdivision of the State of Nebraska" and employee as including "any person employed by any employer."
4. **Employer and Employee.** Several nominally separate business entities are considered to be a single employer where they compose an "integrated enterprise." The controlling criterion in making this determination is whether there are interrelations of operations, common management, and centralized control of labor relations.

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded with directions to dismiss.

Jerry L. Pigsley, of Harding, Shultz & Downs, and Jerom E. Janulewicz and Mark J. Young, Deputy Hall County Attorneys, for appellants.

Edward F. Pohren, of Dwyer, Smith, Grimm, Gardner, Lazer, Pohren & Rogers, for appellee.

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

CONNOLLY, J.

The appellee, Hall County Public Defenders Organization (HCPDO), filed an election petition with the Nebraska Commission of Industrial Relations (CIR), seeking an election recognizing the HCPDO as the bargaining unit for the deputy public defenders in the Hall County public defender's office. Although Hall County and the Hall County Board of Supervisors were named as respondents, Gerard A. Piccolo, the Hall County public defender, was not named. The CIR granted the election, and the county appeals, contending that the CIR erred in various respects, including not finding that Piccolo was a necessary party. Because there are issues regarding wages and working conditions over which both the county board and Piccolo have control, we conclude that Piccolo is a necessary party and reverse, and remand with directions to dismiss.

## BACKGROUND

During the 1995-96 budget process, Piccolo sought wage increases for the four deputy public defenders in his office in order to equalize the wages of the deputy public defenders with the wages of attorneys in the Hall County Attorney's office. The county board refused the wage increases. As a result, the four deputy public defenders filed an election petition with the CIR, seeking an election to recognize the HCPDO as their bargaining unit.

The county refused to recognize the HCPDO as a bargaining unit and answered with three affirmative defenses: (1) Piccolo, as the employer of the deputy public defenders, was a necessary

party to the action; (2) the showing of interest authorizations signed by the deputy public defenders were invalid because Piccolo was involved in seeking union representation; and (3) the petition did not exclude supervisors from the bargaining unit.

The record indicates that Piccolo receives operating policies, personnel policies, and budget requirements from the county board. However, the record also indicates that Piccolo is not required to follow the personnel policies that he receives. For example, Piccolo has chosen not to use the performance evaluations and other documents that are suggested by the county board. In addition, some items, such as the policies procedure manual, are made and adopted by the county officials, not the county board. Piccolo also withdrew his office from representing paternity and child support cases without consulting the county board.

Piccolo testified that the county sets the salaries for the employees in his office and that the county board had denied his request for an increase in salaries. Piccolo also testified that the county board has traditionally given the elected public defender a lot of discretion in determining office policies but that he believes that technically the county has the power to set the working conditions, wages, and benefits of the employees in his office.

Robert Leslie, a member of the county board, testified that the public defender's office is subordinate to the county board by the amount of money that is budgeted and that this was the only control the county board had over the office. Leslie further testified that the county board has not hired, fired, transferred, promoted, laid off, recalled, rewarded, disciplined, or assigned work to the employees of the public defender's office or made recommendations to the elected public defender regarding these things. Leslie also testified that the county fixes the salary budget for the public defender's office, but that the public defender, Piccolo, decides how to apportion that budget among the deputies in his office. Leslie further testified that prior to the filing of the election petition, he was unaware of a possible difference in statutes regarding the setting of salaries for the public defender's office as compared to the offices of other elected officials.

The CIR concluded that Piccolo was not a necessary party to the action because of this court's holding in *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985), and Neb. Rev. Stat. § 23-3403 (Reissue 1991). The CIR, relying on *Sarpy Co. Pub. Emp. Assn.*, determined that Piccolo did not have the authority to set salaries for his deputies, making the county board the appropriate body to represent the employer in the bargaining process. Based on its findings, the CIR granted an election, holding that the HCPDO had made a sufficient showing of interest to entitle it to an election and that the appropriate bargaining unit would be all Hall County assistant public defenders.

## ASSIGNMENTS OF ERROR

The county assigns that the CIR erred in (1) determining that two deputy public defenders were not supervisors and including them in the same bargaining unit as employees they supervised, (2) deciding that the showing of interest authorizations executed by the deputy public defenders were not invalid because of Piccolo's involvement in seeking union representation of the employees in his office, and (3) deciding that Piccolo is not a necessary and indispensable party respondent in the case. Because of our conclusion, we address only the necessary party issue.

## STANDARD OF REVIEW

The standard of review by this court in reviewing a decision of the CIR is whether the CIR's order is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *Nebraska Pub. Emp. v. City of Omaha*, 235 Neb. 768, 457 N.W.2d 429 (1990); *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Continental Western Ins. Co. v. Swartzendruber, ante* p. 365, 570 N.W.2d 708 (1997); *Wolgamott v. Abramson, ante* p. 350, 570 N.W.2d 818 (1997); *Whalen v. U S West Communications, ante* p. 334, 570 N.W.2d 531 (1997).

## ANALYSIS

### PICCOLO AS NECESSARY PARTY

The county contends that Piccolo should have been joined as a necessary party to the action because he is an "employer" of the deputies in his office as contemplated by the Industrial Relations Act, Neb. Rev. Stat. § 48-801 et seq. (Reissue 1993 & Cum. Supp. 1996).

An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

Section 48-801(4) of the Industrial Relations Act defines employer as "the State of Nebraska or any political or governmental subdivision of the State of Nebraska . . . ." Employee is defined as including "any person employed by any employer." § 48-801(5). Under § 48-801(4) and (5), it is clear that the county is the employer of the members of the HCPDO because between Piccolo and the county, only the county is a political subdivision of the State of Nebraska. Neither the county board nor the elected official falls under this definition. However, as this court pointed out in *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985), the question goes beyond who the defined employer is. Rather, because the county as a political subdivision does not have a physical voice, it must speak through a body or individual that is authorized to speak on its behalf. Accordingly, "[t]he more appropriate question is who or what body is authorized to represent the employer." *Id.* at 433, 370 N.W.2d at 497.

In *Sarpy Co. Pub. Emp. Assn.*, we addressed the question of who, between the county board and the elected county officials, was the appropriate entity to speak on behalf of the county in collective bargaining. The CIR had determined that a joint employer relationship existed, but this court disagreed and reversed. In *Sarpy Co. Pub. Emp. Assn.*, we relied on our decision in *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960) (holding that absent evidence that salaries recommended by county officials under Neb. Rev. Stat. § 23-1111 (Reissue

1991) were arbitrary, unreasonable, or capricious, county board was without authority to disapprove official's salary request). Thus, we determined that absent a specific statute, the elected county officials were the appropriate individuals to represent the county in negotiating with the employees in their offices. However, in regard to the county assessor, we determined that because a specific statute applied that acted to shift the ability to set salaries to the county board, the county assessor was not to be considered the sole appropriate person to speak on behalf of the county in the collective bargaining process. Relying on the *Sarpy Co. Pub. Emp. Assn.* decision, this court in *State ex rel. Garvey v. County Bd. of Comm., ante* p. 694, 573 N.W.2d 747 (1998), determined that § 23-3403, like the statute applicable to the county assessor in *Sarpy Co. Pub. Emp. Assn.*, acted to shift the authority to set salaries for the public defender's office to the county board. While it is clear from *Sarpy Co. Pub. Emp. Assn.* and *State ex rel. Garvey* that the ability to set salaries for the public defender's office rests with the county board, it is not clear whether this requires the public defender to engage in collective bargaining together with the county board or whether the county board is the sole body to speak on behalf of the county during collective bargaining. Although *Sarpy Co. Pub. Emp. Assn.* discussed the issue, it did not conclusively answer the question.

This court has previously applied private sector cases controlled by the National Labor Relations Act in order to determine whether or not a joint employer relationship exists between two possible employers. In *American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster*, 196 Neb. 89, 241 N.W.2d 523 (1976), we recognized that the National Labor Relations Board considers several nominally separate business entities to be a single employer where they compose an "integrated enterprise." The controlling criterion in making this determination is whether there are interrelations of operations, common management, and centralized control of labor relations. *American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster, supra.*

In *American Fed. S., C., & M. Emp., AFL-CIO*, we determined that specific statutory and regulatory provisions acted to

take from the county board of welfare much of the prerogative it had with respect to personnel management because the county employees in the case were included under a joint merit system whereby the county board of welfare and the state department of welfare were treated as one agency. In addition, extensive regulations acted to require state approval of job-related matters such as applications and examinations, job appointments, promotions, transfers, demotions, separations, tenure, reinstatements, and appeals of grievances. From these facts, we found that centralized control existed and concluded that it would be inappropriate to require only the county to bargain with employees of the public welfare department, because the county had no control over many areas usually embraced by labor agreements. Rather, much of that control had been transferred to the state by statute.

The statutory scheme in the instant case is not as extensive as the statutory and regulatory scheme seen in *American Fed. S., C., & M. Emp., AFL-CIO*. In the instant case, a specific statute, § 23- 3403, has acted to shift control over the setting of salaries to the county board. However, the fact that the county board has the authority to disapprove a public defender's budget request does not mean the county board has authority to control other aspects of the public defender's office. Rather, the county sets the salaries for the public defender's office while the public defender, as an independent elected official, controls much of the non-salary-related working conditions. For example, the record shows that Piccolo decides which personnel policies to use and chose to have his deputies withdraw from paternity and child support cases without obtaining prior approval of the county board. As the elected official, Piccolo is also the person who has the authority to do such things as determine working hours, approve vacations, and assign work to employees. The record indicates that the county board does not hire, fire, or promote Piccolo's employees. Thus, it is likely there are bargainable issues over which only the public defender, Piccolo, has control.

Of particular importance is the fact that Piccolo and the county board exercise common control over the key item of contention in this case, the salaries of the deputy public defend-

ers. While the county board has authority to set salaries for the deputy public defenders by having the authority to disapprove or reduce a public defender's budget request, the record reflects that the county board does not explicitly dictate how much each individual deputy public defender is paid. Rather, the county board sets the total budget, and Piccolo determines the individual salaries among the deputies. Thus, Piccolo has the ability to pay some deputies more than others and can allocate the budget as he sees fit.

In the instant case, a joint employment relationship is necessary because neither party acting alone can effectively bargain regarding all of the compensation and working-condition issues that are normally embraced by labor agreements. Therefore, we conclude that the CIR erred in its determination that Piccolo was not a necessary party. The election to determine a bargaining agent held pursuant to the order of the CIR is hereby set aside. We reverse the order of the CIR and remand the cause to the CIR with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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## U S WEST COMMUNICATONS, INC., APPELLEE, V. CHERYL A. TABORSKI ET AL., APPELLANTS.

572 N.W.2d 81

Filed January 16, 1998. Nos. S-96-1259 through S-96-1267.

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 Nebraska 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. **Workers' Compensation: Proof.** In a proceeding to modify a prior workers' compensation award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase.
3. ____: ____. In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of his or her employment proximately caused an injury which resulted in disability compensable under the act.

4. ____: ____. A workers' compensation claimant bears the burden to establish a causal relationship between the claimant's alleged injury and his or her employment.
5. ____: ____. To recover workers' 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.
6. **Workers' Compensation: Expert Witnesses.** It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.
7. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
8. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
9. **Pleadings: Evidence.** Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.
10. **Workers' Compensation: Attorney Fees.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Reissue 1993) is a question of fact.
11. **Workers' Compensation: Attorney Fees: Words and Phrases.** A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Nebraska Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part.
12. **Workers' Compensation: Attorney Fees: Appeal and Error.** The filing of a cross-appeal by an employer constitutes the filing of an appeal within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1993).
13. **Attorney Fees.** Whereas Neb. Rev. Stat. § 25-824(2) (Reissue 1995) makes the award of a reasonable attorney fee dependent upon the frivolousness of a claim or defense, the pertinent provisions of Neb. Rev. Stat. § 48-125 (Reissue 1993) make the award of such fee dependent upon whether the appealing employer succeeds in obtaining a reduction in the award.
14. **Attorney Fees: Words and Phrases.** "Frivolousness" for the purposes of Neb. Rev. Stat. § 25-824(2) (Reissue 1995) is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position.
15. **Words and Phrases.** Frivolousness in litigation is a different concept than success in litigation.
16. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas J. Young, of Young & LaPuzza, for appellants.

Christopher E. Hoyme and William M. Muth, Jr., of Berens & Tate, P.C., for appellee.

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

CAPORALE, J.

## I. STATEMENT OF CASES

This consolidated appeal involves nine related workers' compensation cases in which the claimants, the defendants-appellants, Cheryl A. Taborski in case No. S-96-1259; Kimberly J. Fitzner in case No. S-96-1260; Delinda S. Garza, now known as Delinda S. Balaban (hereinafter referred to as Garza-Balaban), in case No. S-96-1261; Kathleen M. Limpp in case No. S-96-1262; Judith A. McKeighan in case No. S-96-1263; Sue A. Volz in case No. S-96-1264; and Dixie L. Hotz-Narine, now known as Dixie L. Hotz (hereinafter referred to as Hotz-Narine), in case No. S-96-1265; and the plaintiffs-appellants, Kathy Ellis in case No. S-96-1266 and Linda Cihacek in case No. S-96-1267, suffered injuries in an accident arising out of and in the course of their employment with U S West Communications, Inc. The claimants appealed to the Nebraska Court of Appeals the generally unfavorable determinations of the Nebraska Workers' Compensation Court review panel concerning the extent of disability and amount of medical benefits to be paid, asserting that the compensation court erred in (1) improperly placing the burden of proof on the claimants, (2) receiving certain medical testimony and relying upon it rather than other medical testimony, (3) entering an award which is inconsistent with its prior orders as well as the pleadings and stipulations, (4) remanding certain determinations to the judge holding the original hearing, and (5) making its award of attorney fees and costs. Under our authority to regulate the caseloads of this court and the Court of Appeals, we, on our own motion, removed the appeal to our docket. In each case, we affirm.

## 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. *Cunningham v. Leisure Inn, ante* p. 741, 573 N.W.2d 412 (1998).

## III. FACTS

On the morning of Thursday, June 6, 1991, a group of U S West employees began to feel ill. The building in which they were working was evacuated, and approximately 31 workers sought emergency medical attention. Complaints again arose on Friday, June 7, and the building was again evacuated. We henceforth refer to these two occurrences as the "incident."

There is evidence that the heating ventilation system, which contained multiple sources of air contaminants, such as volatile organic compounds, and habitats capable of releasing bioaerosol contaminants, together with the workers' complaints and symptoms, represented a well-recognized pattern of conditions commonly known as sick building syndrome.

One physician explained that volatile organic compounds are a major class of contaminants that can cause the syndrome and was of the view that compounds such as spray chemicals, paints, solvents, and cleaning agents were the most likely cause of the incident. He was of the further opinion that particulates were the second most likely cause. According to this witness, when the sudden release of volatile organic compounds causes the syndrome, there is almost no chance of going back and finding an objective cause through the taking and studying of air samples. He also explained that with sick building syndrome, people experience symptoms such as headaches, fatigue, difficulty concentrating, eye irritation, throat irritation, sinus congestion, and coughing when they are in the building, but the symptoms go away when they leave.

The parties stipulated on January 26, 1993, that the claimants suffered personal injury in an accident arising out of and in the course of their employment as a result of the incident. That stipulation further recites that U S West had paid each claimant

some temporary total and temporary partial disability benefits and related medical expenses.

Ruling on the parties' stipulation, the compensation court on original hearing found on March 3, 1993, that each claimant suffered personal injury as a result of an accident arising out of and in the course of employment with U S West. The court also found that as a consequence, each claimant incurred medical and hospital expenses and was intermittently temporarily totally and temporarily partially disabled between June 7, 1991, and December 12, 1992, entitling each to temporary disability benefits, and that the extent of permanent disability, if any, could not yet be determined. In the awards, U S West was ordered to pay any outstanding medical, hospital, and other expenses related to the incident. In addition, the order recited that the court retained jurisdiction such that any party could request a further hearing if unable to agree on subsequent issues, including but not limited to the benefits due and the nature of medical treatment to be provided.

On February 3, 1995, the parties filed another stipulation dated January 9, 1995, which applied, with regard to compensation, from November 5, 1993, and with regard to medical payments, from June 6, 1991. The parties further stipulated, in relevant part:

> 2. US West . . . agrees to pay compensation as previously awarded by the Court, for the periods of time [claimants were] temporarily disabled for the same or similar previously existing symptoms and conditions for which [they have] received treatment since June 6, 1991 and which [are] supported by . . . statement[s] relating the symptoms and conditions to the exposure [as a result of the incident] from [their] attending physician[s]. Within thirty (30) days of receipt of such a statement, US West . . . will either pay the claim or deny the claim based on its own designated physician's written statement justifying the denial . . . . The denied claim shall then be presented to the [compensation court] for determination as to the obligations of US West . . . to pay the same.
>
> . . . .
>
> 6. US West . . . agrees to pay all currently outstanding, related medical expenses for and on behalf of [claimants]

as verified by [their] attending physician[s]. Any such expense submitted on behalf of [claimants] to US West . . . which is denied or remains unpaid as of thirty (30) days from the date hereof may be presented by [claimants] to the [compensation court] for determination as to the obligation of US West . . . to pay same.

. . . .

8. Any claim for compensation arising subsequent to the date hereof which is based upon the same or similar previously existing symptoms and conditions relating to the exposure [as a result of the incident] of [claimants] and supported by a statement from [her] attending physician, shall be paid by US West[, which] shall have the right to contest payments of compensation by bringing such matter before the [compensation court] but shall not cease any such compensation payments without an Order of the [compensation court's] being entered allowing the cessation of compensation.

9. Any claim for medical payments pursuant to §48-120 inclusive of payments for [claimants'] attending physician[s] or referrals by said physician[s] for conditions previously treated and identified by said physician[s] as relating to [claimants'] injur[ies] or illness[es] arising out of [their] employment shall be paid by US West . . . . Claims for medical payments pursuant to §48-120 shall be paid by US West . . . unless within thirty (30) days of receipt any such claim is denied. Any claim so denied may be presented by [claimants] to the [compensation court] for determination as to the obligation of US West . . . to pay same.

On February 21, 1995, the compensation court entered what is denominated "Further Award" in accordance with the parties' January 9, 1995, stipulations. According to the compensation court:

[2]

The stipulation of the parties in regard to payment of compensation benefits, including temporary and permanent disability benefits, applies for the period from and after November 5, 1993 as the parties agree there is no dis-

pute between them as to payment of disability benefits to and including November 4, 1993. As a result of said stipulation, [U S West] agrees to pay compensation benefits for disability that is supported by a statement from the [claimants'] attending physician[s] that causally relates the treatment to [the incident], and said payment will be made within 30 days of receipt of said statement. [U S West] shall have the right to deny said claim within said 30 day period based on its own designated physician's written statement justifying said denial. A further hearing can then be requested by either party to determine the compensability of said claim.

[3]

[U S West] agrees to pay all currently outstanding, related medical expenses of the [claimants] as verified by the [claimants'] attending physician[s]. A further hearing may be requested by either party on any medical expenses denied or remaining unpaid as of 30 days from the date of said stipulation.

[4]

[U S West] further agrees to pay any claim for compensation which arises subsequent to the date of said stipulation which is based upon the same or similar previously existing symptoms and conditions relating to the exposure [as a result of the incident] of the [claimants] and supported by a statement from [her] attending physician. [U S West] shall have the right to contest payments of such compensation but shall not cease any such payments without an order of the [compensation court's] being entered allowing the cessation of said compensation.

. . . .

[8]

The Court retains jurisdiction of this matter and a further hearing may be requested as set forth in said stipulation.

Later, claimants Taborski, Fitzner, Limpp, McKeighan, Volz, Hotz-Narine, Ellis, and Cihacek filed motions for a further hearing, asking that the compensation court determine the extent of their permanent disability, the payment of medical expenses incurred and unpaid, temporary total disability pay-

ments due and unpaid from and after November 1993, waiting time penalties, attorney fees, and the obligation of U S West with regard to further and future medical treatment. According to the motions, since the court's February 21, 1995, award, the parties had been unable to resolve issues dealing with the payment of disability benefits and medical expenses incurred and to be incurred in the future. According to the court, claimant Garza-Balaban filed a similar motion. Claimants Taborski, Fitzner, Limpp, McKeighan, Volz, Hotz-Narine, and Ellis further alleged in separate motions that U S West had refused and failed to make payments on certain claims.

On January 29, 1996, the compensation court entered on original hearing what it labeled either a "Further Award" or "Modification of Awards." The court found that claimants Taborski, Limpp, McKeighan, and Ellis each filed claims for temporary total and temporary partial disability benefits in accordance with paragraph 2 of the parties' January 9, 1995, stipulation, asserting that U S West had not complied with the stipulation with regard to these claims. The compensation court found U S West liable for these claims and held further that U S West was entitled to a credit for all disability payments already made. The court found that claimants Fitzner, Volz, and Hotz-Narine had not claimed temporary disability benefits between November 6, 1993, and January 9, 1995; that claimant Garza-Balaban had suffered no disability after November 1993; and that claimant Cihacek had suffered no disability since October 1992. The court then found that the claimants failed to meet their burden of proving that any continuing symptomatologies, disease processes, or maladies from which they presently suffer are causally related to the incident. Thus, the compensation court held that U S West was not liable for any further workers' compensation benefits.

The claimants thereafter sought review. After they filed their appeals to the review panel, U S West filed cross-appeals. Notwithstanding its prior stipulations, U S West asserted as to each of the claimants that the judge on original hearing erred in holding that the claimants had suffered a personal injury. As to claimants Taborski, Limpp, McKeighan, and Ellis, U S West asserted in addition that the judge on original hearing erred in

awarding certain temporary disability benefits, in awarding attorney fees and waiting time penalties, and in awarding witness fees.

The review panel dismissed the cross-appeals and in part reversed and remanded Taborski's and McKeighan's cases, directing the judge on original hearing to recalculate the amount of credit due to U S West for paying temporary total and temporary partial disability and the amount of attorney fees U S West owes. According to the review panel, the judge on original hearing improperly credited U S West with amounts paid during a period of time when these claimants were disabled. Similarly, the review panel in part reversed and remanded Limpp's case, directing the judge on original hearing to recalculate the amount of credit due to U S West for paying temporary total and temporary partial disability and the amount of waiting time compensation and attorney fees U S West owes.

With regard to Ellis, the review panel found that the judge on original hearing erred in crediting U S West for disability payments made during a period of time when Ellis was found to be disabled. Thus, the review panel remanded the case for the judge on original hearing to recalculate the amount of credit due to U S West and waiting time and attorney fees owed by U S West. The review panel further found that the judge on original hearing erred in calculating the amount of total temporary disability and remanded the case for a new finding.

The review panel otherwise affirmed the decisions of the judge on original hearing.

## IV. ANALYSIS

### 1. Burden of Proof

In the first assignment of error, the claimants urge that the compensation court mistakenly placed the burden of proof on them rather than on U S West. More particularly, they contend that U S West could change its obligations under the orders entered on original hearing prior to January 29, 1996, only by seeking a modification thereof under Neb. Rev. Stat. § 48-141 (Reissue 1993), which provides in relevant part that any "time after six months from the date of the . . . award, an application may be made by either party on the ground of increase or decrease of incapacity . . . ."

The claimants correctly assert that in a proceeding to modify a prior award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase. *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986). However, the threshold question is whether there was here an award entered prior to January 29, 1996, which was subject to modification under § 48-141. That question requires that we look at the nature of the three orders entered on original hearing.

The first, the March 3, 1993, order, dealt with disabilities experienced in the past and provided for the payment by U S West of past and outstanding medical, hospital, and other expenses. The second, the February 21, 1995, order, provided a procedure for resolving disputes among the parties relating to ongoing disability and other claims. Not until the third, the January 29, 1996, order, was the full extent of injury to the claimants determined.

While the first two orders may have been irregular partial awards, see *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N.W. 860 (1937), and *G. A. Steinheimer Co. v. Podkovich*, 122 Neb. 710, 241 N.W. 287 (1932) (parties in workers' compensation case entitled to complete and final disposition), no one appealed the partial nature of the orders or makes such complaint here. Whatever else might be said of those earlier orders, they did not fix the ultimate nature of the claimants' individual conditions.

The fact that it had been determined by admission, stipulation, and findings of the compensation court that the claimants sustained personal injuries in an accident arising out of and in the course of their employment with U S West did not relieve them of the obligation to prove, by a preponderance of the evidence, that the employment proximately caused the disability for which they seek compensation.

In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of his or her employment proximately caused an injury which resulted in disability compensable under the act. *Dyer v. Hastings Indus.*, 252 Neb.

361, 562 N.W.2d 348 (1997). Thus, a workers' compensation claimant bears the burden to establish a causal relationship between the claimant's alleged injury and his or her employment. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). 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.*, 252 Neb. 29, 560 N.W.2d 143 (1997). Nothing in U S West's admission, in the stipulations of the parties, or in the pre-January 29, 1996, orders directs that statements from the claimants' physicians shall conclusively satisfy the claimants' burden of proof, regardless of what evidence U S West presents. Neither is there anything in the record which placed the burden of proof on U S West.

Accordingly, the compensation court did not err in placing the burden of proof on the claimants.

### 2. Medical Evidence

In the second assignment of error, the claimants assert that the compensation court was wrong in receiving the testimony of Dr. David Schwartz and in relying upon it rather than on the testimony of their physicians and experts.

We begin with a review of the relevant evidence in this regard.

Dr. Robert N. Brown treated seven of the nine claimants: Taborski, Fitzner, Garza-Balaban, Volz, Hotz-Narine, Ellis, and Cihacek. According to Brown, each of these claimants has complained about headaches, difficulty concentrating, emotional problems, depression, and sensitivity to particular odors, and each constantly suffers from headaches, fatigue, and difficulty concentrating. He is of the opinion that the claimants were exposed to a volatile organic compound and is of the view that these claimants' symptoms were not caused by a low-level respiratory irritant such as mold spores or pollen. He considers each of the claimants he treated to be on a gradual downhill course and is of the opinion that each will require future medical attention to treat symptoms related to the incident.

In Brown's opinion, Taborski is totally and permanently disabled due to her severe headaches, confusion, and impaired perception. Brown is of the view that Fitzner is totally and perma-

nently disabled. In Brown's view, Garza-Balaban has been affected by the incident and may experience future problems as a result. Brown testified that in addition to the other symptoms described earlier, Volz experienced musculoskeletal problems and that her hepatitis C became more active following the incident. Dr. Imran Khan treated Volz and concluded that she is 60 percent disabled, but as she cannot return to work, is permanently disabled in that regard.

Brown is of the opinion that Hotz-Narine is totally and permanently disabled as a result of the incident. She was also treated by Kahn, who testified that as a result of the incident, in addition to other symptoms she suffers from fibromyalgia, that is, pain over the entire body. In his opinion, she is 60 percent disabled, but as she cannot return to work, he considers her permanently disabled in that regard.

According to Brown, Ellis has had respiratory problems in addition to the other symptoms described earlier, and although she can treat her headaches with medication, she is prone to overmedicate, which causes her to become nonfunctional, as do the untreated headaches. In his opinion, Ellis is totally and permanently disabled.

Brown considers Cihacek to have been affected by the incident and expects that she may experience some future problems as a result.

Dr. Scott D. Blair treated Limpp and McKeighan. He recalls that each at various times complained of nausea, vomiting, fatigue, headaches, diarrhea, lack of concentration, memory loss, and vesiculations or tremors. He is of the view that the symptoms are ongoing problems likely caused by some type of chemical exposure while Limpp and McKeighan were employed at U S West. Although not certain, he suspects that they were exposed to a pesticide, not respiratory irritants such as pollen or mold spores, as exposure to pollen and mold spores does not result in nausea, vomiting, diarrhea, leg weakness, vesiculations, tremors, memory loss, and lack of concentration.

Blair testified that Limpp's condition is slowly getting worse and that she is unable to work, is permanently disabled, and will require future medical care as a result of the incident. He is of the further opinion that as McKeighan cannot think clearly, she

is permanently disabled as a result of the incident and will require future medical care.

Schwartz studied the claimants' medical records, examined the claimants, and, along with other physicians, conducted an independent review of them. He concluded that the claimants' test results are not consistent with a toxic exposure and that there is no relationship between the incident and the claimants' current symptoms. He summarized his findings and those of his colleagues thusly: "Although each of the [claimants] continue[s] to have general physical complaints and ongoing primary care needs, none of [them have] specific medical problems that appear to be related to the reported exposure at U.S. West." He further concluded that "all of these [claimants] have a constellation of symptoms that they date to the exposure . . . . These [claimants] have been extensively evaluated with no significant physical findings or abnormal laboratory results noted."

Schwartz explained that the claimants' symptoms differed from one claimant to the next and that no objective evidence substantiated their symptoms. While he is of the view that the claimants are suffering from the symptoms they complain about, he testified that there is no evidence that the symptoms represent a pathologic underlying disease.

Schwartz found no evidence that the incident resulted in a high-level exposure but concluded that the incident may have resulted in a low-level exposure. In his view, if the claimants experienced a low-level exposure, they would have been symptomatic for no more than a month or two. He explained further that when individuals are exposed to a common source, they are expected to experience similar symptoms and similar diagnoses. According to Schwartz, the claimants "are complaining of very, very different things." The presence of different symptoms suggests that the symptoms could be caused by things totally unrelated to the incident. In his view there is, among the claimants,

> absolutely no pattern of disease outcome that you could begin to formulate and even justify as being related to an exposure that took place. Even if it was an absolutely new disease outcome like the Crown Point Syndrome, a new process, something that medicine had never seen before,

you'd expect to see a similarity in terms of the symptoms for these individuals, and you just simply don't see that.

In contrast, Dr. Matthias I. Okoye testified that patients who have been exposed to the same chemicals may suffer different symptoms.

The claimants urge that as Schwartz' opinions rested on nothing more than mere conjecture or guess as to the extent of the exposure to which the claimants were subjected, his opinions could form no basis for the compensation court's decision. That overlooks, however, that there was evidence that the chances of finding an objective cause by means of sampling air are remote. Indeed, the compensation court found that the level of exposure is unknown. Nonetheless, Schwartz assumed a low-level exposure based upon his examination of the claimants and his review of the medical reports, including the opinions of the claimants' treating physicians and other experts and various environmental reports. Schwartz thus had an adequate basis for his opinions.

It is the role of the Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). Accordingly, when the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996).

As it was within the discretion of the compensation court to determine which, if any, medical expert to believe, this assignment is without merit.

### 3. Inconsistent Nature of Award

In the third assignment of error, the claimants maintain that the compensation court improperly entered an award which is inconsistent with the pleadings, stipulations, and its earlier orders.

First, the claimants argue that the pleadings negate the compensation court's finding that Schwartz partially based his opinion on a lack of similarity in symptoms of the claimants. They contend that U S West's failure to contest the allegations in their petitions that they suffer from " 'sore throat, tightness in the chest, light headedness, headaches, lack of concentration, dis-

orientation, exhaustion, fatigue and the like'" amounts to a judicial admission on the part of U S West that the claimants suffer from the same symptoms. Brief for appellants at 33. However, the claimants point to no specific admission by U S West in the pleadings; they rest their argument only on U S West's failure to contest their lists of alleged symptoms.

A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994). Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence. *Id.* In no sense can it be said that U S West's failure to address the claimants' allegations of symptoms amounts to a judicial admission.

The claimants also assert that the compensation court's ultimate decisions were contrary to the parties' stipulations and the court's previous orders. In this regard, the claimants argue, in essence, that under the stipulations and the court's previous orders, the court was obligated to assess and determine U S West's obligations and responsibilities based upon the statements of the claimants' attending physicians. That is to say, once a claimant submitted a claim accompanied by a physician's statement relating the claim to the incident, U S West had no other option but to pay the claim.

This argument misrepresents the stipulations and previous orders. Pursuant to the January 9, 1995, stipulations and the February 21 orders, U S West could either pay or deny any claim for medical expenses within 30 days of submission. If U S West denied a claim, the claimants were permitted to present the denied claims to the compensation court for a determination as to U S West's obligation to pay. These stipulations and orders also allowed U S West to contest workers' compensation payments by bringing such matters to the compensation court.

Thus, this assignment of error is also without merit.

### 4. Remand to Judge on Original Hearing

The claimants insist in the fourth assignment of error that the compensation court review panel wrongly remanded the cases

of Taborski, Limpp, McKeighan, and Ellis rather than modifying the awards on original hearing by correcting the errors the review panel found with regard to the amounts due and the awards of attorney fees. The claimants contend that rather than remanding the cases, the compensation court review panel should have simply awarded the additional amounts found to be due.

The short and dispositive answer to this claim is that Neb. Rev. Stat. § 48-179 (Reissue 1993) empowers the review panel to "affirm, modify, reverse, or remand the judgment on the original hearing." That being so, the review panel did not err in ruling as it did in this regard.

### 5. Attorney Fees and Costs

In the fifth and final assignment of error, the claimants challenge the compensation court's award of attorney fees and costs.

Claimants Taborski, Limpp, McKeighan, and Ellis contend that the compensation court wrongly determined that a reasonable controversy existed with regard to the payment of disability benefits for the time period between November 1993 and January 9, 1995. These claimants therefore urge that the compensation court erred in failing to award attorney fees and interest pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1993), which provides, in relevant part:

> Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award.

Whether a reasonable controversy exists under § 48-125 is a question of fact. *Grammer v. Endicott Clay Products*, 252 Neb. 315, 562 N.W.2d 332 (1997); *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996).

> "[A] reasonable controversy may exist: (1) if there is a question of law previously unanswered by the Supreme

> Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part."

*Kerkman*, 250 Neb. at 80, 547 N.W.2d at 158, quoting *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). Thus, to avoid the payment of attorney fees assessable under the foregoing portion of § 48-125, the employer must have a reasonable basis in law or in fact for disputing the employee's claim and refraining from payment of compensation. *Kerkman, supra*; *Mendoza, supra*.

The compensation court found on original hearing that U S West failed to follow the January 9, 1995, stipulations with regard to its denial of the claims of Taborski, Limpp, McKeighan, and Ellis submitted between November 5, 1993, and January 9, 1995. More specifically, the court found that while the claimants presented proper statements from their attending physicians supporting the payment of benefits, U S West failed to present a statement from its own designated physician justifying the denial until U S West filed its July 24, 1995, affidavit containing Schwartz' December 13, 1994, report. The review panel likewise found Schwartz' December 13 report insufficient to deny the claims, as the stipulation makes sense only if U S West's denials were based upon a statement by its own designated physician generated after the date of the stipulation.

There was clearly a conflict in the medical testimony adduced at the original hearing. In addition, there was a conflict concerning whether Schwartz' December 13 report satisfied the requirements of the January 9, 1995, stipulation. Thus, the compensation court did not err in determining that a reasonable controversy existed with regard to the payment of disability benefits for the time period between November 1993 and January 9, 1995.

Next, the claimants contend that the review panel erred in failing to award them attorney fees pursuant to the provisions of § 48-125 for defending against U S West's cross-appeal. Because the review panel found U S West's cross-appeal to be frivolous, it awarded each claimant an attorney fee of $100 pursuant to Neb. Rev. Stat. § 25-824(2) (Reissue 1995), which provides:

> Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

The portion of § 48-125 relevant to this claim reads:

> If the employer files an application for review before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review, and the Court of Appeals or Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Court of Appeals or Supreme Court.

As U S West concedes, the filing of a cross-appeal by an employer constitutes the filing of an appeal within the meaning of § 48-125. See *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985). Whereas § 25-824(2) makes the award of "reasonable attorney's fees" dependent, so far as relevant here, upon the frivolousness of a claim or defense, the pertinent provisions of § 48-125 make the award of such fees dependent upon whether the appealing employer succeeds in obtaining a reduction in the award. "Frivolousness" for the purposes of § 25-824(2) is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994). Thus, frivolousness in litigation is a different concept than success in litigation. To that extent, §§ 25-824(2) and

48-125 are in conflict for the purpose of the rule that to the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995). Thus, even if as a court of limited and special jurisdiction, see *Thach v. Quality Pork International, ante* p. 544, 570 N.W.2d 830 (1997), the compensation court had the power to resort to § 25-824(2) in awarding attorney fees, a question we do not decide, it should have applied § 48-125 rather than § 25-824(2).

However, the claimants have not established that they have been prejudiced by that error. Under either § 25-824(2) or § 48-125, the attorney fee is to be reasonable; there is no showing that the fees awarded were otherwise. We recognize that Neb. Rev. Stat. § 25-824.01 (Reissue 1995) specifies a number of factors to be considered in determining the amount of an attorney fee to be awarded under § 25-824(2) which have no direct application to the determination of a reasonable fee under § 48-125. See *Muller v. Tri-State Ins. Co.*, 252 Neb. 1, 560 N.W.2d 130 (1997). However, as there is no showing that the fees awarded are unreasonable, that difference is not material here.

Finally, the claimants complain that the compensation court "did not assess costs with regard to any of the actions before it." Brief for appellants at 56. The claimants recite in their brief that they paid for both a preappeal transcription of the evidence and the bill of exceptions filed herein. However, we are led to no evidence concerning this claim, and, therefore, there is nothing for us to review in that regard.

## V. JUDGMENT

Since the record fails to sustain any of the claimants' assignments of error, we, as first noted in part I, in each case affirm the judgment of the compensation court.

AFFIRMED.

STEPHAN, J., not participating.

# STATE OF NEBRASKA, APPELLEE, v. LAMONT E. ARNOLD, APPELLANT.

572 N.W.2d 74

Filed January 16, 1998. No. S-96-1332.

1. **Convictions: Appeal and Error.** 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.
2. **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.
3. **Aiding and Abetting.** Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
4. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such intent.
5. **Aiding and Abetting: Proof.** Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving a defendant guilty under an aiding and abetting theory.
6. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
7. **Jury Misconduct: Trial.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that 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 are to be made so that the determination may be reviewed.

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

Anthony S. Troia for appellant.

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

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

PER CURIAM.

In accordance with the verdict, the district court adjudged the defendant-appellant, LaMont E. Arnold, guilty on two counts of murder in the first degree, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1995), and two counts of using a deadly weapon in the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1995). Because he was sentenced to life imprisonment on each of the murder convictions, Arnold's appeal was docketed directly in this court as provided by Neb. Rev. Stat. § 24-1106 (Reissue 1995). He asserts, in summary, that the district court erred in (1) finding the evidence sufficient to support the charges and (2) denying his motion to investigate possible juror misconduct. We affirm.

## I. FACTS

Two related homicides took place late on the night of Saturday, September 23, 1995, or during the early morning hours of Sunday, September 24. First, the Omaha police found the body of Louis Clinchers lying on a concrete walkway. He had suffered multiple stab wounds to his upper chest and abdomen, a stab wound in his left arm, a stab wound to his left eye, trauma to his head, and various bruises and abrasions. His "left rear pocket" had been turned inside out.

Not more than three blocks away, the police next found the body of Shawn Nelson in the kitchen of his apartment. They immediately detected the odor of Mace and noticed that items in the apartment were knocked over and broken. Nelson had suffered stab wounds to his torso and back.

Theresa Newberry testified that she and Jennifer Grabenschroer had gone to the house of Rick Larsen and Jason Landers in the late afternoon of the day of the murders. Later that evening, more people began to appear at Larsen's house. Newberry, Grabenschroer, Larsen, and Landers left the house to do laundry and to eat. By the time they returned, approximately 40 people were gathered at Larsen's house. Newberry testified that she saw Arnold at the party and that he appeared to be very intoxicated. She heard Arnold telling Larsen and Landers, while screaming, yelling, and cursing, that he had been "jumped" earlier that day and that the assailants had cut his face. Grabenschroer also heard Larsen, Landers, and Arnold say that

they were going to "jump" some people who earlier had assaulted Arnold. When the police contacted Arnold on September 28, he had an abrasion on the left side of his chin.

Approximately 20 minutes elapsed between the time Arnold and Larsen left the house and then returned, at which time Newberry and Grabenschroer saw Larsen holding a bloody knife and heard him say that he had just "killed somebody." According to Newberry, Larsen carried a knife with him the entire evening. Arnold was standing with Larsen in the hallway, but said nothing. Newberry then heard Larsen and Arnold talking about "[g]oing to get the other dude." As Newberry and Grabenschroer were leaving Larsen's house, Arnold asked for and was given Grabenschroer's Mace. At this point, Arnold said to Newberry that he had personally "bricked" the first victim, later identified as Clinchers, and "beat him up pretty bad." Arnold also told Newberry that Larsen did the stabbing. Newberry and Grabenschroer then left Larsen's house.

Jeff Briney also was at Larsen's house on the night of the murders. Briney testified that Arnold left the party alone and returned upset because he had been jumped and cut on the face by some white men using racial slurs. According to Briney, Arnold and one Eric left the party, and when they returned, Eric stated that he personally beat Clinchers. Larsen then said, "[L]et's go finish him off."

Next, according to Briney, he, Larsen, and Arnold went to find Clinchers. When they arrived, Clinchers was lying on the ground, bleeding from the head and mouth and making gurgling sounds as if choking on something. Briney testified that Arnold watched as Briney kicked and Larsen stabbed Clinchers. Arnold then took a pack of cigarettes from Clinchers' pocket. Because Clinchers was still making sounds, Larsen resumed stabbing him. After the three returned to the Larsen party, Larsen bragged about the killing. According to Briney, Arnold and Larsen asked everybody at Larsen's party where Nelson, the other man who had jumped Arnold, was, and eventually someone told them. Arnold, Briney, Landers, and Larsen then left the party and headed for a nearby apartment complex.

According to Briney, when they arrived at the apartment complex, Arnold hopped into a window well, opened the win-

dow with a knife, and entered an apartment. He was followed by the other three. Two men were present in the living room. Arnold, with his shirt pulled over his head, walked into the living room and began spraying Mace. According to Briney, Nelson hit Arnold, knocking him to the floor; the two continued fighting near the kitchen. After Briney finished fighting with the apartment's other occupant, he saw Arnold and Larsen leave the kitchen; however, Larsen returned with a 2 by 4 and hit Nelson with it.

Briney had reported to the police that upon their return to Larsen's house, Arnold had the knife in his hand, along with his shirt, and was "ditching" the knife before reentering the house; however, at trial Briney testified that Arnold did not have the knife with him as they were walking back to Larsen's house. While Briney stated that he remembered more details about the murder when he spoke to the police earlier, he testified that some of his statements to the police were "told out of fear." Briney testified that before reentering Larsen's house, Arnold hesitated for a moment, took off his shirt, and threw it.

Newberry and Grabenschroer returned to Larsen's house and picked up Arnold after the murders. As Newberry and Grabenschroer were driving Arnold from Larsen's house, Arnold took off his pants, handed them to Newberry, and told her to throw them out the window, which she did. According to Newberry, after arriving at her house, Arnold, laughing and giggling, related that he and the others had handled the situation. According to Grabenschroer, Arnold said that he had killed Nelson in the apartment with a knife. After Arnold left Newberry's house, Larsen and Landers arrived.

Larsen told Newberry that "they," meaning Arnold and Larsen, had beat up Clinchers, but that Larsen personally did the stabbing. As for Nelson, Larsen told Newberry that he had intended to kill him, but that Arnold took the knife. More specifically, Larsen told Newberry that at the Nelson murder scene, Arnold "grabbed the knife out of his hand and was, like, fuck that, he cut my face . . . ." Grabenschroer recalls Larsen saying that he killed Clinchers and that Arnold killed Nelson.

Dr. Jerry Wilson Jones, a pathologist, testified that Clinchers suffered multiple injuries to the head produced by blunt trauma,

and sharp-force injuries produced by a knife. Clinchers' blunt-force head injuries included a large laceration in the right temple associated with a skull fracture which extended into the base of the skull, a diffuse scalp hemorrhage on the left side of the scalp, a small amount of hemorrhage over the surface of the brain, and extensive bruising of the left side of the brain. There was a large laceration of the right temple and fracture of the skull, which are consistent with blunt-force trauma. In Jones' opinion, this laceration was not caused by a knife. Jones testified that Clinchers' head injuries were consistent with being hit in the head with a brick or large rock.

Clinchers suffered a total of 20 stab wounds, including wounds penetrating through his left upper eyelid and right lower eyelid; three wounds of the skin and cartilage of the right ear; four wounds in the right side of the neck penetrating the soft tissue, larynx, trachea, thyroid gland, and carotid artery; two wounds penetrating the front left side of the chest wall into the lung and heart; one wound penetrating the center chest into the sternum; four wounds penetrating the front right side of the chest into the liver; and four wounds penetrating the back right side of the chest into the lung and heart.

Jones testified that Clinchers was alive at the time he received all of his injuries and that the multiple stab wounds to the face, neck, and chest killed him. However, Jones testified that Clinchers' head injuries were very serious and potentially fatal and that Clinchers would likely have died from the head injuries alone had the stab wounds not occurred.

Jones testified that Nelson suffered 17 separate stab wounds and some blunt-force injuries. According to Jones, Nelson died of multiple stab wounds to the scalp, neck, chest, shoulder, and axillary areas.

## II. ANALYSIS

### 1. Sufficiency of Evidence

We consider Arnold's claim in the first assignment of error, that the district court erred in finding the evidence sufficient to sustain the charges, under the rule that 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. 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. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997).

Under the provisions of § 28-303, a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice, and such a killing is a felony. According to § 28-1205, a person commits the offense of using a deadly weapon to commit a felony if he or she uses or possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state. Neb. Rev. Stat. § 28-206 (Reissue 1995) provides that a "person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such intent. *Mantich, supra*; *Brunzo, supra*. But evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving a defendant guilty under an aiding and abetting theory. *State v. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *cert. denied* 498 U.S. 881, 111 S. Ct. 216, 112 L. Ed. 2d 176 (1990).

With regard to the counts associated with the murder of Clinchers, there is evidence that Arnold stated that he was going

to "jump" some people who had assaulted him earlier; that Arnold admitted he personally "bricked" and beat Clinchers; and that Clinchers suffered very serious and potentially fatal blunt-force head injuries consistent with being hit in the head with a brick or large rock, including a large laceration in the right temple associated with a skull fracture which extended into the base of the skull, a diffuse scalp hemorrhage on the left side of the scalp, a small amount of hemorrhage over the surface of the brain, and extensive bruising of the left side of the brain. In addition, there is evidence that Arnold escorted Larsen, who had expressed a desire to "finish [Clinchers] off," and Briney to where Clinchers was lying, still bleeding from the head and mouth, and that Larsen then stabbed Clinchers 20 times. According to the pathologist, although the stab wounds killed Clinchers, had he not been stabbed, he would likely have died from the head injuries.

With regard to the counts associated with the murder of Nelson, there is evidence that after Clinchers' murder, Arnold discussed "[g]oing to get the other dude"; that Arnold asked for and was given Grabenschroer's Mace; that Larsen and Arnold asked people at Larsen's party where Nelson could be found; that after learning where Nelson was, Arnold and others left Larsen's house and headed for a nearby apartment complex; that Arnold jumped into a particular window well at the apartment complex, opened the window with a knife, and entered the apartment; that after Arnold sprayed Mace in the apartment's living room, Arnold and Nelson began fighting near the kitchen; and that after the fighting had ended, Arnold was seen leaving the kitchen. In addition, Arnold admitted that he killed the victim in the apartment with a knife. Moreover, while Larsen admitted stabbing Clinchers, Larsen also stated that Arnold stabbed Nelson, who died as a result of being stabbed 17 times.

Thus, the evidence is such that the jury could find beyond a reasonable doubt that Arnold personally used a deadly weapon to kill both Clinchers and Nelson or that if he did not do so personally, he aided and abetted others in doing so. The first assignment of error is therefore meritless.

### 2. Jury Misconduct

In the second assignment of error, Arnold contends that the district court erred in overruling his motion to investigate possible jury misconduct. This assignment presents a question of law, in connection with which we, as an appellate court, are obligated to reach a conclusion independent of the determination reached by the court below. See *State v. Williams, ante* p. 111, 568 N.W.2d 246 (1997).

Early in the trial, a member of Arnold's defense team noticed two jurors conversing. This occurred after the district court denied the State leave to "publish," that is, as we understand the record, to immediately display to each juror, two photographs depicting Clinchers' bloody body which the court had received over Arnold's objection. According to one of the team members, after the district court had ruled that the photographs would not be published, a juror leaned over to another juror, poked the latter and "kind of like made a real kind of disgusted look and pointed over" to the defense team, and "wiggled a finger, pointing" at the team, at which time the latter juror "just did kind of a nice — kind of like, yeah, uh-huh." Later, "she again looked over at her and like shook her head and said something again, pointed over" to the defense team. The defense unsuccessfully moved to question at least one of the jurors to determine whether there had been any conduct prejudicial to Arnold.

We have held that when an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that 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 are to be made so that the determination may be reviewed. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992); *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978).

In *Hunt*, juror affidavits established that presubmission discussions took place at which jurors discussed the probable out-

come of the case. We remanded the cause for a hearing to determine what was said during those discussions and whether the discussions resulted in prejudice to the plaintiff. In *Steinmark*, a juror affidavit alleged that during deliberations, jurors repeated rumors they had heard about the defendant and had drawn improper conclusions regarding specific pieces of evidence. We remanded the cause for a further hearing upon the matter of misconduct.

But unlike the situation in *Hunt* and *Steinmark*, here the showing does nothing more than establish that a juror may have momentarily reacted to a courtroom occurrence. Under such a circumstance, it cannot be said the district court abused its discretion in implicitly finding that the showing did not rise to the level of tending to prove serious misconduct. The second assignment of error is therefore also without merit.

## III. CONCLUSION

There being no merit to either of Arnold's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

While I agree that the evidence supports Arnold's convictions, I must nonetheless dissent, for the district court abused its discretion in not investigating the jury conduct Arnold described, and thus clearly erred.

Quoting *State v. Washington*, 182 Conn. 419, 438 A.2d 1144 (1980), we acknowledged in *Hunt v. Methodist Hosp.*, 240 Neb. 838, 846, 485 N.W.2d 737, 743 (1992), the seriousness of predeliberation discussions by noting:

> Derived from the constitutional concept of a right to a jury trial is the principle that "it is improper for jurors to discuss a case among themselves until all the evidence has been presented, counsel have made final arguments, and the case has been submitted to them after final instructions by the trial court."

"As confirmed by case law, the constitutional right in both civil and criminal cases protects parties from juror discussions prior to deliberations. *Anything short of silence is juror misconduct*, and at some point, nondeliberation dialogue prejudices a

party and voids the trial." (Emphasis supplied.) *Id.* at 848, 485 N.W.2d at 744.

The situation described by Arnold is not one in which a juror, without engaging anyone else in conversation, shakes or nods the head, rolls the eyes, smiles, laughs, yawns, or demonstrates any other individual response to what has been heard, seen, or otherwise sensed. Rather, it is a situation in which a juror spoke words to another juror under circumstances which at least suggest that the conversation related to something that had transpired in the courtroom, and which further suggest that displeasure was being directed at the defense team. Indeed, the district court acknowledged as much by observing that "[c]learly, they want to see something right now . . . [b]ut, anyway, I am not going to explore it any further . . . ." I therefore submit that Arnold met his burden of making a showing tending to prove that serious misconduct had occurred.

Surely, if one juror said to another that it was obvious that Arnold's team was trying to hide something and for that reason could never vote to acquit Arnold, we would hold that serious jury misconduct had taken place and that Arnold had been prejudiced. However, since the majority chooses to approve the district court's election to remain ignorant, we will never know what was said or whether Arnold was prejudiced.

I would remand the cause to the district court with the direction that it conduct a hearing to determine what was said and whether what was said prejudiced Arnold.

GERRARD, J., joins in this dissent.

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GARY E. MILLER, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
573 N.W.2d 121

Filed January 23, 1998. No. S-96-146.

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 appellate review of a summary judgment, the 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. **Class Actions.** An action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class.
4. **Constitutional Law: Contracts: Public Officers and Employees.** In order to determine whether a governmental entity unconstitutionally interfered with its employee's contractual rights, one must engage in a three-part analysis. One must determine (1) whether there has been an impairment of the contract; (2) whether the governmental entity's actions, in fact, operated as a substantial impairment of the contractual relationship; and, if so, (3) whether that impairment was nonetheless a permissible, legitimate exercise of the governmental entity's sovereign powers.
5. **Constitutional Law: Contracts: Words and Phrases.** The word "impair," as used in the Contract Clause of the U.S. Constitution, requires no construction and may be given its ordinary meaning, which, according to the most basic dictionary definition, is "to make worse."
6. **Constitutional Law: Public Officers and Employees: Pensions: Legislature.** A public employee's constitutionally protected right in his or her pension plan vests upon acceptance and commencement of employment, subject to reasonable or equitable unilateral changes by the Legislature.
7. **Constitutional Law: Contracts: Employer and Employee.** A constitutionally protected contractual right is the settled or reasonable expectation of an employee, not the contract as might be written by the courts. What the Constitution protects is the expectations the employee relied upon to his or her detriment and to the benefit of the employer, who gains the employee's valuable services and loyalty.
8. **Contracts: Public Officers and Employees: Pensions.** Where an employee's expectations concerning pension benefits are legitimately relied on in commencing or continuing employment, the pension benefits become part of a wage-and-fringe-benefit package. A subsequent provision which violates those expectations will be unenforceable unless the state demonstrates a vital state interest in requiring a change in the benefits.
9. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
10. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
11. ____. Errors which are argued but not assigned will not be considered by an appellate court.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

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

Kent N. Whinnery, Deputy Omaha City Attorney, and Jo A. Cavel for appellees.

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

WRIGHT, J.

Gary E. Miller sued the City of Omaha (City), the City of Omaha Employees' Retirement System (COERS), and the State of Nebraska to obtain disability pension benefits for himself and a purported class of participants. Miller alleges that the class of participants includes himself and every former and/or current civilian member of COERS who is receiving a disability retirement pension, or may be entitled to receive the same in the future, and who is having or may have that disability pension entitlement reduced by either workers' compensation or Social Security, or both. Miller appeals from a summary judgment granted in favor of the defendants.

## I. SCOPE 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. *Dahlke v. John F. Zimmer Ins. Agency*, 252 Neb. 596, 567 N.W.2d 548 (1997).

In appellate review of a summary judgment, the 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. *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

## II. FACTS

On September 14, 1961, COERS implemented a pension program for the City's employees. COERS required mandatory employee contributions which approximately equaled the contributions made by the City. The City and the employees also provided equal Social Security contributions. Miller was hired by the City in July 1964 and was covered by COERS, Social Security, and Nebraska workers' compensation.

On March 27, 1987, Miller suffered a back injury on the job which resulted in permanent and total disability. He applied for

a service-connected disability pension from COERS on May 4, 1989, and was granted a disability pension effective June 22.

On or about March 19, 1990, the City and COERS reduced Miller's pension benefits by the amount of workers' compensation payments made to Miller. Subsequently, as a result of the receipt of Social Security benefits, the remainder of his pension benefits from COERS was eliminated, and currently, Miller receives no disability pension benefits from COERS.

At the time of Miller's initial employment, ordinance No. 22929, § 7.24.125 (the 1964 ordinance), was in effect. Section 7.24.125, entitled "Accidental disability pension —Injuries in line of duty," provided in part:

> Any member of the System who, while in the line of duty, has sustained or shall sustain injuries or sickness, arising out of the immediate or direct performance or discharge of his duty, which immediately or after a lapse of time permanently unfit him for active duty, shall receive a monthly accidental disability pension as long as he remains unfit for active duty equal to fifty percent of his average final monthly compensation, but, in no event, shall said disability pension exceed the sum of two hundred fifty dollars per month. In addition thereto, he shall be paid all medical, surgical and hospital expenses which may be incurred as a result of such sickness or injury but the pension and other benefits, being in excess of benefits under the Workmen's Compensation Act, shall be in lieu thereof.

For the period of March 1964 to June 1972, pursuant to the 1964 ordinance, the City paid an employee who was injured on the job periodic workers' compensation benefits and medical expenses until his service-connected disability pension was granted by COERS. Thereafter, to the extent that the pension benefits were in excess of the amount of periodic workers' compensation benefits required by the Nebraska Workers' Compensation Act, the City discontinued such periodic workers' compensation payments. COERS also paid the medical expenses after the awarding of a service-connected disability pension. COERS did not deduct from the pension award the amount of Social Security benefits received by the employee.

In 1972, ordinance No. 26389 (the 1972 ordinance) was passed. Section 7.24.125 was replaced by § 7.24.127 effective

June 20, 1972, through January 24, 1977. Section 7.24.127, entitled "Disability Retirement Pension," provided in 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 him for active duty, shall receive a monthly disability pension as long as he remains unfit for active duty or until he reaches age 65, whichever event occurs first. Such monthly disability pension shall be equal to sixty (60) per cent of his monthly compensation for the last full month prior to disability less other income benefits payable from Social Security. Such disability benefits shall commence six (6) months after the eligible member's disability began. Any member receiving a disability pension under the provisions of this Section shall upon the attainment of age 65 receive in lieu thereof a service retirement pension calculated in accordance with the provisions of 7.24.120 on the basis of average final compensation on the date of disability.
>
> If it is medically demonstrated that the disability was sustained due to injuries or sickness arising out of the immediate or direct performance of a member's employment with the City of Omaha, the member shall be paid, in addition to the disability retirement pension, all medical, surgical, and hospital expenses incurred as a result of such sickness or injury, but the pension and other benefits, being in excess of benefits under Workmen's Compensation Act, shall be in lieu thereof.

For the period of June 20, 1972, through January 24, 1977, pursuant to the 1972 ordinance, the City paid an employee who was injured on the job periodic workers' compensation benefits and medical expenses until his service-connected disability pension was granted by COERS. Thereafter, to the extent that the pension benefits were in excess of the amount of the periodic workers' compensation benefits required by the act, the City discontinued such periodic workers' compensation payments. COERS also paid the employee's medical expenses after the awarding of a service-connected disability pension. COERS deducted from the pension award the amount of Social Security benefits received by the employee.

On January 25, 1977, § 7.24.127 was amended by ordinance No. 27936 (the 1977 ordinance), which remained in effect until April 18, 1989. The amendment provided that disability pension benefits would begin 5 months after the disability began, instead of 6 months, and that the City should pay any medical, surgical, and hospital expenses from its general fund. All other provisions of § 7.24.127, as well as the practices of the City in implementing the ordinance, remained the same.

On December 19, 1980, we decided *Novotny v. City of Omaha*, 207 Neb. 535, 299 N.W.2d 757 (1980). Novotny was disabled as a result of injuries sustained while in the performance of his job duties. The Workers' Compensation Court awarded Novotny $100 per week temporary total disability payments. For almost 2 years, Novotny received disability pension benefits in lieu of workers' compensation benefits. After his pension benefits terminated, the City commenced workers' compensation total disability payments of $100 per week. Novotny continued to receive such workers' compensation benefits until March 7, 1979, when the City began payments to Novotny of $889.54 per month under a disability and retirement pension plan. In ceasing to provide Novotny with workers' compensation benefits, the City relied on the provision in the pension ordinance which stated in part that " 'the pension and other benefits, being in excess of benefits under workmen's compensation act, shall be in lieu thereof.' " *Id.* at 536, 299 N.W.2d at 758.

In *Novotny*, we addressed whether the City was relieved of its statutory obligation to pay workers' compensation benefits when the pension plan provided that payment of disability pension benefits would be in lieu of workers' compensation benefits. We concluded that the payments under the pension plan did not affect the right of Novotny to benefits under the Nebraska Workers' Compensation Act.

For the period after our decision in *Novotny* through April 17, 1989, the City paid an employee who was injured on the job periodic workers' compensation benefits and medical expenses, and COERS paid the employee a service-connected disability pension. Although the City did not immediately amend the ordinance, COERS did not apply the "in lieu thereof" language, and

it did not deduct from the pension award the workers' compensation benefits received by the employee. COERS still deducted from the pension award the amount of Social Security benefits received by the employee.

On April 18, 1989, about 8½ years after our decision in *Novotny*, the 1977 ordinance was amended by ordinance No. 31771 (the 1989 ordinance). The "in lieu thereof" language was deleted, being replaced by the following:

> 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. Such disability benefits shall commence immediately after the eligible member's disability shall have been approved by the board, with disability date having been set by the board upon approval of claim.

After April 18, 1989, the City paid an employee who was injured on the job periodic workers' compensation benefits and medical expenses, and COERS paid such employee a service-connected disability pension. COERS deducted from the pension award the workers' compensation benefits received by the employee from the City and the Social Security benefits received by the employee from the federal government. Miller was granted his disability pension under the 1989 ordinance.

Miller filed his suit on behalf of himself and every former and/or current civilian member of COERS who is receiving a disability retirement pension, or is entitled to or may be entitled to receive the same in the future, and who is having or may have that disability pension entitlement reduced by either workers' compensation or Social Security, or both. Miller sought a declaratory judgment to determine (1) to what extent COERS could reduce disability benefits by either workers' compensation benefits or Social Security benefits and (2) to what extent Miller and members of the class are entitled to an accounting and refund of the reductions, prejudgment interest, postjudgment interest, court costs, and attorney fees. Miller also requested punitive damages under 42 U.S.C. § 1983 (1994).

Miller's motions for partial summary judgment, requesting the court to find that any offset for workers' compensation payments received and/or any offset for Social Security benefits

from the pension entitlement were illegal and unconstitutional, were overruled. The court sustained the defendants' motion for summary judgment against Miller, dismissing Miller's second amended petition.

In its order with respect to Miller's first motion for partial summary judgment, the district court addressed the pension ordinance generally and stated that it was unable to find an impairment, but, instead, found a possible increase. In its final order, the court addressed Miller's contention that he was personally deprived of a vested right to receive $150 per month. The court again found that there was no showing that any change by the City would result in Miller's getting less than he would have received if he had retired prior to July 1972. The court explained that Miller never had any expectation that he would receive both workers' compensation and pension benefits until after our decision in *Novotny v. City of Omaha*, 207 Neb. 535, 299 N.W.2d 757 (1980), when the City began paying both. However, the court found that *Novotny* did not hold that an employee was entitled to both and that the fact that the City mistakenly paid both for approximately 8 years after *Novotny* did not create any right. The court concluded that the City may as a matter of law offset Social Security benefits against pension benefits.

Miller appeals the district court's judgment.

## III. ASSIGNMENTS OF ERROR

In summary, Miller claims the district court erred (1) in finding that the 1977 ordinance allowed the City to reduce disability pension benefits by workers' compensation payments; (2) in not finding that there was a substantial impairment in Miller's pension and the pensions of others when their pensions were reduced by workers' compensation payments; (3) in finding that there was an allowable reduction for 100 percent of the Social Security benefits, including those paid by the employee; (4) in allowing a reduction of disability pension benefits by Social Security and workers' compensation benefits; and (5) in overruling Miller's motions for summary judgment.

## IV. ANALYSIS

As a preliminary determination, we find that the action commenced by Miller does not constitute a class action and that the

action applies to Miller only. An action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). As will be apparent from this opinion, a judgment involving Miller would not necessarily bind all members of the purported class.

1. Impairment of Contract

Miller argues that the district court erred in failing to find that either the offset for Social Security or the offset for workers' compensation benefits constituted a substantial impairment of Miller's contract with the City. To determine whether the City unconstitutionally interfered with Miller's contractual rights, we engage in a three-part analysis. We must determine (1) whether there has been an impairment of the contract; (2) whether the City's actions, in fact, operated as a substantial impairment of the contractual relationship; and, if so, (3) whether that impairment was nonetheless a permissible, legitimate exercise of the City's sovereign powers. See *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

Therefore, we first consider whether, at any point between the commencement of Miller's employment in 1964 and the time of his retirement in 1987, his contractual rights were impaired. In *Caruso v. City of Omaha*, 222 Neb. 257, 260, 383 N.W.2d 41, 44 (1986), we held that the word "impair," as used in the Contract Clause of the U.S. Constitution, requires no construction and may be given its ordinary meaning, which, according to the most basic dictionary definition, is " 'to make worse.' " We stated that not every change constitutes an impairment under the Constitution and that in order for there to be an impairment, the change must take away something and not work to the party's benefit. It is the burden of the employee to show that the situation has been made worse than that which existed when the employee's rights were created. *Caruso v. City of Omaha, supra.*

(a) 1972 Ordinance

Miller asserts that the enactment of the 1972 ordinance constituted a substantial impairment of his contractual rights.

Miller argues that under the pre-1972 pension contract, he had a vested right to a minimum pension of $150 from COERS. He bases this assertion on the fact that under the 1964 ordinance, workers' compensation would not have been a collateral source because had he become disabled at that time, his pension would not have been greater than the workers' compensation benefits then payable. Additionally, there was no offset for Social Security. In contrast, when Miller retired in June 1989, his benefits received through workers' compensation and Social Security exceeded 60 percent of his base compensation for the last full month prior to disability, and as a result, Miller did not receive any disability pension benefits from COERS.

In *Calabro*, we held that a public employee's constitutionally protected right in his or her pension plan vests upon acceptance and commencement of employment, subject to reasonable or equitable unilateral changes by the Legislature. We recognized that the availability of and the security afforded by a pension plan may draw employees into government service. Thus, Miller had a constitutionally protected contractual right in the pension plan as it existed at the time of his employment. See *Calabro v. City of Omaha, supra.*

However, we do not agree with Miller's contention that the 1972 ordinance impaired his contractual rights which existed prior to that time. The Contract Clause of the federal Constitution does not prohibit changes in the contract. See *Caruso v. City of Omaha, supra.* Rather, the issue is whether Miller has been made worse off by the 1972 ordinance, and it is Miller's burden to prove that his situation is worse than that which existed when his rights were created. See *id.*

The 1964 ordinance guaranteed a monthly pension payment of 50 percent of the employee's average monthly compensation, with a cap of $250 per month. In addition, the employee would receive Social Security and medical expenses. If the employee's pension benefits were less than the employee's workers' compensation benefits, he or she would receive those also. Otherwise, if the pension benefits exceeded workers' compensation, they would be in lieu thereof.

The 1972 ordinance changed the disability pension plan by providing for a reduction of pension benefits by the amount of

Social Security the employee received. However, the pension plan also increased the amount of the pension benefits to 60 percent of the employee's monthly compensation, and there was no longer any cap on that amount. Otherwise, the plan remained the same.

We find no evidence from which it can be concluded that Miller was made worse off by the 1972 ordinance. There is evidence as to a change in the source of the funds, but Miller presents no evidence as to why he was made worse off. Having concluded that the 1972 ordinance did not worsen Miller's situation, we do not need to consider the extent of the impairment or whether it was permissible.

(b) 1989 Ordinance

Miller asserts that the 1989 ordinance also constituted an impairment. His first argument in this regard appears to be that the retroactive application of our holding in *Novotny v. City of Omaha*, 207 Neb. 535, 299 N.W.2d 757 (1980), to the language of the previous ordinance nullifies the "in lieu thereof" language therein. As such, simply reading the ordinance with the "in lieu thereof" language deleted, Miller asserts that he had a vested right to full payment of his pension benefits plus workers' compensation without setoff and without regard to whether the pension benefits exceeded the workers' compensation benefits. Therefore, Miller claims that the 1989 ordinance impaired that right by allowing pension benefits to be reduced by workers' compensation so as to ensure only a combined sum of 60 percent of the employee's base compensation.

In making this argument, Miller misconstrues the nature of his constitutionally protected contractual right. In *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), we indicated that what is protected is the settled or reasonable expectation of the employee, not the contract as might be written by the courts. What the Constitution protects are the expectations the employee relied upon to his or her detriment and to the benefit of the employer, who gains the employee's valuable services and loyalty. *Id.*

Prior to *Novotny*, Miller's expectation was that he would receive 60 percent of his monthly salary in pension benefits and medical expenses. That 60 percent would be reduced by Social

Security benefits received. If Miller's pension benefits exceeded his workers' compensation benefits, then the pension benefits would be in lieu thereof, and he would not receive workers' compensation. Otherwise, Miller would also receive workers' compensation.

The 1989 ordinance was similar, except that rather than providing that pension benefits would be in lieu of workers' compensation benefits, the ordinance provided that pension benefits would be reduced by the amount of workers' compensation benefits received. Thus, again, although there has been a change in the source of the funds, Miller makes no argument that the 1989 ordinance made him worse off than what he expected to receive prior to *Novotny*, and we find no evidence in support of such a contention.

Miller's second argument with regard to the 1989 ordinance appears to be that our holding in *Novotny* prohibits the offset of workers' compensation allowed by the 1989 ordinance. In addressing this argument, we point out that *Novotny* was limited to a determination that the workers' compensation statute prohibited workers from paying for their own workers' compensation benefits and prohibited the consideration of other benefits in making the workers' compensation payments. Here, workers' compensation is not being affected by the 1989 ordinance. Workers' compensation is being paid in accordance with the statute fully and without contribution by the employee. *Novotny* did not address the reduction of pension benefits by the amount of workers' compensation benefits paid.

Finally, Miller argues that the 1989 ordinance impaired vested contractual rights that were created by the City's 8-year practice after *Novotny* of allowing employees to receive both pension and workers' compensation benefits without any offset. After our decision in *Novotny*, the City did not immediately amend the ordinance. Instead, up until the passage of the 1989 ordinance, the City did not apply the "in lieu thereof" language and did not offset pension benefits by the amount of workers' compensation. The City continued to deduct the amount of Social Security benefits received from the pension award. Thus, the employee received both workers' compensation and pension benefits without any reduction in either because of the receipt

of the other. The 1989 ordinance changed this practice by providing that pension benefits would be set off against workers' compensation benefits received.

Where the employee's expectations concerning pension benefits are legitimately relied on in commencing or continuing employment, the pension benefits become part of a wage-and-fringe-benefit package. See *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). A subsequent provision which violates those expectations will be unenforceable unless the state demonstrates a vital state interest in requiring a change in the benefits. See *id.*

In *Halpin*, we held that the apparently unwritten administrative policy of including lump-sum payments in the final salary calculation for retirement benefits can create a contractual right within the purview of the Contract Clause. Halpin was a member of the Nebraska State Patrol from 1947 through 1979. Beginning in 1969 and continuing until January 4, 1979, the retirement board calculated the final average monthly salary of a patrolman by including the payment received for unused vacation and sick leave. Commencing January 4, 1979, the board excluded the payment received for unused vacation and sick leave in calculating a patrolman's final average monthly salary.

We held that when the retirement board ceased including these lump-sum payments without an offsetting increase in benefits, there was an impairment of the employee's rights. The record contained testimony from employees stating that they had relied upon representations that their final average monthly salary would be computed by including the lump-sum leave payments they would receive at retirement. There was evidence that the employees relied on this advice and that it constituted an incentive to many of them to enter and remain in the service of the state patrol.

While an administrative practice can create a contractual right, a necessary element to the creation of such a right is that the employee has relied upon the practice or representation in deciding to commence or continue his or her employment. We therefore consider whether there is any evidence that Miller knew of and relied upon the City's practice after *Novotny v. City of Omaha*, 207 Neb. 535, 299 N.W.2d 757 (1980), of neither

offsetting pension benefits by workers' compensation benefits nor applying the "in lieu thereof" language so as to preclude payment of workers' compensation benefits when they were exceeded by the amount of pension benefits. Miller's affidavit submitted in support of his first motion for partial summary judgment stated:

> [P]rior to the effective date of Ordinance 31771, based upon my understanding of the City Code, the law, and my employment agreement, I understood that should I become disabled in the course of employment with the City of Omaha that I would, as a result of the law, be entitled to a full service connected disability without reduction for workers' compensation and/or social security.
>
> . . . I relied upon the receipt of my total disability pension without reduction for workmen's compensation or Social Security benefits as an integral portion of my total employment package which was bargained for by myself through the Nebraska Public Employees Local Union No. 251 and for which I had paid all my years of employment.

We conclude that a material question of fact exists as to whether Miller did or could have in fact relied upon the City's practice that should he become disabled in the course of his employment, he would be entitled for a full service-connected disability pension without reduction for workers' compensation. Although the affidavit also asserts that Miller relied upon the receipt of his pension benefits without reduction for Social Security benefits, we note that Miller does not make this assertion in his brief when discussing the City's practice. Additionally, the evidence is clear that during the time after *Novotny* through the 1989 ordinance, the City did, in fact, deduct Social Security benefits from the amount of pension benefits an employee was eligible to receive.

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Tracy v. City of Deshler, ante* p. 170, 568 N.W.2d 903 (1997); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997). The question on such review is not how a

factual issue is to be decided, but whether any real issue of material fact exists. *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997). The district court erred in granting summary judgment against Miller on the issue of whether the 1989 ordinance impaired his alleged expectation to receive pension benefits without an offset for workers' compensation benefits received.

### 2. Social Security Offset

Miller also assigns as error that "[t]he district court erred in finding that under the IRS rules applicable to the pension fund that there was an allowable reduction for 100 percent of the Social Security benefits including those paid for by the employee." In his brief, Miller argues that the City's act reducing pension benefits by 100 percent of the Social Security benefits was contrary to the applicable Internal Revenue Service (IRS) regulations. In particular, he contends that under Rev. Rul. 71-446, 1971-2 C.B. 187 at §§ 7 and 12, the maximum offset for Social Security is, at most, 64 percent.

Miller fails to assert how the pension plan's alleged conflict with an IRS revenue ruling is relevant to any cause of action or issue over which this court has jurisdiction. A generalized and vague assignment of error that does not advise this court of the issue submitted for decision will not be considered. *Meis v. Grammer*, 226 Neb. 360, 411 N.W.2d 355 (1987). We find Miller's assignment of error regarding the IRS rules and his accompanying argument to be overly vague, and thus, we are unable to address it.

### 3. Remaining Issues

Miller makes a brief reference to an action under 42 U.S.C. § 1983. Although a § 1983 claim was included in his petition, Miller does not on appeal argue that the claim should have succeeded. Therefore, we do not address it further.

Miller also argues that the 1972 and 1989 ordinances constituted a taking of his property without due process of law. However, Miller has failed to refer to his due process arguments in his assignments of error, and therefore, we do not address them. Errors which are argued but not assigned will not be considered by an appellate court. *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

Finally, Miller asserts that summary judgment should not have been granted because there was a factual dispute as to whether Miller was ever a firefighter. Neither party disputes the fact that Miller was not a firefighter. In fact, Miller swore by affidavit that he was a civilian employee, and there is no evidence to the contrary. Accordingly, Miller's contention that there is a factual dispute as to whether he was a firefighter, thereby precluding summary judgment, is without merit.

## V. CONCLUSION

There is a material issue of fact regarding whether Miller relied upon the City's practice between 1980 and 1989 of neither applying the "in lieu thereof" language nor reducing pension benefits by the amount of workers' compensation, such that Miller's protected contractual rights were impaired. Miller claims that he relied upon receipt of his total disability pension without reduction for workers' compensation benefits as an integral portion of his total employment package. Therefore, the district court erred in granting summary judgment against Miller on this issue. We find no merit to any of Miller's other assignments of error.

We therefore reverse the summary judgment of the district court and remand the cause for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# BRIDGETTE A. ANDERSON, BY AND THROUGH HER MOTHER, CINDY ANDERSON/COUVILLON, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT AND CROSS-APPELLEE.

572 N.W.2d 362

Filed January 23, 1998. No. S-96-181.

1. **Rules of Evidence.** In proceedings where the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
2. **Motions for Mistrial: Testimony: Juries.** It is not error to deny a motion for mistrial where a spontaneous, unresponsive portion of an answer was stricken and the jury was instructed to disregard the stricken portion.

3. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
4. **Trial: Witnesses.** In order to predicate error upon a ruling of a trial court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
5. **Evidence: Proof.** In the absence of an offer of proof, the question becomes whether the substance of the evidence was apparent from the context within which a question was asked and whether the evidence would have been material and competent.
6. **Judgments: Appeal and Error.** On questions of law, a reviewing court has the obligation to reach its own conclusions independent of those reached by the lower courts.
7. **Tort Claims Act: Appeal and Error.** On an appeal from a judgment rendered in an action brought under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990), the findings of the trial court will not be disturbed unless clearly wrong.
8. **Courts: Judgments: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
9. **Damages: Appeal and Error.** An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
10. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.
11. **Damages: Appeal and Error.** The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.
12. **Damages: Evidence: Proof.** Damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury.
13. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh evidence but considers the judgment in the light most favorable to the successful party.
14. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them.
15. ____: ____. Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
16. **Expert Witnesses.** Where there is no sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, the expert's opinion is to be stricken.

Appeal from the District Court for Frontier County: JOHN P. MURPHY, Judge. Affirmed.

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

Michaelle L. Behrns and, on brief, Steven D. Burns, of Burns & Associates, P.C., for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

## I. STATEMENT OF CASE

This State Tort Claims Act case between the plaintiff-appellee herein, Bridgette A. Anderson, by and through her mother, Cindy Anderson/Couvillon, and the defendant-appellant, Nebraska Department of Social Services, is before us for the second time. On the first occasion we, among other things, affirmed the district court's summary judgment in favor of Anderson on the issue of liability, but reversed the district court's award of damages to her in the amount of $348,341.83 because of an error in the admission of certain evidence upon which it had relied. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995) (*Anderson/Couvillon I*). Following a new trial on the sole issue of damages, the district court awarded Anderson the sum of $448,341.83; the department appealed, and the mother cross-appealed. Each asserts, in summary, that the district court erred in (1) excluding certain evidence and (2) assessing the amount of damages. We affirm.

## II. FACTS

At the new trial on the issue of damages, the district court admitted the evidence from the original trial, except for that held inadmissible in *Anderson/Couvillon I*. At the original trial, Drs. Melvin Canell, Mona Pothuloori, and Jeff Melvin agreed that Anderson suffered from posttraumatic stress disorder. The major disagreement among them related to Anderson's prognosis; it was noted by Pothuloori that Anderson had not made hoped-for improvement, and Pothuloori described Anderson as being of a high risk of not recovering.

At the new trial, Canell testified that Anderson "has in some ways regressed from the original time that I had seen her." He

testified further that the sexual molestation of Anderson had significantly reduced her educational capacity. Canell described her as being "non-competitive, oppositional, doesn't concentrate very well, has difficulty in immediate recall, has difficulty in interpersonal relationships. . . . [A]ll of those factors would contribute to somehow hamper her abilities in school at any level." He was not sure that "she would complete high school," and he did not think that Anderson would fare well in college. Given her current level of development, he doubted that she would even apply for college.

Based on Canell's educational evaluation, the mother offered the testimony of Dr. Robert Johnson, a business and finance professor, to the effect that the level of education one acquires affects lifetime earning capacity. Johnson presented his calculations of the present value of the loss of earning capacity for Anderson resulting from both her projected failure to earn a high school diploma and her presumed inability to acquire a college degree. However, the district court rejected Johnson's testimony, concluding that without evidence that Anderson was considering college, such evidence was too speculative.

The department called Dr. Eli Chesen, a psychiatrist. Based upon his examination of Anderson and review of the examinations and therapy notes provided by several sources, including Pothuloori and Melvin, he testified that while Anderson has "some fears and problems," he did not "see any evidence of [posttraumatic] stress disorder." He also testified that Anderson might "very well be" a malingerer.

The district court awarded Anderson $5,141.83 for medical expenses, $43,200 for past and future counseling, and $400,000 for pain and suffering and general damages, plus costs.

## III. ANALYSIS OF DEPARTMENT'S APPEAL

### 1. Exclusion of Evidence

In the first assignment of error, the department asserts that the district court wrongly struck certain testimony and improperly refused to permit the department to elicit certain other testimony. In reviewing this assignment of error, we are bound by the rule that in proceedings where the rules of evidence apply, the admission of evidence is controlled by rule and not by judi-

cial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Allphin v. Ward, ante* p. 302, 570 N.W.2d 360 (1997).

The only testimony by Chesen that was stricken related to his answer to the question posed by the department asking: "And in reaching that observation did you consider all of the records, including the original police reports, and doctors' reports and other information that was furnished you? [Answer:] Yes. And I thought they were helpful."

The mother objected without stating a ground and moved to strike the answer after the word "yes." The district court ordered that portion of the answer stricken. The stricken portion of Chesen's answer was not responsive and thus properly stricken. See *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983) (not error to deny motion for mistrial where spontaneous, unresponsive portion of answer was stricken and jury was instructed to disregard stricken portion).

Next, the department urges that the district court wrongly prevented Chesen from answering the question, "Doctor, when you are evaluating someone in your ordinary practice for what appears to be [posttraumatic] stress, do you in making your evaluation use the GAF?" The record does not make clear whether GAF refers to a measurement designated as the "global assessment score" or to some other measurement dealing with global functioning. In any event, the district court sustained the mother's objection to this question on the ground that as Chesen found no posttraumatic stress symptomology, whether he used a particular scale was meaningless. The department now argues that this ruling was an abuse of discretion because it prevented the department from refuting the mother's evidence, symptom by symptom.

But the department misapprehends the basis of the district court's ruling. The court did not rule that any attempt by Chesen to relay the symptoms which influenced his diagnosis was irrelevant, merely that the question of whether he used a particular test was not relevant.

Lastly, the department argues that it should have been able to ask Chesen about the extent to which Anderson had been sexually molested. It argues that the district court was in error in

concluding that such questions were foreclosed by our decision in *Anderson/Couvillon I*. While the bill of exceptions establishes that the district court considered the issue thus foreclosed, we need not consider the correctness of its ruling in that regard, for the bill of exceptions contains no offer of proof establishing that, if wrong, the ruling prejudiced the department.

Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. *Cockrell v. Garton*, 244 Neb. 359, 507 N.W.2d 38 (1993); Neb. Evid. R. 103(1)(b), Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995). In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. *Slocum v. Hevelone*, 196 Neb. 482, 243 N.W.2d 773 (1976).

In the absence of an offer of proof, the question becomes whether the substance of the evidence was apparent from the context within which the question was asked and whether the evidence would have been material and competent. *State v. Fonville*, 197 Neb. 220, 248 N.W.2d 27 (1976).

It is not clear from the record how Chesen's perception of the molestation affected his diagnosis. Neither is it clear that the district court would not have allowed the direct question, How did your knowledge and opinion as to the extent of the molestation affect your diagnosis? Nor is it clear what Chesen's answer would have been had the question been asked. Under this state of the record, the department has no basis to argue that it was prejudiced by the district court's ruling.

For the foregoing reasons, there is no merit to this assignment of error.

### 2. Assessment of Damages

In connection with the second assignment of error, the department contends that the amount of damages awarded is so excessive as to "shock the conscience" and that the district court merely relabeled the hedonic damages held to be not recoverable in *Anderson/Couvillon I* as recoverable for pain and suffering. We review the issues presented by this assignment

under the rule that on questions of law, a reviewing court has the obligation to reach its own conclusions independent of those reached by the lower courts. *Fales v. Books, ante* p. 491, 570 N.W.2d 841 (1997). However, on an appeal from a judgment rendered in an action brought under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990), the findings of the trial court will not be disturbed unless clearly wrong. *Brown v. State*, 205 Neb. 332, 287 N.W.2d 676 (1980).

It is true that when a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *Smith-Helstrom v. Yonker, ante* p. 189, 569 N.W.2d 243 (1997); *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986).

We wrote in *Anderson/Couvillon I* that "while consideration of loss of the enjoyment of life may properly be considered as it relates to pain and suffering, and to disability, it is improper to treat it as a separate category of nonpecuniary damages." *Id.* at 664, 538 N.W.2d at 741. Thus, the district court's judgment in *Anderson/Couvillon I* was reversed because it was predicated in part on the existence of hedonic damages.

The department argues that contrary to the district court's finding that Anderson's condition has worsened since the original trial, statements by Canell that Anderson "is behaving, so far as I know, predictable based probably upon what has happened to her" and that "[s]he's done, frankly, what I expected she would" are evidence that her condition had not worsened.

However, such a position is not supported by the record. In fact, Canell's testimony conveys a very consistent impression that Anderson is not progressing as he had earlier hoped. His statements include:

> And the response to that individual has not been as therapeutically good as I would have expected.
>
> Many children her age respond . . . in a much more fruitful manner. [Anderson] hasn't. And so she's in the sub-population of children who have experienced trauma

> and have simply not profited a great deal from the best efforts that have been made so far.
>
> . . . .
>
> . . . She's somewhat worse than I would have expected.

The question, "And then your testimony here today is basically that they have the same problems [as at the original trial] but they are worse" elicited the response that Anderson "is substantially worse. . . . [W]hat I see in a global pattern is that [Anderson] is a great deal worse . . . ."

It is clear, however, that the district court did not rely solely on Canell's testimony at the second trial in increasing the amount of damages. In Pothuloori's testimony in the first trial, she expressed the hope that 2 to 3 years of therapy would enable Anderson to regain some of her functioning and that she would stabilize. Pothuloori had noted in the original trial that Anderson had already been in therapy for 1½ to 2 years and that children often can make a limited recovery in 4 to 5 years. But she also had expressed the concern that Anderson is a person who is of a high risk of not recovering. Given that background, Canell's testimony takes on added significance, as he noted that Anderson "has in some ways regressed from the original time that I had seen her." That is to say, Anderson had regressed at the end of the period in which it had been hoped that she would have significantly advanced.

This was the evidence the district court considered when it noted in its order that Anderson's situation

> is worse than the Court contemplated at the time of the original judgment entered in this case. The evidence is clear that she has not made any strides in dealing with the situation, and the situation as described by [Pothuloori], which she described as a difficulty to discuss the assault has come to pass.

An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990). If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or

some other means not apparent in the record. See *id.* However, the amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993).

Given the evidence adduced at the new trial concerning the nature of Anderson's condition, we cannot say the district court's award is so excessive as to shock the conscience. Therefore, this assignment, too, is without merit.

## IV. ANALYSIS OF MOTHER'S CROSS-APPEAL

### 1. Exclusion of Evidence

In her first assignment of error, the mother asserts that the district court incorrectly rejected Johnson's testimony.

We have held that damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988).

The questions concerning loss of future earnings for failure to complete high school and for failure to complete college must be analyzed separately because there is different testimony concerning each. While the district court's order focused only on college, because Johnson's testimony established definite independent damages if a high school diploma is not obtained, the question of whether his testimony should have been admitted solely on the question of damages resulting from a lack of high school education must also be examined.

The only evidence concerning Anderson's ability to complete either high school or college is Canell's testimony. As to high school, his comments were limited to, "I'm not sure that she would complete high school." Although there was no relevancy objection to Canell's statement, his lack of certainty nonetheless bears on the weight his testimony should be given in this regard. In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh evidence but considers the judgment in the light most favorable to the successful party.

*Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989). Triers of fact are not required to take opinions of experts as binding upon them. Determining the weight that should be given expert testimony is uniquely the province of the fact finder. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). Thus, even if Canell's uncontroverted statement were not too equivocal to carry much weight, the district court was at liberty to reject it.

Johnson's testimony as to the loss of income resulting from the failure to obtain a college degree was based on Canell's testimony that based upon the sophistication of her family and her intelligence, which he placed at "slightly, not significantly, above average," Anderson would probably have graduated from college, had she not been molested.

The preliminary question is whether it could be determined to a "reasonably certain" degree that Anderson would have attended and graduated from college in the absence of the molestation, particularly since she was 7 years old at the time of the occurrence.

Given the state of the record, the district court did not abuse its discretion in determining that there was no sound and reasonable basis such that Canell was able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. See *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996). In such instances, the expert's opinion is to be stricken. See *id.*

Thus, there is no merit to this assignment of error.

### 2. Assessment of Damages

The foregoing determination renders moot the mother's second assignment of error, claiming that the district court erred in not awarding Anderson damages for the loss of future earning capacity.

## V. JUDGMENT

Accordingly, as first noted in part I, the judgment of the district court is affirmed.

Affirmed.

White, C.J., participating on briefs.

# TERRY A. TALLE, APPELLEE, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

572 N.W.2d 790

Filed January 23, 1998. No. S-96-272.

1. **Rules of Evidence.** In proceedings where the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
2. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; as a result, those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
3. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
4. **New Trial: Proof: Appeal and Error.** Under the law-of-the-case doctrine, all matters which expressly or by necessary implication are adjudicated by an appellate court become the law of the case on remand for a new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial.
5. **Proof: Appeal and Error.** For purposes of the law-of-the-case doctrine, the burden of showing a material and substantial difference in the facts is on the party asserting the difference.
6. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
7. **Trial: Witnesses.** In order to predicate error upon a ruling of a trial court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
8. **Trial: Witnesses: Appeal and Error.** Error in the exclusion of testimony is of no avail if the same testimony or testimony to the same effect has been or was afterward allowed to be given by a witness.
9. **Judgments: Appeal and Error.** On questions of law, a reviewing court has the obligation to reach its own conclusions independent of those reached by the lower courts.
10. **Tort Claims Act: Appeal and Error.** On an appeal from a judgment rendered in an action brought under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990), the findings of the trial court will not be disturbed unless clearly wrong.
11. **Courts: Judgments: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
12. **Damages: Appeal and Error.** The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.

13. ____: ____. An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
14. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.

Appeal from the District Court for Frontier County: JOHN P. MURPHY, Judge. Affirmed.

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

Michaelle Behrns and, on brief, Steven D. Burns, of Burns & Associates, P.C., for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

## I. STATEMENT OF CASE

This is the second time this State Tort Claims Act case appears in this court. In *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 541 N.W.2d 30 (1995) (*Talle I*), we affirmed the district court's summary judgment in favor of Terry A. Talle, the plaintiff-appellee therein as well as in the present case, on the issue of the liability of the defendant-appellant, Nebraska Department of Social Services, but reversed the district court's award of damages in the amount of $142,600 because of an error in the admission of certain evidence upon which it had relied. Following a new trial on the sole issue of damages, the district court awarded Talle the sum of $192,600, and this appeal followed. The department asserts, in summary, that the district court erred in (1) excluding certain evidence and (2) assessing the amount of damages. We affirm.

## II. FACTS

At the new trial on the issue of damages, the evidence from the original trial was admitted by stipulation, except for that held inadmissible in *Talle I*, and both parties also presented additional evidence.

Dr. Melvin Canell, a psychologist who had treated Talle prior to the first trial and had testified therein as to her psychological

condition, testified that he resumed treating Talle in the fall of 1995 after she moved back to the North Platte area. He found that she had regressed significantly, and he treated her intensively and frequently.

Canell attributed some of the regression to Talle's learning that Ronald Heinen, the foster child who had assaulted her, was living and working in North Platte. Canell was also of the view that conditions related to the holiday season were exacerbating her condition, which had become acute enough that in addition to continuing frequent therapy, he sent her to a psychiatrist who prescribed medication. There was also evidence that Talle had difficulty holding a job and that she had gone through a divorce.

Canell concluded, "[A]t this point it would be less than promising than I thought it was a number of years ago. And because of the manner in which she waxes and wanes in her general functioning I think that the prognosis at best would be guarded."

The department called Dr. Eli Chesen, a psychiatrist, who testified that in his opinion Talle suffered from depression and a mixed personality disorder, but did not suffer from posttraumatic stress disorder.

The district court awarded damages of $27,000 for therapy and counseling, $15,600 for lost wages, and $150,000 for past and future pain and suffering.

## III. ANALYSIS

### 1. Exclusion of Evidence

The claim in this first assignment of error, that the district court erred in excluding evidence, focuses on the rulings based on its conclusion that the type of damages suffered by Talle had already been determined, and, thus, further inquiry into that issue was foreclosed. In reviewing this assignment of error, we are bound by the rule that in proceedings where the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., ante* p. 813, 572 N.W.2d 362 (1998). At one point, the district court noted that Chesen could testify as to the general definition of posttraumatic stress disor-

der and that if he testified that Talle "doesn't have that, that's fine." However, the district court later clarified, "[T]his Court long ago determined that there was [posttraumatic] stress. . . . If you want to have him testify now that she's not suffering from this, that's fine. But if he's going to say that she never suffered from it, that's not admissible. That issue I decided."

The department argues that it was error to hold that it was foreclosed from questioning the diagnosis of the disorder, urging that "[t]he judge's rulings prevented all testimony from [Chesen] concerning his experience in dealing with [posttraumatic] stress, whether [Talle] had [posttraumatic] stress at all, and why." Brief for appellant at 11. But that characterization overlooks that the district court's ruling gave the department the opportunity to submit expert testimony that Talle no longer suffered from the disorder and why that was so.

In *Talle I*, we explicitly recited that Talle was suffering from the disorder as well as from depression as a result of the department's and Heinen's acts, and thus impliedly ruled that the district court's findings in those regards were correct. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; as a result, those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. See, *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996); *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994). The doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). In other words, all matters which expressly or by necessary implication are adjudicated by an appellate court become the law of the case on remand for a new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial. *McKinstry v. County of Cass*, 241 Neb. 444, 488 N.W.2d 552 (1992). The burden of showing the material and substantial difference in the facts is on the party asserting the difference. *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988).

The department argues that Chesen's opinion that Talle did not and does not suffer the disorder constitutes sufficient substantially and materially different facts as to make the doctrine inapplicable. However, in this context an opinion is not a fact. There were no new facts presented at the second trial as to the injury to Talle, only evidence as to her present condition and diagnosis. An expert's opinion that contradicts other expert testimony does not put new facts before the court.

Thus, while the department could question the extent of the disability Talle suffered due to the disorder, it was precluded from attempting to adduce evidence that she did not suffer from posttraumatic stress syndrome at the time of the first trial and therefore was barred from offering evidence that Talle never suffered the disorder.

The question therefore becomes whether the district court erred in its rulings relating to questions concerning Talle's condition after the first trial.

The first objection to this line of questioning was sustained as Chesen was beginning to recite his military experience with the disorder. As no offer of proof was made, it is unclear from Chesen's preliminary remarks whether he was tying his experience into his diagnosis that Talle never suffered from the disorder or whether it would tie in strictly with the post-first-trial period (or indeed whether it would tie in at all, there being considerable difference between combat shock and the shock of being assaulted by a teenage boy in one's foster care). Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., ante* p. 813, 572 N.W.2d 362 (1998). In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. *Id.*

An objection was also sustained to Chesen's discussing the disorder in a criminal context. Again, in the absence of an offer of proof, it is not clear as to which diagnosis the discussion would relate.

The department did make an offer of proof after a subsequent objection to relevancy was sustained. As part of the offer of proof, Chesen testified that in his experience the disorder results only from situations in which there is a potential for loss of life and not from day-to-day experiences with a teenager who is out of control, violent, or very difficult to contain. As this testimony supports the conclusion that Talle never suffered from the disorder, it was barred by the law-of-the-case doctrine.

The department also complains that its question as to whether it would be consistent with Chesen's experience "that [posttraumatic] stress does not come from the ordinary day-to-day circumstances of raising teenagers" was deemed to be suggestive and leading. But even if sustaining the objection on the ground stated was error, the error did not prejudice the department, for Chesen was permitted to testify, without objection, that the disorder normally is precipitated by an event, generally very frightening, that is outside of normal human experience, such as occurs on the battlefield. See *Kunkel v. Cohagen*, 151 Neb. 774, 39 N.W.2d 609 (1949) (error in exclusion of testimony of no avail if same testimony or testimony to same effect has been or was afterward allowed to be given by witness).

Accordingly, for each of the foregoing reasons, there is no merit to this assignment of error.

### 2. Assessment of Damages

In the second assignment of error, the department asserts that the district court merely relabeled the hedonic damages held to be not recoverable in *Talle I* as recoverable for pain and suffering and, further, that the addition of $50,000 to the amount awarded in the first trial so "shocks the conscience" as to require reversal. Brief for appellant at 26. We review the issues presented by this assignment under the rule that on questions of law, a reviewing court has the obligation to reach its own conclusions independent of those reached by the lower courts. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, *ante* p. 813, 572 N.W.2d 362 (1998). However, on an appeal from a judgment rendered in an action brought under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 &

Cum. Supp. 1990), the findings of the trial court will not be disturbed unless clearly wrong. *Id.*

It is true that when a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *Id.*

We wrote in *Talle I* that " 'while consideration of loss of the enjoyment of life may properly be considered as it relates to pain and suffering, and to disability, it is improper to treat it as a separate category of nonpecuniary damages.' " 249 Neb. at 25, 541 N.W.2d at 34. Thus, the district court's judgment in *Talle I* was reversed in part because it was predicated on the existence of hedonic damages, which is not recognized in this jurisdiction as a separate category of damages.

It must be borne in mind that at the time of the second trial, Talle had been undergoing therapy at least off and on since February 1991. Evidence that she had not made substantial progress during that time despite her treatment is strong evidence of the seriousness of her condition. Moreover, it was evidence the district court did not have, indeed, could not have had, at the time of the first trial. Under that state of the record, we cannot say that the district court's award for past and future pain and suffering is clearly wrong, nor can we conclude that the district court merely relabeled the nature of the damages it was awarding.

This brings us to the question of the total amount of damages, a matter which is one solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. *Anderson/Couvillon, supra.*

An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Id.* If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record. See *id.*

Given the evidence adduced at the new trial concerning the nature of Talle's condition, we cannot say the district court's award is so excessive as to shock the conscience.

Thus, this assignment, too, is without merit.

## IV. JUDGMENT

As first noted in part I, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, C.J., participating on briefs.

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STEVEN M. CHELBERG, APPELLANT, V. GUITARS & CADILLACS OF NEBRASKA, INC., APPELLEE.

572 N.W.2d 356

Filed January 23, 1998. No. S-96-274.

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. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. **Invitor-Invitee: Words and Phrases.** An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for their mutual advantage.
5. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the business invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

6. **Negligence: Liability: Invitor-Invitee: Proof: Notice.** In cases involving a slip and fall as a result of a slippery or foreign substance on the floor of a business, a plaintiff must establish either actual or constructive notice of the condition which caused the fall.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, IRWIN, and MUES, Judges, on appeal thereto from the District Court for Douglas County, ROBERT V. BURKHARD, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Eugene P. Welch and Francie C. Riedmann, of Gross & Welch, P.C., for appellant.

Robert A. Wichser and Kelly K. Brandon, of Sodoro, Daly & Sodoro, for appellee.

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

MCCORMACK, J.

This is a negligence action brought by appellant, Steven M. Chelberg, for personal injuries resulting from a fall he sustained on a tile walkway located on premises owned by Guitars & Cadillacs of Nebraska, Inc. The district court for Douglas County, Nebraska, granted Guitars & Cadillacs' motion for summary judgment. Chelberg filed a motion for new trial which was denied. Chelberg subsequently filed a second motion for new trial based on the discovery of new evidence. This motion was also denied. Chelberg appealed to the Nebraska Court of Appeals, which affirmed the district court's decision in a memorandum opinion filed June 5, 1997. Chelberg then petitioned this court for further review. We reverse the Court of Appeals' upholding of the district court's order and remand the cause for further proceedings.

## I. BACKGROUND

On October 10, 1993, Chelberg was a patron at Guitars & Cadillacs, a country western nightclub located in Omaha, Douglas County, Nebraska. Guitars & Cadillacs had a large dance floor, seating areas, and a tile walkway which circled the dance floor. Guitars & Cadillacs sold beer out of a "beer

trough." This trough was a steel tub filled with ice and bottles of beer, and was located in a recessed area of the club overlapping the tile walkway which circled the dance floor. A customer would tell the bartender what brand of beer the customer wanted, and the bartender would pull out the bottle, dry it off with a towel, open the top, and hand it to the customer. Some customers would pull out the bottles themselves. The beer trough closed at 12:45 a.m. At that time, the bartender loaded the remaining beer bottles into cardboard cases and placed them on a dolly. The loading of the dolly took place in the area where Chelberg fell. The beer was then wheeled to the beer cooler.

During Guitars & Cadillacs operating hours, three floorwalkers were on duty. Floorwalkers are employees of Guitars & Cadillacs who constantly patrol the club cleaning up spills and emptying beer bottles and drinking glasses. The floorwalkers also watch for unruly customers, straighten up tables, and make a sweep of their assigned area every 5 minutes. Jeffrey Ahl, manager of Guitars & Cadillacs, stated that if something was spilled in the club, the floorwalkers or another club employee would have it cleaned up within 5 minutes.

Sometime between 12:55 and 1:25 a.m on October 10, 1993, Chelberg was walking around the dance floor when he came around a corner where the beer trough was located, and his right leg slipped out from under him. He fell, injuring his right knee and back. Chelberg landed in an area of clear liquid which he described as being approximately 2 feet in diameter. The liquid was 4 or 5 feet from the trough, and Chelberg stated that he had not seen the wet area prior to his fall. Chelberg got up, contacted a club employee, and asked to see a manager. The assistant manager, Ken McCluskey, met with Chelberg. McCluskey wiped up the spill and told Chelberg to call for medical attention if he needed it. Chelberg called an ambulance.

Chelberg filed suit against Guitars & Cadillacs in district court, alleging that Guitars & Cadillacs was negligent in placing the trough full of beer and ice adjacent to the dance floor and in selling wet bottles of beer near this floor without any sponge area or bar area over which to work. Guitars & Cadillacs moved for summary judgment, and the court granted its motion,

noting that there was no credible evidence that Guitars & Cadillacs (1) created a condition on the floor where Chelberg fell, (2) knew of the condition, or (3) could have discovered this condition by exercising reasonable care.

Chelberg filed a motion for new trial on January 25, 1996, alleging that the order of the trial court was not supported by the evidence and was contrary to the law. This motion was heard on January 30. On February 5, Chelberg filed a second motion for a new trial based on newly discovered evidence in the form of a witness named "Jeff Nownes." In an affidavit, Nownes stated that he arrived at Guitars & Cadillacs at 12:30 a.m. on October 10, 1993, and observed a water puddle adjacent to the beer trough during his first 10 minutes in the club. Nownes attested that he discussed Chelberg's fall with Chelberg in mid-January 1996. Nownes asked Chelberg if he could talk with Chelberg's attorney to determine whether he could be called as a witness. Chelberg's attorney telephoned Nownes on February 1. Chelberg's attorney attested, through affidavit, that after meeting with Nownes, the decision was made to file the second motion for new trial, which was filed February 5. On February 9, the trial court denied Chelberg's first motion for new trial without comment. On March 4, the trial court denied Chelberg's second motion for new trial, stating that there was no allegation in either affidavit that Chelberg could not with reasonable diligence have discovered and produced the evidence at the previous hearings. Chelberg appealed this decision to the Court of Appeals, assigning as error the district court's (1) granting of summary judgment and (2) failing to grant a new trial based on newly discovered evidence. The Court of Appeals affirmed the district court's decision. It is from this ruling that Chelberg petitions for further review.

## II. ASSIGNMENTS OF ERROR

Chelberg assigns as error the Court of Appeals' (1) ruling affirming the grant of summary judgment in favor of Guitars & Cadillacs, (2) determination that no genuine issue of material fact existed, and (3) determination that no credible evidence existed that Guitars & Cadillacs created the condition on the floor where Chelberg fell.

## III. 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. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas., ante* p. 177, 569 N.W.2d 436 (1997); *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997); *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (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. *Tracy v. City of Deshler, ante* p. 170, 568 N.W.2d 903 (1997); *Schendt v. Dewey, supra*; *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 567 N.W.2d 178 (1997); *Brown v. Wilson, supra.*

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas., supra*; *Tracy v. City of Deshler, supra.*

## IV. ANALYSIS

We note that *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), abrogates the classifications of invitee and licensee in favor of a standard of care for all those lawfully on the premises of another. Our rule in *Heins, supra*, however, is prospective in application and therefore inapplicable to the instant case.

### 1. Status as Invitee

An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for their mutual advantage. *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996). It is undisputed that Chelberg was a business invitee.

2. Duty Owed to Invitee

A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the business invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997); *McIntosh v. Omaha Public Schools, supra*; *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995).

The first part of the above test may be met by proving any one of the three subparts, namely that the defendant created the condition, knew of the condition, or would have discovered the condition by the exercise of reasonable care. Summary judgment would not be proper if a material issue of fact had been raised with regard to any of these subparts.

(a) Knowledge

We first look to the record to determine if a material issue of fact exists as to Guitars & Cadillacs' knowledge of the condition. There was no evidence presented that Guitars & Cadillacs knew of the dangerous condition of the spill prior to Chelberg's accident. None of the depositions, affidavits, or interrogatories allege or confirm that any Guitars & Cadillacs employee had knowledge of the spill. Therefore, no material issue of fact was raised with regard to Guitars & Cadillacs' knowledge of the spill.

(b) Reasonable Care

We next turn to an examination of the record to determine whether a material issue of fact existed with regard to the reasonable care used by Guitars & Cadillacs to discover the spill. Our case law is clear that in cases involving a slip and fall as a result of a slippery or foreign substance on the floor of a busi-

ness, a plaintiff must establish either actual or constructive notice of the condition which caused the fall. *Cloonan v. Food-4-Less, supra*; *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995). See *Jeffries v. Safeway Stores, Inc.*, 176 Neb. 347, 125 N.W.2d 914 (1964). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it.

In the instant case, the only evidence submitted at the hearing on Guitars & Cadillacs' motion for summary judgment regarding the time the spill was on the floor was the statement of Guitars & Cadillacs' manager, who explained that floorwalkers would clean up a spill within 5 minutes of its occurrence. Chelberg provided no witnesses or circumstantial evidence as to the amount of time the spill was on the floor. Without such evidence, no material issue of fact can be said to exist with regard to whether Guitars & Cadillacs would have discovered the spill with the exercise of reasonable care.

(c) Creation of Condition

We now consider Chelberg's principal contention: Guitars & Cadillacs created the dangerous condition of the spill by the use of the beer trough. Chelberg contends that the wet beer bottles' being pulled from the trough without being toweled off to remove excess moisture was enough evidence for the jury to reasonably infer that Guitars & Cadillacs created the spill. Alternately, he claims that the process of removing the bottles from the trough and transporting them to the cooler, again without toweling off the bottles to remove the excess moisture, could reasonably be inferred as causing the spill. The Court of Appeals found that no material issue of fact existed as to whether Guitars & Cadillacs created the spill. We disagree.

The manager of Guitars & Cadillacs testified that they trained employees involved in beer trough sales activity to grab the beer bottle with a towel, wipe off the bottle, and then hand it to the customer. He stated the reason for this procedure is "the bottles are sitting in a tub of ice and when you pull it out of the ice obviously there is water running off of it. So we wipe it down. It's still ice cold inside and it's still going to seep moisture out or the bottle will still sweat a little bit, but the major

amount, the water moisture is wiped off." Giving all reasonable inferences to Chelberg, the fact finder could find that the bottles pulled out of the trough could drip on the floor and create a slippery, wet, and dangerous condition on the tile walkway used by the customers. Then, to allow some of the customers to remove bottles from the trough without wiping them off and, at 12:45 a.m., shortly before Chelberg's fall, take the rest of the bottles out of the trough, again without wiping them off, and load them onto a beer cart parked in the area where Chelberg fell, establishes a question of fact for the fact finder as to whether Guitars & Cadillacs created a dangerous condition. Therefore, because a genuine issue of material fact exists as to whether Guitars & Cadillacs created the condition, the district court erred in granting summary judgment in favor of Guitars & Cadillacs.

Having determined that the district court erred in granting summary judgment in favor of Guitars & Cadillacs, we need not address the issue of newly discovered evidence or the failure of the district court to grant a new trial.

## V. CONCLUSION

We hold that the district court erred in sustaining Guitars & Cadillacs' motion for summary judgment for the reason that there was a genuine issue of material fact as to whether Guitars & Cadillacs created the condition. We, therefore, reverse the Court of Appeals' decision upholding the district court's order and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., concurs.

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LINCOLN FIREFIGHTERS ASSOCIATION LOCAL 644, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.
572 N.W.2d 369

Filed January 23, 1998. No. S-97-310.

1. **Commission of Industrial Relations: Appeal and Error.** In the Nebraska Supreme Court's review of orders and decisions of the Commission of Industrial Relations, the court is restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

2. **Commission of Industrial Relations: Evidence.** As a general rule, it may be said that the factors most often used to determine comparability as to wage rates and other benefits are geographic proximity, population, job descriptions, job skills, and job conditions.
3. **Commission of Industrial Relations: Wages.** In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make a comparison appropriate.
4. **Commission of Industrial Relations: Evidence.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of its expertise and should be given due deference.
5. **Commission of Industrial Relations: Wages: Proof.** Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish that such is the case.
6. **Commission of Industrial Relations: Expert Witnesses.** The weight which should be given expert opinions is uniquely within the province of the Commission of Industrial Relations.
7. **Commission of Industrial Relations.** Management prerogatives include the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

William A. Harding, Jerry L. Pigsley, and Neal E. Stenberg, of Harding, Schultz & Downs, and Don W. Taute, Assistant Lincoln City Attorney, for appellant.

John P. Fahey, Law Office of John P. Fahey, P.C., for appellee.

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

CAPORALE, J.

## I. STATEMENT OF CASE

In this industrial dispute over wages and conditions of employment for fiscal year September 1, 1995, through August 31, 1996, the respondent-appellant, City of Lincoln, challenges the determinations made by the Nebraska Commission of Industrial Relations upon the petition of the appellee, Lincoln Firefighters Association Local 644, the collective bargaining representative of certain employees of Lincoln's fire depart-

ment. Lincoln successfully sought leave to bypass the Nebraska Court of Appeals and assigns 11 errors which, in summary, assert that the commission erred in (1) selecting the array of comparable cities, (2) failing to adjust for economic variables, (3) failing to account for all fringe benefits, (4) failing to find its health insurance benefits superior to those offered by the array cities, (5) failing to find its pension benefits superior to those offered by the array cities, (6) failing to properly account for fringe benefits not provided by certain array cities, and (7) placing employees into newly established pay lines. We affirm.

## II. SCOPE OF REVIEW

In our review of orders and decisions of the commission, we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *Hall Cty. Pub. Defenders v. County of Hall, ante* p. 763, 571 N.W.2d 789 (1998); *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988); *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984); *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983); *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *modified* 209 Neb. 597, 309 N.W.2d 65; *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977).

## III. FACTS

The relevant facts are presented in the course of analyzing the issues presented by Lincoln's assignments of error.

## IV. ANALYSIS

In industrial disputes involving governmental services, the commission, with an exception not relevant here, is empowered to "establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." Neb. Rev. Stat. §§ 48-810 and 48-818 (Reissue 1993).

Each of the matters addressed and ruled upon by the commission falls within the scope of its statutory authority; thus, the only question before us is whether each challenged aspect of its order is supported by substantial evidence and is not arbitrary, capricious, or unreasonable. *AFSCME Local 2088, supra* (commission has jurisdiction over public employment industrial disputes concerning such matters as wages and fringe benefits).

### 1. Array of Comparable Cities

In the first assignment of error, Lincoln asserts that the commission erred in selecting the array of employers to which Lincoln was compared.

#### (a) Facts

The association proposed that Ann Arbor, Michigan; Davenport, Iowa; Minneapolis, Minnesota; and Peoria, Illinois, be included in the array. Lincoln proposed Des Moines, Iowa; Springfield, Missouri; and Topeka, Kansas. Both parties agreed that Cedar Rapids, Iowa, and Sioux Falls, South Dakota, were comparable. The commission included seven cities in the array: Cedar Rapids, Davenport, Des Moines, Minneapolis, Peoria, Sioux Falls, and Topeka. The commission thus selected three of the four cities proposed only by the association and two of the three cities suggested only by Lincoln. In selecting the array, the commission focused on the department's firefighting and emergency medical services duties and, contrary to the association's request, discounted the department's duties in providing hazardous materials control.

Lincoln contends that the commission should have excluded Davenport, Minneapolis, and Peoria from the array and included Springfield.

Noting that Davenport was excluded from two previous commission arrays involving Lincoln, Lincoln argues that Davenport should not have been included in the present array both because it has less than half the population of Lincoln and because it is considered part of the "quad cities" and therefore part of an area which has too great a population. In short, in Lincoln's view, Davenport is both too large and too small for an appropriate comparison. Lincoln maintains in addition that Davenport does not have emergency medical services similar to

its own, as Davenport does not require the same certification and skill level as does Lincoln. However, there is evidence that notwithstanding some differences in the emergency medical services provided by Davenport and Lincoln, the services are similar in some respects.

In contending that Minneapolis should have been excluded, Lincoln points out that whereas Minneapolis has a metropolitan population of 2,538,834, Lincoln has a metropolitan population of only 213,641, less than a tenth of that of Minneapolis. The record further reveals, however, that the population within the city limits of Minneapolis is 368,383; Lincoln has a population of 191,972 within the city limits. The commission was also presented with evidence that Minneapolis is comparable to Lincoln in geographic proximity, in job descriptions and skills for firefighters, and in job conditions.

In maintaining that Peoria should have been excluded, Lincoln points to testimony that "Peoria is not a mirror image of" Lincoln, that Peoria has a much larger manufacturing base and a smaller governmental employment base than does Lincoln, and that Peoria does not require its firefighters to be certified in the manner Lincoln requires. Again, however, the evidence as to the quality of the emergency medical services provided by Peoria is in conflict, as there is evidence that Peoria provides emergency medical services similar to that provided by Lincoln.

Finally, Lincoln urges that the commission erred in excluding Springfield from the array. Lincoln cites the commission's order, which acknowledges that Springfield is both geographically proximate and meets the size criteria and that its fire department also provides significant emergency medical services. However, the association presented evidence that Springfield's emergency medical services personnel lack equipment for bleeding control, splinting, spinal immobilization, and medical assessment and that its emergency medical services personnel function at a lower basic life support level than do Lincoln's emergency medical services personnel.

(b) Application of Law to Facts

The basis for selecting an array is set forth in § 48-818, as noted earlier. Simply put, § 48-818 requires that the employers

selected for the comparative array must be demonstrated to be similar.

As a general rule, it may be said that the factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988); *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *modified* 209 Neb. 597, 309 N.W.2d 65. In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make a comparison appropriate. *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln,* 216 Neb. 274, 343 N.W.2d 735 (1984).

Lincoln first rests its conclusion that the populations of Davenport and Minneapolis are too dissimilar to make appropriate comparisons on the claim that the commission has long considered only array members with populations that are not less than half or more than twice the population of the compared-to employer. Lincoln further notes that after the present case was decided, the commission rejected cities from an array because they were part of a metropolitan statistical area that was not comparable to the compared-to community. Lincoln concludes from the foregoing that by failing to reject Davenport and Minneapolis in the present case, the commission was acting in an arbitrary, capricious, and unreasonable manner.

But the commission noted that it here declined to eliminate cities through reliance on metropolitan statistical area data "as there was no evidence presented to support the contention that a city's presence in a larger metropolitan area directly affected wages or work, skills and working conditions." While Lincoln presented expert testimony that cities in metropolitan statistical areas are entwined in that area's economy, it provided no evidence as to how wages or working conditions were affected or why a city in a larger metropolitan statistical area should be automatically excluded from the array. The association countered with an expert's testimony that a fire department's location in a larger metropolitan statistical area does not necessarily

make a difference. The expert also testified that a fire department is somewhat different from other employers, even from police departments, because the operations of a fire department generally stay within city limits.

The commission's determination in this regard is a factual one; thus, it could reasonably place greater reliance on that factor in one case and less reliance on it in another case. As we have observed in the past,

> We must not lose sight that the "guidelines" used by the [commission] are not statutory requirements, and the failure of the evidence to strictly comply with the guidelines does not require us to find that the action of the [commission] . . . was arbitrary and capricious. Guidelines are nothing more than . . . a framework . . . .

*AFSCME Local 2088*, 208 Neb. at 523, 304 N.W.2d at 375.

Finally, Lincoln argues that since Springfield was included in the array during both of its two previous disputes with its firefighters, it is arbitrary for the commission to exclude Springfield from the present array. But again, which employers should be included in an array is dependent upon the issues in the case in question, for it does not necessarily follow that the use of an array in a particular case requires that it be used in a subsequent case involving the same parties. See *AFSCME Local 2088, supra.*

(c) Conclusion

Of necessity, determining comparables requires the granting of some discretion to the commission, and unless there is no substantial evidence upon which the commission could have concluded that the factors it used resulted in an appropriate array, we may not as a matter of law disallow the commission's determination. See, *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988); *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *modified* 209 Neb. 597, 309 N.W.2d 65. Stated another way, determinations made by the commission in accepting or rejecting claimed comparables are within the field of its expertise and should be given due deference. *AFSCME Local 2088, supra*; *Fraternal Order of Police v. County of Adams*, 205 Neb. 682, 289 N.W.2d 535 (1980). The commission's determi-

nation here is supported by substantial evidence and is neither arbitrary, capricious, nor unreasonable; as a consequence, there is no merit to the first assignment of error.

2. ADJUSTMENT FOR ECONOMIC VARIABLES

As noted in part I, in the second assignment of error Lincoln contends that the commission erred by failing to adjust for economic variables, and argues specifically that the commission's failure to adequately account for differences in the degree of unionization in Lincoln and the degree of unionization in the array cities led the commission to set improperly high rates of pay for its firefighters.

(a) Facts

Relying upon the degree of unionization for the states in which the array cities were located and the degree of unionization in Nebraska, Lincoln's expert concluded that there is a high degree of correlation between wages paid to firefighters and the degree of unionization in the labor market. It was the expert's personal view that there was no reason to suspect that "Lincoln is all that dissimilar from the rest of the state," but the expert admitted that if the degree of unionization in Lincoln was not the same as for the state as a whole, the calculations relating to Lincoln's variation within the array cities would change.

Lincoln's expert testified that the probabilities for chance correlations between maximum wage rates were low, 4.28 percent for public sector unionization and a very low .97 percent for private sector unionization. However, the probability for chance correlations between minimum wage rates and unionization were higher, 9.20 percent for both public and private sector unionization. The expert considered such degrees of chance correlations to be acceptable.

The association's expert found the correlation of unionization with minimum wage rates not to be statistically significant. In the association's expert's view, the probability of a chance correlation should not exceed 5 percent, a claim which Lincoln's expert specifically disputed. The association's expert was of the further view that the study made by Lincoln's expert was flawed in that the number of observations were too small to permit the use of the regression analysis relied upon by Lincoln's expert.

(b) Application of Law to Facts

We have held that where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish that such is the case. See *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty., supra.* The commission found that the use by Lincoln's expert of statewide unionization data rather than city data, together with the high probability of a chance correlation between minimum wage rates and degree of unionization, made his opinions unreliable. Under the record presented, we cannot say that the commission's conclusion that Lincoln failed to prove that the degree of unionization in the array cities affected the result to Lincoln's detriment is not supported by substantial evidence or that it is arbitrary, capricious, or unreasonable. The assignment of error is therefore without merit.

3. Mootness of Certain Fringe Benefits

In the third assignment of error, Lincoln maintains that the commission wrongly considered certain fringe benefits provided by Lincoln to be moot.

Lincoln takes specific issue with respect to 7 of the 21 fringe benefits the commission treated as moot, namely, the use of sick leave for funeral leave, sick leave accumulation rate, vacation accumulation rates, funeral leave, number of employees paid to attend negotiations, amount of life insurance coverage, and personal leave.

We have previously held that in establishing wage rates under § 48-818, the commission is required to take into consideration the overall compensation received by the employees, including all fringe benefits. *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977). However, this does not require a dollar-for-dollar costing out of each benefit when, as here, the contract year in dispute is already past. Section 48-818 requires only that the "overall compensation" be addressed. We recognize the impossibility or impracticality of retroactively changing fringe benefits for an expired contract year, and we question the practicality of assigning a monetary value to a fringe benefit such as the number of employees allowed to participate in negotiations.

Of the 21 items mooted by the commission, Lincoln was below the prevalent in 8 of them, above the prevalent in 6 of them, and comparable in 7 of them. Under that circumstance, we cannot say the mooting of these fringe benefits when the contract year in dispute is over is arbitrary, capricious, or unreasonable. We thus find no merit to this assignment of error.

### 4. Health Insurance Benefits

In the fourth assignment of error, Lincoln claims the commission erred in comparing its health insurance benefits to those of the array cities by considering the percentage of the premium paid by the respective employers.

Lincoln urges that the comparison should be made by calculating the midpoint of the employers' monthly costs for providing health insurance. It thus computed the composite cost per month representing single, employee-spouse, and family coverage, and weighted the average based upon the number of employees enrolled in each type of plan, preferred provider and health maintenance organizations and indemnity. In general, Lincoln wished to compare employers' costs while the association wanted to compare benefits. Lincoln's method would result in a minimum economic offset of $663.72 per employee per year because it would result in a determination that Lincoln was paying that much more than the prevalent amount for health, dental, and life insurance.

Lincoln argues that the method chosen by the commission to determine comparability is misleading, pointing out that "[u]nder the percentage of premium method, an employer paying 100% of a significantly lower value medical plan would be determined to be providing a better medical plan than an employer paying 99% of a significantly higher value medical plan." Brief for appellant at 37. However, the same criticism can be made of an analysis based solely on the amount of premiums paid. Under that approach, a city paying $1,000 a month for a health plan would be credited with more economic offset than a city paying $950 a month for a health plan, even if the $950 plan offered significantly better medical coverage to employees. Lincoln does not maintain that its insurance coverage exceeds the prevalent in quality, only that its expense exceeds the preva-

lent in expense. Indeed, each party's health insurance expert opined that Lincoln's benefits were comparable to those provided by the array cities.

As the commission's determination, based on the benefits received by the employees, is supported by substantial evidence and is not arbitrary, capricious, or unreasonable, there is no merit to this assignment.

### 5. Retirement Benefits

In the fifth assignment of error, Lincoln asserts that the commission erred in concluding that the difference between Lincoln's pension benefits and those of the array cities was so insignificant as to be comparable.

#### (a) Facts

The commission was presented with two markedly different opinions. Lincoln's expert concluded that Lincoln was providing $1,298 annually above the prevalent level for pension benefits, which would place Lincoln 4 percent of the gross wage above the prevalent. The association's expert also found Lincoln's pension benefits to be above prevalent, but only by seven one-hundredths of 1 percent of payroll.

Given these contrasting analyses, the commission held that the association's analysis was more credible and that the difference between Lincoln's pension benefits and those provided by the array cities was so small as to make those of the array cities comparable.

The commission gave several reasons for its holding that the association's analysis was more credible. The association's analysis is based on a weighted average of the two pension plans currently used by Lincoln's fire department, basing the weight given each plan upon the number of employees currently enrolled in each plan. Lincoln's analysis is based only on the first of these two plans, notwithstanding that 93 percent of the firefighters in the contract year in question belonged to the second plan.

#### (b) Application of Law to Facts

The key difference between Lincoln's analysis and the association's analysis is accounted for by the fact that Lincoln's

expert assumed the "average" firefighter would retire at age 50. According to the association's expert, this assumption about retirement age constitutes over 75 percent of the difference between the opinion of Lincoln's expert and that of the association's expert. Lincoln's expert made this assumption because of the "intent of the City to encourage its uniformed employees to retire at age 50." However, Lincoln's own actuarial assumptions for its firefighter plans predict only a 25-percent retirement at age 50, with 30 percent not retiring until after age 64. The assumption of retirement age is crucial because, as Lincoln itself noted, the difference between it and the array cities "becomes less significant as retirement is delayed (and might reverse if retirement is delayed long enough)." The commission noted that Lincoln's use of a retirement age of 50 as an underlying assumption in its analysis is "[o]f major concern."

Also influencing the commission's decision was Lincoln's use of the cost of living adjustment as part of the retirement benefit. It was uncontested that there is a pool of approximately $2 million dedicated toward this adjustment. However, the association's analysis did not use that money to increase the value of the pension for three reasons. First, it was not a guaranteed benefit and so it was not included in Lincoln's actuarial valuation report. Second, while the current fund will probably cover the current retirees, an investment return of over 7 percent is necessary in order to fund adjustments for the active members of the plan. Third, if a return of over 7 percent were assumed, then such a return would affect the other cities in the array, canceling out, or at least reducing, Lincoln's advantage over the array pension plans.

The commission was also critical of Lincoln's choice to increase the present value of the pension benefits because they are tax deferred. The commission considered that it was not appropriate to adjust for differing tax treatment because the benefits were tax deferred, not tax exempt.

The general rule is that the weight which should be given expert opinions is uniquely within the province of the fact finder. See, *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993) (civil action). See, also, *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995) (workers' compensation

action); *State v. Kells*, 199 Neb. 374, 259 N.W.2d 19 (1977) (criminal action). We discern no reason that the rule should be otherwise with respect to the commission.

(c) Conclusion

As the commission's decision that Lincoln's pension benefits are comparable to those provided by the array cities is supported by substantial evidence and is not arbitrary, capricious, or unreasonable, there is no merit to this assignment of error.

6. Accounting for Unoffered Fringe Benefits

In the sixth assignment of error, Lincoln urges that the commission failed to properly account for fringe benefits not provided by some array cities.

While Lincoln argued that where an array city did not provide a benefit, a zero should be used in calculating the prevalent wage rate, the association successfully contended that those cities not providing a benefit should be eliminated from the calculations, and the midpoint should be determined using only those array cities that provided the benefit.

The commission ascertained whether a specific benefit is widely or generally offered within the array, that is, whether it is "prevalent." In doing so, the commission concluded that if a majority of the array does not offer a benefit, it is not prevalent, even if Lincoln offers such a benefit. The commission gave no value for a benefit offered by only a minority of cities in the array and concluded that no value should be given to the minority of cities not offering a prevalent benefit.

We cannot say that the matching of similar fringe benefits provided in order to determine a prevalent level for each separate benefit is not supported by substantial evidence or is arbitrary, capricious, or unreasonable; thus, there is no merit to this assignment of error.

7. Placement of Employees Into Pay Lines

In the seventh and final assignment of error, Lincoln complains that the commission usurped a management prerogative by placing covered employees into newly established "pay lines," which we understand to be nothing more than graded wage-step progression schedules for particular job classifications.

(a) Facts

The commission ordered the initial placement of all covered employees into pay lines based upon their years of service in their particular classification at the beginning of the fiscal year in question, provided the employee had not received an unsatisfactory job performance evaluation while in that job classification.

(b) Application of Law to Facts

We have not previously addressed this precise issue. However, we did observe in *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972), that

> [w]ithout attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed.

Lincoln argues that while it conducts ongoing job evaluations of firefighters, there is no reasonable method of determining past performance for the purpose of progression on the pay lines. One of Lincoln's expert witnesses testified that "grade creep" can occur when very little is at stake in an evaluation system such as that used by the fire department. A commission member who dissented on this issue observed that as the evaluation system was implemented solely for job retention and disciplinary purposes, it would be inappropriate to use it for placement and progression of employees on a pay line. However, the majority of the commission concluded:

> It is not credible to argue that past job performance evaluations do not provide an adequate basis for determining satisfactory job performance for initial placement of bargaining unit members on pay lines in this case when [Lincoln] deems them valid for job retention and disciplinary purposes as well as for advancement of police and civilian bargaining unit members along their pay lines.

The association asked Lincoln's compensation manager several times how the current evaluation system would have to be

changed in order for it to be valid to use for progression on a pay line, but the manager could not suggest any changes; in his answer he commented only that he had not looked at it and that the evaluation system might change and it might not change. As the commission noted, "[Lincoln] has indicated no desire or intention to eliminate or modify such requirements."

Nonetheless, Lincoln further argues that there is no substantial evidence that initial placement on a pay line based on seniority is the prevalent practice. However, this argument not so subtly shifts the focus from placement of employees on a pay line that has been established by prevalent practice to the question of what is the prevalent practice for initial placement in a pay line. Lincoln is correct in concluding that there was no evidence submitted about the prevalent practice on the question of initial placement on a pay line. But there was evidence as to how cities within the array determined progression on their pay lines. Lincoln does not contest that in the comparable cities the great majority of pay progression is done automatically either by anniversary hire date or by anniversary hire date plus an acceptable evaluation.

There is no question that the commission has the statutory authority to establish wage-step progression schedules. *Nebraska Pub. Emp. v. City of Omaha*, 247 Neb. 468, 528 N.W.2d 297 (1995) (wage-step progression schedule is condition of employment which commission has been given statutory authority to establish); *Douglas Cty. Health Dept. Emp. Assn v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988). Section 48-818 provides that "the findings and order or orders [of the commission] may establish or alter the scale of wages . . . ." It is logical to conclude that a prevalent practice can be established on progression within a pay line and that this practice can then be applied to determine the placement on a pay line.

(c) Conclusion

The evidence submitted here shows both the pay plans and the means used for progression by other cities in the array. Therefore, there was substantial evidence to support the commission's decision, and the decision cannot be said to be arbitrary, capricious, or unreasonable. As a consequence, this assignment of error also fails.

## V. JUDGMENT

The record failing to sustain Lincoln's assignments of error, the decision of the commission is affirmed.

AFFIRMED.

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## STATE OF NEBRASKA ON BEHALF OF KEITH I. HOPKINS, JR., A MINOR CHILD, APPELLEE, V. CHYRLYN K. BATT, APPELLEE, AND RICHARD A. FILBERT II, APPELLANT.

573 N.W.2d 425

Filed January 30, 1998. No. S-96-290.

1. **Paternity: Appeal and Error.** In a filiation proceeding, the appellate court reviews the trial court's judgment de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion. On questions of law, however, the appellate court has an independent obligation to reach the correct conclusion.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. Because the requirement of standing is fundamental to a court's exercise of jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
4. **Paternity: Child Support.** Pursuant to Neb. Rev. Stat. § 43-1411 (Cum. Supp. 1994), the State, in its parens patriae role, may bring a paternity action on behalf of a minor child for future support.
5. **Actions: Parties.** Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Neb. Rev. Stat. § 25-304 (Reissue 1995). Parties acting in a representative capacity, including executors, administrators, trustees, or a person expressly authorized by statute may bring an action without joining the person for whose benefit it is prosecuted.
6. **Paternity: Child Support.** A child born out of wedlock has a statutory right to receive support from its father, and a cause of action to enforce a parental duty to provide support belongs to the child.
7. **Res Judicata: Judgments.** Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment

was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

8. **Estoppel: Words and Phrases.** Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his own deeds, acts, or representations.
9. **Estoppel.** The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; and as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
10. **Marriage: Paternity: Presumptions: Proof.** Neb. Rev. Stat. § 42-377 (Reissue 1993) provides that children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to Neb. Rev. Stat. §§ 42-347 to 42-379 (Reissue 1993 & Cum. Supp. 1994), shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown. This statutory presumption may be rebutted by clear, satisfactory, and convincing evidence.
11. **Paternity: Presumptions.** In a paternity action, the mother and the alleged father are competent to testify that a child's parentage is contrary to the presumption of legitimacy.
12. **Marriage: Parent and Child.** In the absence of a biological relationship between a husband and his wife's child, the husband may acquire certain rights and responsibilities when he elects to stand in loco parentis to the child.
13. **Parent and Child: Intent: Proof: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation.
14. **Paternity.** An acknowledgment of paternity by another person is not conclusive in an action to establish paternity in the biological father.
15. **Paternity: Child Support.** Child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock.
16. **Child Support: Rules of the Supreme Court.** In determining the amount of child support to be paid by a parent, the court must consider the earning capacity of each parent and apply the Nebraska Child Support Guidelines adopted by the Nebraska Supreme Court.
17. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child

support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.

18. **Child Support: Rules of the Supreme Court: Taxation.** The Nebraska Child Support Guidelines contemplate that income for purposes of child support may differ from taxable income and do not prevent consideration of tax-exempt benefits in determining the amount of a parent's income derived from all sources.
19. **Parent and Child: Child Support.** A child's biological parent has the primary obligation of support.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Gregory Plank, of Hascall, Jungers, Garvey & Delaney, for appellant.

John W. Reisz, Deputy Sarpy County Attorney, for appellee State.

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

STEPHAN, J.

In this filiation proceeding initiated by the State of Nebraska, the district court for Sarpy County determined that Richard Filbert II was the biological father of Keith I. Hopkins, Jr. (Keith), a minor child, and ordered Filbert to pay child support. On appeal, Filbert contends that the district court erred in refusing to recognize several defenses which he asserted and in calculating Filbert's support obligation. We find no error and, therefore, affirm the judgment of the district court.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Chyrlyn K. Batt and Keith I. Hopkins (Hopkins) were married on August 4, 1985. Batt gave birth to four children during the marriage, the youngest of whom was Keith, born April 18, 1992. The marriage was dissolved by the district court for Sarpy County on October 8, 1993. Batt was awarded custody of the four children, and Hopkins was ordered to pay a total of $1,214 per month in child support. On May 3, 1995, the decree of dissolution was modified because the two older children chose to live with Hopkins. The two younger children, including Keith, remained in Batt's custody. In the order for modification,

Hopkins' child support obligation was decreased to $400 per month, with a provision for reduction to $250 per month if Batt had custody of only one child.

On April 19, 1995, the State of Nebraska filed a petition in the district court for Sarpy County on behalf of Keith, requesting a determination that Filbert is Keith's biological father and obligated to provide child support. Batt and Filbert were named as defendants in this action; Hopkins is not a party. In his answer, Filbert denied paternity and asserted defenses of collateral estoppel, equitable estoppel, res judicata, laches, and mootness.

At trial on February 13, 1996, Batt testified that while separated from Hopkins prior to the dissolution of their marriage, she had sexual relations with Filbert on July 27, 1991, resulting in the conception of Keith. She denied having any other sexual partners within 2 months of the probable conception date. Batt testified that she telephoned Filbert regarding the pregnancy, but she could not remember exactly what was said during the conversation.

Filbert testified that at the time of trial he was on active duty in the Air Force, stationed in California. He was married and lived in base housing with his wife, his stepson, and his son from a previous marriage. His gross monthly income was $1,828, and his net take-home pay was approximately $1,511. A portion of this amount, designated as "BAS," is a subsistence allowance which is not subject to federal income tax. Filbert testified that he did not remember having sexual relations with Batt, but he believed that he was Keith's biological father.

The State presented evidence of genetic testing performed to determine whether Filbert was Keith's biological father. The test results established a 99.98-percent probability of paternity as compared to an untested, unrelated man of the North American Caucasian population. The record contains no evidence of any testing to determine whether Hopkins could be Keith's biological father.

The district court found that Filbert was Keith's biological father and awarded custody to Batt subject to reasonable visitation. Filbert was ordered to pay child support for Keith in the amount of $307 per month commencing on March 1, 1996. In determining this amount, the court considered Filbert's taxable

income, as well as his nontaxable BAS and the value of his military housing. The district court also ordered Filbert to insure Keith under his health plan and pay all medical, dental, orthodontic, and optical expenses not covered by insurance or his military benefits. In addition, Filbert was ordered to pay half of any day-care expenses incurred while Batt worked, the costs of the action, and $270 in genetic testing expenses.

Filbert appealed from the decision of the district court. Pursuant to our authority to regulate the dockets of the Nebraska Court of Appeals and this court, we removed this case to our docket on our own motion.

## II. ASSIGNMENTS OF ERROR

Restated, Filbert assigns as error the district court's rejection of his alternative theories of defense to the allegations of paternity, which included (1) res judicata arising from the decree dissolving the marriage of Batt and Hopkins, (2) equitable estoppel arising from false representations by Batt and Hopkins in the dissolution proceeding, (3) the presumption of legitimacy, (4) the doctrine of in loco parentis, and (5) an alleged acknowledgment of paternity by Hopkins. In addition, Filbert alleges error in the manner in which the district court calculated his child support obligation.

## III. SCOPE OF REVIEW

In a filiation proceeding, the appellate court reviews the trial court's judgment de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988). In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Lancaster, supra.*

A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion. *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996); *Sylvis v. Walling*, 248 Neb. 168, 532

N.W.2d 312 (1995); *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994). On questions of law, however, the appellate court has an independent obligation to reach the correct conclusion. *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992).

## IV. ANALYSIS

Before addressing Filbert's assignments of error, we find it necessary to examine the nature of this proceeding and determine whether the State has standing to bring this action. Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). Because the requirement of standing is fundamental to a court's exercise of jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Id.*

The State alleges in its petition that it is authorized to seek relief pursuant to Neb. Rev. Stat. §§ 42-358 (Cum. Supp. 1994), 43-512 et seq. (Reissue 1993 & Cum. Supp. 1994), and 43-1401 et seq. (Reissue 1993 & Cum. Supp. 1994). We find no basis for standing under § 42-358, which deals with the appointment of attorneys for minor children in dissolution actions. While § 43-512.03(c) authorizes a county attorney acting on behalf of the State to initiate a civil action to establish paternity and collect child support on behalf of children born out of wedlock, it must be interpreted in conformity with the entire statutory scheme codified in Neb. Rev. Stat. §§ 43-501 to 43-526 (Reissue 1993 & Cum. Supp. 1994), which constitutes "new, supplemental, and independent legislation upon the subjects of assistance and services for delinquent, dependent, and medically handicapped children . . . ." § 43-501. These statutes define a "dependent child" as one who receives or is entitled to receive public assistance. § 43-504(1). The remedy specified in § 43-512.03 is a means by which the State, as the real party in interest, may recover amounts which it has paid or is obligated to pay on behalf of a dependent child. §§ 43-512 and 43-512.03(4); *State on behalf of Garcia v. Garcia*, 238 Neb.

455, 471 N.W.2d 388 (1991). There is no allegation in this case that Keith has received or is eligible to receive public assistance benefits, and the remedy provided by § 43-512.03 is therefore inapplicable.

However, the State also invokes § 43-1411, which provides in part:

> A civil proceeding to establish the paternity of a child may be instituted, in any district court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act if the child is not domiciled or found in Nebraska, where the mother or alleged father is domiciled, by (1) the mother or the alleged father of such child . . . or (2) the guardian or next friend of such child *or the state*, either during pregnancy or within eighteen years after the child's birth.

(Emphasis supplied.) Where paternity is established in an action commenced under this section, the court shall retain jurisdiction and order the father to pay support, court costs, and reasonable attorney fees. § 43-1412(3). We have construed § 43-1411 as a means by which the State, in its parens patriae role, may bring a paternity action on behalf of a minor child for future support. *State on behalf of B.A.T. v. S.K.D.*, 246 Neb. 616, 522 N.W.2d 393 (1994); *Oglesby, supra*. In contrast to § 43-512.03, the State's right to sue under this section is not conditioned upon the payment of public assistance benefits for the minor child.

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Neb. Rev. Stat. § 25-304 (Reissue 1995). *Misle v. Misle*, 247 Neb. 592, 529 N.W.2d 54 (1995); Neb. Rev. Stat. § 25-301 (Reissue 1995). Parties acting in a representative capacity, including executors, administrators, trustees, "or a person expressly authorized by statute" may bring an action without joining the person for whose benefit it is prosecuted. § 25-304. It is clear from the petition that the State brings this action on behalf of Keith and not on its own behalf. A child born out of wedlock has a statutory right to receive support from its father, § 43-1402, and a cause of action to enforce a parental duty to provide support belongs to the child, *Sylvis v. Walling*, 248 Neb. 168, 532

N.W.2d 312 (1995). Thus, Keith is the real party in interest, and the State is authorized by statute to bring this action on his behalf.

Having determined these preliminary issues, we address Filbert's assignments of error.

### 1. Prior Adjudication of Paternity

Filbert claims that because Hopkins' paternity was adjudicated in the dissolution action, the State's claim that he is Keith's biological father is barred by the doctrine of res judicata. Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). As Filbert conceded in his brief, the fourth essential element of res judicata is not present in this case because he was not a party to the dissolution proceeding. Therefore, the decree in that proceeding does not bar the claim asserted against him in this case.

### 2. Equitable Estoppel

Next, Filbert contends that the paternity claim is barred by the principle of equitable estoppel. In general, equitable estoppel is a bar which "precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his own deeds, acts, or representations." (Emphasis omitted.) *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 165, 481 N.W.2d 165, 175 (1992). See, also, *Jennings v. Dunning*, 232 Neb. 366, 440 N.W.2d 671 (1989). The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; and as to the

other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Mendoza, supra.*

In essence, Filbert contends that the conduct of Batt and Hopkins in naming Keith after Hopkins and representing in the dissolution proceeding that Hopkins was Keith's father estops them from denying Hopkins' paternity. Thus, Filbert argues, Hopkins' paternity by estoppel is established even if he is not Keith's biological father. In *Mendoza, supra*, we rejected a similar claim based upon the fact that the person whose actions were alleged to create paternity by estoppel was not a party to the action against the alleged biological father. We stated: "As the doctrine of estoppel acts to preclude a *party* to the suit from taking a position contrary to that taken previously, it is inapplicable in this case." *Id.* at 165, 481 N.W.2d at 175. In this case, Filbert asserts that the conduct of Hopkins and Batt should preclude them from denying Hopkins' paternity. However, Hopkins is not a party to this action and therefore cannot be estopped. In addition, while Batt is a party defendant, she has asserted no claim and consequently cannot be estopped. The claim in this case belongs to Keith, and it cannot be defeated by operation of equitable estoppel arising from any conduct of Hopkins and Batt.

### 3. Presumption of Legitimacy, In Loco Parentis, and Acknowledgment

Filbert also argues that the district court erred in refusing to apply the presumption of legitimacy and the doctrines of in loco parentis and acknowledgment to find that Hopkins was Keith's father, thereby eliminating the possibility of Filbert's paternity. Each of these legal tenets is a method by which a nonbiological parent may be proclaimed a legal parent without the necessity of adoption. Filbert claims that it is legally impossible for Keith to have two fathers and, therefore, that Filbert cannot be Keith's father.

(a) Presumption of Legitimacy

The presumption of legitimacy is a common-law doctrine which has to some extent been preserved in Nebraska's statutes dealing with the dissolution of marriage. Neb. Rev. Stat. § 42-377 (Reissue 1993) provides:

> Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-379, shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown.

This statutory presumption may be rebutted by clear, satisfactory, and convincing evidence. In a paternity action, the mother and the alleged father are competent to testify that a child's parentage is contrary to the presumption of legitimacy. § 43-1412(1); *Roebuck v. Fraedrich*, 201 Neb. 413, 267 N.W.2d 759 (1978).

The presumption of legitimacy was rebutted in this case. Batt testified that she did not have sexual relations with anyone other than Filbert during the time period in which Keith was conceived and that Filbert was Keith's father. Filbert did not deny this and in fact testified as to his belief that he was Keith's father. In addition, the record contains results of genetic testing indicating a 99.98-percent probability that Filbert is Keith's father. This constitutes clear, satisfactory, and convincing evidence which is sufficient to overcome the statutory presumption that Keith is Hopkins' child.

(b) In Loco Parentis

In the absence of a biological relationship between a husband and his wife's child, the husband may acquire certain rights and responsibilities when he elects to stand in loco parentis to the child. See, *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946). We have stated:

> "'A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation,

> without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation.'. . ."

*Hickenbottom*, 239 Neb. at 592, 477 N.W.2d at 17 (quoting *Austin, supra*).

This doctrine does not shield Filbert from a determination of paternity. Even if we assume that at some time in the past Hopkins intended to stand in loco parentis to Keith by naming the child after him and paying child support pursuant to the dissolution decree, there is no evidence that such a relationship existed at the time of trial. There was uncontroverted evidence that Batt returned Hopkins' child support payments for Keith because she and Hopkins agreed that he was not Keith's father. Keith has lived with Batt, not Hopkins, since the dissolution of Batt and Hopkins' marriage in 1993. Whatever his previous intentions, there is no evidence that Hopkins intended to stand in loco parentis in relation to Keith at any time relevant to this action.

(c) Acknowledgment

Whether there has been a legally cognizable acknowledgment of paternity is determined by statute. At the time of Keith's birth in 1992, § 43-1409 (Reissue 1988) provided in part:

> A person may state in writing that he is the father of a child or perform acts, such as furnishing of support, which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child.

This statute was amended, with an operative date of July 1, 1994, and provides: "The signing of a notarized acknowledgment . . . by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. Such a signed and notarized acknowledgment or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish support." § 43-1409 (Cum. Supp. 1996).

The record in this case contains no document signed by Hopkins acknowledging paternity, either in the form currently prescribed by § 43-1409 or otherwise. However, Filbert contends that Hopkins' acquiescence in the naming of the child and his payment of child support establish that he considered himself to be Keith's father and, therefore, constitute an acknowledgment of paternity under the language of § 43-1409 prior to the 1994 amendment.

We addressed a similar issue in *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992), a paternity action in which it was alleged that Mendoza was the father of a child born prior to the mother's marriage to a man named Castillo. The mother and Castillo testified that Castillo was not the natural father of the child, and blood tests corroborated this testimony. However, there was evidence that Castillo executed a sworn document acknowledging that he was the biological father of the child in order to obtain a new birth certificate showing the child's surname as "Castillo." In addition, there was evidence that Castillo supported the child, who lived in his household, and that the child regarded Castillo as his father. Mendoza contended that Castillo's actions constituted an acknowledgment of paternity under the language of § 43-1409 prior to the 1994 amendment, which conclusively established Castillo and excluded Mendoza as the father of the child. In rejecting this argument, we cited with approval the decision by the Louisiana Supreme Court in *Smith v. Cole*, 553 So. 2d 847 (La. 1989), which recognized a " 'dual paternity' " scheme in which the mother of a child born out of wedlock may bring a filiation proceeding for support against a putative father despite the existence of another " 'legal father.' " *Mendoza*, 240 Neb. at 158, 481 N.W.2d at 171. We quoted the following passage from *Smith*:

> "The presumption [of legitimacy] was intended to protect innocent children from the stigma attached to illegitimacy and to prevent case-by-case determinations of paternity. It was not intended to shield biological fathers from their support obligations. . . . The presumed father's acceptance of paternal responsibilities, either by intent or default, does not enure to the benefit of the biological father. It is

> the fact of biological paternity or maternity which obliges parents to nourish their children."

*Mendoza*, 240 Neb. at 158, 481 N.W.2d at 172. We wrote further:

> [T]he legal status of children born out of wedlock is much more favorable today than in the past. Thus, the necessity of indulging in legal fictions in order to steadfastly protect their legal status is somewhat lessened. . . . This trend in the law, combined with the inequity of granting biological fathers of children born out of wedlock extensive rights without imposing on them corresponding responsibilities, indicates that concerns regarding the stigma of illegitimacy should not outweigh the primary purposes of the filiation statutes: identifying the biological fathers of children born out of wedlock and imposing on them an obligation of support.

(Citation omitted.) 240 Neb. at 159, 481 N.W.2d at 172.

The facts that Keith bears Hopkins' name and that Hopkins paid child support pursuant to the dissolution decree do not compel a finding that Hopkins, and not Filbert, is Keith's father. Even assuming that Hopkins' actions would constitute an acknowledgment of paternity under the pre-1994 version of § 43-1409, this would not defeat the claim against Filbert. Under *Mendoza*, an acknowledgment of paternity by another person is not conclusive in an action to establish paternity in the biological father. We find no error by the district court in rejecting Filbert's defense based upon an alleged acknowledgment of paternity by Hopkins.

### 4. Calculation of Child Support

Filbert argues that even if paternity is established, the district court erred in determining the amount of child support for which he was responsible in that (1) it included the value of Filbert's military housing and subsistence allowance in its calculation and (2) it failed to consider child support payments by Hopkins pursuant to the dissolution decree as modified. We address these contentions separately to determine whether the district court abused its discretion in awarding child support.

Child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock. § 43-1402; *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994). In determining the amount of child support to be paid by a parent, the court must consider the earning capacity of each parent and apply the Nebraska Child Support Guidelines adopted by this court. Neb. Rev. Stat. § 42-364(6) (Cum. Supp. 1994). The guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. Nebraska Child Support Guidelines, paragraph C; Neb. Rev. Stat. § 42-364.16 (Cum. Supp. 1996); *Oglesby, supra.*

Filbert argues that the value of his military housing and BAS should have been excluded from the district court's child support calculations because they do not constitute taxable income pursuant to the Internal Revenue Code. See I.R.C. § 134. He contends that the Nebraska Child Support Guidelines permit the court to consider only the taxable income of the parents. However, paragraph D of the Guidelines states that total monthly income includes the "income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages." Although the guidelines require parties to submit at least 2 years' tax returns, they clearly contemplate that a court will consider factors other than taxable income in making child support calculations. For example, the guidelines require a self-employed person to add back into his or her income any depreciation claimed on tax returns. *Id.* In addition, the guidelines permit a court to consider a person's earning capacity rather than simply his or her actual earnings. *Id.* See *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). Also, the guidelines permit divergence from the guidelines themselves if application of the guidelines would result in an unjust or inappropriate figure. Paragraph C(5). Thus, the guidelines contemplate that income for purposes of child support may differ from

taxable income and do not prevent consideration of tax-exempt benefits in determining the amount of a parent's income "derived from all sources." The district court did not err by including the nontaxable value of Filbert's military housing and BAS in calculating his child support obligation.

Under the decree of dissolution as modified on May 3, 1995, Hopkins is to pay $400 per month child support for the two children in Batt's custody, including Keith. Filbert contends that the district court erred in failing to consider Hopkins' court-ordered child support payments for Keith in calculating Filbert's support obligation. This contention is without merit for two reasons. First, there is uncontroverted evidence that Batt has returned to Hopkins that portion of his child support payments attributable to Keith. Second, under *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992), a child's biological parent has the primary obligation of support. Thus, regardless of any support payments Hopkins may have made, Filbert is responsible for providing full support for Keith. The district court therefore did not abuse its discretion in not considering any obligation which Hopkins may have had under the dissolution decree in calculating Filbert's child support payments. By so holding, we express no opinion regarding the nature of Hopkins' future child support obligation under the dissolution decree, since that issue is not before us and Hopkins is not a party to this action.

In conclusion, we find each of Filbert's assignments of error to be without merit and therefore affirm the judgment of the district court for Sarpy County.

AFFIRMED.

# ARLYN W. PLOEN, APPELLANT, V. UNION INSURANCE COMPANY, APPELLEE. ARLYN W. PLOEN, APPELLANT, V. UNION INSURANCE COMPANY AND SHELTER MUTUAL INSURANCE COMPANY, APPELLEES.

573 N.W.2d 436

Filed January 30, 1998. Nos. S-96-453, S-96-454.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **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.
3. **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 judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Insurance: Subrogation.** In the absence of a valid contractual provision or statute to the contrary, an insurer may exercise its right of subrogation only when the insured has obtained an amount that exceeds the insured's loss.
5. **Due Process: Statutes: Presumptions.** Statutes creating a permanent irrebuttable presumption have long been disfavored under the Due Process Clauses of the 5th and 14th Amendments.
6. ____: ____: ____. In cases involving constitutionally protected rights, a challenged irrebuttable presumption under the 5th Amendment Due Process Clause must meet the applicable 14th Amendment standard. In contrast, other irrebuttable classifications need meet only the standard of legislative reasonableness.
7. **Legislature: Discrimination.** Under the standard of legislative reasonableness, the Legislature's action is sufficient if it is rationally based and free from invidious discrimination.
8. **Constitutional Law: Statutes.** Neb. Rev. Stat. § 44-3,128.01 (Reissue 1993) meets the standard of legislative reasonableness and is therefore constitutional and enforceable.
9. **Insurance: Contracts: Motor Vehicles: Compromise and Settlement.** Under the terms of the Underinsured Motorist Insurance Coverage Act, an insurer could avoid its policy obligation only if the insured's settlement with the tort-feasor adversely affected the insurer's rights.
10. **Insurance: Contracts: Intent.** When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, the court shall seek to ascertain the intention of the parties from the plain meaning of the policy.
11. **Affidavits.** Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.

12. **Insurance: Contracts.** The parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever restrictions and conditions they please upon their obligations, not inconsistent with public policy.
13. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
14. **Contracts: Public Policy.** The determination of whether a contract violates public policy presents a question of law.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William G. Line for appellant.

David L. Welch and Michael C. Pallesen, of Gaines, Mullen, Pansing & Hogan, for appellee Union Insurance Co.

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

WRIGHT, J.

Arlyn W. Ploen commenced two actions for declaratory judgment in the district court for Dodge County, one against Union Insurance Company (Union) and the other against Union and Shelter Mutual Insurance Company (Shelter). On April 23, 1996, the district court sustained Union's motion for summary judgment and overruled Ploen's cross-motion for summary judgment. On the same date, the court sustained the motions for summary judgment of Union and Shelter and overruled Ploen's cross-motion for summary judgment. Ploen appeals, and the cases have been consolidated for purposes of appeal.

## SCOPE OF REVIEW

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

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. *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997).

## FACTS

On December 24, 1991, Ploen was a passenger in a car owned and operated by his father. The car was hit from behind by a car driven by Karen Keller, and Ploen allegedly suffered back injuries as a result of the accident. Ploen sued Keller, who admitted liability, and the parties eventually settled for $54,000 of Keller's policy liability limit of $100,000. However, Ploen alleges that his damages total at least $250,000.

Ploen was covered by his father's policy with Union for $5,000 in medical payments and $25,000 in underinsured motorist benefits. He was also covered by his own policy with Shelter for $25,000 in medical payments and $100,000 in underinsured motorist benefits. Ploen alleges that as a result of the accident, he incurred medical expenses in the amount of at least $50,364. Union paid to or on behalf of Ploen $5,000 in medical payments, and Shelter paid $25,000 to Ploen for medical payments.

Prior to his settlement with Keller, Ploen requested that Union and Shelter give their consent to the proposed settlement agreement and requested that Union and Shelter waive their subrogation interests. Both companies denied such requests on the basis that Ploen should not settle for less than Keller's policy limit if his damages were indeed $250,000.

Thereafter, Ploen filed petitions for declaratory judgment against Union and Shelter. In its answer denying liability for underinsured coverage and asserting subrogation rights, Union relied on its contractual provision stating that recovery will be

had only after "the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." Shelter relied on its contractual provision stating that it was obligated to pay only such damages as "are in excess of the total limits of all bodily injury liability insurance policies and bonds applicable to the person or persons legally responsible for such damages and available to cover the **insured's** damages." Union and Shelter also asserted that Ploen had breached the insurance contracts by settling without their written consent.

Union and Shelter each moved for summary judgment, and Ploen filed cross-motions for summary judgment. The district court sustained Union's and Shelter's motions for summary judgment, overruled Ploen's cross-motions for summary judgment, and dismissed the lawsuits. In so doing, the court specifically found that Neb. Rev. Stat. § 44-3,128.01 (Reissue 1993), a statute providing for subrogation of medical payments, is constitutional. Ploen timely appealed the orders granting summary judgments to Union and Shelter and overruling his cross-motions for summary judgment.

## ASSIGNMENTS OF ERROR

Ploen makes the following assignments of error: (1) The district court erred in finding that Ploen's settlement with Keller adversely affected Union and Shelter, (2) the court erred in finding that § 44-3,128.01 is constitutional, and (3) the court erred in sustaining Union's and Shelter's motions for summary judgment and overruling Ploen's cross-motions for summary judgment.

## ANALYSIS

### Subrogation for Medical Payments

We first address whether Union and Shelter are able to subrogate for the medical payments made to or on behalf of Ploen. In support of their right to subrogate, Union and Shelter rely on § 44-3,128.01, which provides:

> A provision in an automobile liability policy or endorsement which is effective in this state and which grants the insurer the right of subrogation for payment of

> benefits under the medical payments coverage portion of the policy shall be valid and enforceable, except that if the claimant receives less than actual economic loss from all parties liable for the bodily injuries, subrogation of medical payments shall be allowed in the same proportion that the medical expenses bear to the total economic loss. For purposes of this section, it shall be conclusively presumed that any settlement or judgment which is less than the policy limits of any applicable liability insurance coverage constitutes complete recovery of actual economic loss.

In *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 122, 498 N.W.2d 74, 81 (1993), we explained that "in the absence of a valid contractual provision or statute to the contrary, an insurer may exercise its right of subrogation only when the insured has obtained an amount that exceeds the insured's loss." Therefore, if § 44-3,128.01 is invalid, a question of material fact would exist as to whether Ploen had obtained an amount that exceeded his loss, and Union and Shelter would not be entitled to summary judgments on this issue.

Ploen argues that § 44-3,128.01 violates due process by creating an irrebuttable presumption that settlement for less than the tort-feasor's coverage equals full recovery. In *Elliott v. Ehrlich*, 203 Neb. 790, 797-98, 280 N.W.2d 637, 642 (1979), we stated that "[s]tatutes creating a permanent irrebuttable presumption have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." We held that a regulatory provision by the Nebraska Department of Public Welfare which stated that the responsibility of parents for pregnant minors included responsibility for unborn children, insofar as it created an irrebuttable presumption that the maternal grandparent actually contributes all the income required for the needs of the unborn child, was unconstitutional. We recognized that welfare benefits are a matter of statutory entitlement for persons qualified to receive them and that their termination involves state action that adjudicates important rights. We thus held that "[t]he state's interest in administrative ease and certainty cannot save the conclusive presumption of the regulation from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the per-

tinent facts of actual contribution." *Elliott*, 203 Neb. at 798, 280 N.W.2d at 642.

In contrast to *Elliott*, in *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984), the appellant contended that a provision of the Social Security Act created an irrebuttable presumption that nursing homes which are not at least 85 percent occupied (or 50 percent in the case of new construction) are inefficient and uneconomical. We explained that social welfare legislation and regulation are treated differently:

> Classifications are upheld where no constitutionally protected right of status is significantly impaired, and where the classification bears a rational relationship to a legitimate legislative goal. In such cases classifications to avoid administrative difficulty of individual determinations in every case are proper, even though the classifications adopted are neither necessary nor universally true.

*Id.* at 735-36, 346 N.W.2d at 229, citing *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

In *Weinberger*, the Court upheld an irrebuttable presumption for purposes of Social Security benefits that any marriage not preceding a wage earner's death by at least 9 months was a sham. *Weinberger* illustrates the distinction between *Haven Home, Inc.* and *Elliott*. In *Weinberger*, the Court distinguished cases regarding legislative decisions regulating the private sector of the economy and public treasury from cases involving constitutionally protected rights such as the right to conceive and raise one's children, residency, or the freedom of personal choice in matters of marriage and family life.

In cases involving constitutionally protected rights, a challenged irrebuttable presumption under the 5th Amendment Due Process Clause must meet the applicable 14th Amendment standard. In contrast, other irrebuttable classifications need meet only the standard of legislative reasonableness. See *Weinberger v. Salfi, supra*. Under the standard of legislative reasonableness, the Legislature's action is sufficient if it is rationally based and free from invidious discrimination. See, *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996); *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981).

The right to settle with a tort-feasor for less than the tort-feasor's policy limit without one's insurer's consent does not approach a constitutionally recognizable right, and Ploen does not make such a contention. Therefore, we consider whether the irrebuttable presumption found in § 44-3,128.01 is rationally based and free from invidious discrimination. See *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). In enacting § 44-3,128.01, the Legislature reached a compromise between the concern that persons injured be fully compensated in spite of subrogation clauses attempting to receive a portion of a limited recovery and the concern that insureds not be able to obtain a double recovery at the expense of insurers. There is no evidence that the statute is discriminatory.

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995). We conclude that § 44-3,128.01 meets the standard of legislative reasonableness and is therefore constitutional and enforceable by Union and Shelter as to their right of subrogation for medical payments.

### Liability for Underinsured Benefits

Next, we address whether Ploen is entitled to underinsured benefits from either Union or Shelter. Ploen argues that since he seeks only the difference between the policy limit and his damages, his settlement with the tort-feasor for less than the policy limit did not adversely affect Union's or Shelter's rights. In *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995), we stated that under the terms of the Underinsured Motorist Insurance Coverage Act, an insurer could avoid its policy obligation only if the insured's settlement with the tort-feasor adversely affected the insurer's rights. Neb. Rev. Stat. § 60-582 (Reissue 1993), which was in effect at the time of the accident, provided that the underinsured motorist coverages shall not apply where the insured settles without the insurer's consent if such settlement adversely affects the rights of the insurer.

We first consider Ploen's policy with Shelter. Shelter failed to file a brief in this court. The only indication that Shelter may have been adversely affected by Ploen's settlement was Union's assertion at oral argument, allegedly on Shelter's behalf, that the policy with Shelter contained a clause prohibiting the insured from settling with a tort-feasor for less than the tort-feasor's policy liability limit. Shelter's policy contained a provision which stated:

> [T]he limits of liability of this coverage shall be reduced by the total limits of all bodily injury liability insurance policies and bonds applicable to the person or persons legally responsible for such damages. **Our** obligation hereunder shall apply only to such damages as are in excess of the total limits of all bodily injury liability insurance policies and bonds applicable to the person or persons legally responsible for such damages and available to cover the **insured's** damages.

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. *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997). When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, the court shall seek to ascertain the intention of the parties from the plain meaning of the policy. *Id.*

We conclude that Shelter's policy does not require that the insured must exhaust the tort-feasor's liability policy in order to assert a claim for underinsured motorist benefits. We do not address whether Shelter may have been adversely affected by Ploen's settlement with the tort-feasor.

Having determined that the policy does not preclude Ploen from settling for less than the tort-feasor's policy limit, we conclude that a material question of fact exists as to whether Ploen can recover under the provisions of Shelter's underinsured motorist policy and that the district court erred in granting summary judgment to Shelter.

We next address Ploen's contention that he is entitled to summary judgment on his cross-motion because the amount of his damages is undisputed. In arguing that his damages are undisputed, Ploen relies on Union's and Shelter's failure to controvert his affidavit which stated that his damages were in excess of $250,000. Ploen's affidavit sets forth an opinion as to the amount of damages, but it does not establish damages as a matter of law. Statements in affidavits as to opinion, belief, or conclusions of law are of no effect. *Whalen v. U S West Communications, ante* p. 334, 570 N.W.2d 531 (1997). The court properly overruled Ploen's cross-motions for summary judgment, because a question of fact exists as to the nature and extent of Ploen's injuries and the amount of his damages sustained as a result of such injuries.

We next address Ploen's policy with Union, which stated: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." Ploen argues that despite this clear language, the provision in question is void as against public policy.

Some courts have held similar provisions to be against public policy. In *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), for example, the court held that automobile insurance policy provisions requiring an insured to exhaust the tortfeasor's liability limits before underinsured benefits are available were void as against public policy of the no-fault automobile insurance act. The court explained:

> The purposes of the no-fault act . . . include those of easing the burden of litigation and encouraging prompt payment of claims. Enforcement of policy exhaustion clauses would produce results contrary to those purposes. It could serve to force an insured to litigate the claim to final judgment in order to exhaust the policy limits. Litigation expenses would lessen the insured's net recovery, the time involved in litigation would serve to delay payment to the insured, and the litigation itself would unnecessarily burden our court system. Where the best settlement available is less than the defendant's liability limits, the insured should not be forced to forego [sic] settle-

> ment and go to trial in order to determine the issue of damages. The insured has the right to accept what he or she considers the best settlement available and to proceed to arbitrate the underinsurance claim for a determination of whether the damages do indeed exceed the tortfeasor's liability limits.

*Id.* at 260-61. See, also, *Shaw v. Continental Ins. Co.*, 108 Nev. 928, 840 P.2d 592 (1992).

In contrast, at least one court has held under a provision similar to the one found in Union's policy that the insured's failure to exhaust the limits of the tort-feasor's liability policy precluded the insured from recovering underinsured motorist benefits. See *Ciarelli v. Commercial Union Ins. Cos.*, 234 Conn. 807, 663 A.2d 377 (1995).

The parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever restrictions and conditions they please upon their obligations, not inconsistent with public policy. *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982); *Lonsdale v. Union Ins. Co.*, 167 Neb. 56, 91 N.W.2d 245 (1958). From our review of the Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. § 44-6401 et seq. (Cum. Supp. 1996 & Supp. 1997), previously codified as the Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. § 60-571 et seq. (Reissue 1993), we conclude that Union's underinsured motorist coverage is consistent with the requirements of the act and is not contrary to the law. Having made this conclusion, we consider Union's provision to determine whether or not it is contrary to public policy.

Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community. *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 315 (1996); *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994). The determination of whether a con-

tract violates public policy presents a question of law. *Jasper v. Smith*, 540 N.W.2d 399 (S.D. 1995).

Uninsured motorist coverage laws were enacted for the benefit of innocent victims of financially irresponsible motorists. See *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). Underinsured motorist coverage indemnifies an insured when a tort-feasor's insurance coverage is inadequate. Union's policy provides that it will pay underinsured motorist benefits "only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted . . . ." On the basis of the facts applicable to the policy in issue, we conclude that Union's restriction is plain and unambiguous, should be enforced according to its terms, and is not contrary to public policy.

While noting the concern that a provision such as Union's might encourage an insured to litigate against the tort-feasor rather than settle, we also note the insurer's concern that the insured settle with the tort-feasor for the maximum amount possible before the insured is allowed to seek underinsured benefits. We believe that such a determination with regard to public policy is better left to the wisdom of the Legislature. Since Union's policy is valid and enforceable as to its underinsured motorist coverage, we do not consider whether Ploen's settlement with the tort-feasor adversely affected Union's rights under the policy. We therefore affirm the judgment of the district court granting summary judgment to Union.

## CONCLUSION

The summary judgment in favor of Shelter is reversed on the issue of underinsured benefits, and the cause is remanded for further proceedings. The summary judgment in favor of Union is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., concurring in part, and in part dissenting.

The majority determined Shelter's provision was not an exhaustion clause and Union's exhaustion clause was consistent with public policy. I concur because the majority correctly

determined Shelter's policy was not an exhaustion clause, but it failed to address the ambiguity of the provision. However, I also dissent because the majority failed to identify the ambiguity in Union's exhaustion clause, failed to construe the provision against Union, and failed to determine the exhaustion clause was void as against public policy.

Shelter's underinsured motorist policy provides:

> [T]he limits of liability of this coverage shall be reduced by the total limits of all bodily injury liability insurance policies and bonds applicable to the person or persons legally responsible for such damages. **Our** obligation hereunder shall apply only to such damages as are in excess of the total limits of all bodily injury liability insurance policies and bonds applicable to the person or persons legally responsible for such damages and available to cover the **insured's** damages.

The majority concluded that Shelter's policy did not require Ploen to exhaust the tort-feasor's liability policy to assert a claim for underinsured motorist benefits. The majority reached the correct conclusion, yet failed to determine exactly how the provision operates or to identify the ambiguity in the provision.

For example, in *Gust v. Otto*, 147 Wis. 2d 560, 433 N.W.2d 286 (Wis. App. 1988), the Wisconsin Court of Appeals addressed an underinsured motorist provision with language virtually identical to that in Shelter's policy and concluded the provision in question was a reduction clause rather than an exhaustion clause. The provision in *Gust* provided:

> "The company will pay all sums . . . because of bodily injury . . . provided
>
> "(1) that the limits of liability for Underinsured Motorists coverage shall be reduced by the total limits of all Bodily Injury Liability insurance policies applicable to the person or persons legally responsible for such damages;
>
> "(2) that the company's obligation hereunder shall apply only to such damages that are in excess of the total limits of all Bodily Injury Liability insurance policies applicable to the person or persons legally responsible for

> such damages and available to cover the insured's damages . . . ."

*Gust*, 147 Wis. 2d at 563-64, 433 N.W.2d at 287.

The issue on appeal was whether the underinsured motorist coverage began at the level of the insured's *underlying recovery* or at the level of the major liability carrier's *policy limit*. The court initially stated that, when read together, subparagraphs (1) and (2) create an ambiguity which must be construed against the insurer. Subparagraph (1) reduces the insurer's underinsured motorist coverage by the total limits of all bodily injury insurance policies. Subparagraph (2), however, reduces the insurer's underinsured motorist coverage by the total limits of all bodily injury insurance policies and the damages available to cover the insured's damages. Thus, the court determined that subparagraph (2) qualified subparagraph (1) by limiting the reduction to the insured's damages, be it the policy limit or an amount available to cover the insured's damages.

In *Gust*, Verlyn Otto, while driving with a passenger, struck an oncoming car containing Harold Gust, Gust's wife, and the Newmier family. Otto, who was found 100 percent negligent, had a $300,000 liability insurance policy. All claims for the Gusts and Newmiers totaled $479,000. Their total recovery from Otto's insurer was $248,184, the remaining portion of Otto's $300,000 liability coverage being paid to Otto's passenger. The insurer contended that coverage began at Otto's policy limit of $300,000. The Gusts contended that coverage began with the underlying recovery of $248,184. The court determined the amount available for the insured's damages did not amount to Otto's policy limit of $300,000, but, rather, the underlying recovery of $248,184. The court found that the insurer was entitled to reduce the underinsured motorist coverage only by the portion of the total bodily injury limit specifically available to cover the insured's damages. The court reasoned that the insurer's interpretation would allow insurance companies to benefit from a credit not received by the insured. As such, the court held that subparagraph (2) established the scope of the insurer's reducing clause, and thus, the insurer could reduce its coverage by the amount of the insured's underlying recovery, $248,184.

Based on the ruling in *Gust, supra*, and the factually similar situations, the majority in the instant case correctly determined Shelter's policy did not contain an exhaustion clause. However, the majority failed to address exactly how Shelter's provision operates or to identify the ambiguity in the clauses. Therefore, I concur in the majority's conclusion, but not the rationale.

Union's provision stated, "We will pay under this coverage only after the limits of liability under *any applicable* bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements." (Emphasis supplied.) The majority determined the exhaustion clause was consistent with public policy and, thus, valid and enforceable. In turn, the majority affirmed the district court's grant of summary judgment and did not consider whether Ploen's settlement with the tort-feasor adversely affected Union's rights under the policy. However, I dissent because Union's exhaustion clause (1) contains an ambiguity and (2) is inconsistent with public policy.

The phrase "any applicable" in Union's policy is ambiguous. For example, in *Tate v. Secura Ins.*, 587 N.E.2d 665, 669 (Ind. 1992), the Indiana Supreme Court addressed an underinsured motorist coverage clause which provided coverage would occur " 'only after the limits of liability under *any applicable* bodily injury liability bonds or policies have been exhausted by payment or judgments or settlements.' " (Emphasis in original.) The insurer interpreted the clause to refer to all potential policies that may be alleged, and, as such, the insured failed to satisfy the policy language if the insured did not assert claims against every possible liability insurance policy applicable. The court rejected this interpretation and stated, "The phrase 'any applicable' in the exhaustion provision is at best ambiguous." *Tate*, 587 N.E.2d at 669. The court construed the ambiguous phrase against the insurer and determined the phrase meant only one policy providing bodily injury liability coverage for a tort-feasor from whom the policyholder may be legally entitled to recover.

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). When confronted with ambiguous language, this court has stated:

> Insurance companies in drafting their policies formulate language which may either prevent or create ambiguity. In such draftsmanship, precision provides certainty, while the absence of articulation accounts for ambiguity. As expressed in *Peony Park v. Security Ins. Co.*, 137 Neb. 504, 508, 289 N.W. 848, 851 (1940): "It is consistent with both reason and justice that any fair doubt as to the meaning of the words of a policy should be resolved against the one who prepares it, for if the terms of a policy are capable of two meanings, that is, where the true meaning is doubtful, the law favors such construction as will protect the insured, and not avoid the policy." See *Farm Bureau Ins. Co. v. Pedlow*, 3 Mich. App. 478, 142 N.W.2d 877 (1966).

*Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 498, 334 N.W.2d 463, 465 (1983). In the instant case, Union's exhaustion clause contains the same ambiguous phrase as that found in *Tate, supra*; yet, the majority failed to determine the phrase was ambiguous or to construe the provision against the drafting party. See, *Moller, supra*; *Denis, supra*. Moreover, as also witnessed in *Tate, supra*, we have multiple insurance policies which the underinsured motorist coverage carrier, Union, could allege must be exhausted before the insured, Ploen, satisfies the underinsured policy language. As a consequence, Union could argue that both Keller's policy with American Family Insurance Company and Ploen's father's policy with Union must have been exhausted before Ploen satisfies the underinsured policy language. However, the majority failed to address this ambiguity, and Union is now obligated to pay Ploen and/or any other person carrying Union insurance "only after the limits of liability under *any applicable* bodily injury liability bonds or policies have been exhausted . . . ." (Emphasis supplied.)

Union's exhaustion clause is also void as against public policy. Those states that have held exhaustion provisions to be valid and enforceable have done so based on statutory authority. See, Connecticut Gen. Stat. § 38a-336 (1992); Kentucky Rev. Stat. Ann. § 304.39-320 (Michie 1996); S.D. Codified Laws § 58-11-9 (Michie 1996). The majority in *Ploen* relied on a Connecticut case, *Ciarelli v. Commercial Union Ins. Cos.*, 234

Conn. 807, 663 A.2d 377 (1995), but failed to mention Connecticut's controlling statute. The majority of other courts who have addressed this issue have ruled that exhaustion clauses are void as against public policy. See, *Leal v. Northwestern Nat. County Mut.*, 846 S.W.2d 576 (Tex. App. 1993); *Brown v. USAA Cas. Ins. Co.*, 17 Kan. App. 2d 547, 840 P.2d 1203 (1992); *Shaw v. Continental Ins. Co.*, 108 Nev. 928, 840 P.2d 592 (1992); *Mann v. Farmers Insurance Exchange*, 108 Nev. 648, 836 P.2d 620 (1992); *Matter of Estate of Rucker*, 442 N.W.2d 113 (Iowa 1989); *Mulholland v. State Farm Auto. Ins.*, 171 Ill. App. 3d 600, 527 N.E.2d 29 (1988); *Longworth v. Van Houten*, 223 N.J. Super. 174, 538 A.2d 414 (1988); *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St. 3d 22, 521 N.E.2d 447 (1988), *modified on other grounds*, *McDonald v. Republic-Franklin Ins. Co.*, 45 Ohio St. 3d 27, 543 N.E.2d 456 (1989); *Aetna Cas. & Sur. Co. v. Farrell*, 855 F.2d 146 (3d Cir. 1988); *Hamilton v. Farmers Insurance*, 107 Wash. 2d 721, 733 P.2d 213 (1987); *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), *superseded by statute*, *Onasch v. Auto-Owners Ins. Co.*, 444 N.W.2d 587 (Minn. App. 1989); *Weinstein v. Am. Mut. Ins. Co. of Boston*, 376 So. 2d 1219 (Fla. App. 1979). Cf., *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (S.C. App. 1997); *Boyle v. Erie Ins. Co.*, 441 Pa. Super. 103, 656 A.2d 941 (1995); *Adkinson v. State Farm Mut. Auto. Ins. Co.*, 856 F. Supp. 637 (M.D. Ala. 1994); *Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991); *Vogt v. Schroeder*, 129 Wis. 2d 3, 383 N.W.2d 876 (1986). See, also, 3 Alan I. Widiss, Uninsured and Underinsured Motorist Insurance § 44.2 (2d ed. 1997 Supp.). For example, the Ohio Supreme Court observed:

> There are of course a number of considerations which militate in favor of settlement between the underinsured tortfeasor's insurer and the injured party. Obviously, settlement avoids litigation with its attendant expenses and resultant burden upon the legal system. Where the amount of settlement is less than the policy limits, the unpaid amount may well represent the savings in litigation costs for both sides. More importantly, settlement hastens the payment to the injured party who obviously needs compensation soon after the injuries when the medical

> expenses begin to amass and when the anxiety level is probably quite high. Additionally, there are many situations where litigation would not be a preferred course of action because, while the injuries are certain, there may remain other problems of proof. Thus, the public policy considerations, apart from the contract of the parties, generally favor settlements.

*Bogan*, 36 Ohio St. 3d at 25-26, 521 N.E.2d at 451. Similarly, the Nevada Supreme Court determined that exhaustion clauses violate public policy because

> they unnecessarily promote litigation costs, increase the number of trials, and unreasonably delay the recovery of underinsured motorist benefits. Specifically, these cases point out that an insured may have valid reasons for accepting less than the tortfeasor's policy limit, that an "underinsured motorist carrier" can compute its payments to the insured as if the insured *had* exhausted the tortfeasor's policy limit, and that if an "exhaustion clause" is in effect, the tortfeasor's carrier can force the plaintiff to go to trial by offering less than the tortfeasor's policy limit, thereby greatly increasing litigation costs and expenses and promoting delay.

(Emphasis in original.) *Mann*, 108 Nev. at 650, 836 P.2d at 621. However, the majority of the aforementioned authorities have noted that the insurers had notice of the settlement negotiations and that the underinsurance coverage started at the limits of the tort-feasor's liability coverage, not the settlement amount. See Neb. Rev. Stat. § 44-6412 (Cum. Supp. 1996) (newly amended Nebraska consent-to-settle statute). Nonetheless, neither issue affects the outcome of the instant case because Ploen gave Union notice of the settlement negotiations and the majority denied Ploen underinsurance coverage before reaching the issue of the amount of coverage.

In *Augustine v. Simonson*, 940 P.2d 116 (Mont. 1997), the Montana Supreme Court addressed a situation with fact and reasoning nearly identical to those in *Ploen* and ruled that the exhaustion clause was against public policy. In *Augustine*, Susan Simonson collided with Travis Gray's automobile. Tracy Augustine, Chase Augustine, and Cole Davison were passen-

gers in Gray's vehicle. Simonson was insured, with an aggregate combined single limit of $100,000. Gray settled for $20,000, Tracy Augustine settled for $16,875, Chase Augustine settled for $16,875, and approximately $1,100 was paid for property damage. As such, with one potential claim outstanding, approximately $54,600 had been paid out and approximately $45,400 remained. The Augustines then sought to obtain the remaining damages from their underinsured motorist carrier, Farmers Insurance Exchange. Farmers denied the Augustines' claim and alleged the Augustines failed to comply with the exhaustion clause by entering into settlements for less than the tort-feasor's policy limits. The exhaustion clause provided: " 'We will pay under this coverage only after the limits of liability under any applicable **bodily injury** liability bonds or policies have been exhausted by payment of judgments or settlements.' " (Emphasis in original.) *Augustine*, 940 P.2d at 119. At trial, the district court recognized public policy reasons for invalidating exhaustion clauses but declined to hold the clause invalid because " 'it would be unwise to encroach on the legislative function in this area.' " *Id.* at 118.

On appeal, the Montana Supreme Court initially determined the exhaustion clause required the insured to entirely exhaust the limits of all existing bodily injury liability bonds or policies before proceeding against the underinsured motorist carrier. The Montana Supreme Court overruled the district court's judgment, noting the general purpose of underinsurance and specifically the aforementioned passages from *Bogan, supra*, and *Mann, supra*. The court stated that the holding in *Bogan* was consistent with Montana public policy; the purpose of underinsurance, to provide indemnification for accident victims when the tort-feasor does not provide adequate indemnification; and the declared public policy of encouraging settlement and avoiding unnecessary litigation. Therefore, the court concluded the exhaustion provision was contrary to public policy and unenforceable to the extent the provision violates public policy.

This court has stated that the purpose of underinsured motorist insurance 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.*, 252

Neb. 1, 8, 560 N.W.2d 130, 135-36 (1997). We have also recognized that settlements are looked upon with favor. See *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993). Moreover, Neb. Rev. Stat. § 44-6409 (Supp. 1997), although not yet effective at the date of trial, provides that "[t]he maximum liability of the insurer under the . . . underinsured motorist coverage shall be the amount of damages for bodily injury . . . sustained by the insured less the amount *paid* to the insured . . . ." (Emphasis supplied.) The language in § 44-6409 contradicts the notion that exhaustion clauses are consistent with Nebraska public policy. Considering the stated purpose of underinsured motorist coverage, the general tenor toward settlements, and the greater weight of authority, Union's exhaustion clause should have been found void as against public policy. I dissent.

GERRARD, J., concurring in part, and in part dissenting.

I join that portion of Chief Justice White's dissent concluding that the exhaustion clause in the underinsured motorist section of Union's insurance contract is void as against public policy. Such a clause that requires entire exhaustion of a tort-feasor's liability insurance as a prerequisite to asserting an underinsured motorist claim is contrary to sound public policy for the reasons set forth in the Chief Justice's dissent. This is particularly true when, as here, the injured party seeks only the difference between the tort-feasor's liability policy limit and the damages sustained by the injured party.

In all other respects, I concur in the opinion of the court.

MCCORMACK, J., joins in this concurrence and dissent.

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STATE OF NEBRASKA, APPELLEE, V.
LARRY L. ROUCKA, APPELLANT.
573 N.W. 2d 417

Filed January 30, 1998. No. S-96-1191.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.

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 decision made by the court below.
3. **Constitutional Law: Statutes.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge.
4. **Statutes: Demurrer.** A motion to quash or a demurrer is the proper procedural method for challenging the facial validity of a statute.
5. **Pleas: Waiver.** All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
6. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and then files a motion to quash.
7. **Constitutional Law: Appeal and Error.** Generally, the Nebraska Supreme Court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
8. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
9. **Constitutional Law: Statutes: Standing.** The traditional rule of standing applies to a challenge to a statute on the grounds of vagueness.
10. ____: ____: ____. To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
11. ____: ____: ____. Conduct which is clearly proscribed by a statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court affirmed.

William G. Line 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.

Larry L. Roucka was charged in the county court for Dodge County with driving while under the influence (DUI), second

offense, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993), and refusal to submit to a chemical test, in violation of Neb. Rev. Stat. § 60-6,197(4) (Reissue 1993). Roucka filed a motion to quash, challenging the constitutionality of § 60-6,196(8), which motion was overruled. The county court found Roucka guilty of the DUI, second offense, and refusal to submit to a chemical test charges. Roucka appealed to the district court for Dodge County, which affirmed the convictions and sentences of the county court. He then timely appealed the decision of the district court.

## I. SCOPE OF REVIEW

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (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 decision made by the court below. *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997).

## II. FACTS

On February 17, 1996, at approximately 10:18 p.m., two Fremont police officers received a dispatch informing them that a possible intoxicated driver had just left Sapp Brothers driving a red and white Ford pickup with "43 county license plates." When the officers first saw the pickup, it was straddling two lanes of traffic at a stoplight at the corner of Military and Broad Streets. As the light turned green, the pickup proceeded south through the intersection, and the police officers observed it cross over the centerline several times. The police officers then stopped the pickup.

One of the officers approached the pickup and noticed that the driver, later identified as Roucka, appeared to be intoxicated. Roucka was asked to perform three field sobriety tests, which he performed poorly, and the officer then placed him under arrest for DUI.

Roucka was taken to the police department, where officers read Roucka the postarrest advisory form and asked that he

perform a chemical breath test. Roucka refused to take a breath test and refused to sign the advisory form which had been read to him. He told the officers that he would not give a breath test, but would give a blood test. He was advised that after he gave a breath test, he could take a blood test at his own expense. Roucka continued to refuse to take the breath test, and he was subsequently cited for second-offense DUI and refusal to submit.

Prior to trial, Roucka moved to quash the information on the basis that § 60-6,196(8) was facially unconstitutional. After the motion to quash was overruled, Roucka entered a plea of not guilty to both the second-offense DUI and refusal to submit charges. A bench trial was conducted, and Roucka was found guilty of both charges. Roucka was sentenced to 90 days in jail, a 1-year license revocation, and a $500 fine on the second-offense DUI charge, as well as 60 days in jail, a 6-month license revocation, and a $200 fine on the refusal to submit charge. The sentences were to be served concurrently.

## III. ASSIGNMENTS OF ERROR

Roucka assigns as error that the courts below erred in not finding § 60-6,196(8) unconstitutional and in finding him guilty of refusal to submit in spite of the defective advisory form.

## IV. ANALYSIS

### 1. Constitutionality of § 60-6,196(8)

Roucka argues that § 60-6,196(8) should be struck down by this court because it is unconstitutionally vague on its face. Section 60-6,196(8) provides:

> Any person who has been convicted of driving while intoxicated for the first time or any person convicted of driving while intoxicated who has never been assessed for alcohol abuse shall, during a presentence evaluation, submit to and participate in an alcohol assessment. The alcohol assessment shall be paid for by the person convicted of driving while intoxicated. At the time of sentencing, the judge, having reviewed the assessment results, may then order the convicted person to follow through on the alco-

hol assessment results at the convicted person's expense in lieu of or in addition to any penalties deemed necessary.

Roucka argues that the phrase "assessed for alcohol abuse" is not defined in the criminal code and has no generally accepted meaning and that such term is meaningless and gives the court no direction as to the expenses that may be incurred as a result of the "alcohol assessment." Essentially, Roucka asserts that the motion to quash he filed prior to trial should have been sustained. Roucka claims that since subsection (8) is not severable from the remainder of § 60-6,196, the "entire DUI statute is in violation of the state and federal constitutions because of its outlandish penalty provisions." See brief for appellant at 5.

As a preliminary matter, it is necessary to set forth the procedural and standing requirements to challenge the constitutionality of a statute. Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996).

(a) Procedure

A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *Id.* See, also, *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (holding that facial challenge to legislative act is most difficult challenge to mount successfully, because challenger must establish that no set of circumstances exists under which act would be valid). A motion to quash or a demurrer is the proper procedural method for challenging the facial validity of a statute. *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Kelley, supra.* All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. *State v. Conklin, supra*; *State v. Bocian*, 226 Neb. 613, 413 N.W.2d 893 (1987); *State v. Etchison*, 190 Neb. 629, 211 N.W.2d 405 (1973). Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless

that defendant asks leave of the court to withdraw the plea and then files a motion to quash. See, *State v. Conklin, supra*; *State v. Bocian, supra*; *State v. Etchison, supra.*

Roucka filed a motion to quash on March 19, 1996. This motion was overruled by the county court on May 7. Subsequently, Roucka entered a plea of not guilty. We conclude that Roucka has not waived his right to facially challenge § 60-6,196(8) as unconstitutionally vague. Accordingly, we have jurisdiction to consider his facial challenge.

(b) Standing

Roucka does not specify which constitutional provision § 60-6,196(8) violates. Generally, this court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Meints*, 223 Neb. 199, 388 N.W.2d 813 (1986). Since Roucka has not designated the provision in the Nebraska Constitution he considers analogous to the 5th and 14th Amendments to the U.S. Constitution, our analysis is limited to a consideration of the relevant provisions of the U.S. Constitution.

A statute may be constitutionally infirm if the statute is either vague or overbroad. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984). A vagueness challenge to a statute is conceptually distinct from an overbreadth challenge. *State v. Carpenter, supra*; *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994); *State v. Copple, supra.* An overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected conduct. *Id.* "Moreover, an enactment which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of first amendment rights." *Frey*, 218 Neb. at 561, 357 N.W.2d at 218-19. Accord *State v. Copple, supra.*

In *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), the Court explained the problems with vague criminal laws:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." [Citation omitted.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

See, also, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Thus, vague statutes offend the 5th and 14th Amendment guarantees, and it is the minimal guidelines to govern law enforcement and due process requirements discussed in *Kolender* and *Grayned* with which this court is concerned.

In *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494-95, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982), the Court established guidelines for determining whether a statute is facially invalid:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

See, also, *Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986); *State v. Frey, supra*.

Using the framework provided by *Hoffman Estates*, we first address whether § 60-6,196(8) is overbroad. Here, the statutory proscription does not reach a substantial amount of constitutionally protected conduct, and there is no standing to challenge § 60-6,196(8) on the basis that it is overbroad. Further, Roucka has not challenged the statute as being overbroad.

Unlike an attack based on the overbreadth of a statute, a vagueness challenge questions the clarity of statutory language. The traditional rule of standing applies to a challenge to a statute on the grounds of vagueness. *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). See, also, *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997); *State v. Kipf, supra*. Thus, conduct which is clearly proscribed by the statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. See, *Hoffman Estates v. Flipside, Hoffman Estates, supra*; *State v. Carpenter, supra*; *State ex rel. Dept. of Health v. Jeffrey, supra*; *State v. Sommerfeld, supra*; *State v. Kipf, supra*. Accordingly, to have standing to challenge a statute as vague, Roucka must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to others.

We find significant the fact that Roucka claims that subsection (8) is not severable from the remainder of § 60-6,196 and, therefore, attacks § 60-6,196 as a whole. On this basis, Roucka asserts that his conviction for DUI should be set aside. Since Roucka argues that subsection (8) is not severable, we will not attempt to make such a determination and will look at the statute as a whole to determine whether Roucka has engaged in conduct which is clearly proscribed by the statute. Section 60-6,196 clearly prohibits persons from driving while under the

influence of drugs or alcohol, and Roucka was convicted of this crime. Thus, addressing § 60-6,196 as a whole, we conclude that Roucka does not have standing to attack the vagueness of the statute, because he has engaged in conduct which is clearly proscribed by the statute.

### 2. Advisory Form

Roucka argues that his conviction for refusal to submit to a chemical test should be reversed because of the inadequacy of the advisory form read to him. The State contends that the advisory form complied with the concerns discussed in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), and therefore sufficiently warned Roucka of the risks of submitting to and refusing to submit to a chemical test. The State points out that the form was revised on July 20, 1995, approximately 2 weeks after our opinion in *Smith*, in order to comply with the deficiencies highlighted in *Smith*.

Prior to the administration of a breath test, all operators are read an advisory form. The sufficiency of this form has been the subject of several cases in Nebraska—the most significant being *Smith*. In *Smith*, the issue was whether the arresting officer, by reading the advisory form, gave Smith adequate notice of the consequences of failing a breath test, as required by § 60-6,197(10), which at that time provided:

> Any person who is required to submit to a preliminary breath test or to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised of (a) the consequences of refusing to submit to such test or tests and (b) the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in violation of subsection (1) of section [60-6,196]. Refusal to submit to such test or tests shall be admissible in any action for a violation of section [60-6,196] or a city or village ordinance enacted pursuant to such section.

We concluded that Smith had not been fully advised of the consequences of submitting to a breath test and failing it, as required by § 60-6,197(10). We held that the advisory form should have warned Smith of the cost of reinstating his license,

that he could be charged with a felony, that he could be charged with both refusal to submit and DUI, and that the results of the chemical test were probative of DUI and could be used in a court of law. Because Smith was not informed of these consequences, we concluded that his operator's license could not be revoked by the director of the Department of Motor Vehicles. See, also, *State v. Christner*, 251 Neb. 549, 557 N.W.2d 707 (1997).

These same principles have been applied in cases where the defendant refused to take a chemical test and was charged with refusal to submit. For example, in *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996), we held that the advisory form read to Perrine failed to adequately advise him of the consequences of refusing to take a breath test. Subsequent cases in this state have held that the advisory form invalidated in *Smith* was also insufficient to give a criminal defendant notice of the natural and probable consequences of submitting to or refusing to submit to a chemical test. See, *State v. Christner, supra*; *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997); *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997); *State v. Fiedler*, 5 Neb. App. 629, 562 N.W.2d 380 (1997); *State v. Connick*, 5 Neb. App. 176, 557 N.W.2d 713 (1996); *State v. Miceli*, 5 Neb. App. 14, 554 N.W.2d 427 (1996).

In response to *Smith*, the Fremont Police Department amended its postarrest advisory form so that each of the deficiencies listed in *Smith* was corrected. Subsequently, the Legislature amended § 60-6,197(10) to provide as follows: "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." See 1996 Neb. Laws, L.B. 939, § 2. This amendment became operative on February 27, 1996, and removed the need to advise a motorist faced with the choice of taking a chemical test of the natural and probable consequences of submitting or refusing to submit to the chemical test. See *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

Roucka was read the above-mentioned revised advisory form prior to refusing to give a breath test. He was charged

with DUI on February 17, 1996, but the amended version of § 60-6,197(10) was not in effect at the time of the incident and, therefore, does not apply to Roucka. Therefore, the issue is whether the revised advisory form complied with § 60-6,197(10) prior to its amendment.

We conclude that the advisory form read to Roucka sufficiently addressed each of the concerns raised in *Smith*. Roucka claims, however, that even if the advisory form complies with *Smith*, it is still inadequate in light of our decisions in *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996), and *Perrine v. State, supra*, because those cases raise an additional deficiency in the advisory form.

In *Biddlecome*, we held that the advisory form read to the defendant prior to taking the chemical test was defective because, in addition to all the concerns raised in *Smith*, the form did not mention "the restrictions on a motorist's ability to obtain employment driving privileges contained in § 60-6,206(2)." 249 Neb. at 285, 543 N.W.2d at 172. Neb. Rev. Stat. § 60-6,206(2) (Reissue 1993) provides:

> At the expiration of thirty days after an order of revocation is entered under subsection (1) of this section, any person whose operator's license has been administratively revoked for a period of ninety days for submitting to a chemical test pursuant to section 60-6,197 which disclosed the presence of a concentration of alcohol in violation of section 60-6,196 (a) may make application to the director for issuance of an employment driving permit . . . to operate a motor vehicle . . . . *This subsection shall not apply to nor shall any person be eligible for the benefit of this subsection during any period of time during which his or her operator's license is subject to an administrative revocation order (i) for refusal to submit to a chemical test of blood, breath, or urine as required by section 60-6,197*
> . . . .

(Emphasis supplied.) Roucka claims that because the revised form failed to advise him of the restrictions described in § 60-6,206(2), the entire advisory form was inadequate and that like the defendant in *Biddlecome*, he could not be charged with refusal to submit.

We are not persuaded by Roucka's argument, for we can readily distinguish the case at bar from *Biddlecome v. Conrad, supra*, and *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996). The advisory forms in *Biddlecome* and *Perrine* contained all the deficiencies noted in *Smith*, and in addition, the forms did not advise the operator of the restriction on an operator's ability to obtain employment driving privileges contained in § 60-6,206(2). Here, the advisory form read to Roucka specifically addressed each of the concerns set forth in *Smith* and excluded only a discussion of § 60-6,206(2).

We emphasize that in *Smith*, we stated that the advisory form was deficient because it, among other things, failed to inform the arrested party of (1) the evidentiary consequences of the chemical test; (2) the license reinstatement fee; (3) whether criminal penalties attached to the first, second, third, and fourth commissions of refusal to submit to the chemical test, or, rather, to the first, second, third, and fourth commissions of DUI; and (4) other charges, including felony charges, which can result from a test disclosing an illegal concentration of alcohol. In *Biddlecome* and *Perrine*, we added the requirement that the form include the restrictions on a motorist's ability to obtain employment driving privileges contained in § 60-6,206(2). We concluded that the forms in *Smith*, *Biddlecome*, and *Perrine* included such a limited recitation of consequences as to be not only inadequate but misleading. The inadequacy of the form was that, taken as a whole, it did not provide sufficient warning to comply with § 60-6,197(10). A reasonable application of § 60-6,197(10) before the 1996 amendment permits us to conclude that the advisory form read to Roucka, although not mentioning the restrictions contained in § 60-6,206(2), substantially complied with the statute then in effect, and the county court was correct in finding that Roucka unlawfully refused to submit to the chemical test.

## V. CONCLUSION

We affirm the convictions and sentences of the county court, as affirmed by the district court.

AFFIRMED.

WHITE, C.J., concurs.

CONNOLLY, J., concurring.

I agree with the result; however, I am of the opinion that *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), and *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996), were incorrectly decided for the reasons I have previously set forth in the dissent in *Smith*.

GERRARD, J., joins in this concurrence.

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STEVEN D. GASTON, APPELLEE, V.
APPLETON ELECTRIC COMPANY, APPELLANT.
573 N.W. 2d 131

Filed January 30, 1998. No. S-97-338.

1. **Workers' Compensation: Appeal and Error.** Pursuant to 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. ____: ____. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations.
3. **Workers' Compensation: Time.** Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes a 50-percent penalty payment for waiting time where the employer fails to pay compensation after 30 days' notice of the disability and where no reasonable controversy exists regarding the employee's claim for benefits.
4. **Workers' Compensation: Final Orders: Time: Appeal and Error.** In the absence of the filing of an appeal, a three-judge review panel's order on rehearing becomes a final adjudicated award. If an appeal is not filed within 30 days of the final order, the review panel's order is deemed final on the date it was rendered, rather than on the date the 30-day statutory time for appeal from the award expired.
5. **Workers' Compensation: Final Orders: Time.** Waiting-time penalties, as provided in Neb. Rev. Stat. § 48-125 (Reissue 1993), apply to final adjudicated awards or final orders of the Workers' Compensation Court.
6. **Workers' Compensation: Time: Attorney Fees.** The purpose of the 30-day waiting-time penalty and the provision for attorney fees, as provided in Neb. Rev. Stat. § 48-125 (Reissue 1993), is to encourage prompt payment by making delay costly if the award has been finally established.
7. **Workers' Compensation.** The only legitimate excuse for delay in the payment of workers' compensation benefits is the existence of a genuine dispute from a medical or legal standpoint that any liability exists, and the fact that an employer is considering an appeal with no appeal actually filed is not sufficient evidence to sustain a finding of genuine medical or legal doubt as to liability.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jon S. Reid, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Michael J. Lehan, of Kelley, Lehan & Hall, P.C., for appellee.

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

GERRARD, J.

We recently held in *Roth v. Sarpy Cty. Highway Dept., ante* p. 703, 572 N.W.2d 786 (1998), that, in the absence of the filing of an application for review, the 30-day period for payment of workers' compensation benefits, pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1993), commences on the date that an award is entered by a single judge of the Nebraska Workers' Compensation Court.

In the instant case, a three-judge review panel of the Workers' Compensation Court summarily affirmed a compensation award entered by a single judge of the compensation court in favor of Steven D. Gaston. Appleton Electric Company (Appleton) did not appeal the affirmance of the review panel and paid Gaston compensation benefits 46 days after the entry of the order of affirmance. This case presents the slightly different question of whether the 30-day period for the payment of workers' compensation benefits begins to run on the date the three-judge review panel enters an order affirming the award of compensation benefits or on the date the 30-day statutory time for appeal from the review panel's order expires.

## PROCEDURAL BACKGROUND

On January 6, 1995, Gaston filed a petition in the Workers' Compensation Court, seeking workers' compensation benefits for injuries he sustained while employed by Appleton. After a trial on the matter, a single judge of the compensation court determined that Gaston was entitled to workers' compensation benefits and entered an award on June 30. Appleton filed an application for review of the award. On January 9, 1996, a

three-judge review panel of the compensation court summarily affirmed the award of the single judge. Appleton elected not to appeal from the order of the review panel and paid Gaston compensation benefits on February 14.

On February 28, 1996, Gaston filed an application in which he requested the original single judge to order Appleton to pay penalties, interest, and attorney fees, pursuant to § 48-125, for the reason that the workers' compensation benefits due Gaston were not made within 30 days after notice of disability as required by § 48-125. The single judge, after a hearing, denied Gaston's application for penalties, interest, and attorney fees. The single judge reasoned that the review panel's order of affirmance did not become final until the 30-day statutory time for appeal had expired on February 8; thus, the payments of compensation by Appleton were not delinquent.

Gaston then filed an application for review of this determination, contending that a 50-percent penalty and attorney fees should have been assessed on the February 14, 1996, payment of benefits because the payment occurred more than 30 days after the entry of the January 9 order of affirmance by the three-judge review panel. Agreeing with Gaston, a three-judge review panel of the compensation court found that the 30-day period for the payment of compensation benefits commenced to run on January 9, the date the review panel entered its order, and thus, the February 14 payment of compensation benefits was untimely. The review panel remanded the case to the single judge with an order to enter an award granting Gaston penalties and attorney fees on all payments not made within 30 days of the entry of the order of affirmance on January 9. Appleton appeals.

## SCOPE OF REVIEW

Pursuant to 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. *U S West*

*Communications v. Taborski, ante* p. 770, 572 N.W.2d 81 (1998); *Roth v. Sarpy Cty. Highway Dept., ante* p. 703, 572 N.W.2d 786 (1998). However, as to questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Roth v. Sarpy Cty. Highway Dept., supra.*

## ASSIGNMENT OF ERROR

Appleton's seven assignments of error can be restated and consolidated into the following single assignment: The three-judge review panel of the Workers' Compensation Court erred in determining that the 30-day period for the payment of workers' compensation benefits commenced to run on the date the three-judge review panel entered its order affirming the award of compensation benefits, rather than on the date the 30-day statutory time for appeal from the review panel's order expired.

## ANALYSIS

Appleton asserts that an award of workers' compensation benefits is not final and enforceable until the 30-day statutory time for appeal from the review panel's order expires, regardless of whether an appeal is actually filed. Gaston, on the other hand, contends that the payment of compensation benefits is due 30 days from the date of the review panel's order because Appleton elected not to appeal from the order, and an order of the compensation court is final when issued, not 30 days later when the right to appeal expires and no appeal has been filed.

Section 48-125 provides in pertinent part that

> all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice has been given of the obligation for medical payments,

> and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award.

Section 48-125 authorizes a 50-percent penalty payment for waiting time where the employer fails to pay compensation after 30 days' notice of the disability and where no reasonable controversy exists regarding the employee's claim for benefits. *Roth v. Sarpy Cty. Highway Dept., supra*; *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

In support of its assertion that the 30-day period for the payment of workers' compensation benefits did not commence to run until the time to perfect an appeal lapsed, Appleton relies on *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992) (*Leitz II*). In *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991) (*Leitz I*), the Workers' Compensation Court awarded workers' compensation benefits to the injured employee. The employer appealed the award to this court, and we upheld the award on appeal. The opinion of this court was filed on February 15, 1991, and the mandate was filed with the Workers' Compensation Court on February 25. The employer did not make payment of the workers' compensation benefits until after March 17, which resulted in the employee's filing a claim for the imposition of a 50-percent penalty and attorney fees. The issue in *Leitz II* was whether the 30-day period for the payment of compensation benefits commenced to run on February 15, when the opinion was filed, or on February 25, when the mandate was filed with the Workers' Compensation Court. We held that because the Workers' Compensation Court did not obtain jurisdiction of the case until the mandate was filed, the 30-day period for the payment of benefits did not begin to run until the award was final, which was 30 days after the mandate was filed with the Workers' Compensation Court. *Id.*

Unlike in *Leitz II*, the Workers' Compensation Court in the instant case had continuous jurisdiction over the matter and the filing of a mandate was not necessary to reinvest jurisdiction in the compensation court. Thus, consistent with our reasoning in *Roth v. Sarpy Cty. Highway Dept., ante* p. 703, 572 N.W.2d 786 (1998), we hold that, in the absence of the filing of an appeal,

the three-judge review panel's order on rehearing becomes a final adjudicated award. See, also, *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987).

As provided in § 48-125, waiting-time penalties apply to final adjudicated awards. *Roth v. Sarpy Cty. Highway Dept., supra*; *Leitz II, supra*. In the present case, the January 9, 1996, order of the review panel was final on the date it was rendered because Appleton did not file an appeal within 30 days of the order. Therefore, the 30-day period for the payment of benefits commenced to run on January 9, and the February 14 payment of benefits was untimely.

The purpose of the 30-day waiting-time penalty and the provision for attorney fees in § 48-125 is to encourage prompt payment by making delay costly if the award has been finally established. *Roth v. Sarpy Cty. Highway Dept., supra*. See, also, *Smith v. University of Nebraska Medical Center*, 201 Neb. 730, 271 N.W.2d 852 (1978), *modified on rehearing* 202 Neb. 493, 276 N.W.2d 86 (1979); *McCrary v. Wolff*, 109 Neb. 796, 192 N.W. 237 (1923). The only legitimate excuse for delay in the payment of workers' compensation benefits is the existence of a genuine dispute from a medical or legal standpoint that any liability exists. *Roth v. Sarpy Cty. Highway Dept., supra*; *Grammer v. Endicott Clay Products*, 252 Neb. 315, 562 N.W.2d 332 (1997); *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989). The mere fact that Appleton was considering an appeal, without actually filing an appeal, is not sufficient evidence to sustain a finding of genuine medical or legal doubt as to liability, thereby excusing Appleton for its delay in paying the compensation benefits. See *Roth v. Sarpy Cty. Highway Dept., supra*. Furthermore, requiring payment within 30 days, rather than within 60 days, of the review panel's order of affirmance is in accord with the purpose behind the penalty provision, which is to ensure the prompt payment of undisputed compensation benefits to the injured employee.

## CONCLUSION

For the foregoing reasons, we conclude that the review panel correctly found that Appleton's February 14, 1996, payment of workers' compensation benefits was untimely. Thus, we affirm

the order of the review panel that remanded the case to the single judge with instructions to enter an award granting Gaston penalties and attorney fees on all payments not made within 30 days of the January 9 order of affirmance.

AFFIRMED.

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GLEN BONGE AND EVELYN BONGE, HUSBAND AND WIFE, APPELLANTS, V. COUNTY OF MADISON, STATE OF NEBRASKA, APPELLEE.

573 N.W.2d 448

Filed February 6, 1998. No. S-96-313.

1. **Constitutional Law: Property.** Whether an unconstitutional regulatory takings case is ripe for adjudication is a question of law.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
4. **Property: Zoning: Final Orders.** Before a taking claim is ripe for review, there must be a final and authoritative determination of the type and intensity of development legally permitted on the subject property.
5. ___: ___: ___. Generally, to attain a final decision in regulatory takings cases, there must be at least (1) a rejection of a development plan and (2) a denial of a variance where the statute or bylaw at issue provides for such exceptions.
6. **Property: Final Orders: Proof.** An exception to the requirement of obtaining a final decision in regulatory takings cases occurs where a plaintiff is able to show that administrative remedies would be futile.
7. **Judgments: Directed Verdict.** A judgment on a directed verdict is a judgment on the merits.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and INBODY, Judges, on appeal thereto from the District Court for Madison County, ROBERT B. ENSZ, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Charles W. Balsiger, P.C., for appellants.

Joseph M. Smith, Madison County Attorney, for appellee.

CAPORALE, WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

Glen Bonge and Evelyn Bonge, husband and wife, brought this inverse condemnation action against the County of Madison (County) for damages allegedly sustained when the County enacted certain flood plain management regulations applicable to land owned by the Bonges. During the course of a jury trial, the district court sustained the County's motion for a directed verdict and dismissed the action. The Bonges appealed to the Nebraska Court of Appeals, which affirmed the judgment of the district court. See *Bonge v. County of Madison*, 5 Neb. App. 760, 567 N.W.2d 578 (1997). We granted the Bonges' petition for further review.

## SCOPE OF REVIEW

Whether an unconstitutional regulatory takings case is ripe for adjudication is a question of law. *Ventures Northwest Ltd. v. State*, 81 Wash. App. 353, 914 P.2d 1180 (1996).

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997). See *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997).

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Perryman v. Nebraska Dept. of Corr. Servs., ante* p. 66, 568 N.W.2d 241 (1997). See, also, *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997).

## FACTS

In 1968 or 1969, the Bonges entered into a lease-purchase agreement for certain property in Madison County referred to as "Sandy Beach." The Bonges made improvements to what was originally an abandoned gravel pit, and in 1970, they began using Sandy Beach as a mobile home park. The property was ultimately purchased in 1980.

In 1975, the County adopted comprehensive zoning and subdivision regulations. Richard Wozniak, the zoning administrator

and planner for the County, testified that Sandy Beach was initially zoned "R-M" (mobile residential district) and that it had not been rezoned. The 1975 zoning and subdivision regulations included flood plain regulations. However, spaces provided to delineate those areas to which the flood plain regulations applied were left blank.

In 1984, the Bonges were cited for 47 violations by a fire inspector, and the Madison County District Court enjoined them from continuing to operate the mobile home park without a license. Glen Bonge testified that after the injunction was issued, he made additional improvements to the property with the intention of redeveloping it as a residential recreation area. Among other improvements, the Bonges installed a new sanitary sewer and a new water system and improved the roads. Glen Bonge further testified that the bottom of the wastewater lagoon was raised to a level that would be above the 100-year flood plain. This was done in order to meet new standards that were being set by the then Department of Health. However, Glen Bonge admitted that he had not checked the department's rules and regulations and did not notify the department for approval before making these improvements.

As of the date of his testimony in February 1996, Glen Bonge had not applied to the department for the license required to lift the 1984 injunction. However, despite the fact that a number of items on the property had been in disuse, Glen Bonge believed he would be able to immediately bring those items up to the department's specifications. Glen Bonge testified that at some point after 1985, he applied to have the property rezoned from "R-M" to "R-R" (residential recreation district), and, based upon his understanding of the flood plain management regulations at that time, he requested a special use permit to add accessory buildings for a campground. Glen Bonge testified that the application was denied; however, there is no evidence in the record as to the reason for the denial. Glen Bonge stated that he resubmitted the application in 1992, but thereafter, he voluntarily withdrew it.

In 1987, in response to Federal Emergency Management Agency requirements and in order to retain its flood insurance program, the County passed resolution No. 87-22, which

adopted a federal "Flood Hazard Boundary Map" prepared by the U.S. Department of Housing and Urban Development as its official map. On November 17, 1992, the County passed resolution No. 92-39, which incorporated the boundary map into the floodway fringe area of the zoning district. The Bonges' land lies within the flood plain, and it is resolution No. 92-39 which the Bonges assert constitutes a taking by the County.

The flood plain management regulations do not include a mobile home park as one of the specified "Permitted Uses." Ransom Roman, a real estate appraiser, testified that "the highest and best use" of Sandy Beach, if the property was subject to the restrictions of the flood plain management regulations, was as pasture ground. Roman estimated the value of the land as pasture ground to be $14,000. In contrast, Roman testified that if the Bonges were allowed to use the land for some form of a mobile home park, regardless of whether it was zoned R-M or R-R, the value would be $193,000.

At the close of the Bonges' evidence, the district court sustained the County's motion for directed verdict on the grounds that the Bonges had failed to prove causation and damages, and dismissed the action. The Bonges appealed to the Court of Appeals, which concluded that because the Bonges have neither sought nor received a final decision on the application of the flood plain management regulations and have failed to show that such an application would be futile, the Bonges' claim is not ripe. The Court of Appeals therefore affirmed the judgment of the district court.

## ASSIGNMENTS OF ERROR

The Bonges assert that the Court of Appeals erred in (1) finding that they had failed to exhaust their administrative remedies, (2) finding that their claim is not ripe, and (3) affirming the district court order sustaining the County's motion for directed verdict.

## ANALYSIS

The Court of Appeals correctly concluded that because the Bonges have neither sought nor received a final decision on the application of the flood plain management regulations to their property, their taking claim is not ripe. Before a taking claim is

ripe for review, there must be a final and authoritative determination of the type and intensity of development legally permitted on the subject property. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986). In *MacDonald, Sommer & Frates*, the Court explained that "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.'" 477 U.S. at 349, quoting *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). Generally, to attain a final decision in regulatory takings cases, there must be at least (1) a rejection of a development plan and (2) a denial of a variance where the statute or bylaw at issue provides for such exceptions. See, *Thompson v. City of Red Wing*, 455 N.W.2d 512 (Minn. App. 1990); *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234 (Tex. App. 1994).

An exception to the requirement of obtaining a final decision in regulatory takings cases occurs where a plaintiff is able to show that administrative remedies would be futile. See *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994). In *Whitehead Oil Co.*, the city argued that we should not reach the oil company's claim because the city had taken no final action against the oil company under the current O-3 zoning designation. We pointed out that this argument ignored the fact that the city had indeed taken final action when it denied the oil company's application for a use permit. We then rejected the argument that the oil company was required to seek a variance from the city's board of zoning appeals which would permit the desired use despite the zoning restriction. We explained that a request for variance would be futile in light of the city's past actions in denying the permit and the fact that the city's board of zoning appeals did not have the power to grant the desired variance.

In contrast, in *Paragon Properties v Novi*, 452 Mich. 568, 550 N.W.2d 772 (1996), a property owner brought an action against the city, alleging the unconstitutional taking of its property when the city denied the owner's request to rezone the

property from single-family residential to mobile home district. The court noted that the zoning board of appeals had the administrative authority to permit uses that would otherwise not be permitted under a zoning ordinance and held that the city's denial of the rezoning request absent a request for variance was not a final decision. The court explained that there was no information regarding the potential uses of the property that might have been permitted and that there was no information regarding the extent to which the owner may have been injured as a result of the ordinance. The court rejected the owner's contention that because variances were to be sparingly granted, any application for a variance would be futile. See, also, *Galbraith v. Planning Dept.*, 627 N.E.2d 850 (Ind. App. 1994) (inverse condemnation action challenging rezoning as floodway not ripe where landowners failed to seek final administrative determination from both agencies named in ordinance); *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907 (1990) (inverse condemnation claim as to wetlands ordinance was not ripe because of landowner's failure to exhaust administrative remedies by applying for building permit which would have resulted in determination of what uses of property were permissible and to what extent).

It is undisputed that the County has not arrived at a definite position on the Bonges' application to use Sandy Beach as a mobile home park or a residential recreation district, and we reject the Bonges' contention that such application would be futile. Resolution No. 92-39, § 6, provides that a variance to the flood plain and floodway regulations may be granted by the board of adjustment if the applicant demonstrates that (1) the proposed development will not increase flood heights; (2) the proposed development is not within a wetland; (3) the proposed development does not require an Army Corps of Engineers § 404 permit; (4) there is no objection from the Lower Elkhorn Natural Resources District; (5) the proposed development will not create threats to the health, safety, and general welfare of any person; (6) the proposed development will not cause damage from any form of material which may move downstream from the proposed development and cause an extraordinary public expense and create nuisances; and (7) an exceptional

hardship exists that is other than economic or financial alone. The granting of a variance clearly falls within the board of adjustment's powers, as defined by Neb. Rev. Stat. § 23-168.03 (Reissue 1991). The Bonges have failed to show that it would be futile to apply to the board of adjustment for a variance to use Sandy Beach as a mobile home park, and therefore, their inverse condemnation action is not ripe for our review.

The Bonges assert that even if the Court of Appeals was correct in its determination that the action is not ripe, the decision affirming the district court's directed verdict is erroneous because the district court lacked jurisdiction over the action. We agree. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997). See *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997).

In *Iowa Coal Min. Co. v. Monroe County*, 555 N.W.2d 418, 432 (Iowa 1996), an inverse condemnation case based on certain zoning ordinances, the court noted that "[i]f a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it." The court explained that the "basic rationale" for the ripeness doctrine "'is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Id.* at 432, quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

Similarly, in *Cumberland Farms, Inc. v. Town of Groton*, 46 Conn. App. 514, 699 A.2d 310 (1997), the appellate court affirmed the trial court's dismissal for lack of jurisdiction after holding that a landowner's inverse condemnation action was premature because its appeal for a variance to zoning regulations was still pending. The appellate court explained that "[u]ntil that appeal has been completed it is impossible to know the extent of the loss, if any, suffered by the plaintiff." *Id.* at

518, 699 A.2d at 313. We find that the rationale expressed in *Iowa Coal Min. Co.* and *Cumberland Farms, Inc.* is applicable to the case at bar.

The district court made a determination that the Bonges had failed to prove causation and damages, and granted a directed verdict in favor of the County. A judgment on a directed verdict is a judgment on the merits. See *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). Because the district court lacked jurisdiction, it should not have entered a judgment on the merits, and the Court of Appeals erred in affirming the district court's judgment. We therefore reverse the decision of the Court of Appeals and remand the cause to that court with directions to remand the cause to the district court with directions to dismiss for lack of jurisdiction.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C.J., participating on briefs.

GERRARD, J., not participating.

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## THOMAS MCALLISTER, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES AND NEBRASKA DEPARTMENT OF ADMINISTRATIVE SERVICES (NEBRASKA STATE PERSONNEL BOARD), APPELLEES.

573 N.W.2d 143

Filed February 6, 1998. No. S-96-373.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Due Process: Notice: Words and Phrases.** The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified.
3. **Administrative Law.** An agency's rules or regulations are invalid unless they are filed with the Secretary of State.
4. **Administrative Law: Penalties and Forfeitures: Presumptions.** Any rule or regulation prescribing a penalty creates a presumption that the rule or regulation at issue affects private rights and interests.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

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

J. Murray Shaeffer for appellant.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellees.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Appellant, Thomas McAllister, an employee of appellee the Nebraska Department of Correctional Services (Department), was terminated pursuant to Department administrative regulation No. 112.6, Employee Discipline, rule C-V006 - Conduct Inappropriate for a State Employee. McAllister contends that his termination did not comport with due process. Specifically, McAllister asserts that regulation No. 112.6 prescribes a penalty and therefore is a "rule or regulation" within the meaning of the Administrative Procedure Act (APA), which requires that such rules or regulations must be filed with the Secretary of State. We conclude that regulation No. 112.6, which prescribes a penalty, is a rule or regulation within the meaning of the APA. Because regulation No. 112.6 has not been filed with the Secretary of State, it is invalid. Accordingly, McAllister's termination pursuant to regulation No. 112.6 was a denial of due process. Thus, we reverse.

## BACKGROUND

McAllister, a 19-year employee of the Department, was employed at the Lincoln Correctional Center when the Department charged him with violating Department regulation No. 112.6, rule C-V006 - Conduct Inappropriate for a State Employee and rule C-V007 - Being in an Unalert State. These charges were the result of allegations that McAllister had fallen asleep while on duty. A disciplinary hearing was held by the members of the management of the Lincoln Correctional Center, who found McAllister guilty of violating rule C-V006 and recommended immediate termination of McAllister's employment. The director of the Department adopted the management's recommendation.

After McAllister's employment was terminated, he filed a grievance with the Nebraska State Personnel Board. A hearing officer found that the Department had just cause and acted in good faith in disciplining McAllister and that the discipline imposed was proper. The board adopted the recommendation of the hearing officer, and McAllister appealed to the district court for Lancaster County, which affirmed the board's decision.

The district court held that the Department was not required to file regulation No. 112.6 with the Secretary of State because it fit within the " 'internal management' exception" of the APA. The district court determined that since both McAllister and the Department are subject to the Nebraska Classified System Personnel Rules, 273 Neb. Admin. Code. (1993), which are on file with the Secretary of State, these rules satisfied McAllister's due process rights.

## ASSIGNMENTS OF ERROR

McAllister asserts that the district court erred in (1) determining that regulation No. 112.6 dealing with discipline of employees was an internal regulation not required to be filed with the Secretary of State, pursuant to the APA; (2) taking judicial notice, sua sponte, of title 273 of the Nebraska Administrative Code; (3) determining that the holding in *Nebraska Dept. of Correctional Servs. v. Hansen*, 238 Neb. 233, 470 N.W.2d 170 (1991), was applicable to this case; and (4) determining that the evidence supported the charge that McAllister was asleep for 30 minutes.

## SCOPE OF REVIEW

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Sacco v. Carothers, ante* p. 9, 567 N.W.2d 299 (1997).

## ANALYSIS

McAllister asserts that he was denied procedural due process when his employment was terminated by the Department pursuant to regulation No. 112.6, which had not been filed with the Secretary of State as required by the APA. "The central meaning of procedural due process is that parties whose rights are to

be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified." *Dannehl v. Department of Motor Vehicles*, 3 Neb. App. 492, 499, 529 N.W.2d 100, 105 (1995). When an individual is entitled to the protections of the APA, as is McAllister, the notice and hearing required by procedural due process is governed by the Legislature. See *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994). Neb. Rev. Stat. § 84-906 (Reissue 1987) of the APA provides that "[n]o rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State." We have previously indicated that according to the plain meaning of § 84-906, it is irrelevant whether or not an individual has actually been prejudiced by an agency's failure to file a rule or regulation with the Secretary of State. See *Gausman v. Department of Motor Vehicles, supra*. Rather, we stated:

> Although the [D]epartment [of Motor Vehicles] claims it complied with procedural due process by affording [the appellant] timely notice of the hearing, an opportunity to refute or defend against the charge, an opportunity to confront and examine adverse witnesses, and a hearing before an impartial decisionmaker, the department's failure to comply with § 84-906 is a denial of due process.

*Gausman*, 246 Neb. at 684, 522 N.W.2d at 421.

The State does not dispute McAllister's contention that the Department's employee disciplinary regulations were not filed with the Secretary of State. Accordingly, we must determine whether the Department's regulations were valid as applied to McAllister even though they were not filed in accordance with § 84-906 of the APA.

The district court determined that because both McAllister and the Department are governed by the Nebraska Classified System Personnel Rules, which have been properly filed, McAllister's procedural due process rights were satisfied. Likewise, the Department argues that McAllister's discipline was validly imposed pursuant to the provisions of the labor contract between the State of Nebraska and specified bargaining units, one of which includes McAllister. However, both the district court and the Department ignore the procedural posture of

the instant case. Although the Department may have properly disciplined McAllister according to the Nebraska Classified System Personnel Rules or the labor contract, matters which we need not decide, the Department chose not to do so. Rather, our review of the record indicates that the Department's disciplinary action against McAllister was brought pursuant to Department regulation No. 112.6. The letter of recommended disciplinary action from Warden Robert P. Houston to the director of the Department stated that McAllister's disciplinary hearing "was held in accordance with DCS Regulation 112.6." In accordance with that recommendation, the director found McAllister guilty of a violation of rule C-V006 - Conduct Inappropriate for a State Employee, which is contained within regulation No. 112.6. Accordingly, we limit our review to the validity of Department regulation No. 112.6. See *Dannehl v. Department of Motor Vehicles, supra.*

As we have stated, an agency's rules or regulations are invalid unless they are filed with the Secretary of State. *Gausman v. Department of Motor Vehicles, supra.* Thus, if the employee disciplinary regulations of the Department are "rules and regulations" within the meaning of the APA, we must declare those rules and regulations invalid. Neb. Rev. Stat. § 84-901(2) (Reissue 1987) of the APA defines "rule or regulation" as

> any rule, regulation, or standard issued by an agency . . . designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure, but not including rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public . . . for the purpose of the Administrative Procedure Act, every rule and regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests . . . .

The Department argues that the regulations at issue are not rules and regulations within the meaning of the APA because they concern the internal management of the Department and do not affect private rights, private interests, or procedures available to the public. McAllister, however, contends that the Department's employee disciplinary regulations are rules and regulations

within the meaning of the APA because they constitute a penalty, which creates a presumption that they affect private rights and interests.

The instant case is similar to *Rossie v. State Rev. Dept.*, 133 Wis. 2d 341, 395 N.W.2d 801 (Wis. App. 1986). In *Rossie*, the Wisconsin Department of Revenue appealed a judgment enjoining it from enforcing two administrative directives that prohibited smoking in any of its facilities. Wisconsin's statute defining administrative "rules" subject to the State's rule-making procedures did not include any "'action or inaction of an agency . . . which . . . [c]oncerns the internal management of the agency and does not affect private rights or interests . . . .'" *Id.* at 349, 395 N.W.2d at 805. The parties did not dispute that the directive concerned internal management; rather, the issue was whether the directives affected private rights or interests. The court held that neither private rights nor interests were involved and that thus, the directives were not "rules" within the meaning of the statute.

The court stated that the possibility that the employee may be terminated did not require that all disciplinary regulations be promulgated in accordance with its statute.

> "'Private rights and interests' is not defined by statute or caselaw. However, it is apparent that they are rights and interests which are unrelated to the job or to the workplace. Otherwise, nearly all work rules would fail to meet [the statute's] exception because they are, by definition, some type of restriction on employees' rights and interests."

*Id.* at 349-50, 395 N.W.2d at 805.

However, unlike the Wisconsin statute at issue in *Rossie*, Nebraska's APA does define "private rights and interests" to the extent that it states that any rule or regulation prescribing a penalty creates a presumption that the rule or regulation at issue affects such rights and interests. See § 84-901(2). Section 84-901(2) does not necessarily limit "private rights and interests" to those which are unrelated to the workplace. Therefore, the issue is whether Department regulation No. 112.6 prescribes a "*penalty*." If so, it is *presumed* to affect private rights and interests, regardless of whether the rights or interests at stake are those of an agency employee or some other individual.

Although the APA does not define "penalty," 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. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). Black's Law Dictionary 1133 (6th ed. 1990) states that "penalty" is "[a]n elastic term with many different shades of meaning . . . although its meaning is generally confined to pecuniary punishment." Assuming arguendo that the definition of "penalty" is limited to pecuniary punishment, a matter we need not decide, the Department's employee disciplinary regulations still constitute a "penalty." A violation of the Department's employee disciplinary regulations may result in suspension without pay, demotion, or reduction in salary within a salary grade, all of which are pecuniary punishments. Thus, the Department's employee disciplinary regulations prescribe a penalty, creating a presumption that they affect private rights and interests.

Because regulation No. 112.6 is presumed to affect private rights and interests, it does not fit within the internal management exception of § 84-901. We conclude that Department regulation No. 112.6 is a rule or regulation within the meaning of the APA and that it is therefore invalid as it was not filed with the Secretary of State.

We recognize that filing employee disciplinary rules and regulations with the Secretary of State may impose a burden on administrative agencies. The 1981 Model State Admin. Proc. Act § 3-116, comment, 15 U.L.A. 56 (1990), states the purpose of exempting certain rules and regulations from the usual rule-making procedure:

> The exemptions from usual rule-making procedures and publication requirements . . . represent an effort to strike a fair balance between the need for public participation in, and adequate publicity for, agency policymaking on the one hand, and the conflicting need for efficient, economical, and effective government on the other hand.

For rules and regulations that prescribe a penalty, including those dealing with internal employee discipline, Nebraska's Legislature has struck the balance in favor of public participa-

tion and adequate publicity. This court cannot say that a fair balance has not been struck. If it so chose, the Legislature could have excluded employee disciplinary regulations from the requirements of the APA.

Because we have already concluded that the Department's rules and regulations are invalid, we need not address McAllister's remaining assignments of error.

## CONCLUSION

We conclude that Department regulation No. 112.6, which was not filed with the Secretary of State, is a rule or regulation within the meaning of the APA. Thus, regulation No. 112.6 is invalid as against McAllister. Because McAllister was charged and found guilty of violating an invalid regulation, he was not afforded procedural due process. Accordingly, McAllister's discipline was improper, and the district court's decision does not conform to the law.

REVERSED.

White, C.J., participating on briefs.

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## SANITARY AND IMPROVEMENT DISTRICT NO. 1 OF FILLMORE COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

573 N.W.2d 460

Filed February 6, 1998. Nos. S-96-385, S-96-386.

1. **Final Orders: Appeal and Error.** The three types of orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
2. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
3. **Eminent Domain.** A condemnation action is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
4. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or

defense that was available to the appellant prior to the order from which the appeal is taken.

5. **Eminent Domain: Legislature: Statutes.** The power of eminent domain may be exercised only on the occasion and in the mode or manner prescribed by the Legislature. Statutes conferring and circumscribing the power of eminent domain must be strictly construed.
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. Specifically, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. **Statutes.** In general, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. However, to the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
8. **Statutes: Legislature: Presumptions: Judicial Construction.** When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it.
9. **Statutes.** Where one statute refers to another and the latter is subsequently repealed, the statute repealed, absent contrary legislative intent, becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned.
10. **Eminent Domain: Public Utilities: Sanitary and Improvement Districts.** Under Neb. Rev. Stat. § 70-301 (Reissue 1996), a public power district has the power of eminent domain to acquire right-of-way over lands owned by a sanitary and improvement district.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed as modified, and causes remanded for further proceedings.

Donald Pepperl, of Pepperl, McMahon-Boies, and Jerry D. Anderson for appellant.

James A. Eske, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, and Bonnie J. Hostetler for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

These consolidated appeals present a single question of law: Does a public power district have the power of eminent domain to acquire right-of-way over lands owned by a sanitary and

improvement district for the purpose of constructing transmission lines and related structures? We hold that such power is conferred by Neb. Rev. Stat. § 70-301 (Reissue 1996) and, therefore, affirm the judgments of the district court for Fillmore County as modified, and remand the causes for further proceedings.

## BACKGROUND

Appellee Nebraska Public Power District (NPPD) is a public corporation and political subdivision of the State of Nebraska. See Neb. Rev. Stat. § 70-601 et seq. (Reissue 1996). Appellant Sanitary and Improvement District No. 1 of Fillmore County, Nebraska (S.I.D. 1), is a public corporation and political subdivision of the State of Nebraska. See, Neb. Rev. Stat. § 31-727 et seq. (Reissue 1993); *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (1985). Sanitary and improvement districts have been characterized as quasi-municipal corporations. See *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986).

In 1993, NPPD obtained approval from the Nebraska Power Review Board to construct and operate a 345,000-volt electric transmission line, known as the Pauline-Moore line, extending from a substation south of Hastings, Nebraska, to NPPD's Sheldon Power Plant north of Hallam, Nebraska, a distance of approximately 96 miles. In 1995, NPPD commenced separate condemnation actions in the county court for Fillmore County, Nebraska, for the purpose of acquiring "easement right-of-way" over two irregular tracts of land in Fillmore County for the construction of a portion of the Pauline-Moore line. NPPD contended that it possessed the power of eminent domain to acquire this right-of-way pursuant to §§ 70-301 and 70-670. NPPD alleged that S.I.D. 1 claimed an interest in the land by reason of certain quitclaim deeds recorded in 1994. Court-appointed appraisers awarded damages to S.I.D. 1 in the amount of $7,724 for one parcel and $2,974 for the other. S.I.D. 1 appealed both awards to the district court for Fillmore County. See Neb. Rev. Stat. § 76-715 (Reissue 1996).

In its amended petitions on appeal, S.I.D. 1 alleged that it owned the parcels of land which are the subject of the condemnation and asserted several defenses which are referred to in its

petitions as separately numbered "causes of action." In the third cause of action of each amended petition, S.I.D. 1 alleged that the subject parcels were public property over which NPPD had no statutory power of eminent domain and prayed that the court declare the attempted condemnation void and quiet title to the property in its name. In its answers, NPPD denied these allegations and reasserted its authority to acquire the right-of-way by condemnation under §§ 70-301 and 70-670. The district court consolidated the cases for separate trial on this issue, reserving for later determination other issues, including the adequacy of damages awarded by the appraisers.

On April 5, 1996, following a bench trial at which no testimony was offered and exhibits were received without objection, the district court entered an order finding that NPPD "does have the authority under Neb. Rev. Stat. Sections 70-301 and 70-670 to acquire an easement over [property owned by S.I.D. 1] through the exercise of the power of eminent domain" and dismissing the third cause of action in each case. S.I.D. 1 filed a timely notice of appeal in each case. Pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court, we removed the cases to our docket on our own motion and ordered them consolidated for argument and disposition.

## ASSIGNMENT OF ERROR

Restated, S.I.D. 1 contends that in each of these cases the district court erred in determining that NPPD possessed statutory power of eminent domain to acquire right-of-way over property to which S.I.D. 1 held title.

## 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. *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997); *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997).

## ANALYSIS

While these cases were pending before the Court of Appeals, NPPD filed motions to dismiss for lack of jurisdiction pursuant

to Neb. Ct. R. of Prac. 7B(1) (rev. 1996), based upon its contention that the orders of the district court were not final and appealable because of the pendency of other issues in each case. The motions were overruled without prejudice to briefing and argument on the subject of jurisdiction. Because the jurisdictional issue was raised during oral argument, we examine it here pursuant to our power and duty to determine whether appellate jurisdiction exists. See *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996).

The three types of orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. Neb. Rev. Stat. § 25-1902 (Reissue 1995); *State v. Gibbs, ante* p. 241, 570 N.W.2d 326 (1997); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). A condemnation action is a special proceeding within the meaning of § 25-1902. See *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951).

In a special proceeding, an order is final and appealable if it affects a substantial right of the aggrieved party. *City of Lincoln v. Twin Platte NRD, supra*; *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996); *Jarrett v. Eichler, supra.* In this case, the orders from which the appeals are taken eliminated what S.I.D. 1 alleged to be a complete defense to condemnation, and thus affected a substantial right. Therefore, we conclude that we have jurisdiction to hear and determine these appeals under § 25-1902.

Turning to the merits, we begin with the established principle that the power of eminent domain may be exercised only on the occasion and in the mode or manner prescribed by the Legislature. *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995). Statutes conferring and circumscribing the power of eminent domain must be strictly construed. *Id.* We applied these principles in *State v. Boone County*, 78 Neb. 271, 110 N.W. 629 (1907), in resolving the issue of whether a county could exercise the power of eminent domain to acquire school lands for purposes of building a public road. Noting that the Legislature had specifically authorized the condemnation of public lands for certain purposes, including construction of irrigation systems and railroads, we found no similar statutory authority for the exercise of eminent domain to acquire school lands for road construction.

In determining whether §§ 70-301 and 70-670 grant NPPD the power of eminent domain to acquire right-of-way over lands owned by S.I.D. 1, we must apply familiar principles of statutory interpretation. 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. *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997); *In re Estate of Nuesch*, 252 Neb. 610, 567 N.W.2d 113 (1997); *Piska v. Nebraska Dept. of Soc. Servs.*, 252 Neb. 589, 567 N.W.2d 544 (1997). Specifically, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Omaha World-Herald v. Dernier, ante* p. 215, 570 N.W.2d 508 (1997); *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997); *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

In general, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. See, *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *Solar Motors v.*

*First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). However, 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*, 252 Neb. 731, 567 N.W.2d 115 (1997); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

With these principles in mind, we examine the language of the two statutes at issue in these cases. Section 70-301 provides:

> Any public power district, corporation, or municipality that is now or may hereafter be engaged in the generation or transmission, or both, of electric energy for sale to the public for light and power purposes or the production or distribution, or both, of ethanol for use as fuel may acquire right-of-way over and upon lands, except railroad right-of-way and depot grounds, for the construction of pole lines or underground lines necessary for the conduct of such business and for the placing of all poles and constructions for the necessary adjuncts thereto, in the same manner as railroad corporations may acquire right-of-way for the construction of railroads. Such district, corporation, or municipality shall give public notice of the proposed location of such pole lines or underground lines with a voltage capacity of thirty-four thousand five hundred volts or more which involves the acquisition of rights or interests in more than ten separately owned tracts by causing to be published a map showing the proposed line route in a legal newspaper of general circulation within the county where such line is to be constructed at least thirty days before negotiating with any person, firm, or corporation to acquire easements or property for such purposes and shall consider all objections which may be filed to such location. After securing approval from the Public Service Commission and having complied with sections 86-301 to 86-331, such public power districts, corporations, and municipalities shall have the right to condemn a right-of-way over and across railroad right-of-way and depot grounds for the purpose of crossing the same. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

Section 70-670 provides:

> In addition to any other rights and powers hereinabove conferred upon any district organized under or subject to Chapter 70, article 6, each such district shall have and exercise the power of eminent domain to acquire from any person, firm, association, or private corporation any and all property owned, used, or operated, or useful for operation, in the generation, transmission, or distribution of electrical energy, including an existing electric utility system or any part thereof. The procedure to condemn property shall be exercised in the manner set forth in Chapter 76, article 7. In the case of the acquisition through the exercise of the power of eminent domain of an existing electric utility system or part thereof, the Attorney General shall, upon request of any district, represent such district in the institution and prosecution of condemnation proceedings. After acquisition of an existing electric utility system through the exercise of the power of eminent domain, the district shall reimburse the state for all costs and expenses incurred in the condemnation proceedings by the Attorney General.

S.I.D. 1 contends that all power of eminent domain possessed by a public power district is conferred by § 70-670 and that § 70-301 merely specifies the procedure to be followed in exercising that power. This position is inconsistent with the fact that § 70-670 makes no reference to § 70-301, but specifically provides that the power of eminent domain which it confers is to be exercised pursuant to the condemnation procedure set forth in chapter 76, article 7, of Nebraska Revised Statutes. Similarly, § 70-301 makes no reference to § 70-670, but provides that the procedure to condemn property shall be that set forth in Neb. Rev. Stat. §§ 76-704 to 76-724 (Reissue 1996). The position urged by S.I.D. 1 would require us to regard § 70-301 as redundant or superfluous, contrary to our principles of statutory interpretation.

Reading both statutes together and giving effect to all of their provisions, we interpret §§ 70-301 and 70-670 as granting separate and distinct powers of eminent domain to public power districts. Section 70-301 refers specifically and exclusively to

the acquisition of "right-of-way over and upon lands" for the purpose of constructing overhead or underground transmission lines. It does not permit the acquisition of any other interest in land for any other purpose. In contrast, § 70-670 refers to a broader power of eminent domain, permitting a public power district to acquire "any and all property" to be utilized in the "generation, transmission, or distribution of electrical energy." This power is specifically designated as being "[i]n addition to any other rights and powers" conferred by preceding statutory provisions. Therefore, we conclude that the authority of a public power district to acquire right-of-way for transmission lines by eminent domain is conferred by § 70-301; its authority to acquire land for other purposes is governed by § 70-670.

These cases are limited to condemnation of right-of-way, and therefore, we must determine whether the power of eminent domain conferred by § 70-301 extends to public lands. Again, we examine the statutory language used by the Legislature. Section 70-301 authorizes acquisition of right-of-way "over and upon lands," with the specific exception of certain railroad property which may not be condemned without prior approval of the Public Service Commission. The statute uses the phrase "person, firm, or corporation" in reference to potential condemnees. Had the Legislature intended to preclude condemnation of right-of-way over lands owned by public corporations, it could have either included a specific exception, as it did for railroad property, or limited the power of eminent domain to acquisition of land owned by *private* corporations, as it did in § 70-670. The absence of any such exception or limitation in § 70-301 suggests that none was intended.

Another indication of legislative intent can be derived from the language of § 70-301 which provides that the authority to acquire right-of-way for construction of powerlines is to be exercised "in the same manner as railroad corporations may acquire right-of-way for construction of railroads." When § 70-301 was last amended in 1986, the power of a railroad to acquire right-of-way by eminent domain was set forth in Neb. Rev. Stat. § 74-304 (Reissue 1990), which permitted a railroad to appropriate so much of any "road, street, alley, or public way or ground of any kind, or any part thereof" necessary for loca-

tion of any part of the railroad. In *State v. Boone County*, 78 Neb. 271, 110 N.W. 629 (1907), we recognized that similar statutory language then contained in Comp. Stat. ch. 16, § 83 (1905) permitted a railroad to use the power of eminent domain to acquire right-of-way over public lands. When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it. *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982); *State v. Kock*, 207 Neb. 731, 300 N.W.2d 824 (1981). Thus, the statutory provision that public power districts may acquire right-of-way in the same manner as railroads reflects legislative intent that a public power district may exercise the power of eminent domain to acquire right-of-way over public lands. This conclusion is not affected by the repeal of § 74-304 in 1994. Where one statute refers to another and the latter is subsequently repealed, the statute repealed, absent contrary legislative intent, becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. *Fisher v. City of Grand Island*, 239 Neb. 929, 479 N.W.2d 772 (1992); *School Dist. No. 17 and Westside Comm. Schools v. State, supra.*

## CONCLUSION

The district court correctly found that NPPD has statutory authority to exercise the power of eminent domain to acquire right-of-way over lands owned by S.I.D. 1. We disagree with the district court only in that we find that this power is derived solely from § 70-301. We, therefore, affirm the judgments of the district court as modified and remand these causes for further proceedings because other issues remain unresolved.

AFFIRMED AS MODIFIED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., participating on briefs.

JOSEPH MANDOLFO AND NANCY MANDOLFO,
HUSBAND AND WIFE, APPELLEES, V.
JOHN P. CHUDY, AN INDIVIDUAL, APPELLANT.
573 N.W.2d 135

Filed February 6, 1998. No. S-96-557.

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. **Guaranty: Contribution.** A coguarantor is entitled to no more by way of contribution than would put him on an equality of loss with the other coguarantors in view of his share of the obligation undertaken.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL W. AMDOR, Judge. Judgment of Court of Appeals affirmed.

Frederick S. Cassman, of Abrahams Kaslow & Cassman, for appellant.

Robert M. Slovek and Jonathan Nash, Jr., of Kutak Rock, for appellees.

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

WRIGHT, J.

## STATEMENT OF CASE

This is an action by Joseph Mandolfo and Nancy Mandolfo, two of six coguarantors of a $325,000 promissory note, who purchased an assignment of the note and guaranty, and commenced suit against John P. Chudy, one of the other four coguarantors, to recover the entire principal balance of the note and accrued interest.

## SCOPE OF REVIEW

The issues in this case present questions of law, in connection with which an appellate court reaches a conclusion independent of the lower court's ruling. *McAllister v. Department of Corr. Servs.*, *ante* p. 910, 573 N.W.2d 143 (1998); *Brams Ltd. v. Elf Enters.*, *post* p. 932, 573 N.W.2d 139 (1998).

## FACTS

L A Partners, a limited partnership consisting of limited partners LeRoy Bower and Joseph Mandolfo and general partner Synvestor Properties, Ltd., purchased a building in Omaha. David Barton was the president of Synvestor Properties. The purchase was financed in part by loans of $325,000 from American Investments, Inc. (American), and $90,000 from Logan Development Limited Partnership (Logan).

The $325,000 note was secured by a document containing the individual guaranties of Joseph Mandolfo, Nancy Mandolfo, Barton, LeRoy Bower, and Jean Bower. On the same date, Chudy executed a separate guaranty of the note containing certain conditions which, if met, would operate as a release of his individual guaranty. It is undisputed that those conditions have not been met and that Chudy's guaranty remained in full force and effect. Both guaranties were separate and distinct instruments, and each guaranteed the entire principal amount of the $325,000 note.

The $90,000 note was secured by separate written guaranties of Joseph Mandolfo, Barton, and LeRoy Bower. On September 2, 1988, L A Partners defaulted on the $90,000 note, and Logan made demand for payment upon Mandolfo, Barton, and LeRoy Bower. On February 16, 1993, Logan executed and delivered to Chudy an assignment of all its right, title, and interest in the $90,000 note.

Around June 30, 1989, L A Partners defaulted on the $325,000 note to American. Demand for payment was made on each of the partners, and on October 6, First American Savings Bank (First American) (successor entity of American) received payment of $13,308.50 from Joseph Mandolfo to be applied to the loan of L A Partners. The payment was made expressly to reduce Joseph Mandolfo's personal guaranty on the loan and was not to be construed as a payment from L A Partners.

On October 20, 1989, the Mandolfos negotiated an agreement with First American to purchase the $325,000 note and refinanced the loan by personally borrowing from First American an amount sufficient to repay the outstanding balance of $310,203.12. Pursuant to the agreement, on October 20, First American assigned to the Mandolfos all its right, title, and inter-

est in the note and its accompanying guaranties. First American and the Mandolfos structured the transaction as a purchase and assignment, rather than a payment of the note.

Pursuant to the assignment, the Mandolfos sued Chudy for payment of the entire balance of the note, which they alleged to be $320,000, plus interest from June 30, 1989. According to his rights under the assignment of the $90,000 note from Logan, Chudy counterclaimed against Joseph Mandolfo, a guarantor of the note, for payment.

The district court held that although the Mandolfos had been guarantors with Chudy on the $325,000 note, which would entitle them to a contribution from Chudy of a one-sixth pro rata share only, the Mandolfos' purchase of the note created a creditor-guarantor relationship, and that minus an offset for their one-third liability, the Mandolfos were entitled to recover from Chudy $310,203.12 plus simple interest at 11 percent per annum from October 20, 1989, which totaled $211,091.33. The court thereby found that Chudy's liability on the $325,000 note was $521,294.48 minus the Mandolfos' one-third share of $173,764.81. The court, pursuant to Chudy's counterclaim, credited Chudy with $169,032.44 principal and interest, and after the offsets, judgment was entered in favor of the Mandolfos for $178,497.23 together with the costs of the action.

Chudy's motion for new trial was overruled, and he appealed. The Nebraska Court of Appeals reversed the judgment of the district court, holding that despite the fact that the Mandolfos and First American labeled the transaction a "purchase," the Mandolfos were limited by the law governing guarantors, which limited their recovery against coguarantors to no more than a coguarantor's pro rata share of the obligation (increased proportionately only in the case that the other guarantors were proved insolvent). See *Mandolfo v. Chudy*, 5 Neb. App. 792, 564 N.W.2d 266 (1997). We granted the Mandolfos' petition for further review.

## ASSIGNMENT OF ERROR

The Mandolfos assert that the Court of Appeals erred by holding that they could not and did not acquire the rights of

transferees of the $325,000 note as provided by Neb. U.C.C. § 3-203(b) (Reissue 1992).

## ANALYSIS

This case presents an issue of first impression as to whether coguarantors of a promissory note who have purchased an assignment of the note may recover the entire amount of the note from a coguarantor. In *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946), we held that a coguarantor was entitled to no more by way of contribution than would put him on an equality of loss with the other coguarantors in view of his share of the obligation undertaken. We held that this is true even though the coguarantor obtained an assignment from the creditor.

The Mandolfos argue that the transfer of the $325,000 note vested in them the right to enforce the note under the Nebraska Uniform Commercial Code and that pursuant to § 3-203, they can proceed as a creditor, thereby having the right to recover the full amount due on the note from any of the individual guarantors. Neb. U.C.C. § 3-201(1) (Reissue 1980), the predecessor of § 3-203(b), which was in effect at the time of the transfer, provides: "Transfer of an instrument vests in the transferee such rights as the transferor has therein . . . ." The term "instrument" is defined in Neb. U.C.C. § 3-102(e) (Reissue 1980): " 'Instrument' means a negotiable instrument."

The Mandolfos' basic argument is that since our decision in *Exchange Elevator Company* occurred before the adoption of the Uniform Commercial Code, to the extent that our holding in *Exchange Elevator Company* and the Uniform Commercial Code are inconsistent, the later adoption of the code controls. The issue presented is whether § 3-201 changes the law set forth in *Exchange Elevator Company*, which limited the right of a coguarantor on a note to no more by way of contribution " 'than will put him on an equality of loss with others in view of his share of the obligation undertaken. . . .' " See 147 Neb. at 61, 22 N.W.2d at 411. We thus consider whether pursuant to § 3-201, the transferee of a note and guaranty can enforce the guaranty in the same manner that the transferee could enforce the note.

In *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), *overruled on other grounds, First Nat. Bank*

*v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985), we held that a guaranty of a promissory note was not a negotiable instrument and was not governed by article 3 of the Nebraska Uniform Commercial Code because it did not contain an unconditional promise to pay a sum certain and was not payable on demand or at a time certain. See, also, Neb. U.C.C. § 3-104 (Reissue 1980) (defining negotiable instrument). We further explained that the guaranty could not be construed together with the promissory note so as to satisfy the required elements of a negotiable instrument. We conclude that the guaranty by Chudy is likewise not a negotiable instrument.

In other jurisdictions where an assignment was obtained by one of several coguarantors after full payment was made on the note, the courts have overwhelmingly held that recovery against a coguarantor was limited to the coguarantor's contributory share. See, e.g., *Collins v. Throckmorton*, 425 A.2d 146 (Del. 1980); *Curtis v. Cichon*, 462 So. 2d 104 (Fla. App. 1985); *Koeniger v. Lentz*, 462 So. 2d 228 (La. App. 1984); *Weitz v. Marram*, 34 Md. App. 115, 366 A.2d 86 (1976); *Estate of Frantz v. Page*, 426 N.W.2d 894 (Minn. App. 1988). In *Koeniger*, the court specifically rejected an argument that a payment deemed a "purchase" could circumvent the rules of suretyship.

Although the Mandolfos rely upon *Estate of Frantz* for the proposition that as purchasers they are entitled to the original creditor's right to recover the entire amount from any coguarantor, we conclude that *Estate of Frantz* does not support this argument. In that case, the court reaffirmed that a coguarantor is generally not liable for more than his pro rata share of the debt absent an agreement to the contrary.

We therefore conclude that the assignment of the note and its guaranties does not enhance the Mandolfos' rights against Chudy. Although the Mandolfos may proceed as creditors on the promissory note, the assignment does not alter their status as coguarantors of the note. Although § 3-201(1) vests in the transferee any right of the transferor to enforce the instrument, the guaranty under which Chudy's rights are determined is not a negotiable instrument and is not subject to the provisions of § 3-201. Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and

a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it. *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996).

As correctly determined by the Court of Appeals, the limitation upon the Mandolfos' recovery against a coguarantor does not conflict with their rights under the Uniform Commercial Code to enforce the note against L A Partners. The assignment of the note and the guaranty does not change the Mandolfos' status as coguarantors with Chudy. Therefore, our decision in *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946), is still controlling, and absent proof that one of the other coguarantors is insolvent, the Mandolfos can recover no more than Chudy's pro rata share of the note as determined by the Court of Appeals.

## CONCLUSION

The Mandolfos do not dispute the amount of Chudy's pro rata share as determined by the Court of Appeals. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

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BRAMS LIMITED, A NEBRASKA PARTNERSHIP, APPELLEE, V. ELF ENTERPRISES, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS ECCO MOTORS, AND THOMAS RINE, APPELLEES, AND BANK OF PAPILLION, APPELLANT.

573 N.W.2d 139

Filed February 6, 1998. No. S-96-628.

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. **Uniform Commercial Code: Security Interests.** A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record. Neb. U.C.C. § 9-403(3) (Reissue 1992).
3. ____: ____. A financing statement substantially complying with the requirements of Neb. U.C.C. § 9-402(8) (Reissue 1992) is effective even though it contains minor errors which are not seriously misleading.
4. ____: ____. Principles of substantial compliance are applicable to the filing of continuation statements under Neb. U.C.C. § 9-403(3) (Reissue 1992).

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed.

James C. Cripe for appellant.

Dean J. Jungers for appellee Brams Ltd.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

This case presents the question: Between two creditors, Brams Limited and the Bank of Papillion, who has priority over a security interest in a debtor's collateral? The security interest at issue was originally given to the Bank of the Midlands, which after a merger or acquisition, became the Bank of Papillion. The Bank of Papillion filed a continuation statement on the security interest but failed to attach a written statement of assignment as required by Neb. U.C.C. § 9-403(3) (Reissue 1992). The district court determined the continuation statement was not valid because a separate written and signed statement of assignment was not attached, and thus, the interest of the Bank of Papillion had lapsed. We conclude that even though a written assignment was not attached, the continuation statement filed by the Bank of Papillion was in substantial compliance with § 9-403(3), and the continuation statement filed by the Bank of Papillion was valid. Accordingly, we reverse.

## BACKGROUND

Elf Enterprises, Inc., doing business as Ecco Motors, gave the Bank of the Midlands a security interest in all of its personal property. A financing statement covering the property was filed by the Bank of the Midlands on April 12, 1989. Later, on April 15, Ecco Motors gave appellee Brams a security interest in the same property. The security interest was given to Brams pursuant to a lease that was filed by Brams on October 3, 1991.

Effective November 10, 1989, the appellant, Bank of Papillion, acquired the Bank of the Midlands and, in the process, acquired all of the assets and obligations of the Bank of the Midlands. Although the district court states in its order that the Bank of Papillion "purchased" the Bank of the Midlands,

the acquisition is described in the record as a merger. In any event, whether the transaction was a merger or an acquisition is not crucial to our decision. The record indicates that at the time of the "merger" or "defacto merger," the corporation, Bank of the Midlands, dissolved, and the Bank of the Midlands merged into, and became part of, the Bank of Papillion.

On January 3, 1994, the Bank of Papillion filed a continuation statement of the Bank of the Midlands' security interest in Ecco Motors' property. The continuation statement was signed by "Bank of Papillion Formerly Bank of the Midlands." The continuation statement was not accompanied by a separate written statement of assignment. Brams filed a continuation of its security interest on July 7, 1992.

Following an auction of Ecco Motors' property in September 1994, the Bank of Papillion obtained the proceeds of the auction in the amount of $12,179. The question before the district court relevant to this appeal was, Who was entitled to those proceeds—the Bank of Papillion or Brams? The district court determined that when the Bank of Papillion filed the continuation statement, the statement was not effective because, pursuant to § 9-403(3), a continuation statement that is not signed by the original secured party of record must be accompanied by a separate written statement of assignment. The district court determined this was not done and, as a result, found the original security interest had lapsed after 5 years on April 12, 1994, while Brams' interest remained in effect at the time of the auction. Accordingly, the district court found Brams was entitled to the proceeds.

## ASSIGNMENT OF ERROR

The Bank of Papillion assigns as error the district court's determination that a continuation statement filed by a bank that has changed its name since the filing of the original financial statement is fatally defective if it is not accompanied by a written statement of assignment.

## STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Continental Western Ins. Co. v. Swartzendruber, ante* p. 365,

570 N.W.2d 708 (1997); *Wolgamott v. Abramson, ante* p. 350, 570 N.W.2d 818 (1997).

## ANALYSIS

Brams contends that under the plain language of § 9-403(3), a separate written statement of assignment should have been attached to the continuation statement filed by the Bank of Papillion, and because no such statement was attached, the continuation statement the Bank of Papillion filed was invalid. The Bank of Papillion contends the absence of a separate written statement of assignment does not render the continuation statement ineffective because any error that occurred was not seriously misleading.

Essentially, the Bank of Papillion is asking this court to read into § 9-403(3), which deals with continuation statements, the substantial compliance provision of Neb. U.C.C. § 9-402(8) (Reissue 1992) applicable to financing statements. Section 9-402(8) states that a financing statement substantially complying with the requirements of § 9-402 is effective, even if it contains minor errors that are not seriously misleading. Section 9-403(3), applicable to continuation statements, does not contain such a provision. Thus, Brams argues that the plain language of § 9-403(3) should control.

Section 9-403(3) states:

> Any such continuation statement must be signed by the secured party, identify the original statement by file number, and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record . . . .

However, § 9-402(8), applicable to the filing of financing statements, states in part, "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." Furthermore, comment 9 to § 9-402 states in part, "Subsection (8) is in line with the policy of [article 9] to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of

such statutory requirements in which courts have occasionally indulged themselves."

This court has not addressed the issue of whether the substantial compliance provision of § 9-402(8) applies to the area of continuation statements in § 9-403(3). However, jurisdictions that have addressed the issue have almost universally applied principles of substantial compliance to continuation statements even though the U.C.C. does not include language regarding substantial compliance in § 9-403. See, *In re Kruckenberg*, 160 B.R. 663 (Bankr. D. Kan. 1993); *F.D.I.C. v. Victory Lanes*, 158 B.R. 617 (Bankr. E.D. Va. 1993); *In re Cohutta Mills, Inc.*, 108 B.R. 815 (Bankr. N.D. Ga. 1989); *In re Adam*, 96 B.R. 249 (Bankr. D.N.D. 1989); *In re Vincent Gaines Implement Co., Inc.*, 71 B.R. 14 (Bankr. E.D. Ark. 1986); *In re Edwards Equipment Co.*, 46 B.R. 689 (Bankr. W.D. Okla. 1985); *In re Barnes*, 15 UCC Rep. Serv. (Callaghan) 956, (D. Me. 1974).

The reason most often cited for such a rule is that the article 9 system of filing financing statements is a system under which prospective creditors are able to gain notice that a secured party may have an interest in the collateral, but prospective creditors must make further inquiries about the complete state of affairs. *F.D.I.C. v. Victory Lanes, supra.* Because continuation statements are part of the same notice-filing scheme, a continuation statement serves the same purpose as a financing statement because it places potential creditors on notice that another creditor might have an interest in the collateral and contemplates that the potential creditor will make further inquiries into the matter. *F.D.I.C. v. Victory Lanes, supra.* See, also, *In re Kruckenberg, supra* (stating that financing statements and continuation statements serve mutual purpose of giving notice to creditors); *In re Edwards Equipment Co.*, 46 B.R. at 691 (stating that financing statement and its continuation statement are "inextricably entwined"). Accordingly, it is logical that the substantial compliance rule applicable to financing statements under § 9-402(8) should also apply to continuation statements under § 9-403(3). *F.D.I.C. v. Victory Lanes, supra.* See, also, Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code, ¶ 2.14 at 2-164 (rev. ed. 1993) (stating agreement with application of substantial compliance rule to field of continuation statements).

We have recognized that the purposes of the article 9 filing system are to provide notice and to simplify the filing process. In *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 55, 200 N.W.2d 1, 8 (1972), we stated:

> "The fundamental purpose of Art. 9 of the code is to make the process of perfecting a security interest easy, simple, and certain. It was intended to be a complete reversal of prior chattel security law and to rid the unaware of the traps of requirement of specific types of acknowledgements, technical affidavits of consideration, selection of specific proper forms, and other pitfalls that were not uncommon. The code very simply and briefly provides for a notice-filing procedure with a minimum of information required . . . ."

See, also, *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992). When dealing with financing statements, we have declined to follow a strict statutory construction that would require literal, or almost literal, compliance with the words of § 9-402. See *Mid-Amer. Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc.*, 191 Neb. 74, 214 N.W.2d 18 (1974). In light of the above-stated purposes of article 9, we are persuaded by the weight of authority from other jurisdictions and conclude that principles of substantial compliance are applicable to the filing of continuation statements under § 9-403(3).

Having determined that principles of substantial compliance are applicable, we must address whether the Bank of Papillion substantially complied with the requirements of § 9-403(3). The issue has also been described as " 'whether or not a "reasonably diligent researcher" would be misled by the irregularity.' " *F.D.I.C. v. Victory Lanes*, 158 B.R. 617, 622 (Bankr. E.D. Va. 1993). Only a few courts have addressed the specific issue of whether the failure to attach a written statement of assignment will render a continuation statement ineffective when the original secured party of record has changed its name or merged with another entity.

The case of *In re Kruckenberg*, 160 B.R. 663 (Bankr. D. Kan. 1993), is directly on point factually with the instant case. In *In re Kruckenberg*, financing statements were filed with the original secured party listed as the Isabel State Bank. Following an

agreement under which the Isabel State Bank merged with the First National Bank of Medicine Lodge, continuation statements were filed which listed the secured party as " 'the First National Bank of Medicine Lodge, formerly Isabel State Bank.' " *Id.* at 666. A separate written statement of assignment was not attached. The U.S. District Court for the District of Kansas found that at most, any errors in the continuation statements amounted to mere " 'harmless error[s].' " *Id.* at 670. In particular, the court noted that continuation statements are indexed according to the debtor's name and that a creditor searching the files would not be misled by the manner in which the continuation statements were filed. Furthermore, the court stated that the secured party clearly listed its former name and stated that "[i]t is difficult to accept that a creditor would be unable to make the connection." *Id.* Thus, the court found the continuation statements "easily facilitate[d] the notice-filing policy of Article Nine," *id.*, and refused to invalidate them.

In *F.D.I.C. v. Victory Lanes, supra*, the Federal Deposit Insurance Corporation signed continuation statements in its corporate capacity when it should have signed them in its capacity as a receiver. The U.S. District Court for the Eastern District of Virginia found that the error was minor and, as such, would not act to make the continuation statements ineffective. In reaching this conclusion, the court applied the test of whether or not a reasonably diligent researcher would be misled by the irregularity. The court then concluded that from the face of the continuation statement, a prospective researcher was put on notice that the debtors' assets may be encumbered and was given the name and address of the entity to whom further inquiry could be directed. Thus, the misnomer in the case was not seriously misleading.

Brams cites to the case *In re Dittmer*, 102 B.R. 143 (Bankr. C.D. Ill. 1988), to support its position that the continuation statement signed by the Bank of Papillion was ineffective. However, *In re Dittmer* involved a sale of assets between two separate and legally distinct entities, both of whom were still in existence at the time the continuation statements at issue in *In re Dittmer* were filed. The instant case does not involve the partial sale of assets between two independent entities. Rather, the

Bank of the Midlands ceased to exist at the time its assets were acquired or it was merged with and became part of the Bank of Papillion.

As illustrated by *In re Kruckenberg* and *Victory Lanes*, the continuation statement filed by the Bank of Papillion was in substantial compliance with the requirements of § 9-403(3) and cannot be said to be seriously misleading. From the face of the continuation statement, it was clear that Ecco Motors' property might be encumbered, and the address of who to contact for more information was available. Furthermore, as in *In re Kruckenberg*, it is difficult to imagine that Brams was misled in any way when the continuation statement was signed "Bank of Papillion Formerly Bank of the Midlands." Thus, we conclude the continuation statement filed by the Bank of Papillion was in substantial compliance with the requirements of § 9-403(3). Accordingly, we reverse the order of the district court.

REVERSED.

WHITE, C.J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE,
v. WILLIAM L. PARKS, APPELLANT.
573 N.W.2d 453

Filed February 6, 1998. No. S-96-1012.

1. **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.
2. **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.
3. **Jury Instructions: Records: Appeal and Error.** When the record demonstrates that a trial court understood the nature of an orally requested jury instruction, an appellate court may review the trial court's refusal to give the orally requested instruction.
4. **Jury Instructions: Lesser-Included Offenses: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simul-

taneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

5. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.
6. **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.
7. **Criminal Law: Due Process: Proof.** In a criminal case, due process requires the prosecution to prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged.
8. **Constitutional Law: Criminal Law: Intent: Proof.** It is constitutionally impermissible to relieve the State of its obligation to prove requisite criminal intent.
9. **Jury Instructions: Lesser-Included Offenses: Evidence.** Where the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater crime but not necessary for the lesser offense, the defendant has a duty to offer at least some evidence to dispute the issue if he wishes to have the benefit of a lesser-included offense instruction.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Sarpy County, RONALD E. REAGAN, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

Julie E. Bear, of Reinsch & Slattery, 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.

STEPHAN, J.

William L. Parks was convicted by a jury in the district court for Sarpy County of knowing or intentional child abuse, in violation of Neb. Rev. Stat. § 28-707(1) (Reissue 1995). Parks filed an appeal in the Nebraska Court of Appeals, in which he contended that the district court erred in failing to instruct the jury on a lesser-included offense of negligent child abuse. Parks also asserted that the evidence was insufficient to support his conviction and that his sentence of 18 to 36 months' imprisonment was excessive. The Court of Appeals affirmed Parks' conviction and sentence. See *State v. Parks*, 5 Neb. App. 814, 565 N.W.2d

734 (1997). Parks then petitioned this court for further review, which we granted. We conclude that the district court erred in not instructing the jury on the lesser-included offense of negligent child abuse, and therefore, we reverse the Court of Appeals' judgment affirming the district court's judgment and remand the cause for a new trial.

## FACTUAL AND PROCEDURAL BACKGROUND

On April 13, 1996, Parks and Grace Madsen took their then 6-month-old son to the emergency room of the University of Nebraska Medical Center for treatment of an injury to his right leg. The physician who initially examined the baby noticed that the leg was externally rotated and flexed at the hip and that the thigh was swollen. Suspecting a fracture or dislocation of the right femur, the physician asked the baby's parents if he had experienced any recent trauma.

Madsen reported that the baby had been fussy and had a high fever on the previous day, April 12, so she and Parks brought him to the emergency room, where he was diagnosed with an ear infection and given antibiotics. Madsen said that later the same day she found the baby's leg twisted in the bars of his crib and noticed it was swollen. On the next day, April 13, Madsen noticed that the baby's right leg remained swollen and that he was not using it, so she and Parks brought him back to the emergency room. Parks was present during Madsen's recitation of this medical history, but did not contribute significantly.

After conducting a physical examination and reviewing x rays, physicians determined that the baby had a displaced spiral fracture of his right femur. According to the baby's physicians, a spiral fracture is caused by the application of a twisting or "torquing" motion to the bone. Because the femur is one of the strongest bones in the body, a child under the age of 1 would not generally be able to generate sufficient force to injure himself in this manner, and some external cause is usually responsible for the injury. The most common cause of this type of injury in a child under the age of 3 is abuse, followed by other causes such as motor vehicle accidents and falls from heights. Because the baby's injury was inconsistent with the history of his leg becoming caught in his crib, his physicians suspected abuse and

conducted a further examination. They found that the baby had a bruise near his right eye and a fracture of his right tibia which had nearly healed. Pursuant to hospital policy, the suspected abuse was reported to police. Parks left the hospital and went home shortly after learning that police had been notified.

Investigator Steve Miller of the Bellevue Police Department was assigned to the investigation. Miller first interviewed the physicians who treated the baby and then contacted Parks at 4 a.m. on April 14 to question him about the baby's injury. Parks initially disclaimed any knowledge of the incident, but then told Miller that the injury occurred early on the evening of April 12 while he was changing the baby's diaper. Parks told Miller that the baby was lying on his stomach in his crib when Parks entered the room to check on him. As Parks approached the crib, the baby's feet were to Parks' right and his head to the left. Parks told Miller that he grasped the baby's right leg with one hand and, in one rapid motion, turned the baby over onto his back while rotating him 90 degrees so that his feet were toward Parks. When he turned the baby over, Parks heard a snapping noise. Parks told Miller that immediately prior to this incident, the baby had been crying and Parks was angry with him. Parks admitted to Miller that he had problems controlling his anger, but he stated that he never intended to hurt the baby.

Parks was charged with "knowingly or intentionally plac[ing] a minor child in a situation that endanger[ed] his or her health or life; or . . . cruelly confin[ing] or cruelly punish[ing] a minor child, in violation of Section 28-707(1)," a Class IV felony. Parks entered a plea of not guilty. Trial to a jury was held on July 15, 1996. The physicians who examined and treated the baby testified regarding his injury and the history given by Madsen. Miller testified as to statements which Parks made to him during his questioning, as summarized above.

Parks testified on his own behalf and contradicted Miller's testimony in some respects. He stated that he left the hospital on the night of April 13 after a nurse told him that only one parent could stay with the baby. Parks said that he was awakened during the night by Miller and another detective, who took him to the police station. Parks testified that during the ensuing 2 hours of questioning, Miller repeatedly suggested how the baby's

injury must have happened, but that he never agreed to Miller's characterization and refused to speak without an attorney or provide a written statement. Parks denied telling Miller that he intentionally hurt his son.

On cross-examination, Parks testified that on the date of the baby's injury, he and Madsen had been arguing all day and that she stated that she was going to leave with the baby. Parks admitted that he was angry with Madsen, but he stated that the baby's crying did not bother him and denied telling Miller that it did. Parks testified that on April 12, "I found [the baby's] leg . . . caught in the crib, but I had already went to turn him and I didn't think it would hurt him. I don't know if it did or not." Parks stated that he entered the baby's room again later in the day to change his diaper. When he turned the baby over by grasping his hand and leg, he heard a popping noise, which he thought was the crib creaking. He said that he was under stress at this time due to the argument with Madsen. Later, Parks noticed that the baby was not using his right leg. Parks admitted during cross-examination that he is sometimes unable to control his anger. Parks stated that he did not tell Miller about the baby's leg being caught in the crib because he was worried about the baby at the time Miller was questioning him.

The district court found that there was insufficient evidence to support the charge that Parks had placed the baby "in a situation that endangers his or her life or health," in violation of § 28-707(1)(a), and therefore, instructed the jury only on the charge that Parks had knowingly or intentionally "cruelly punished" the baby in violation of § 28-707(1)(b). The jury returned a verdict of guilty, and Parks was subsequently sentenced to imprisonment for a term of 18 to 36 months. Parks appealed his conviction and sentence to the Court of Appeals.

Citing its decision in *State v. Fitzgerald*, 1 Neb. App. 315, 493 N.W.2d 357 (1992), the Court of Appeals held that negligent child abuse is a lesser-included offense of intentional child abuse. *State v. Parks*, 5 Neb. App. 814, 565 N.W.2d 734 (1997). However, the court determined that there was no rational basis in the evidence to convict Parks of the lesser-included offense of negligent child abuse because he did not present expert medical testimony to support his claim that the baby's injuries could

have occurred accidentally. Thus, the Court of Appeals found no error in the refusal of the district court to give a lesser-included offense instruction. The Court of Appeals also held that the evidence was sufficient to support Parks' conviction and that his sentence was not excessive. We granted Parks' petition for further review.

## ASSIGNMENTS OF ERROR

Parks contends that the district court erred in (1) failing to instruct the jury on the lesser-included offense of negligent child abuse, (2) finding the evidence sufficient as a matter of law to support the jury's verdict finding Parks guilty of intentional child abuse, and (3) imposing an excessive sentence.

## SCOPE OF REVIEW

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997); *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997).

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. Stubbs*, 252 Neb. 420, 562 N.W.2d 547 (1997); *State v. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996); *State v. Brozovsky*, 249 Neb. 723, 545 N.W.2d 98 (1996).

## ANALYSIS

The State argues that by his failure to tender a proposed lesser-included offense instruction, Parks failed to preserve this issue for appeal. 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. Yeutter*, 252 Neb. 857, 566 N.W.2d 387 (1997); *State v. Kinser, supra*. In *State v. Grant*, 242 Neb. 364, 370, 495 N.W.2d 253, 257 (1993), *overruled on other grounds by State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), we stated that "when the record demonstrates that a trial court understood the nature of the orally requested jury instruction, an appellate court may review the trial court's refusal to give the orally requested instruction."

The record in this case reflects the following discussion during the instruction conference:

> MR. BOYLAN [Parks' counsel]: As far as the rest of the instructions, my objection would be that as I mentioned yesterday, there should be, in my opinion, some language as to whether the jury decides it was done intentionally or negligently, and I think that comes from the way the statute is worded.
>
> THE COURT: The State has to prove that it's done intentionally or knowingly.
>
> MR. BOYLAN: My point is that I think the jury could decide that it was done negligently.
>
> THE COURT: If they do it's not guilty. You can argue that, as far as I'm concerned. You can argue it in the sense they have to require that it was — State has to prove that it was done intentionally or knowingly. If they find it was done negligently he is not guilty and he is off intentional child abuse.

The State admits that "[i]t may have been clear enough that the defense wanted the jury to have the option of considering negligent child abuse . . . ." Brief for appellee at 8. We agree and therefore conclude that this issue was preserved for appeal and is properly before us.

A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the

lesser offense. *State v. Al-Zubaidy, ante* p. 357, 570 N.W.2d 713 (1997); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so. *State v. Schneckloth, Koger, and Heathman,* 210 Neb. 144, 313 N.W.2d 438 (1981). Parks was charged under § 28-707, which provides in pertinent part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or health; or
>
> (b) Cruelly confined or cruelly punished; or
>
> (c) Deprived of necessary food, clothing, shelter, or care.
>
> . . . .
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
>
> (4) Child abuse is a Class IV felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.
>
> (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.
>
> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

The State argues that no lesser-included offense instruction is possible under this statute because it defines a single offense of child abuse with varying penalties to be determined by the sentencing judge depending upon the defendant's state of mind when the offense was committed. In support of this argument, the State relies upon *State v. Schneckloth, Koger, and Heathman, supra*, in which we construed Neb. Rev. Stat. § 28-313 (Reissue 1995) as defining a single offense of kidnapping, with different penalties depending upon whether the victim was voluntarily released unharmed, and *State v. Heathman,* 224 Neb. 19, 395 N.W.2d 538 (1986), in which we construed Neb. Rev. Stat. § 28-912 (Reissue 1995) as defining a single offense of escape,

but providing for an enhanced penalty if certain aggravating factors were present. We find the child abuse statute under which Parks was convicted to be structurally different and therefore distinguishable from the statutes construed in *Schneckloth, Koger, and Heathman* and in *Heathman*. The words "knowingly, intentionally, or negligently" are included in § 28-707(1), which defines the elements of child abuse, as well as in § 28-707(3) through (6), which subsections define the range of penalties. Because the Legislature has specifically included the defendant's state of mind as an element of the offense as well as a factor to be considered in determining the classification of the offense and penalty, we interpret the child abuse statute as defining several offenses ranging in severity from a Class I misdemeanor to a Class IB felony.

Although Parks was originally charged in the alternative with violation of § 28-707(1)(a) or (b), the district court submitted only the question of whether Parks abused the baby by "knowingly or intentionally . . . cruelly punish[ing]" him. Therefore, we must determine from the language of § 28-707 whether there exists a lesser-included offense of committing child abuse by *negligently* causing a child to be "cruelly punished." 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. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

We agree with the Court of Appeals that misdemeanor child abuse is a lesser-included offense of felony child abuse under § 28-707. The proscribed conduct for each offense is exactly the same; it is the actor's state of mind which differentiates the offenses. If the abuse is committed knowingly and intentionally, it is a felony; if committed negligently, it is a misdemeanor. We have recognized that one state of mind can be included within another. For example, in *State v. Green*, 238 Neb. 475, 486-87, 471 N.W.2d 402, 410 (1991), we held that "[r]eckless driving lies somewhere between careless driving . . . and willful reckless driving . . . ." In *State v. Howard, ante* p. 523, 534, 571 N.W.2d 308, 316 (1997), we held that careless driving is a lesser-included offense of reckless driving, noting: "We cannot

imagine a situation in which a motor vehicle could be driven with 'wanton disregard for the safety of persons or property' without its also being driven 'without due caution.' " Thus, we conclude that because negligent child abuse falls somewhere between intentional abuse and lawful conduct, misdemeanor child abuse is a lesser-included offense of felony child abuse under the statutory elements test. As stated by the Court of Appeals in this case: "It seems axiomatic that one who intentionally punishes a child, for example by burning with a cigarette, also is negligent, since his or her conduct obviously fails to meet the standard of how a reasonably prudent person would treat or discipline a child." *State v. Parks*, 5 Neb. App. 814, 819, 565 N.W.2d 734, 738 (1997). Because it is impossible to commit intentional child abuse without also committing negligent child abuse, the first prong of the statutory elements test was met in this case.

We disagree with the Court of Appeals, however, with respect to the second prong of the test, i.e., whether the evidence presents a rational basis to support a verdict of acquittal of intentional and knowing child abuse and conviction of negligent child abuse. The medical testimony at trial established that a spiral fracture of the femur would not normally result from a small child accidentally catching his leg in the bars of his crib and that an injury of this nature was "suspicious for child abuse." The Court of Appeals reasoned that this evidence afforded no rational basis for concluding that the baby's injury was not inflicted intentionally. While we agree that an inference of abuse can be drawn from the medical testimony, we do not agree that it affords a basis from which the jury could have drawn an inference as to Parks' state of mind at the time the injury was inflicted, i.e., whether he was acting knowingly and intentionally or negligently. As we have noted, the defendant's state of mind is the only factor which differentiates misdemeanor child abuse from felony child abuse under § 28-707.

We further disagree with the conclusion of the Court of Appeals that Parks had a duty "to support his 'negligent causation' defense with medical evidence," 5 Neb. App. at 825, 565 N.W.2d at 741, relying on the rule stated in *Storjohn v. Fay*, 246 Neb. 454, 519 N.W.2d 521 (1994), that when the character of

the injury is not objective, expert testimony is required to establish the cause and extent of the injuries. This principle of civil law is inapplicable to a criminal case, where due process requires the prosecution to prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged. See, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). It is constitutionally impermissible to relieve the State of its obligation to prove requisite criminal intent. See *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). It is true that where the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater crime but not necessary for the lesser offense, the defendant has a duty to offer at least some evidence to dispute the issue if he wishes to have the benefit of a lesser-included offense instruction. *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *overruled on other grounds by State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996); *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978). We find that the record in this case contains such evidence.

The prosecution contended that Parks knowingly and intentionally injured the baby as punishment for his crying and thereby committed felony child abuse in violation of § 28-707(1)(b) and (4). Intent is the state of the actor's mind when the actor's conduct occurs. *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). The intent with which an act is committed may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995). From the evidence in this case, a jury could have concluded that Parks, angered at the baby's crying, knowingly and intentionally punished him by exerting sufficient force to cause the spiral fracture. While the evidence is therefore sufficient to sustain a conviction of felony child abuse, there was also evidence which, if believed by the jury, would have warranted a different result. Parks testified that the baby's injury occurred while he was positioning him to change his diaper, a lawful act from which no inference of intent to inflict cruel punishment can be drawn. Parks further testified that this occurred while he was

under stress because of an argument with Madsen and that he was not angry with the baby and did not intend to hurt him. A jury could conclude from this evidence that Parks, while angry and distracted by the argument with Madsen, negligently grasped the baby by the leg and unintentionally exerted more force than necessary to turn him over, thereby causing his injury. Thus, a jury could have found that Parks inflicted cruel punishment upon the baby, i.e., the spiral fracture of his femur, but did so negligently rather than knowingly and intentionally. There is, therefore, a rational basis upon which a jury could have acquitted Parks of felony child abuse but convicted him of misdemeanor child abuse. The district court erred in not giving a lesser-included offense instruction, and Parks is therefore entitled to a new trial. Because the cause will be remanded for this reason, we do not address Parks' other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

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## STATE OF NEBRASKA, APPELLEE, V. STEVEN JACOB, APPELLANT.

574 N.W.2d 117

Filed February 13, 1998. No. S-95-885.

1. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
2. **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.
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. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion by the trial court.
5. **Venue: Due Process: Proof.** To warrant a change of venue due to pretrial publicity, mere exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Rather, to warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity.
6. **Venue: Appeal and Error.** A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
7. **Venue: Juries: Proof.** A number of factors must be evaluated in determining whether a defendant has met the burden of showing that pretrial publicity has made

it impossible to secure a fair trial and impartial jury. Among them are the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn.

8. **Venue: Juries.** Voir dire examination provides the best opportunity to determine whether venue should be changed.
9. **Juror Qualifications.** The law does not require a juror to be totally ignorant of the facts and issues involved, and it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court.
10. **Jurors: Presumptions: Proof.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.
11. **Jurors: Appeal and Error.** The question of whether a prospective juror should be removed for cause is addressed to the discretion of the trial court and is subject to reversal only when clearly wrong.
12. **Juries: Statutes.** Because peremptory challenges are a creature of statute and are not required by the federal Constitution, a right to peremptory challenges is denied or impaired only if the defendant does not receive that which state law provides.
13. **Juries: Due Process.** The federal Constitution's requirement of due process is met as long as a state's statutorily mandated number of peremptory challenges is granted.
14. **Criminal Law: Trial: Juries.** Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.
15. **Criminal Law: Trial: Juries: Appeal and Error.** To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant.
16. **Criminal Law: Jury Misconduct: Proof.** Where jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.
17. **Rules of Evidence.** In all proceedings where Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
18. **Rules of Evidence: Judges.** Judicial discretion is a factor involved in admissibility of evidence under Neb. Evid. R. 402 and 403, Neb. Rev. Stat. §§ 27-402 and 27-403 (Reissue 1995).
19. **Proof: Trial: Appeal and Error.** All matters expressly or by necessary implication adjudicated by the Nebraska Supreme Court become the law of the case on remand for new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial. The burden of showing a material and substantial difference in the facts is on the party asserting the difference.
20. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and the trial court's decision will not be reversed absent an abuse of discretion.

21. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument.
22. ____: ____. An issue not presented to or decided by the trial court is not an appropriate issue for consideration on appeal.
23. **Trial: Prosecuting Attorneys: Miranda Rights.** A prosecutor's use of a defendant's postarrest, post-*Miranda* silence is fundamentally unfair because *Miranda* warnings imply not only that a person has the right to remain silent, but that his or her silence will not be used against him or her as evidence of guilt.
24. **Witnesses: Testimony: Juries.** The credibility of a witness and the weight to be given that witness' testimony are issues for the jury to resolve.
25. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
26. **Rules of Evidence: Hearsay.** The residual hearsay exception is to be used rarely and only in exceptional circumstances.
27. **Rules of Evidence: Hearsay: Appeal and Error.** An appellate court will affirm the trial court's ruling on whether evidence is admissible under Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995), unless the trial court has abused its discretion.
28. **Criminal Law: Juries.** To aid in determining the innocence or guilt of a defendant, a jury may consider the defendant's voluntary flight immediately or soon after the occurrence of a crime.
29. **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.
30. **New Trial: Appeal and Error.** While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish that a defendant did not receive a fair trial, a new trial must be granted.
31. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Rules of Evidence commit the evidentiary question at issue to the discretion of the trial court.
32. **Trial: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at the State's expense generally rests in the discretion of the trial court.
33. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.
34. **Trial: Appeal and Error.** When an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

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

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan for appellant.

Steven Jacob, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

WRIGHT, J.

## NATURE OF THE CASE

Following a retrial, Steven Jacob was found guilty of first degree murder in the death of Melody Hopper and second degree murder in the death of James Etherton. He was also found guilty of using a firearm to commit those crimes. Jacob was sentenced to two terms of life imprisonment and two terms of not less than 6 years 8 months nor more than 20 years' imprisonment, all sentences to be served consecutively. Jacob timely filed this appeal.

## SCOPE OF REVIEW

A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995).

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. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997).

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. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997).

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).

## FACTS

Jacob and Hopper began dating in February 1988, but the relationship had deteriorated by June or early July 1989. Hopper began dating Etherton and eventually moved into Etherton's residence in July 1989.

On August 1, 1989, Hopper went to see her supervisor at her place of employment. She appeared flushed, very fidgety, and visibly upset. Raymond Gifford, Hopper's supervisor, testified that he knew Hopper fairly well and that he had never seen Hopper as agitated and angry as she was on that occasion.

Gifford testified that Hopper told him that shortly after Etherton left the house that morning, Hopper heard the door handle rattle and the doorbell ring. When she opened the door, Jacob entered uninvited and stated that he wanted to talk to Hopper about getting back together. Hopper told Jacob she was no longer interested in getting back together. Jacob told Hopper that he at least wanted to talk to her and that if she would not do that, he might do something drastic. Hopper had difficulty getting Jacob to leave and had to physically shove him out of the house. She then locked all the doors and windows, and called Etherton at his place of employment to tell him what had happened.

On August 2, 1989, at approximately 3:45 a.m., John Ingram, a coworker of Etherton's who rented a basement bedroom from Etherton, awoke to use the bathroom. Dressed in underwear and a cutoff T-shirt, Ingram started toward the bathroom. As he walked out of the bedroom, he saw glass sparkling on the floor by the back door. Ingram heard the floor above him creak and, realizing someone was in the house, went back to the nightstand in his bedroom and retrieved a .22-caliber pistol. He returned to the basement stairway, where he heard three quick gunshots. He heard a woman scream twice and three or four more shots. After the last shot, he heard a shell casing roll around somewhere upstairs and a thump on the floor directly above him.

Believing that someone had been shot, Ingram decided to get out of the house. He ran out the back door, went around the corner of the house, jumped the fence, and ran down the block. He ran north to the corner and then west three houses. Ingram went to a house he believed was a fire marshal's, rang the doorbell,

and knocked on the door. When the door was answered, Ingram stated that someone had been shot and that "they emptied a clip on them."

Det. Sgt. Larry Barksdale joined Sgt. Larry Nelson at the Etherton house at approximately 4 a.m. They discovered that the back, basement screen door had been propped open with a rock and that the glass on the inner door was broken out. Barksdale observed a storm window lying on the ground which had apparently been removed from the window immediately south of the basement door and was later found to contain fingerprints matching Jacob's.

After entering the house and making their way upstairs, the officers discovered Etherton's nude body lying at the end of the hallway, near the northeast bedroom door. He had suffered multiple wounds from three gunshots. The officers then heard a faint voice cry for help from the bedroom, where they found Hopper, nude and bleeding, under the bed. Suffering several wounds apparently caused by two gunshots, Hopper died several days later. Investigators found six shell casings and one live round in the northeast bedroom and the hallway. Sgt. Mark Bohaty testified that all the casings were from fired 9-mm bullets and that all were fired from the same weapon. The live round was also a 9-mm cartridge.

Jacob's father testified that Jacob had owned a 9-mm pistol, which Jacob's father had last seen in the summer of 1989, or perhaps earlier. Jacob testified that he had owned a 9-mm Llama pistol. Bohaty testified that the rifling characteristics of the shell casings from the scene were consistent with those produced by a 9-mm Llama pistol. The pistol itself was apparently not recovered.

Found in the bedroom was a typed four-page letter written by Jacob to Etherton dated July 9, 1989. At trial, Jacob testified that the letter was written to explain a comment made by him to Etherton about holding Etherton responsible for Hopper. The letter stated that Jacob did not mean for the comment to be interpreted as a threat. After describing Hopper's past history of relationship problems, the letter explained, "I would like you to be successful where I failed her." The letter further stated:

> It's almost unbelievable to think that I spent both Tuesday and Thursday nights with Melody and then on

> Sunday she is sleeping with you and on Wednesday you're off to Wyoming without a single word to me; not even a "Dear John" letter.
>
> If I hadn't known that this has happened before I am not sure what I would think about Melody.

Jacob ended the letter by stating that he doubted that Etherton or Hopper would ever speak to him again, but hoped that Etherton would "be happy and more successful than I have been."

Officer Todd Beam arrived at the neighbor's house where Ingram was and then accompanied Ingram downtown for questioning. In testifying about his observations of Ingram on the morning of the interrogation, Beam stated that he had detected a very slight odor of stale alcohol, but he did not believe Ingram was intoxicated or impaired by alcohol. Although Beam did not recall Ingram's telling him anything about any person Ingram saw or the make and model of a car, Beam recalled that while they were still at the neighbor's house, Ingram mentioned something about a car he had seen drive by. Beam described Ingram's demeanor at the neighbor's house as excited and agitated, but stated that Ingram had calmed down considerably by the time he started taking Ingram's taped statement at 6:19 a.m. During this statement, Ingram did not mention seeing a car.

At trial, Ingram testified that as he waited outside for the police to be called, he saw a car drive by. The car was light-colored and was going slow. Ingram said he saw the driver for a few seconds and made eye contact. He described the driver as having a receding hairline, glasses, a mustache, and dark hair. Ingram testified that the evening after he was questioned, he saw a picture of Jacob on the news and recognized Jacob as the person he had seen drive by shortly after the shooting. Ingram called the police, and when they came to talk to him the next morning, he identified Jacob. During his testimony, Ingram identified Jacob as the driver of the vehicle.

At trial, Jacob stated that he left on vacation shortly after speaking with Hopper on August 1, 1989. He drove to Minnesota; Sioux Falls, South Dakota; Grand Forks, North Dakota; Winnipeg, Ontario, Canada; and Montreal, Quebec, Canada. He then drove to Boston, Massachusetts, and back up

to Canada. On August 9, Jacob bought a ticket from St. John, New Brunswick, Canada, to London, England. Jacob testified that he decided not to fly out of St. John, however, because he found the parking at the St. John airport to be inadequate and he believed he could exchange his ticket for a better fare flying out of Boston. Jacob said that on his way to Boston, he was delayed by an accident on the highway, and he decided to fly to Boston from nearby Bangor, Maine. He wanted to sell his van there because of mechanical difficulties he had experienced throughout the trip. Before attempting to sell the van in Bangor, Jacob bought a ticket from Bangor to Boston and checked in his luggage at the Bangor airport. Jacob was arrested on August 10 in Brewer, Maine, when he attempted to sell his van to a used-car dealership.

Jake Faulkerson shared a cellblock with Jacob for a brief period in September 1989. Faulkerson testified that while in prison, Jacob had stated that he "was not going to end up doing a minute on his time . . . because he didn't leave any witnesses." Jacob then allegedly told Faulkerson, " 'I shot him first so the bitch could see what she had coming.' "

Following his convictions and sentences, Jacob appealed.

## ASSIGNMENTS OF ERROR

Jacob makes the following assignments of error: (1) The trial court erred in overruling his motions to change venue and in failing to change venue to another county, thereby denying his due process right to a fair trial by an impartial jury; (2) the trial court erred in failing to grant Jacob's motions to strike certain venirepersons for cause, including those who knew of inadmissible evidence, thereby requiring Jacob to use peremptory challenges, all in violation of Jacob's due process right to a fair trial by an impartial jury; (3) the trial court erred in overruling Jacob's motion to prohibit jury dispersal and to require sequestration during trial, and in failing to sequester the jury during trial, in violation of his due process right to a fair trial by an impartial jury; (4) the trial court erred in failing to hold an adequate hearing and in overruling Jacob's motion for mistrial, motion for special prosecutor, and motion for new trial relating to the juror misconduct resulting from the discovery of a news-

paper article in the jury room, thereby denying Jacob his due process right to a fair trial; (5) the trial court erred in failing to inform Jacob about a communication from the jury, in having unauthorized contact with the jury during deliberations, and in overruling the motion for new trial on those grounds, thereby denying Jacob his due process right to a fair trial; (6) the trial court erred in failing to admit exhibit 644, Ingram's taped statement; in instructing the jury in the absence of and without the knowledge of Jacob; and in misinstructing the jury regarding exhibit 644; (7) the trial court erred in testifying as a witness at the trial and enhancing the credibility of Ingram, thereby prejudicing Jacob and denying him his right to a fair trial; (8) the trial court erred in overruling defense objections and in admitting the testimony of Gifford regarding a conversation that he had with Hopper, because that evidence was hearsay and did not qualify as an excited utterance; (9) the trial court erred in sustaining the State's objection to, and failing to admit as evidence, the testimony of witnesses Sue Jacob and Patricia Ockinga regarding conversations they had with Hopper, thereby denying Jacob his due process right to present evidence; (10) the trial court erred in overruling Jacob's motion for a mistrial and motion for new trial based upon prosecutorial misconduct in the closing arguments, thereby allowing the State to comment upon and violate Jacob's rights to remain silent, to face-to-face confrontation, to the effective assistance of counsel, and to be personally present during his trial; (11) the trial court erred in overruling Jacob's motion to strike witness Faulkerson and in allowing him to testify at trial, because these actions denied him his right to confrontation and his right to due process, and because the probative value of the testimony of Faulkerson was substantially outweighed by the danger of unfair prejudice and misleading the jury; (12) the trial court erred in sustaining the State's objection to exhibit 673, the videotape interview of Samual "Buddy" Phifer, and in refusing to admit the same into evidence, thereby denying Jacob his due process right to present evidence; (13) the trial court erred in finding that the State had met its burden to establish the admissibility of evidence that Jacob's departure from Lincoln, Nebraska, and the circumstances surrounding his arrest in Brewer, Maine, constituted

evidence of flight; in admitting such evidence at trial; and in determining that the probative value of such evidence was not substantially outweighed by the prejudicial effect; (14) the trial court erred in failing to give Jacob's proposed jury instruction on flight; (15) the trial court erred in overruling Jacob's motion to dismiss at the close of all of the evidence, in overruling the motion for a new trial based upon insufficiency of the evidence, and in finding sufficient evidence to support the convictions; and (16) the trial court erred in failing to find that Jacob was denied his due process right to a fair trial by the cumulative effect of all the preceding assigned errors.

Additionally, in his pro se supplemental brief, Jacob assigns as error that (17) the trial court erred in denying the motion to dismiss on double jeopardy grounds, (18) the trial court erred in not granting Jacob a hearing on his claims of ineffective assistance of counsel, (19) trial counsel was ineffective, (20) the trial court erred in not allowing evidence of Etherton's jealous violence toward women, (21) the trial court erred in allowing Ingram's identification testimony into evidence, (22) the trial court erred in not allowing Jacob access to expert witnesses, (23) the trial court erred in not removing the Lancaster County Attorney from this case and in not allowing the county attorney to be called as a witness at the motion to dismiss, (24) the trial court erred in sustaining an objection to exhibit 642, and (25) applying the new circumstantial evidence standard in this case would violate the prohibition against ex post facto laws.

## ANALYSIS

### CHANGE OF VENUE

Jacob argues that the trial court abused its discretion in failing to grant his motion for a change of venue. In essence, Jacob claims that the numerous newspaper articles and radio and television broadcasts made it impossible for him to receive a fair trial.

To warrant a change of venue due to pretrial publicity, mere exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Rather, to warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity. *State v. McHenry*, 247 Neb.

167, 525 N.W.2d 620 (1995). A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *Id.* A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

A number of factors must be evaluated in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. Among them are the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn. *Id.*; *State v. McHenry, supra.*

Much of the pretrial publicity reflected the fact that this was a retrial and dealt with Hopper's identification of Jacob, which we held in *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993), to be inadmissible. Jacob admits that the news accounts were "accurate as far as they went," but claims they were misleading in that they failed to recite the reasons why Hopper's statements were not admitted. See brief for appellant at 17. He claims the media coverage included negative characterizations of him by the prosecutor and the judge, the most significant of which was that the Lancaster County Attorney had stated through the media that he had faith in Hopper's dying declaration and that the State's case was in shambles without it. The trial court overruled the motion for change of venue, stating that it would be reconsidered when and if a jury was selected.

We have previously explained that voir dire examination provides the best opportunity to determine whether venue should be changed. *State v. McBride, supra*; *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). In addition to general voir dire, the trial court ordered individual, sequestered questioning of the jury so that an independent and extensive voir dire could be

conducted with respect to each prospective juror. All prospective jurors were questioned separately, and some underwent additional followup questions.

The fact that there were many newspaper articles and television broadcasts is only one of the factors to be considered. In *McHenry, supra*, we held that the law does not require a juror to be totally ignorant of the facts and issues involved, and it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court. Based on our review of the record, we cannot say that the trial court abused its discretion in denying the change of venue.

### MOTIONS TO STRIKE

Related to the issue of venue is Jacob's claim that the trial court erred in failing to sustain his motions to strike certain venirepersons for cause, including those who knew of inadmissible evidence, thereby requiring Jacob to use peremptory challenges. During voir dire, the defense moved to strike 31 of the 64 venirepersons for cause. The court sustained 11 of those motions. Of the remaining 20 jurors Jacob moved to strike, all but 3 venirepersons were removed through peremptory challenges by both sides. Of those three, two were removed prior to deliberations. Jacob points out that because he had used his peremptory challenges, one juror to which the defense had previously objected, Gerald Nelson, remained on the jury panel. He claims he was thus prejudiced by the trial court's denial of his motion to strike.

During voir dire, Nelson stated that he was aware of the murders and Hopper's identification of Jacob from 1989 newspaper accounts, although he stated:

> I guess I kind of feel like what you read in the paper isn't always necessarily the truth. I didn't read in depth about what really went on and I don't know what really went on.
>
> . . . .
>
> [T]o me it's like what kind of shape was [Hopper] in when she nodded and I — did she — I don't know if she understood the question fully or what. I mean, I'm just not — I know you're asking me how can I put that out of my mind, but I think that if — I think I would go more on

> what goes on here. That's all I can tell you. Here people are sworn under oath.

The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. *State v. Rice*, 231 Neb. 202, 435 N.W.2d 889 (1989). The question of whether a prospective juror should be removed for cause is addressed to the discretion of the trial court and is subject to reversal only when clearly wrong. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985).

We conclude that the trial court did not abuse its discretion by denying Jacob's motion to strike venireperson Nelson.

Regardless of whether Jacob was prejudiced by the ultimate makeup of the jury, Jacob claims he had a right not to have to use peremptory challenges to cure what Jacob contends were the trial court's numerous errors. In *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), the Court explained that because peremptory challenges are a creature of statute and are not required by the Constitution, a " 'right' " to peremptory challenges is " 'denied or impaired' " only if the defendant does not receive that which state law provides. The Court stated that since the applicable state law required that peremptory challenges had to be exercised to rectify the trial court's errors in denying motions to strike, the petitioner received all that he was due. In *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990), we stated that *Ross* makes it clear that the federal Constitution's requirement of due process is met as long as a state's statutorily mandated number of peremptory challenges is granted. The effect of *Ross* is to leave to each state the question of whether a wrongful denial of a challenge for cause violates due process because a peremptory challenge must be used to eliminate that venireperson. *State v. Bradley, supra.*

Of the remaining 20 venirepersons who were subject to Jacob's motions to strike for cause, Jacob exercised 11 peremptory challenges. Two other jurors were removed before deliberations as the result of an investigation of jury tampering—Jeff Eske and Alvin Meier—and the only remaining venireperson who was subject to a defense motion to strike for cause who actually served on the jury was Nelson.

Jacob complains that Susan Jones, who was removed with one of his peremptory challenges, should have been struck for cause because she worked for the Department of Correctional Services at the penitentiary. Jones worked in the mailroom opening mail, and there is no evidence that she had any direct contact with the inmates or custodial responsibilities. Jacob has not cited any authority which would indicate that Jones had to be stricken because she worked in a prison. Neb. Rev. Stat. § 25-1601(1) (Reissue 1995) provides: "Persons disqualified to serve as either grand or petit jurors are . . . (d) jailers . . . ." The trial court refused to disqualify Jones on this basis, and we conclude that the trial court did not abuse its discretion.

Jacob argues that the trial court erred in failing to allow him to strike for cause certain jurors who indicated that they had previously heard something about his case. Jacob relies upon Neb. Rev. Stat. § 29-2006 (Reissue 1995), which provides that there is good cause for striking a prospective juror when "(2) . . . he has formed or expressed an opinion as to the guilt or innocence of the accused . . . ." Of the remaining venirepersons subject to Jacob's motions to strike for cause, all stated that they were willing and had the ability to afford Jacob a presumption of innocence and would set aside any previous impressions of the case and render a verdict based solely upon the evidence presented at trial.

We find that the trial court did not abuse its discretion in denying these challenges for cause.

### JURY SEQUESTRATION

Jacob argues that the trial court erred in overruling his motion to prohibit jury dispersal and to require sequestration during trial. Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court. *State v. Bradley, supra.* To warrant reversal, denial of a motion to sequester the jury before submission must be shown to have prejudiced the defendant. *Id.*

Jacob claims that during the trial, the jurors were exposed to publicity which was highly prejudicial. On September 30, 1994, a September 8 edition of the Lincoln Star was found in the jury room. The newspaper was on the corner of the jury table, lying

open to the page containing an article entitled "Prosecution in Jacob case won't use dying declaration." As will be discussed further below, those jurors who were found to possibly have knowledge of the newspaper's contents and who were found to have anything to do with the newspaper's being in the room were excused before deliberation.

Therefore, Jacob has failed to show that he was prejudiced by the trial court's denial of his motion to sequester, and this assignment of error is without merit.

### JUROR MISCONDUCT

Jacob asserts that the trial court erred in failing to hold an adequate hearing and in overruling his motion for mistrial, motion for special prosecutor, and motion for new trial relating to juror misconduct. According to Jacob, the exposure of certain jurors to the above-mentioned newspaper article, as well as later discussion among the jurors as to who might have been responsible, constituted prejudicial jury misconduct.

The trial court conducted an immediate inquiry into the scope of the jury's exposure to the newspaper. The bailiff testified that she entered the jury room at approximately 12:30 p.m. and that the only person in the room was alternate juror Meier. There was no newspaper on the table at that time. Thereafter, at approximately 1 p.m., juror Eske brought the newspaper to the bailiff, stating that it was found in the jury room. After giving the newspaper to the judge, the bailiff went to the jury room and asked the jurors who had been in the room during the lunch break and whether anyone had seen a newspaper. The bailiff did not give the jurors any further information about the newspaper, and she told them that they should not discuss the matter among themselves. The court questioned all those jurors who were thought to have been in the jury room at any time between the bailiff's visit and the discovery of the newspaper.

When Eske was questioned, he stated that he returned to the jury room from lunch at approximately 12:55 p.m. Alternate juror Meier and juror Lois LaPage were the only persons in the room at that time. Eske saw a newspaper lying on the table, but did not stop to look at it. Eske stated that after he sat down, juror Charlene Bady entered the room. She noticed the newspa-

per and realized that it contained an article about the case. Bady announced that the newspaper should not be there, and because Bady's hands were full, Eske took it to the bailiff. Eske explained that in the course of so doing, he noticed that the headline made reference to the prosecution not using a " 'dying statement.' "

When LaPage was questioned, she stated that she had never seen a newspaper in the room. After Eske arrived, LaPage went to get a soft drink. When she returned, the bailiff entered and asked about whether a newspaper had been lying on the table. At that time, Bady explained that a newspaper with an article about the case had been found in the room. LaPage stated she told Bady she did not want to hear anything about the article. Other than the fact that it made reference to the case, Bady did not reveal what the article was about, and LaPage stated that she could set aside the incident in deciding the case.

Finally, Meier and Bady were questioned. Meier stated that he had gone out to smoke a cigarette and that he knew nothing about the newspaper until the bailiff came in and questioned the jury about it. He stated that he could set aside anything relating to the incident. Bady stated that when she entered the jury room, Meier and Eske were the only persons present. She immediately saw the newspaper, and upon reading "Prosecution" and "Jacob case," she announced that it should not be there. Bady explained that she did not know anything else about the article and that she could disregard anything involving the incident in making her decision in the case.

Based on this initial inquiry, Jacob moved for a mistrial, which motion was overruled. Jacob then moved to strike Eske because, based upon the evidence that was adduced, he was the only one that could recall what the headline said. The trial court granted the motion and selected Meier by lot as the person to replace Eske. Jacob then moved to strike Meier because, by process of elimination, it appeared that Meier and Eske were the only jurors who could have brought the newspaper into the room. The court overruled the motion to strike, as well as Jacob's renewal of his motion for mistrial.

Further investigation into the incident was conducted by the Lincoln Police Department and the Lancaster County Sheriff's

Department. During a break in closing arguments, Det. Sgt. Robert Marker, Jr., reported that he had concluded that the only juror who could have placed the newspaper in the jury room was Meier. Jacob again moved for a mistrial, which motion was also overruled, but the trial court removed Meier from the jury and replaced him with another alternate.

After the verdict was rendered, Jacob moved for a new trial on the grounds, inter alia, that interviews of some of the jurors after the verdict showed there might have been speculation that defense counsel placed the newspaper in the jury room. Jacob's counsel made particular reference to Bady, who, upon being questioned after the verdict as to who might have placed the newspaper in the jury room, stated that she thought it was defense counsel.

At the hearing on the motion for new trial, Jacob adduced testimony from all members of the jury panel, including excused and alternate jurors. Several of the jurors indicated that they knew there was an incident involving a newspaper, and some jurors were further aware that a newspaper was found in the jury room which contained an article involving the trial. However, other than Eske, who had been excused before deliberations, none of the jurors knew anything else about the article.

Neither did there appear to have been extensive discussion or speculation prior to the verdict as to who might have placed the newspaper there. Two jurors, John Noonan and Eske, mentioned that they might have heard a comment from an unknown juror that defense counsel could have brought the newspaper in. However, all of the jurors denied forming any opinion or making any statement with regard to defense counsel's possibly being responsible for the newspaper. Besides Noonan and Eske, none of the other jurors remembered hearing any such comment. Bady, in particular, testified that at no point prior to the verdict did she form or express an opinion as to who might have brought in the newspaper.

The trial court, after reviewing all the evidence, found beyond a reasonable doubt that Jacob was not prejudiced by the presence of the newspaper article or by any speculation as to who might have placed the newspaper in the jury room and overruled the motion for new trial. The court noted that Jacob

made no attempt prior to deliberations to question any of the remaining jurors.

Where jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988). 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. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997). Jacob has failed to establish that he was prejudiced, and we find this assignment of error to be without merit.

### Ex Parte Instruction

Jacob claims that the trial court erred in its ex parte instruction to the jury and in overruling a motion for new trial on those grounds. During deliberation, the jury sent the following message to the court: "We are unable to find the tape in evidence of the testimony of Mr. Ingram with Officer Beam." The court's ex parte response was that "[a] portion of the tape was played in court but not received in evidence."

The State had called Ingram as a witness to relate the events occurring the night of the murders. Ingram testified about the light-colored car's slowly going west on Lexington Avenue and his later identification of Jacob as the driver.

Ingram was subsequently called as a witness by Jacob. Outside the hearing of the jury, Jacob's counsel offered exhibit 644, which contained the tape-recorded statement of Ingram to Beam. Counsel argued that it was

> important that the tape is played so that later the State can't argue that because [Ingram] forgot some specific important facts because he was excited or upset or anything like that, and the tape, again, would allow the jury to listen to his demeanor at the time the statement was given so they could, again, weigh any argument that may be made about why he may not be able to recall accurately the offense that occurred some two hours before that.

Jacob's counsel wanted the tape played to show that Ingram's demeanor at the time of his statement to Beam was normal, in order to rebut any argument by the State that because he was

excited, Ingram forgot to mention to Beam that he had seen someone drive by in a car. The State objected, and discussions continued outside the hearing of the jury. Defense counsel stated: "What I would like to do is play the tape up until — I'm not trying to get in inadmissible evidence. What I would be willing to do is to get up through his description of what occurred. In other words, what he told Officer Beam."

Jacob then resumed direct examination. Ingram was handed exhibit 455, which was the transcription of his taped statement to Beam. Ingram did not dispute that the transcription accurately reflected what Ingram told Beam. When asked whether in his taped statement he had referred to seeing a car or an individual after the shooting, Ingram responded that he had not. When asked about his demeanor at the time he gave the statement, Ingram stated that he was "shook up," nervous, and trembling, and that the tape recording of his statement would accurately reflect what he sounded like when the statement was taken.

Defense counsel then requested that part of the tape recording, from the *Miranda* warnings through Ingram's initial narrative to Beam as to what had happened, be played to the jury. The trial court ruled as follows: "I will give you leave — I won't receive the exhibit into evidence, but I will give you leave to play those portions, go through the Miranda." The jury then heard a portion of the tape of the interview between Ingram and Beam.

At the hearing on the motion for new trial, the trial court found the communication by the court to the jurors regarding the tape was improper, but that it was clear from the record that it was innocuous. The court found beyond a reasonable doubt that Jacob was in no way prejudiced by the communication and that any error was harmless.

Although the trial court relied upon our holding in *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979), that an improper communication with a juror or jurors creates a rebuttable presumption of prejudice and that the burden is on the State to prove that the communication was not prejudicial, the rule governing communications between a trial court and jurors is set forth in *State v. Mahlin*, 236 Neb. 818, 823, 464 N.W.2d 312, 316 (1991):

> "There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict."

From our review of the record, we conclude that the communication was improper but not prejudicial. The record does not affirmatively show that Jacob was prejudiced by the trial court's response to the jury about the tape. The record shows that the communication had no tendency to influence the verdict.

Jacob's counsel cross-examined Ingram and also called Ingram as a witness to point out the inconsistencies in his testimony. A portion of Ingram's taped statement was played to the jury, and the jury heard testimony by Ingram as to why he did not mention the car and its driver during the 6 a.m. interview and why he did not identify Jacob as the driver until he spoke with the police on August 3, 1989.

The trial court's comment reflected the fact that a certain piece of evidence was published but not entered into evidence. The previously played portions of the tape recording, like testimony of an actual witness at trial, are not to be reheard by jurors. Jurors must rely upon their memory of what they heard the witness say, be it from a live witness or a tape recording. See *Shiers v. Cowgill*, 157 Neb. 265, 59 N.W.2d 407 (1953) (practice of allowing official stenographer to read to jury his notes of testimony of witness, upon request made by jury which is allegedly in disagreement as to such witness' testimony, should not be encouraged).

The tape recording was offered to attack Ingram's credibility and was, therefore, impeachment. The jury was instructed regarding testimony admitted for impeachment purposes as follows:

> You have heard testimony concerning statements allegedly made by witnesses prior to this trial which may be inconsistent with their testimony at this trial. This testimony has been admitted solely for impeachment purposes to aid you in estimating the credibility of the wit-

> nesses and to determine the weight to be given to their testimony. You may consider it for that limited purpose only and not as evidence of the facts declared in the prior statements.

Thus, the jury was instructed by the trial court that it could consider the statement made by Ingram prior to trial for the limited purpose of determining the credibility of Ingram's testimony at trial and not as evidence of the facts set forth in the taped statement that was played. This was consistent with the court's ruling in response to Jacob's counsel's request to publish a portion of the tape to the jury. Outside the hearing of the jury, Jacob's counsel requested:

> At this time, Your Honor, I would offer 644 and ask to publish it to the jury, the tape, to hear Mr. Ingram's voice.
>
> . . . .
>
> . . . As I said, we can go through, which will also show his voice and his demeanor. That's not going to be critical evidence as far as anything that the jury shouldn't hear. Then we'll finish it at the end of that sentence and stop it here.

The court responded: "I will give you leave — I won't receive the exhibit into evidence, but I will give you leave to play those portions, go through the Miranda." Since the communication had no tendency to influence the jury's verdict, we find this assignment of error to be without merit.

### Failure to Admit Taped Statement

Jacob assigns as error that the trial court erred in failing to admit exhibit 644, Ingram's taped statement to the police. In all proceedings where Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). In the case of Ingram's taped statement, because it was not offered for the truth of the matter asserted, the statement would be governed generally by Neb. Evid. R. 402 and 403, Neb. Rev. Stat. §§ 27-402 and 27-403 (Reissue 1995). We have previously held that judicial discretion is a fac-

tor involved in admissibility of evidence under §§ 27-402 and 27-403. See, *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Therefore, we uphold the trial court's decision as to the admissibility of Ingram's taped statement unless the ruling is an abuse of discretion. See, e.g., *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997). Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995).

The trial court did not abuse its discretion with regard to the tape recording of Ingram's statement. The court allowed that portion of the taped statement which defense counsel requested for the purpose of showing Ingram's demeanor in giving his statement to Beam. We find this assignment of error to be without merit.

### COURT AS WITNESS

Jacob assigns as error that the trial court acted as a witness. We disagree. During direct examination, Ingram identified Jacob as the person he saw drive by after the shootings. Jacob's counsel then stated to the court: "Judge, I agree he's identified Mr. Jacob." In response, the court stated: "All right. The record will so reflect." Jacob argues that this statement by the court constituted testimony as a witness, in violation of Neb. Evid. R. 605, Neb. Rev. Stat. § 27-605 (Reissue 1995). We find no merit to this assignment of error.

### EXCITED UTTERANCE

Jacob asserts that the trial court erred in admitting Gifford's testimony about Hopper's statement to Gifford regarding Jacob's visit on August 1, 1989. Jacob claims that the statement does not qualify under the excited utterance exception to the hearsay rule.

In *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993), faced with the same argument, we held that Hopper's statements to Gifford were admissible as excited utterances. All matters expressly or by necessary implication adjudicated by this court become the law of the case on remand for new trial and

will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial. *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988). The burden of showing the material and substantial difference in the facts is on the party asserting the difference. *Id.*

In *Jacob, supra*, we noted that "[t]he record is unclear as to the exact time of Jacob's exchange with Hopper at Etherton's house, only revealing that it occurred sometime in the morning, i.e., presumably anytime before 12 noon." *Id.* at 187, 494 N.W.2d at 118. Thereafter, Hopper called Etherton and Sue Jacob (Jacob's mother) and arrived at work at approximately 1 p.m. The evidence showed that during the conversation with Gifford, Hopper appeared "flushed, very fidgety, and visibly upset," and that Gifford had never seen Hopper as agitated and angry as she was on August 1, 1989. See *id.* at 188, 494 N.W.2d at 118. We held that the statement was an excited utterance because "it is clear that Hopper exhibited observable manifestations that she made the statement while under the stress of excitement caused by Jacob's visit." *Id.* at 189, 494 N.W.2d at 119.

Jacob claims that in *Jacob, supra*, it appeared that Hopper's conversation with Gifford occurred approximately 1 hour after the incident with Jacob, while in the present case, the evidence establishes that the conversation occurred at least 4 hours after the incident with Jacob. In support of this contention, Jacob first argues that the evidence as to the time of Hopper's exchange with Gifford has changed from the first trial. During Jacob's second trial, Gifford testified that Hopper arrived in his office not very long after 1 p.m., in the "early afternoon." He testified that Hopper told him that after Jacob left and she locked the doors and windows, she called Etherton to let him know what had happened and then she called Jacob's mother. Gifford explained, "She was not there a long time, and then she left." On cross-examination, Gifford was confronted with a police report indicating that Hopper arrived around 3 p.m. and his prior deposition testimony that his memory probably would have been better at the time of the police report. He then admitted that he "would still be unsure of that time." On redirect

examination, however, Gifford clarified that he did not review the police report at the time it was made to make sure it was accurate and that it was still his "best recollection" that Hopper came in to see him shortly after 1 p.m. We conclude that Jacob has failed to prove that this evidence is substantially different from the facts presented at the first trial.

Jacob also claims that the evidence has changed as to the time Jacob visited Hopper and as to whether Hopper in fact could have consciously reflected on the event before speaking with Gifford. Sue Jacob testified during the second trial that she received a phone call from Hopper around 10 or 10:30 a.m. When asked whether Hopper sounded upset at the beginning of their phone conversation, Sue Jacob responded, "Yes, or concerned." At the hearing on Jacob's motion in limine to preclude the testimony of Gifford, Sue Jacob admitted that she did not remember the exact time of the conversation, but that she thought it was "between 10:00, 10:30, 11:00, in that vicinity." Sue Jacob was also confronted with prior deposition testimony in which she said that when Hopper first contacted her on the phone, Hopper was angry, upset, and talking fast. On redirect by Jacob's counsel, Sue Jacob agreed with the characterization that Hopper started the conversation concerned and excited, calmed down, and then left the conversation angry. At trial, Sue Jacob approximated that the conversation with Hopper lasted only 10 minutes. Thus, as in *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993), it is proper to say that the record is unclear as to the exact time of Jacob's exchange with Hopper at Etherton's house, although it can be concluded that it occurred sometime before noon.

Jacob also failed to show that Sue Jacob's testimony that Hopper temporarily calmed down presents a material and substantial change from the facts presented in the first trial. In both trials, the facts show that after two short phone conversations, Hopper arrived at work very agitated and upset. She was, as described in *Jacob, supra*, flushed, very fidgety, and visibly upset. In *Jacob*, we held that despite the contention that Hopper had ample opportunity to reflect upon the event before communicating it to Gifford, the facts showed clearly that Hopper exhibited observable manifestations that she made the state-

ment while under the stress of excitement caused by Jacob's visit. Our holding in *Jacob* that Hopper's statement to Gifford was admissible as an excited utterance is the law of the case.

### Proffered Testimony of Ockinga and Sue Jacob

Jacob claims the trial court erred in sustaining the State's objection to the testimony of witnesses Ockinga (Hopper's sister) and Sue Jacob regarding conversations they had with Hopper. Jacob's counsel attempted to introduce the testimony of Ockinga and Sue Jacob to rebut the State's argument that Jacob killed Hopper in a jealous rage, because the statements were admissible under Neb. Evid. R. 803(2), Neb. Rev. Stat. § 27-803(2) (Reissue 1995), as showing Hopper's state of mind. The court held that the state of mind of the victim was not relevant and, therefore, not admissible.

Jacob's offer of proof stated that Ockinga would testify that Hopper had told Ockinga she was frustrated with her relationship with Jacob because he was not paying much attention to her. Certain proposed testimony by Sue Jacob was similarly meant to show Hopper's discontent with her relationship with Jacob.

The exercise of judicial discretion is implicit in determinations of relevancy, and the trial court's decision will not be reversed absent an abuse of discretion. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). We find that the trial court did not abuse its discretion in excluding this testimony.

### Prosecutorial Misconduct in Closing Arguments

Jacob claims the trial court erred in overruling his motion for a mistrial and motion for a new trial based on prosecutorial misconduct during closing arguments. The following statement was made by the prosecution during closing arguments:

> Credibility, ladies and gentlemen. Does it make sense? As you judge credibility, ladies and gentlemen, recall. Recall. Who has had five years to think of his answers, five years to run through all of this. Five years to prepare. Who sat through this trial and heard every witness and every question. Who sat on the stand and didn't want to answer the question that was posed, he wanted to give his own answer. Credibility, ladies and gentlemen. That's your job to decide.

Immediately following this argument, Jacob moved for mistrial based on his right to remain silent. The trial court overruled the motion, finding Jacob's objection untimely and not sufficiently specific. The court also concluded that the remarks were not prejudicial, did not mislead or unduly influence the jury, and were simply remarks based on inferences and deductions drawn from the evidence. The court also concluded that if any error had occurred, it was harmless.

Jacob's objection and assertion that he had a right to remain silent immediately following closing arguments were timely and were sufficient to preserve the objection. See *Graham v. Simplex Motor Rebuilders*, 191 Neb. 320, 215 N.W.2d 641 (1974). In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument. *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

Jacob now argues that in addition to violating his right to remain silent, the statement violated due process and his Sixth Amendment rights to confrontation and effective assistance of counsel. Since these issues were not presented to or decided by the trial court, we consider only the right to remain silent. An issue not presented to or decided by the trial court is not an appropriate issue for consideration on appeal. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995).

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. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997). In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Court held that a prosecutor's use of a defendant's postarrest, post-*Miranda* silence is fundamentally unfair because *Miranda* warnings imply not only that a person has the right to remain silent, but that his or her silence will not be used against him or her as evidence of guilt. That is not the factual situation that occurred in this case.

Jacob took the stand and offered his version of the facts. The State's closing argument implied that in evaluating the credibility of Jacob's testimony, the jury should consider that Jacob had

the benefit of first hearing all the witnesses' testimony and had 5 years to prepare his testimony.

Relying on *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988), Jacob argues that the prosecution's comments on his credibility were error and cannot be harmless. We disagree. The facts in this case are not analogous to *Lofquest*, in which the defendant was cross-examined with a series of questions regarding his failure to previously tell his story to law enforcement. The prosecution then asked the defendant if he understood that if he had told law enforcement officials his story nearer to the time of the incident, they would have been able to go to the scene and look for evidence to corroborate his story. After a defense objection, the prosecutor addressed the court, with the jury present, stating: " 'I think it affects his credibility if he gave no statements to the officers prior to this time.' " *Id.* at 569, 418 N.W.2d at 596. The trial court allowed the questioning and gave no curative instruction. In closing arguments, the prosecutor reiterated that a proper investigation could have been conducted if the defendant would have spoken sooner, and the prosecutor asked the jury: " '[W]ouldn't you tell them? I would.' " *Id.* at 570, 418 N.W.2d at 597. We held that the error was not harmless. Here, there was no comment on Jacob's postarrest silence, and therefore, the trial court did not abuse its discretion in overruling Jacob's motion for mistrial. We find nothing in the argument that can be construed as a comment on Jacob's postarrest silence. This assignment of error is without merit.

### Motion to Strike Witness Faulkerson

Jacob asserts that the trial court erred in overruling his motion to strike Faulkerson as a witness because allowing him to testify denied Jacob his rights to confrontation and due process and that the probative value of Faulkerson's testimony was substantially outweighed by the danger of unfair prejudice to Jacob. Jacob first claims he was denied due process because the State should have known that Faulkerson's testimony was false. The record does not support this. The cases relied upon by Jacob—*Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)—concern testimony elicited

and argument made by the prosecution regarding the witness' relationship with the prosecution, which the prosecution affirmatively knew to be false.

The credibility of a witness and the weight to be given that witness' testimony are issues for the jury to resolve. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). There being no evidence to support the claim that the State knew Faulkerson's testimony was false, the determination of credibility is for the jury.

Second, Jacob argues that the admission of Faulkerson's testimony denied Jacob his right of confrontation. Jacob's argument is as follows:

> The acts of the prosecutors in this case placed the Defendant in a dilemma: either he had to give up his right to confrontation of a key prosecution witness regarding the witness' motive to fabricate his testimony or he had to give up his right to a fair trial by exposing the second jury to the "dying declaration" evidence, this Court's reversal of a prior conviction, and the fact that defendant's brother was in prison. It is intolerable that one constitutional right should have to be surrendered in order to assert another. Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). The denial of the Defendant's right to confront Faulkerson could not be harmless error because Faulkerson's testimony involved an alleged admission by the Defendant.

Brief for appellant at 72-73. We disagree. Jacob was not denied his right to confront Faulkerson, because Faulkerson appeared as a witness in open court and was subject to cross-examination if Jacob so chose. We find no merit in this argument.

Finally, Jacob complains that Faulkerson's testimony should not have been permitted under § 27-403. Jacob offers no author-

ity for this position. We conclude that the testimony and observations of Faulkerson, who was subject to cross-examination on the subject of credibility, although prejudicial to Jacob, were not unfairly prejudicial and therefore not excludable under § 27-403. See *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994).

We find no merit to Jacob's assignment of error that the trial court erred in allowing Faulkerson's testimony.

### Failure to Admit Videotaped Statement of Phifer

Jacob contends that the trial court deprived him of his due process right to present evidence when it refused to admit exhibit 673, a videotaped statement given by Phifer to Investigator Richard Doetker of the Lincoln Police Department on August 16, 1989, in Brewer, Maine. Phifer was working at Intown Auto Sales the day Jacob attempted to sell his van. Jacob argued that the videotape was important to show that he wanted a reasonable price for the van and to show his innocent behavior prior to the arrest.

Jacob asserts that exhibit 673 was admissible based on the residual exception to hearsay under Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995). The trial court held that Jacob had made a showing that Phifer was unavailable, but that the videotaped statement was hearsay and did not come within the residual exception to the hearsay rule.

The residual hearsay exception is to be used rarely and only in exceptional circumstances. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). An appellate court will affirm the trial court's ruling on whether evidence is admissible under § 27-804(2)(e) unless the trial court has abused its discretion. See *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993). We conclude that the trial court did not abuse its discretion in failing to admit the videotaped statement of Phifer.

### Motion in Limine on Evidence of Flight

Jacob argues that the trial court erred in overruling his motion in limine to prohibit the State from introducing evidence that Jacob left the city of Lincoln on August 2, 1989. Jacob claims that the evidence fails to support the characterization of his conduct as flight because there was allegedly no evidence

that he made any deliberate attempt to conceal his whereabouts or identity and that other conduct prior to his arrest indicates he was unaware that there was a warrant for his arrest.

To aid in determining the innocence or guilt of a defendant, a jury may consider the defendant's voluntary flight immediately or soon after the occurrence of a crime. *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993). Jacob appears to contend, however, that in order for evidence of flight to be admissible, the State must first prove by clear and convincing evidence that the accused departed with consciousness of guilt. Jacob relies on *State v. Lincoln*, 183 Neb. 770, 164 N.W.2d 470 (1969). In *Lincoln*, we held that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

In *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980), we held that despite the fact that there was evidence from which it could be concluded that the defendant ran because he was frightened or to avoid detection, it was for the jury to decide whether his departure constituted flight. We have never held that before evidence of departure may be admitted, it must be proved by clear and convincing evidence that the defendant had consciousness of guilt during such departure. If the evidence is sufficient to support a jury's determination that the departure constituted flight, it is proper to submit such evidence.

We conclude that the evidence presented at trial was sufficient to support such a finding, and therefore, we determine that this assignment of error is without merit.

### Jury Instruction on Flight

Jacob also argues that the trial court erred in failing to give his proposed instruction on flight. The proposed instruction stated:

> The defendant's voluntary departure from the State of Nebraska does not warrant an inference of guilt, unless you find, beyond a reasonable doubt, circumstances present and unexplained which, in conjunction with the leav-

ing, reasonably justify that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). Flight is circumstantial evidence that may be used by the trier of fact to establish guilt beyond a reasonable doubt. With regard to circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt. See *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984). The State does not need to first establish beyond a reasonable doubt that a circumstance exists before it can present evidence of such circumstance to the jury. The instruction is not a correct statement of the law, and the trial court did not err in failing to give it to the jury.

### Sufficiency of Evidence

Jacob contends that the evidence was insufficient to support his convictions because without the testimony of Faulkerson and Gifford, which he claims is inadmissible, the State would not have been able to meet the burden of proof necessary to submit the case to the jury. Having already found that the testimony of Faulkerson and Gifford was properly admitted, we conclude from our review of the record that the evidence was sufficient to sustain the convictions. We find no merit to this assignment of error.

### Cumulative Effect of Errors

Jacob argues that the cumulative effect of all the above errors deprived him of his constitutional right to a public trial by an impartial jury. In *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986), we held that while any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish that the defendant did not receive a fair trial, a new trial must be granted. From our review of the record, we conclude that there were no cumulative errors. We find no merit in this argument.

### DOUBLE JEOPARDY

Prior to trial, Jacob's counsel moved to dismiss on double jeopardy grounds because the State was attempting to use evidence that was or should have been inadmissible from the first trial. Jacob now argues in his pro se supplemental brief that the trial court erred in denying the motion to dismiss on double jeopardy grounds because of prosecutorial misconduct. None of the alleged bases for such conduct were argued to the trial court at the time counsel moved to dismiss on double jeopardy grounds. An issue not presented to or decided by the trial court is not an appropriate issue for consideration on appeal. *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). Because the issue of prosecutorial misconduct was neither presented to nor decided by the trial court in ruling upon the motion to dismiss, we find no merit to this assignment of error.

### PROFFERED EVIDENCE OF ETHERTON'S CHARACTER

Jacob's pro se brief also assigns error in the trial court's failure to allow evidence of Etherton's alleged jealous violence toward women. The State was granted a motion in limine to exclude any evidence regarding the character of Etherton because Jacob was not claiming self-defense. The court thus excluded the proffered testimony of Patricia Etherton and Patricia Einspahr, Etherton's ex-wife and former girl friend respectively, who would have testified as to his previous threats of violence toward them. Jacob argues that this evidence should have been admitted under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), to show motive for Hopper to fabricate the story she told Gifford about Jacob pushing his way into her home on August 1, 1989. We find that Etherton's alleged acts of threatening women in previous relationships have no probative value in showing that Hopper had a motive to lie to Gifford regarding Jacob's visit. This assignment of error is without merit.

### INGRAM'S IDENTIFICATION TESTIMONY

Jacob's pro se brief argues that the trial court erred in allowing Ingram's identification testimony into evidence. Jacob asserts that Ingram's testimony is unreliable, is the result of a

suggestive "showup" at the preliminary hearing for the first trial, and is based on seeing Jacob identified as a suspect on television and in the newspaper. Prior to trial, the court overruled Jacob's motion to suppress the eyewitness identification by Ingram based upon its alleged suggestive nature. The court again overruled an objection to Ingram's identification during trial.

During trial, Ingram testified that when he saw a picture of Jacob on the news, he called the police to tell them that he had seen that person drive by shortly after the shooting. He clarified, however, that his testimony identifying Jacob as the man who drove by was based on what he saw while standing in front of the neighbor's house. The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Rules of Evidence commit the evidentiary question at issue to the discretion of the trial court. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). The trial court did not abuse its discretion in allowing Ingram's testimony.

### Failure to Appoint Ballistics Expert

Jacob alleges that the trial court erred in not providing him with a ballistics expert. According to Jacob, he had hired a ballistic expert, a Mr. Kreps, prior to his first trial. Kreps allegedly concluded that the physical evidence did not comport with Ingram's description of the shooting. Accordingly, Jacob argues that the appointment of a ballistics expert was necessary to impeach Ingram's credibility.

Before trial, Jacob's counsel requested approval to obtain a ballistics expert, asserting that such expert could refute the testimony of Ingram. At that time, counsel made reference to a person who had previously been obtained by Jacob; however, counsel indicated that the individual did not have the credentials to qualify as a ballistics expert. The trial court overruled the motion. The right of an indigent defendant to the appointment of an expert witness at the State's expense generally rests in the discretion of the trial court. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). We find that the court did not abuse its discretion in refusing to appoint a ballistics expert on Jacob's behalf.

INEFFECTIVE ASSISTANCE OF COUNSEL

Under an independent heading, Jacob contends that his trial counsel was ineffective in failing to sufficiently argue during the hearing on the motion to appoint a ballistics expert. Specifically, Jacob asserts that counsel erred in failing to present Kreps' report to the court and in arguing that there was no showing of any need for a ballistics expert. We disagree. Trial counsel argued to the court that a ballistics expert would be able to refute certain testimony by Ingram, and counsel relayed Jacob's insistence that the appointment of a ballistics expert was "imperative." It appears that counsel did not introduce Kreps' report because counsel believed that Kreps did not have the credentials to qualify as an expert. We cannot conclude that this rendered counsel's performance deficient.

In addition to the argument that trial counsel failed to properly present the need for a ballistics expert, Jacob makes numerous references to alleged ineffectiveness of counsel under the heading "The District Court erred in not granting the defendant a hearing on his claims of Ineffective Assistance of Counsel." Supplemental brief for appellant at 22. This heading corresponds to one of his assignments of error. Jacob begins this section with the following statement: "I raise the issue of ineffective assistance of counsel, now, to overcome any claim of having waived the following or other errors made by trial or other counsel that would prevent me from proceeding to the Federal Court on a writ of Habeas Corpus." *Id.*

Jacob raises these ineffective assistance of counsel claims for the first time before this court. Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). When an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.* From the record, we cannot say whether or not an evidentiary hearing on these issues is necessary, and therefore, we do not address this argument on direct appeal.

### COUNTY ATTORNEY AS WITNESS

Jacob assigns as error that the trial court erred in not removing the Lancaster County Attorney from this case and in not allowing the county attorney to be called as a witness on the motion to dismiss. Jacob contends the court thereby denied him his right to compel the attendance of witnesses on his behalf, as guaranteed by the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. In his argument for this assignment of error, Jacob makes vague reference to the admissibility of a "9mm gun document" and alleged comments by the county attorney during a pretrial hearing for his first trial. See supplemental brief for appellant at 14. We cannot discern Jacob's argument on this point, and therefore, we do not address it.

### ERRORS NOT DISCUSSED

Assignments of error Nos. 24 and 25 are not discussed in Jacob's brief. Therefore, we do not address them.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

CAPORALE, J., dissenting.

I am distressed to note that this is the third occasion in the short space of 2 years in which we have been made aware that our trial courts are not providing proper jury room security. *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997) (newspaper found in Douglas County jury room); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997) (spouse permitted to spend night with sequestered Richardson County juror). While it is time to remedy that situation, I write to respectfully dissent from that portion of the majority's opinion which holds that the trial court's improper ex parte instruction to the jury did not prejudice the defendant, Steven Jacob.

As the majority opinion notes, the only purpose for playing a portion of the tape-recorded statement was to impeach John Ingram's explanation that because he was "shook up," nervous, and trembling while giving the statement, he failed to mention the light-colored, slowly traveling vehicle later determined to

have been driven by Jacob. In response to the jury's concern that it was unable to find the tape recording among the items of evidence it had been given, the trial court advised not that "the language contained in the portion of the tape recording played had been received in evidence, but the tape itself had not," but instead wrote that "[a] portion of the tape was played in court but not received in evidence." Said another way, the court instructed the jury that the exact portion of the tape recording played in court was not received in evidence.

The majority's interpretation of the trial court's message is contrary to the clear and ordinary meaning of what the court wrote and is arrived at by considering discussions made outside the presence of the jury. The propriety of particular remarks made by a court to a jury after its retirement for deliberation must be measured by the language employed, not by the meaning the court intended. See *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986) (meaning of judgment determined from language, not what parties thought judge meant or what judge thought he or she meant).

Moreover, even if the trial court's ex parte instruction were open to multiple interpretations, we would not be free to assume that the jury accepted the legally correct interpretation. An instruction to a jury given in language which is susceptible of two interpretations, one correct in point of law and the other incorrect, and which may have misled the jury to the prejudice of the complaining party, is a misdirection, for which the judgment will be reversed. *Frederick v. Ballard*, 16 Neb. 559, 20 N.W. 870 (1884).

Contrary to the majority's reasoning, the prejudicial nature of the trial court's improvident ex parte instruction is not overcome by its instruction concerning the use of testimony admitted solely for impeachment purposes. What is at issue here is not the testimony solicited by Jacob about Ingram's tape-recorded statement, but the actual tape-recorded statement itself. In that regard, the trial court properly instructed that the jury must be governed solely by the evidence introduced. See *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991).

In short, the trial court's ex parte instruction prejudicially deprived Jacob of his 6th and 14th Amendment right to present

a defense. I would therefore reverse the trial court's judgment and remand the cause for a new trial.

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## MARY WALKENHORST ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

573 N.W.2d 474

Filed February 13, 1998. No. S-96-436.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Eminent Domain: Damages.** A plaintiff in an eminent domain case is entitled to recover the fair market value of property taken, as well as any decrease in the fair market value caused by a governmental taking.
5. **Constitutional Law: Eminent Domain: Damages.** Not only is a condemnor liable to compensate for a taking but also, by virtue of Neb. Const. art. I, § 21, for consequential damage to other property in excess of the damage sustained by the public at large.
6. ____: ____: ____. The words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
7. **Constitutional Law: Damages.** It is the diminution in market value which establishes the damages under Neb. Const. art. I, § 21.
8. ____: ____. "Consequential damage" defines the kind of damage that is compensable under Neb. Const. art. I, § 21; it does not define the measure of damages.
9. **Eminent Domain: Real Estate: Valuation.** There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.
10. **Eminent Domain: Improvements.** The unit rule is applicable whenever the market data approach is employed, and this rule requires that the value of improved property

be considered as a whole, without the assignment of separate costs for the land and individual improvements.

11. **Eminent Domain: Damages.** With regard to a partial taking of land, in considering the effect of severance on the market value of the remainder, account must be taken of all of the inconveniences caused by the severance as they might affect a prospective purchaser and the effect of the severance upon every available, reasonable, and probable future use of the property, as it relates to the market value of the remainder of the property considered as a unitary whole.
12. **Trial: Witnesses: Appeal and Error.** It is within the trial court's discretion to determine if there is sufficient foundation for a witness to give his opinion about an issue in question. A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
13. **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.
14. **Eminent Domain: Expert Witnesses: Damages.** Expert testimony concerning the measure of damages in an eminent domain action must be tied to the market value of the property remaining before and after the acquisition.
15. **Trial: Eminent Domain: Witnesses.** For the testimony of an expert or lay witness to be admissible on the question of market value of real estate, the witness must be familiar with the property in question and the state of the market.
16. **Eminent Domain: Damages.** Where trees are put to a special purpose, such as for windbreaks, shade, or ornamental use, the measure of the value of condemned land is usually the difference in value of the realty before and after the destruction of the trees.
17. **Trial: Evidence: Testimony: Proof: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial court by an offer of proof or was apparent from the context of the testimony.
18. **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 appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence.
19. **Jury Instructions: Appeal and Error.** Regarding a claim of prejudice from an instruction given or a court's refusal to give a tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
20. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
21. **Jury Instructions: Eminent Domain: Damages.** While a condemnee may testify to and the jury may consider itemized burdens, the trial court is not required to instruct the jury on each individual item making up the condemnee's damages.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

William J. Morris and Cheryl L. Adams, of Nelson Morris & Titus, for appellants.

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

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

## STATEMENT OF CASE

In this eminent domain action, the State of Nebraska, through its Department of Roads, acquired fee title and temporary and permanent easements to part of the condemnees' property. The Madison County Court awarded the condemnees $15,340. On appeal to the Madison County District Court, a jury returned a verdict in the amount of $9,991. The condemnees have timely appealed from that verdict.

## SCOPE OF REVIEW

A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.*

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996).

## FACTS

The condemnees claim they were inadequately compensated for land taken by the State. Mary Walkenhorst, Dale Walkenhorst, Margaret Olson, Marvin Olson, and Morris Moyer each own an undivided one-sixth interest in the land

involved herein. Eunice Moyer may hold a life estate as to an undivided one-half interest in the land, and George H. Moyer, Jr.; Marilyn Moyer; Jon M. Moyer; Ann M. Long; and Steve A. Long each hold an undetermined interest in the land. Tim Sunderman is a tenant on the land.

The condemnees own two quarter sections of land in Madison County, Nebraska. The land is separated by U.S. Highway 81, which runs north and south. The land is a farm composed of pastureland and cultivated cropland. The land east of Highway 81 included a shelterbelt containing six rows of trees which extended for approximately ½ mile, as well as a home, barn, cribs, and yards suitable for conducting cattle raising and feeding operations. The land was once fenced on all four sides, and there are stock wells, tanks, and catch pens on each quarter section.

On February 22, 1994, through its power of eminent domain, the State acquired two strips of the condemnees' property in order to reconstruct Highway 81. The State acquired 8.24 acres on the east side of the highway and 1.78 acres on the west side of the highway. In this condemnation, the State seized 10.02 total acres of land in fee title, acquired three permanent easements totaling .29 acres and a temporary easement of .36 acres, and obtained control of access to the condemnees' remaining property. Additionally, a fence on the west side of the condemnees' property had to be torn down, and the State built the condemnees a new access road.

At trial, witnesses for the condemnees were Jon Moyer, one of the owners; Richard Walsh, a licensed engineer; James Brogan, an abstractor; and Doug Reigle, one of the farm tenants. Ronald Lumb, a forester, was not permitted to testify in front of the jury, and the condemnees offered his testimony as an offer of proof, which was overruled.

The jury returned a verdict of $9,991. Following trial, the condemnees' motion for new trial was overruled. The condemnees appealed, and a petition to bypass the Nebraska Court of Appeals was granted by this court.

## ASSIGNMENTS OF ERROR

In summary, the condemnees assert that the district court erred in (1) excluding their evidence regarding the value of trees

as a shelterbelt and timber, and the value of the trees as related to the fair market value of the land taken and the diminution in value to the land remaining; (2) excluding their tendered jury instructions referring to impairment of access caused by the taking and to the value of the trees and the cost of replacing fencing; and (3) admonishing the jury to disregard their counsel's closing argument regarding the cost of repairing the access roads.

## ANALYSIS

The condemnees argue that a shelterbelt of trees located on property taken by the State constitutes property separate and apart from the land and that Neb. Const. art. I, § 21, entitles them to compensation for the shelterbelt in addition to any compensation granted for the taking of the land. In the alternative, the condemnees claim they have not been compensated by the State for the value of the shelterbelt as it relates to the value of the land taken and the diminution in value of the land remaining after the shelterbelt was removed.

In *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994), we held that a plaintiff in an eminent domain case is entitled to recover the fair market value of property taken, as well as any decrease in the fair market value caused by a governmental taking. See, also, NJI2d Civ. 13.01. The general rule is that consequential damages are not recoverable in eminent domain cases. See 29A C.J.S. *Eminent Domain* § 117 (1992). However, Nebraska is an exception to this rule because article I, § 21, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." In Nebraska, " 'not only is the condemnor liable to compensate for the taking but also . . . by virtue of section 21, art. I of [our] Constitution . . . for consequential damage to other property in excess of the damage sustained by the public at large. . . .' " See *Patrick v. City of Bellevue*, 164 Neb. 196, 205, 82 N.W.2d 274, 280 (1957).

In *Leffelman v. City of Hartington*, 173 Neb. 259, 262, 113 N.W.2d 107, 109 (1962), we referred to the proper measure of damages pursuant to article I, § 21, by stating: " '"The words, 'or damaged,' in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exer-

cise of the right of eminent domain which diminish the market value of private property.'" Thus, we recognized that it is the diminution in market value which establishes the damages under article I, § 21, and that "consequential damage" defines the kind of damage that is compensable under article I, § 21; it does not define the measure of damages. See, also, NJI2d Civ. 13.08 comment. We have consistently held that the damages in an eminent domain case are measured based on market value, whether it be fair market value of the property actually acquired or the decrease in market value of the remaining property.

There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996).

In *Westgate Rec. Assn.*, we stated that although we had not heretofore adopted the unit rule by name, we had demonstrated a preference for valuing condemned property as a whole, citing *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975), and *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952). "[T]he unit rule is applicable whenever the market data approach is employed . . . and . . . this rule requires that the value of improved property be considered as a whole, without the assignment of separate costs for the land and individual improvements . . . ." *Westgate Rec. Assn.*, 250 Neb. at 20, 547 N.W.2d at 493.

In *Westgate Rec. Assn.*, we recognized that methods of valuation other than market data may be used in certain circumstances. Citing *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968), we held that capitalization of income

of rentals from a reasonably prospective use of the property was an acceptable method of arriving at present market value. We have also recognized that generally, the reproduction cost method as an independent test of value is used only in rare cases where there is a lack of comparable sales of similar property, the structures on the property are in some sense unique, or the character of the improvements is unusually well adapted to the kind of land upon which they are located. *Westgate Rec. Assn. v. Papio-Missouri River NRD, supra.*

In *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997), we reiterated that the measure of damages for partial takings of land is the market value of the land taken and the difference in value of the remainder before and after the taking. In considering the effect of severance on the market value of the remainder, account must be taken of all of the inconveniences caused by the severance as they might affect a prospective purchaser and the effect of the severance upon every available, reasonable, and probable future use of the property, as it relates to the market value of the remainder of the property considered as a unitary whole.

Thus, the condemnees' claim that they should be compensated separately for the value of the trees is without merit, for vegetation is generally not to be valued separately and then added to the value of the underlying land in a summation approach. See 4 Julius L. Sackman, Nichols on Eminent Domain § 13.09[1] (rev. 3d ed. 1997). See, also, *Medelman v. Stanton-Pilger Drainage Dist., supra.* The condemnees cannot be compensated for the value of the shelterbelt as a shelterbelt; instead, the only relevant inquiry is how the presence of the shelterbelt on the condemned land affects the fair market value of the land taken. See, *Dawson v. Dept. of Transp.*, 203 Ga. App. 157, 416 S.E.2d 163 (1992); *State Roads Comm'n v. Toomey*, 302 Md. 94, 485 A.2d 1006 (1985); *County of Muskegon v Bakale*, 103 Mich. App. 464, 303 N.W.2d 29 (1981).

In the alternative, the condemnees argue that they should have been compensated for the value of the shelterbelt, as it enhanced the value of the land taken and diminished the value of the land not taken. They allege that there are no recent sales

of property remotely similar to the property taken from them by the State. Relying upon *Graceland Park Cemetery Co. v. City of Omaha*, 173 Neb. 608, 114 N.W.2d 29 (1962), they claim that their property has no determinable fair market value because of this absence of comparable sales. In *Graceland Park Cemetery Co.*, we recognized that certain types of property are not bought and sold on an open market and, consequently, do not have a recognizable fair market value. We reasoned that when the fair market value of such property is not obtainable, some other formula of fixing the value of the property must be devised.

Here, the condemnees' property is farmland containing a shelterbelt of trees, and therefore, an alternate valuation method does not need to be used. The shelterbelt is not of such a unique nature as to render use of the fair market value standard unjust, to render the determination of the market value impossible, or to require use of one of the other valuation methods described in *Westgate Rec. Assn. v. Papio-Missouri NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). In another Nebraska eminent domain case involving a shelterbelt, the market data approach had been utilized to estimate the fair market value of the land taken and the value of the land remaining. See *Chaloupka v. State*, 176 Neb. 746, 127 N.W.2d 291 (1964). Therefore, we reject the condemnees' recommendation that we adopt a special valuation approach under these circumstances.

Claiming that neither Lumb, a forester, nor Jon Moyer, one of the condemnees, was allowed to testify as to the value of the shelterbelt taken by the State, the condemnees argue that Lumb and Jon Moyer would have provided evidence of the value of the trees as they enhanced the value of the land taken and as to how their loss diminished the value of the property that remained. The condemnees assert that had Lumb been allowed to testify, he would have told the jury that the unit value of the trees growing on the land taken was $25,000, i.e., $80,000 for the value of 350 trees minus depreciation plus sawlog value of the cottonwood trees.

The State objected to Lumb's testimony, which objection was sustained on the grounds that the testimony was an improper measure of damages, it was unrelated to the fair market value of the land, and proper foundation had not been laid. In an offer of

proof, Lumb gave his opinion as to both the value of the shelterbelt and the value of the shelterbelt as used on the land at the time of the taking. The offer was overruled. The condemnees argue that Lumb's testimony should have been presented to the jury because Lumb stated that the value he attributed to the shelterbelt was directly related to its value on the condemned land and because using replacement value for the trees was not an improper measure of damages.

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Westgate Rec. Assn., supra.* It is within the trial court's discretion to determine if there is sufficient foundation for a witness to give his opinion about an issue in question. A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. 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. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997).

Expert testimony concerning the measure of damages in an eminent domain action must be tied to the market value of the property remaining before and after the acquisition. "[A]n expert witness, when properly qualified, may testify as to the valuation of the property . . . ." *Patterson v. City of Lincoln*, 250 Neb. 382, 388, 550 N.W.2d 650, 655 (1996). For the testimony of an expert or lay witness to be admissible on the question of market value of real estate, the witness must be familiar with the property in question and the state of the market. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

Lumb was not asked to testify regarding how the presence of the shelterbelt enhanced the market value of the property. Lumb testified that he believed the use of a tree affected the fair market value of that tree. He also testified that the trees located on the condemnees' land protected the land from wind erosion and protected the livestock from wind. However, when Lumb was asked to attribute a value to the trees, he did not relate this value

to the fair market value of the land. Instead, he began with the replacement cost of the trees and, therefore, used an improper measure of damages. Thus, the district court did not abuse its discretion when it ruled that the condemnees had not laid proper foundation for Lumb's testimony regarding the value of the trees.

The condemnees also assert that it would be unfair for them not to be allowed to introduce evidence regarding the value of the trees taken, because the State's witness testified that he believed the trees had no value whatsoever. However, the State's valuation of the trees was not introduced as a separate item of damage. The State's appraiser testified as to what effect he believed the presence of the trees had on the fair market value of the condemned land and, thus, used the proper measure of damages. Accordingly, the district court did not abuse its discretion when it excluded Lumb's testimony.

The condemnees' claim that Jon Moyer was not allowed to testify regarding how the trees affected the fair market value of the land taken is also without merit. Jon Moyer was not asked to render an opinion regarding whether the fair market value of the condemned land was affected by the presence of the shelterbelt. Thus, the condemnees' assertion that the district court precluded Jon Moyer from introducing this evidence is not supported by the record.

The second aspect of the measure of damages is how a partial taking affects the fair market value of the remaining land. In *Laube v. Estate of Thomas*, 376 N.W.2d 108, 109 (Iowa 1985), the Iowa Supreme Court noted that where trees are "put to a special purpose, such as for windbreaks, shade or ornamental use, the measure [of the value of condemned land] is usually the difference in value of the realty before and after the destruction of the trees." See, also, *Miss. State Highway Com'n v. Viverette*, 529 So. 2d 896 (Miss. 1988); *State Roads Comm'n v. Toomey*, 302 Md. 94, 485 A.2d 1006 (1985); *State, Department of Highways v. Burleigh*, 160 So. 2d 782 (La. App. 1964); *Walters v. Iowa Elec. Co.*, 203 Iowa 471, 212 N.W. 884 (1927). Therefore, evidence of the value of the lost trees is relevant, but such evidence must be related to the fair market value of the land in order to be admissible.

Lumb was never asked to render an opinion regarding the effect which the loss of the shelterbelt would have on the fair market value of the remaining property. His testimony was limited to the replacement cost of the trees only and failed to relate the value of the trees to the fair market value of the remaining land. Therefore, Lumb's testimony was properly excluded. Conversely, Jon Moyer did testify that he believed there was a diminution in the value of the remaining land caused by the loss of the shelterbelt. Jon Moyer opined that the fair market value of the land on the east side of the highway was $600 per acre before the taking and that the value of the remainder was only $450 per acre. Therefore, contrary to the condemnees' assertion, Jon Moyer did give an opinion concerning the market value of the remaining property.

On redirect, Jon Moyer was asked what factors he considered in valuing the land on the east side of the property before and after the taking. The State's objection to this testimony was sustained, and the condemnees argue that the district court abused its discretion by excluding this evidence. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial court by an offer of proof or was apparent from the context of the testimony. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991); *State v. Bennet*, 2 Neb. App. 188, 508 N.W.2d 294 (1993). The substance of what Jon Moyer would have testified to is not apparent from the context of the testimony, and the condemnees made no offer of proof of the factors that Jon Moyer was prohibited from discussing. Thus, the record does not indicate how Jon Moyer's testimony on redirect would have varied from his prior testimony that the remainder damages were related to the loss of the shelterbelt, and the condemnees have not sufficiently preserved this assignment of error for appeal.

The condemnees argue that the district court erred in excluding their testimony regarding whether the property west of the highway was devalued by loss of access. On redirect of Jon Moyer, the condemnees' counsel asked whether the property west of the highway was devalued in "any way by its access being limited or by its access being destroyed by this highway project." The State's objection that this question was beyond the

scope was sustained. The district court overruled the condemnees' offer of proof that Jon Moyer would testify that before access on the west side was limited, the property had an average value of $469 per acre, and that after access was limited, the property had a value of only $405 per acre.

The offer of proof was beyond the scope of the cross-examination, and the district court did not abuse its discretion in sustaining the objection. Although the content of the offer of proof alluded to what would have been a proper measure of damages of the value of the property before and after the taking, such evidence had not been explored on direct and had not been discussed on cross-examination. The offer of proof did not explain how these damages were to be considered by the jury or how this evidence related to the evidence introduced on cross-examination or during direct examination. The record is clear that the condemnees were attempting to introduce evidence as to damages because of limited access and because of diminution in market value. Since diminution in market value was never offered during direct and was not inquired into on cross-examination, the objection was properly sustained, and the district court did not abuse its discretion in overruling the offer.

The condemnees argue that the district court erred in excluding both of their tendered jury instructions referring to impairment of access caused by the taking and in excluding their tendered jury instructions referring to the value of the trees and the cost of replacing fencing. To establish reversible error from a court's refusal to give a requested instruction, the appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989). Regarding a claim of prejudice from an instruction given or a court's refusal to give a tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. *Id.*

Instructions Nos. 5 and 7 given by the district court were patterned after NJI2d Civ. 13.01 and 13.02 respectively and state the law as recently set out in *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996), and *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991). The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988).

We find that the instructions given by the district court were based on the Nebraska Jury Instructions, were not misleading, and adequately covered the issues involved in this case. The condemnees have not shown that they were prejudiced by the jury instructions which were given. The record shows that the jury was allowed to consider the loss of trees, access, and fencing not as separate items, but generally as they affected the market value of the condemnees' property. Therefore, the condemnees were not prejudiced by the omission of their offered instructions, and the district court did not err in refusing to give the condemnees' requested instructions.

The condemnees note that the district court did not specifically instruct the jury regarding the alleged loss of access and the alleged diminution in fair market value caused by the loss of the trees and fence, and the condemnees claim that this was error. In *Heye Farms, Inc. v. State*, 251 Neb. 639, 647, 558 N.W.2d 306, 312 (1997), we specifically held that "while the condemnee may testify to and the jury may consider itemized burdens, the trial court is not required to instruct the jury on each individual item making up the condemnee's damages." Accordingly, the district court was not under an obligation to submit the jury instructions which the condemnees offered.

Finally, the condemnees argue that the district court erred in admonishing the jury to disregard their counsel's closing argument regarding the cost of repairing the access road. During closing arguments, the condemnees' counsel began discussing access and gave the cost estimate previously testified to by the engineer as an estimate of the damage caused by the loss of access. The State's objection to this figure was sustained as an improper itemization of damages. The estimated cost of repairing the loss of access was not properly related to the fair market value of the remaining land.

## CONCLUSION

Having considered all the condemnees' assignments of error and finding them to be without merit, we affirm the judgment of the district court.

AFFIRMED.

WHITE, C.J., participating on briefs.

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CEDARS CORPORATION, APPELLEE AND CROSS-APPELLANT, V. SUN VALLEY DEVELOPMENT CO. AND U.S. INVESTMENT CORPORATION, APPELLANTS AND CROSS-APPELLEES, AND CONCORD CORPORATION ET AL., APPELLEES.
573 N.W. 2d 467

Filed February 13, 1998. No. S-96-490.

1. **Trial: Appeal and Error.** The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Actions.** An action is frivolous or in bad faith if a party attempts to relitigate the same issue previously resolved in an action involving the same party.
4. **Attorney Fees: Appeal and Error.** Ordinarily, an improper calculation of attorney fees would require a remand in order to reconfigure the award.
5. ____: ____. When the record is sufficiently developed that a reviewing court can apply the law to the facts and calculate a fair and reasonable attorney fee without resorting to remand, that route is available to the appellate court.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed as modified.

Steven J. Riekes, P.C., of Marks Clare & Richards, for appellants.

Joseph F. Gross, Jr., of Timmermier, Gross & Burns, for appellee Cedars Corp.

Maurice R. Johnson, of Peebles & Evans, P.C., for John M. Peebles.

Denise E. Frost for Domina & Copple, P.C.,

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

CONNOLLY, J.

The Nebraska Court of Appeals determined that appellee Cedars Corporation had filed a frivolous cause of action against appellants, Sun Valley Development Co. and U.S. Investment Corporation. *Cedars Corp. v. Sun Valley Dev. Co.*, 94 NCA No. 26, case No. A-92-1044 (not designated for permanent publication) (*Cedars VII*). On remand, the district court for Douglas County awarded fees and costs against Cedars and its attorneys in accordance with Neb. Rev. Stat. § 25-824 (Reissue 1995). The district court allocated responsibility for payment of the fee award among Cedars and its attorneys, with Cedars bearing primary responsibility for payment of the award. Sun Valley and U.S. Investment appeal, contending that the allocation was an abuse of discretion. Cedars cross-appeals, contending that the district court abused its discretion in determining the overall amount of the award. We conclude that the district court did not abuse its discretion in determining the overall amount of the award, but did abuse its discretion in its allocation of that award. Accordingly, the award is modified, and the sanction of $26,595.85 and costs is allocated evenly, one-third to Cedars, one-third to attorney John M. Peebles, and one-third to Domina & Copple, P.C.

## BACKGROUND

The seeds of this appeal were planted in a series of seven lawsuits filed by Cedars. Edward E. Milder, a resident of California, is the president, sole officer, and sole stockholder of Cedars. In 1959, Cedars became part of a joint venture involving Sun Valley, U.S. Investment, and three other joint venturers. Since the late 1960's, Milder has repeatedly and unsuccessfully brought suit against the joint venturers, seeking an audit of the transactions that occurred as part of the joint venture. A common thread in all these cases was the issue of the audit. A more detailed factual background of the first such lawsuit can be found in *Cedars Corp. v. H. Krasne & Son, Inc.*, 189 Neb. 220, 202 N.W.2d 205 (1972) (*Cedars I*).

Following *Cedars I*, two suits were filed in the district court for Douglas County. The record does not specifically state the outcome of these first two cases. Next, in *Cedars Corp. v. Sun Valley Development Co.*, 213 Neb. 622, 330 N.W.2d 900 (1983)

(*Cedars IV*), this court affirmed an order of the district court dismissing a fourth suit filed by Cedars and determined that the action was barred by either res judicata or collateral estoppel. This court further stated that Cedars could not continue to maintain frivolous and vexatious suits by merely rearranging the parties or changing their names. Also during 1983, in *Cedars Corp. v. Valley Ho Corp.*, 214 Neb. 48, 332 N.W.2d 52 (1983) (*Cedars V*), another appeal regarding the joint venture was found to be without merit.

Cedars next filed a federal Racketeer Influenced and Corrupt Organizations Act (RICO) suit. The federal district court granted a motion for sanctions, finding that while the complaints were framed in various ways, Cedars was "simply attacking the same basic point again and again," and that the complaints constituted harassment under Fed. R. Civ. P. 11.

In 1994, the Nebraska Court of Appeals held in an unpublished decision that Cedars had filed a frivolous cause of action. The Court of Appeals remanded with directions to award appellants, Sun Valley and U.S. Investment, reasonable attorney fees and court costs for proceedings in the trial court pursuant to § 25-824, the statutory section authorizing an award of reasonable attorney fees against any party or attorney who has brought or defended a frivolous action. *Cedars VII*. During the time the instant case was pending, Peebles represented Cedars and was employed by the law firm of Domina & Copple.

### Involvement of Attorney Peebles and Domina & Copple Law Firm

The record of the hearing on remand shows that Peebles first represented Milder and Cedars in 1987 while Peebles was an employee at the law firm of Steier & Kreikemeier, P.C. At that time, Peebles entered an appearance on behalf of Cedars in the RICO action. At the time of his appearance in the federal case, or shortly thereafter, Peebles knew there was a motion pending to dismiss the case and a motion for sanctions. Peebles also knew the motion for sanctions stated that the lawsuit was the sixth such action filed by Cedars against Sun Valley. After entering his appearance, Peebles filed an amended complaint. Subsequently, the federal court issued an order granting a motion for sanctions against Cedars in the amount of $1,268.

The order stated that the lawsuit was the sixth action instituted by Cedars against Sun Valley, that all of Cedars' claims arising out of the joint venture had been fully litigated, and that the court found the complaint to be frivolous and filed for an improper purpose. Peebles testified that the cost of the sanctions was passed on to Milder or his corporation and that he told Milder of the order. Peebles also testified he made efforts to review the validity of the Cedars RICO action by reviewing documents that had been filed and reviewing the proceedings. Peebles also discussed issues with accountants and relied on the expertise of other attorneys regarding some issues.

After the federal RICO action, in 1989, Milder again hired Peebles to represent him in the instant case. Peebles was hired after the lawsuit had been filed. At that time, Peebles had left his employment with Steier & Kreikemeier and was employed as an associate at the law firm of Domina & Copple. The answer filed by Sun Valley alleged the affirmative defense of res judicata, listed the prior cases, and requested sanctions for the institution of a frivolous action. U.S. Investment filed notice that it would move for sanctions at the time of trial on the basis that the proceedings were frivolous. Later, in 1990, Peebles received a letter from an attorney for one of the appellants informing him that he concluded there was no merit to the action, that it was frivolous, and that it was filed for the purpose of harassing his client. In 1991, Peebles received a letter from the same attorney stating that 2 years had passed since the lawsuit was filed, that Peebles had failed to appear at a hearing, and that since Peebles had presented no experts to support his position, the attorney hoped the suit would be dismissed. Peebles testified that he knew he was dealing with a client who was filing vexatious lawsuits and that some of Milder's demands of him did not make sense. Peebles further testified Domina & Copple also knew it was dealing with a client who was filing vexatious lawsuits.

Milder terminated services with Peebles and Domina & Copple after judgment had been entered against him and a motion for a new trial was denied. Thus, in the instant case, Milder was represented by Peebles in his capacity as an employee of the Domina & Copple firm from the time Peebles entered his appearance in the action until Milder terminated the services of Peebles and Domina & Copple following trial.

While Peebles was employed at Domina & Copple, he was supervised by a partner and the firm's shareholders, who were aware of the case. Peebles testified that any pleadings he signed were on behalf of the firm and that billings were made by the firm. At one point in the litigation, in response to demands by Milder for extensive discovery that Peebles conceded did not make sense, a partner at the firm wrote to Milder requesting that a sum of $150,000 be paid in advance if Milder wished the firm to continue the case for him. The letter also stated the firm would have to withdraw as counsel unless the fee requirement was met if the firm was to pursue the discovery regime outlined by Milder. Peebles further testified he discussed the Cedars case with the partners of Domina & Copple. The record indicates Peebles discussed with some of the partners the history of prior litigation. Peebles left Domina & Copple in 1993.

Milder testified the current assets of his corporation totaled approximately $1,200 and its investment in the joint venture was the only assets it ever had. Milder testified he personally borrowed money in order to finance the litigation. Milder stated Peebles never advised him that the U.S. District Court found the federal RICO litigation to be frivolous or that sanctions had been awarded. Milder also testified Peebles was the only attorney he dealt with at Domina & Copple. However, Peebles testified that someone from Steier & Kreikemeier discussed the sanction issue with Milder and that a copy of the order awarding sanctions in the federal RICO case had been sent to Milder and discussed with him.

Frederick S. Cassman, the attorney who represented Sun Valley at trial, submitted an affidavit indicating his charge for services at the rate of $150 per hour was $5,980.50 and there was $65.35 in costs and expenses. An attorney called as an expert witness testified this sum was reasonable. The witness further testified $17,500 was a reasonable charge for the services of the attorney for U.S. Investment in the case.

The district court awarded sanctions in the sum of $26,595.85 and allocated responsibility for the sum by assessing $250 to the law firm of Domina & Copple, $1,000 to Peebles, and $25,345.85 to Cedars.

## ASSIGNMENTS OF ERROR

The appellants assign as error abuse of discretion by the trial court by allocating primary responsibility for the payment of attorney fees to Cedars rather than allocating the major responsibility for the fees to Peebles and Domina & Copple.

On cross-appeal, Cedars assigns as error abuse of discretion by the district court by erroneously assessing the evidence to include an inflated estimate of attorney fees and by disregarding the circumstances surrounding the litigation at the trial level.

## STANDARD OF REVIEW

The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

## ANALYSIS

The appellants contend the district court abused its discretion when it allocated the primary responsibility for the payment of attorney fees to Cedars rather than to Peebles and the Domina & Copple law firm. The appellants argue that the allocation made by the district court does not serve the purposes of an award of attorney fees under § 25-824 because the allocation is not sufficient to deter the attorneys involved from representing clients in future frivolous actions, and because Cedars has limited assets, the allocation will not provide compensation to Sun Valley.

Section 25-824 states:

> (2) . . . [I]n any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

> (3) When a court determines reasonable attorney's fees or costs should be assessed, it shall allocate the payment of such fees or costs among the offending attorneys and parties as it determines most just and may charge such amount or portion thereof to any offending attorney or party.

Neb. Rev. Stat § 25-824.01 (Reissue 1995) lists factors that a court shall consider when granting an award of attorney fees pursuant to § 25-824(2) and in determining the amount to be assessed against offending attorneys and parties. The factors include, but are not limited to, the following:

> (1) The extent to which any effort was made to determine the validity of any action or claim before the action was asserted; (2) the extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses that have been found not to be valid; (3) the availability of facts to assist the party to determine the validity of a claim or defense; (4) the relative financial position of the parties involved; (5) whether or not the action was prosecuted or defended in whole or in part in bad faith . . . . [The statute lists five more factors that are less applicable to the instant case.]

Section 25-824.01 specifically addresses the determination of the amount of an award under § 25-824. However, reason dictates that the allocation of amounts due between offending parties and attorneys is "part and parcel" of the determination of the amount of the award. *Major v. First Virginia Bank*, 97 Md. App. 520, 631 A.2d 127 (1993).

In 1983, § 25-824 was amended to allow courts to award attorney fees against an offending attorney. In *Graham v. Waggener*, 219 Neb. 907, 911, 367 N.W.2d 707, 710 (1985), we determined that an action was res judicata and that the attorneys involved "simply chose to ignore a fully binding adverse final judgment." We further stated that "a proliferation of actions in which the same issues are raised is not proper and will not be tolerated. . . . Such a tactic engenders disrespect for law and justice and unnecessarily adds to the caseload of an already overburdened judicial system." *Id.* (citing *Stones v. Plattsmouth*

*Airport Authority*, 193 Neb. 552, 228 N.W.2d 129 (1975), and *Cedars IV*). Accordingly, we made an award of attorney fees and taxed responsibility for those fees to the offending party. However, we also stated that but for the fact that the ability of the court to tax fees against offending attorneys was new, a portion of the award in *Graham* would have been taxed to Graham's attorneys, and made clear that "[t]his provides due warning for the future." 219 Neb. at 911, 367 N.W.2d at 710.

An action is frivolous or in bad faith if a party attempts to relitigate the same issue previously resolved in an action involving the same party. *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993). It is clear that the attorneys involved in the instant action did not just fail to discover that Cedars' claim was without merit. Rather, they chose to ignore a series of rulings stating the issues involved were res judicata. The record is clear Peebles knew of the amount and nature of the previous Cedars litigation. The fact Cedars was engaged in a series of frivolous actions was readily apparent simply by reading the cases. In 1983, we stated in *Cedars IV*, "Cedars has had its day in court and cannot continue to maintain frivolous and vexatious suits by merely rearranging the parties or changing their names." 213 Neb. at 627, 330 N.W.2d at 904. Furthermore, when Peebles began representing Cedars in the instant action, he knew sanctions had been imposed in the previous RICO litigation and knew of the court's determination that Cedars was "attacking the same basic point again and again" in a manner that constituted harassment under Fed. R. Civ. P. 11.

Concerning Domina & Copple's involvement, the record shows that as an associate of the firm, Peebles signed documents on behalf of the firm and that billing of clients was conducted by the firm. The record further shows that Domina & Copple exercised some degree of oversight regarding the cases handled by attorneys in its office. Of particular importance is the fact at one point a partner of the Domina & Copple firm wrote a letter to Milder informing him that the firm might withdraw as counsel and requesting the sum of $150,000 if the firm was to carry out discovery as requested by Milder. Peebles tes-

tified this was in response to discovery demands by Milder that did not make any sense.

In the instant case, both Peebles and the law firm of Domina & Copple had clear notice of the frivolous nature of the Cedars lawsuit. While zealous advocacy is usually to be commended, it is also necessary for an attorney to know when to redirect an argument to protect his client's best interests or in some instances, to just say "no more." See *Major v. First Virginia Bank*, 97 Md. App. 520, 542, 631 A.2d 127, 138 (1993) (affirming a fee award taxed to attorneys after "three courts and at least as many judges" found the claim involved to be without merit). Thus, where the underlying facts are largely undisputed, "counsel is primarily responsible for ascertaining whether claims are supported by existing law or a nonfrivolous argument for the extension thereof." *Levine v. County of Westchester*, 164 F.R.D. 372, 376 (S.D.N.Y. 1996) (taxing fees to attorney, rather than client, following maintenance of frivolous action).

The often-cited purpose of sanctions is deterrence. See *Temple v. WISAP USA in Texas*, 152 F.R.D. 591 (D. Neb. 1993), and *Levine v. County of Westchester, supra* (both applying Fed. R. Civ. P. 11). Thus, if through a fee award, little responsibility is allocated to attorneys for their actions, there will be little deterrent effect on the behavior of the attorneys involved or on other members of the profession. The district court's lopsided allocation placed little or no responsibility upon the attorneys. The trial court's allocation was untenable. Accordingly, the district court abused its discretion in its allocation of the fees involved, and the award must be modified.

Having determined that the district court abused its discretion, we next conclude that we should reallocate the award, rather than remand for a reallocation. Ordinarily, an improper calculation of attorney fees would require a remand in order to reconfigure the award. See, *In re Thirteen Appeals Arising Out of San Juan*, 56 F.3d 295 (1st Cir. 1995); *Lipsett v. Blanco*, 975 F.2d 934 (1st Cir. 1992) (discussing reallocation of attorney fees under abuse of discretion standard in civil rights cases). However, when the record is sufficiently developed that the reviewing court can apply the law to the facts and calculate a fair and reasonable fee without resorting to remand, that route is

available to the appellate court. *In re Thirteen Appeals Arising Out of San Juan, supra*; *Lipsett v. Blanco, supra.* In the instant case, the litigation is over, with only the issue of fees remaining. This series of litigation has gone on now for over 25 years; a remand would only serve to waste additional resources and further prolong the mischief. The record is sufficiently developed for this court to make a determination of a just allocation.

Peebles cannot disclaim responsibility for his actions on the grounds he was acting under the direction of individuals in the firm. The record indicates that Milder sought out Peebles because Peebles had previously represented him. The record further shows Peebles had sufficient discretion and control over the case, and he must also be responsible for his individual conduct. See *Brubakken v. Morrison*, 240 Ill. App. 3d 680, 608 N.E.2d 471 (1992).

The record also shows Cedars, Peebles, and the Domina & Copple firm had the opportunity to apply the brakes on this litigation and they failed to do so. Accordingly, they will share equally in the sanctions. We conclude that the attorney fees and costs are to be shared equally: one-third Cedars, one-third Peebles, and one-third Domina & Copple.

## CROSS-APPEAL

On cross-appeal, Cedars contends that the district court abused its discretion in determining the reasonableness of the fee award and that the award should have been made for only time spent at trial. The Court of Appeals directed that an award of reasonable fees be made for proceedings in the trial court. Such a statement did not act to limit the fee award only to time spent at trial. Rather, the use of the term "trial court" can be read synonymously with the term "district court." Thus, Cedars' argument that the award was only to be for time spent at trial is without merit. In addition, the record contains sufficient evidence regarding the reasonableness of the total amount reached by the district court. As a result, we cannot say that the district court abused its discretion in determining the overall amount of the fee award.

AFFIRMED AS MODIFIED.

GERRARD, J., not participating.

# THOMAS E. MILLER, D.D.S., APPELLEE, V. MARK B. HORTON, M.D., M.S.P.H., DIRECTOR OF HEALTH, ET AL., APPELLANTS.

574 N.W.2d 112

Filed February 13, 1998. No. S-96-534.

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. **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. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992), when a petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
4. **Administrative Law: Final Orders: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court.
6. **Administrative Law: Courts.** Neb. Rev. Stat. § 84-917(3) (Cum. Supp. 1992) provides that upon the filing of a petition for review, an agency may order a stay or the court may order a stay. The stay can only be granted, however, when the court finds that (1) the applicant is likely to prevail when the court finally disposes of the matter; (2) without relief, the applicant will suffer irreparable injuries; (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and (4) the threat to public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action in the circumstances.

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

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellants.

Fredric H. Kauffman and Susan Kubert Sapp, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and CHEUVRONT, D.J.

McCORMACK, J.

This case is an appeal by Mark B. Horton, Director of Health; the Nebraska Department of Health; and the State of Nebraska ex rel. Don Stenberg, Attorney General (all hereinafter State), from a decision of the district court for Lancaster County, Nebraska. The action was begun by the then Department of Health as a disciplinary action under the Administrative Procedure Act (Act), Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987 & Cum. Supp. 1992), against Thomas E. Miller, D.D.S. The district court reversed the decision of the Department of Health which had suspended Miller's license to practice dentistry for 30 days. We took this case upon our own motion under our power to regulate the caseloads of this court and the Nebraska Court of Appeals. We affirm.

## BACKGROUND

Miller has been licensed to practice dentistry in the State of Nebraska since July 1962, but is not licensed to practice either medicine or surgery. The Attorney General filed an action before the Department of Health against Miller in 1992, alleging that Miller had exceeded the scope of the practice of dentistry as delineated by Neb. Rev. Stat. § 71-183 (Reissue 1996) and that he had invaded the practice of medicine and surgery. The evidence adduced at the hearing showed that Miller had treated patients C.S., L.W., E.H., and Ardys Stadler during 1988 and 1989. The evidence further shows that an employee of Miller's, at Miller's request, had performed both blood and urine analyses of these patients during those time periods. Miller would then prescribe enzymes, based upon analysis and suggestions by the Nutritional Enzyme Support System (NESS) Corporation, to treat dietary deficiencies in these patients which could lead to more serious health problems such as bursitis, circulation problems, and other blood conditions, in addition to oral problems. Miller alleges that diet and nutrition are important in the practice of dentistry because diet can affect the deterioration of the teeth, jaws, and gums.

The State relied on the expert testimony of Dr. Richard Tempero for his opinions that relying on unscientific analysis to diagnose and prescribe enzyme treatments was outside the prac-

tice of dentistry and that no dental school taught such methods. Tempero testified that because the tests were not scientifically repeatable, they were unreliable as a method of diagnosing nutritional deficiencies that lead to dental problems. In its order entitled "Findings of Fact, Conclusions of Law and Order," dated November 30, 1994, the Department of Health found that Miller had practiced outside the scope of dentistry. The Department of Health, however, did not impose sanctions against Miller. Instead, the hearing officer scheduled a "dispositional hearing," at which time he would take new testimony and hear argument as to an appropriate disposition or sanction.

Miller appealed to the district court this decision finding he had practiced outside the scope of dentistry. The State demurred on the grounds that the Department of Health was waiting to hold a "dispositional hearing," and thus no disposition had been ordered in the administrative hearing. As such, the State argued that the matter was not yet ripe for judicial review by the district court. The district court overruled the demurrer, finding that there was no statutory authority for the Department of Health to hold a "dispositional hearing," but found that the Department of Health had authority to enter a disposition order in the case.

The Department of Health thereafter ordered that Miller's license to practice dentistry be suspended for 30 days. In May 1995, Miller filed a second petition, appealing both the Department of Health's original order finding that he had practiced outside the scope of dentistry and the suspension order. Miller later amended this petition. The State demurred on the grounds that the same cause of action was already pending between the two parties and that the district court had no jurisdiction over the original order because it had already decided the issue with its previous ruling. Miller then filed a motion to consolidate the two actions, which the district court granted at the same time that it overruled the State's demurrer. The district court then found that the State had failed to prove by clear and convincing evidence that Miller had practiced outside the scope of dentistry, and it reversed the orders and dismissed the proceedings against Miller by the Department of Health.

## ASSIGNMENTS OF ERROR

The State assigns that the district court erred (1) in finding that the November 30, 1994, findings of fact, conclusions of law, and order issued by the Department of Health was a final, appealable decision; (2) in overruling the State's motion to dismiss Miller's first petition for failing "to name the State of Nebraska ex rel. Attorney General Don Stenberg as a party"; (3) in overruling the State's demurrer to Miller's second petition on the basis that the district court did not have jurisdiction over the November 30 order; (4) in granting Miller's motion to consolidate the two petitions rather than dismissing one of the petitions; (5) in applying a pure de novo standard of review to the Department of Health's findings of fact and conclusions of law; (6) in interpreting what the scope of the practice of dentistry involved as set forth in § 71-183; and (7) in finding that Miller had practiced within the authorized scope of dentistry in testing his patients' urine and blood for nutritional deficiencies and prescribing enzymes as treatment.

## STANDARD OF REVIEW

A final order rendered by a district court in a judicial review pursuant to the Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Norwest Corp. v. State, ante* p. 574, 571 N.W.2d 628 (1997); *Wolgamott v. Abramson, ante* p. 350, 570 N.W.2d 818 (1997); *McGuire v. Department of Motor Vehicles, ante* p. 92, 568 N.W.2d 471 (1997). On an appeal under the 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. *Norwest Corp. v. State, supra*; *Vinci v. Nebraska Dept. of Corr. Servs., ante* p. 423, 571 N.W.2d 53 (1997); *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997).

Under § 84-917(5)(a), when a petition instituting proceedings for review under the Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996); *McKibbin v.*

*State,* 5 Neb. App. 570, 560 N.W.2d 507 (1997). When reviewing an order of a district court under the 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. *Norwest Corp. v. State, supra*; *Wolgamott v. Abramson, supra*; *McGuire v. Department of Motor Vehicles, supra.*

## ANALYSIS

We note at the outset that the State abandoned its second assigned error that the trial court overruled the State's motion to dismiss based on the failure "to name the State of Nebraska ex rel. Attorney General" as a party at argument, and we will not discuss the matter herein.

The State's fifth assigned error, that the standard of review applied by the district court was unconstitutional, was not argued at the district court level. Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. *Wolgamott v. Abramson, supra.* As such, the State's fifth assigned error will not be addressed.

For purposes of discussion, we consolidate the State's first, third, and fourth assigned errors to discuss the issues of whether the district court had jurisdiction over the first petition and whether the consolidation of the two petitions was proper. We will further combine the State's sixth and seventh assigned errors to assess whether the district court erred in reversing the findings of the Department of Health and in finding that Miller had practiced within the scope of dentistry.

### District Court Jurisdiction

It is the State's position that the district court did not have jurisdiction to hear Miller's appeal from the November 30, 1994, order, because the Department of Health had only made its findings of fact and conclusions of law but had not issued a disposition of the case.

In spite of the alleged infirmities in the first petition, however, the district court properly had jurisdiction over the second petition which followed the Department of Health's disposition

of the action. At that point, any jurisdictional infirmities were corrected, and the district court properly heard the matter under the provisions for judicial review outlined in the Act.

### Issuance of Stay

Miller, in his petition for review of the November 30, 1994, order, requested that the court stay the State from taking any action to affect the license holder as a result of the order, including the holding of a dispositional hearing. The court, by its order of February 10, 1995, granted this stay, finding that the Department of Health had no statutory authority to require a second dispositional hearing and that the record on this matter had been closed. Even if the district court had jurisdiction under the first petition, § 84-917(3) provides that upon the filing of a petition for review, the agency may order a stay or the court may order a stay. The stay can only be granted, however, when the court finds:

> (a) The applicant is likely to prevail when the court finally disposes of the matter, (b) without relief, the applicant will suffer irreparable injuries, (c) the grant of relief to the applicant will not substantially harm other parties to the proceedings, and (d) the threat to public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action in the circumstances.

§ 84-917(3). No such findings were made by the court in compliance with this section, and therefore the stay was improvidently granted.

### Scope of Practice of Dentistry

The State's sixth and seventh assigned errors revolve around the district court's finding that Miller had not exceeded the scope of the practice of dentistry in using nutrition analysis to treat the patients in question. We review the judgment of the district court for errors appearing on the record and will not substitute our factual findings for those of the district court where competent evidence supports those findings. *Norwest Corp. v. State, ante* p. 574, 571 N.W.2d 628 (1997); *Vinci v. Nebraska Dept. of Corr. Serv., ante* p. 423, 571 N.W.2d 53 (1997); *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997). The question, therefore, is whether the

decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

The Department of Health must prove by clear and convincing evidence its allegations that Miller *both* practiced outside the scope of dentistry *and* that he had invaded the practice of medicine. Section 71-183 provides the definition for the practice of dentistry. Specifically, § 71-183 provides that one is practicing dentistry if he or she:

> (1) Performs, or attempts or professes to perform, any dental operation or oral surgery or dental service of any kind [or]
>
> . . . .
>
> (6) [d]iagnoses, or professes to diagnose, prescribe for, or professes to prescribe for, treats, or professes to treat disease, pain, deformity, deficiency, injury, or physical condition of the human teeth or jaws, or adjacent structure.

Based upon this definition, in its order filed April 5, 1996, the district court found:

> The evidence in the record (Plaintiff's dental records and testimony) demonstrates that Plaintiff customarily utilized blood and urine analysis in the diagnosis and treatment of specific dental problems related to the teeth, jaws or adjacent structures. It is abundantly clear that the Plaintiff's concern with nutritional deficiencies pertain and relate solely to the oral problems of his patients.

The evidence in the record indicates that Miller's treatment of his patients was within the statutory definition of dentistry when that statute is read as a whole. Miller testified that the purposes of the blood and urine analyses in the four patients was to assist in prescribing an enzyme which, in turn, would aid digestion to alleviate problems that had manifested themselves in the oral cavity. Miller had never prescribed enzyme pills for non-oral conditions.

The State urges that to read § 71-183 to allow for nutritional treatment of oral problems opens a Pandora's box, whereby dentists will be performing brain surgery in order to treat oral problems. The evidence was that Miller had completed 3,000 hours of postgraduate seminar training in orthodontics, periodontal surgery, nutrition, implantology, reconstruction, and

cranial mandibular orthopedics, and was board-certified by the American Board of Oral Implantology. We emphasize, however, that the holding announced in this case is based upon a failure by the Department of Health to prove its allegations by clear and convincing evidence. No broad sweeping inferences may be made from the findings in this case. Instead, the facts of this case clearly show that Miller was using the blood and urine analyses to determine the nutrition of his patients in order to provide systemic treatment of specific oral problems.

At numerous points during his testimony, Miller pointed out to the Department of Health that he did the blood and urine analyses on the four patients in question only to prescribe an enzyme to help digestion, which in turn would help problems which had manifested themselves in the oral cavity. Miller testified at one point that a multivitamin was not as effective as using the specific enzymes that the blood and urine tests could suggest. Miller further testified that he never prescribed any of the enzyme/vitamin pills for nonoral conditions such as bursitis. It is clear from the record that Miller was performing these tests only to treat deficiencies in the oral cavity, which clearly put Miller's treatment methods within the plain meaning of § 71-183.

In addition to Miller's testimony, the testimony of the State's own expert, Tempero, supported the district court's reversal of the Department of Health's findings. At one point, Tempero testified that the use of the data compilations from the NESS company was outside the scope of practice of both dentistry *and* medicine. Tempero went on to testify that a practitioner would be within the scope of the practice of dentistry in using systemic treatment of nutritional deficiencies to treat problems in the mouth. The only contrary evidence is Tempero's testimony that he thought a reasonable dentist would not rely on the information from the NESS company.

Based upon this testimony, the district court found that the Department of Health had failed to establish by clear and convincing evidence that Miller had *both* practiced outside the scope of dentistry *and* had invaded the practice of medicine. Completely absent from the record is any positive testimony that Miller's actions invaded the scope of the practice of

medicine. Instead, the State proceeded on the negative inference that if Miller practiced outside the scope of dentistry, then he must have been invading the practice of medicine. There is nothing untenable or erroneous about the district court's decision to reverse the Department of Health's findings. Based upon the evidence adduced at the hearing, the decision of the district court comports with a commonsense reading of § 71-183. We agree with the finding of the district court that the State failed to prove its case against Miller by clear and convincing evidence, and no error appears on the record from the district court.

## CONCLUSION

We find that the district court was clearly premature in taking the appeal of the November 30, 1994, order of the Department of Health, as such order was not final. However, this infirmity was cured by the later petition by Miller, and the State conceded that jurisdiction was proper at that time.

We find that the district court was not clearly erroneous in overturning the findings of the Department of Health. The district court properly reviewed the record from the Department of Health hearing and found that the State had failed to prove its case by clear and convincing evidence, and we conclude that this finding is not clearly erroneous.

AFFIRMED.

WHITE, C.J., participating on briefs.
WRIGHT, J., not participating.

# TERRY BARGMANN AND LISA BARGMANN, HUSBAND AND WIFE, ET AL., APPELLANTS, V. SOLL OIL COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.
# JANET LUTJEN, APPELLANT, V. SOLL OIL COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.
# KEVIN TONJES AND JO ANN TONJES, HUSBAND AND WIFE, ET AL., APPELLANTS, V. SOLL OIL COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

574 N.W.2d 478

Filed February 13, 1998. Nos. S-96-1182, S-96-1183, S-96-1184.

1. **Negligence: Words and Phrases.** Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances, or the failing to do something that a reasonably careful person would do under similar circumstances.
2. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.
3. **Negligence.** Negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances.
4. ____. Duty is a question of whether a defendant is under any obligation for the benefit of a particular plaintiff; in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
5. ____. The question of whether a legal duty exists for actionable negligence is a question of law dependent upon the facts in a particular situation.
6. **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.
7. **Negligence: Presumptions.** The mere fact that an injury or accident occurred does not raise any presumption of negligence.
8. **Negligence: Presumptions: Proof.** One alleging negligence has the burden to prove such negligence; establishing that an accident has occurred does not prove a case of negligence; negligence is not presumed and must be proved by evidence, direct or circumstantial.
9. **Negligence.** Res ipsa loquitur is a qualification of the general rule that negligence is not to be presumed.
10. ____. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
11. ____. One who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.
12. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the

movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

13. **Negligence.** One cannot be negligent in failing to perform an act which one did not in the first instance have a duty or obligation to perform.
14. ____. If there is no duty owed, there can be no negligence.
15. **Torts: Nuisances: Liability: Proximate Cause: Negligence.** In a law action one may be subject to liability for a tortious private nuisance (1) if the defendant's conduct is a proximate cause of an invasion of another's interest in the private use and enjoyment of land and (2) if the invasion is intentional and unreasonable or is otherwise actionable under rules controlling liability for negligence or liability for abnormally dangerous conditions or activities.
16. **Nuisances: Words and Phrases.** An invasion is intentional if the actor acts for the purpose of causing it or knows that it is resulting or is substantially certain to result from his or her conduct.
17. **Nuisances: Property: Words and Phrases.** If a defendant's conduct unavoidably results in an interference with the use and enjoyment of another's property, the interference is intentional in the sense that the interference was substantially certain to follow from the defendant's conduct.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Shelley A. Horak for appellants.

Clarence E. Mock, of Johnson and Mock, for appellee Soll Oil Co.

Shirley K. Williams, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellee Derald Bargmann.

Don Stenberg, Attorney General, and William L. Howland for intervenor State of Nebraska.

CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

## I. STATEMENT OF CASE

This appeal involves three related suits in which the plaintiffs-appellants, Terry Bargmann and Lisa Bargmann, husband and wife, and Maressa Bargmann, Alyssa Bargmann, and Mariah Bargmann, minors, by and through their father and natural guardian, Terry Bargmann, in case No. S-96-1182; Janet Lutjen in case No. S-96-1183; and Kevin Tonjes and Jo Ann

Tonjes, husband and wife, and Eric Andrews, Ellen Andrews, and Blake Tonjes, minors, by and through their mother and natural guardian, Jo Ann Tonjes, in case No. S-96-1184, assert that they suffered damages through the torts of the defendants-appellees in each case, Soll Oil Company, a Nebraska corporation; David Soll; and Derald Bargmann, doing business as Bargmann Corner Service. In each case the parties filed motions for summary judgment, and in each case the district court sustained the defendants' motions. The plaintiffs thereupon appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in finding that none of the defendants had (1) been negligent or (2) created a nuisance. Under our authority to regulate this court's caseload and that of the Court of Appeals, we removed the matter to this court's docket. We affirm in part, and in part reverse, and remand for further proceedings.

## II. SCOPE 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. *Chelberg v. Guitars & Cadillacs, ante* p. 830, 572 N.W.2d 356 (1998); *Battle Creek State Bank v. Preusker,* ante p. 502, 571 N.W.2d 294 (1997).

## III. FACTS

It is sufficient for purposes of this appeal to state that in each case, the plaintiffs have suffered damages as the result of petroleum contamination in and around their homes, including vapors coming from their sump pits. There is evidence that a plume of contamination runs from Derald Bargmann's service station operation to the plaintiffs' homes, which is joined by a second plume of contamination originating at the Soll Oil operation. The contamination around the plaintiffs' homes was first discovered in September 1994.

David Soll worked for Neel Oil beginning in 1976 or 1977 and purchased Neel Oil in 1977 or 1978. How or when Soll transferred his purchase to Soll Oil or whether it was Soll Oil

that made the original purchase is far from clear; we therefore refer to the operation as that of the Soll interests. In 1985, the Soll interests sold the bulk plant, which consisted of six aboveground tanks. According to Soll, none of the six tanks at the bulk plant ever leaked.

After 1985, the Soll interests' business consisted solely of a service station operated adjacent to the bulk plant location. The Soll interests stopped selling gasoline at the service station in 1992, and the tanks were removed in 1993. The tanks were not tested for tightness during the time the Soll interests sold gasoline, from 1977 to 1992. In order to determine if any product was missing, the Soll interests took a physical inventory each month and compared that figure to how much product had been sold. Soll stated that no overflows occurred while he operated the business and that no spillage ran into the pit on the property.

In 1993, the Soll interests removed the underground tanks and hired Welding Construction to take soil samples before filling the holes left by the removal. Welding Construction never informed the Soll interests of any possible contamination problems. After the tanks were excavated, there may have been a minimal amount of discoloration in the soil underneath the removed tanks. No steps were taken to clean the possibly discolored soil, and the holes were not filled for approximately 6 months, notwithstanding that the Nebraska Department of Environmental Quality had instructed that the holes be filled as soon as possible. There is evidence that the failure to fill the holes probably allowed rain and snow to collect in them. At some point, Kevin Tonjes inspected the tanks which had been dug out of the ground and noticed that some of them had holes.

Derald Bargmann leased the property from which he operates his service station beginning in 1957 and purchased it in 1960. This location has been the site of service stations selling petroleum products out of tanks since the 1920's. In approximately 1959 or 1960, Derald Bargmann's two underground storage tanks were placed above ground. According to him, the soil surrounding these two tanks was normal in color, appearance, and odor, and there were no signs that either tank had leaked.

Derald Bargmann habitually looks at his aboveground tanks on almost a daily basis and never observed any product leaking

from them. No visual inspection has ever disclosed any problems, and no employee reported any leaks. An October 3, 1994, test indicated that none of the product lines running from the pumps were leaking, and no leaks have ever been discovered or suspected.

Until the late 1960's or early 1970's, Nebraska/Iowa Supply monitored the amount of product going into and coming out of the service station tanks through the use of meters and by stick testing. No shortages or lost product was ever found. In the late 1960's or early 1970's, Derald Bargmann began conducting his own inventory and followed the same procedure formerly used by Nebraska/Iowa Supply to regularly compare the amount of product going into each tank to the amount going out. The tanks are now equipped with sight gauges, which eliminate the need for using measuring sticks. The fire marshal also annually inspects the service station.

Flora Johnson, Derald Bargmann's bookkeeper since 1984, stated that in conducting inventories, an employee gives her a daily meter reading and a stick or sight-gauge reading, which she then records. Johnson also records the amount of product delivered, which information is given by the transport drivers delivering the product, and records the readings taken before and after delivery. At the end of each week, Johnson compares the figures to check for any discrepancies. According to her, except for one occasion, these weekly figures have always matched. On that occasion, a weekly comparison of the inventory and stick measurement revealed a possible problem with one aboveground tank. Derald Bargmann then put a small amount of fuel into the suspect tank, took a stick measurement that evening, and took another stick measurement the next morning. The second measurement varied from the previous evening's measurement, and Derald Bargmann pumped the fuel out of the tank and never used it again. According to him, the soil around this tank was not discolored and did not give off an unusual odor, there were no visible leaks or holes in the tank, and it was not thought that a significant amount of product had been lost. Thus, the soil was not tested. Derald Bargmann stated that this is the only incident where a leak has been suspected. At a later time, this tank failed a leakage test. However, Derald

Bargmann had not been using this tank since the discovery of the possible leak.

Terry Bargmann worked for Derald Bargmann for 10 years. Terry Bargmann recalls only the one episode during those 10 years where a tank was found to be leaking. According to Terry Bargmann, around 1986 or 1987, after discovering a shortage in one of the tanks via a meter reading, a small amount of gasoline was put in the tank to test it. Upon finding that gasoline was being lost, use of the tank was stopped altogether. Terry Bargmann also stated that he did not notice anything out of the ordinary around the tank and could not tell just by looking at the outside of the tank that it was losing gasoline.

Derald Bargmann maintains one waste-oil tank, which has operated without incident. Some splashing around the fill pipe of the waste-oil tank has occurred, resulting in some soil discoloration. This discolored soil (a couple of feet in all) was removed in 1994. Kurt Gatzemeyer, Derald Bargmann's employee, recited the methods used by Derald Bargmann to conduct his inventory. One of Gatzemeyer's duties was putting waste oil into a tank, and while performing this task, he once caused an insignificant amount of waste oil to splash out. According to Gatzemeyer, all of the soil discolored by this splashing was removed.

Jim Heine, a deputy Nebraska State Fire Marshal whose duty it is to inspect petroleum storage tanks, stated that he inspected Derald Bargmann's operation on October 3, 1994. At that inspection, Heine told Derald Bargmann that four of his above-ground tanks no longer met the current code, after which Derald Bargmann removed them from service. According to Derald Bargmann, these removed tanks did not have any holes or show any signs of leakage. Heine also noticed some discolored soil surrounding the area of Derald Bargmann's waste-oil tank, but is of the opinion that it would take far more than the amount of spillage he saw at that time to cause the petroleum contamination problem at issue. Heine finally stated that in his opinion, Derald Bargmann's service station was operated in an appropriate manner in compliance with the standards in the petroleum marketing industry in the area.

In or around January 1995, Derald Bargmann hired Coranco, Inc., to analyze and remedy any problems at his service station. According to Coranco employee Ralph Martin, there is contamination of unknown age at the service station. Martin is of the view that the majority of the contamination at the service station is historic, dating to the 1920's, and not related to the current operations.

In Martin's view, the contamination at Derald Bargmann's service station, the Soll interests' operation, and an oil truck fire in 1959 might all have contributed to the contamination of the plaintiffs' homes. Martin testified that the Soll interests contributed to the overall contamination problem by leaving open the holes resulting from the removal of underground tanks, thereby allowing rainwater to run onto the contaminated soil. Based on his data, the contamination seems to be traveling with the ground water.

In September 1994, the Nebraska Department of Environmental Quality hired Terracon Environmental to assess and remedy the contamination problem and to pinpoint the source of the contamination. Stephen K. Bunting, a Terracon employee, is of the view that Derald Bargmann's operation is the source of contamination under the Terry Bargmann and Tonjes residences and that both Derald Bargmann's operation and the Soll interests' operation are the sources of contamination under the Lutjen residence. Bunting found no other areas of possible sources for the ground water contamination.

Bunting investigated some underground gasoline storage tanks which had been removed from the Soll interests' property and discovered that they were corroded and had holes and pitting in them. Terracon tested soil samples from the excavation area, and the results showed no significant impact. Terracon also reviewed a report on a nearby oil-truck fire occurring in 1959 and concluded that if the fire did result in a spill, it would not have contributed to the contamination at the plaintiffs' homes.

## IV. ANALYSIS

### 1. NEGLIGENCE

Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar cir-

cumstances, or the failing to do something that a reasonably careful person would do under similar circumstances. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995). In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty. *Gans v. Parkview Plaza Partnership, ante* p. 373, 571 N.W.2d 261 (1997); *Whalen v. U S West Communications, ante* p. 334, 570 N.W.2d 531 (1997). Negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances. *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 240 N.W.2d 32 (1976).

Duty is a question of whether a defendant is under any obligation for the benefit of a particular plaintiff; in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. *Gans, supra*; *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995). The question of whether a legal duty exists for actionable negligence is a question of law dependent upon the facts in a particular situation. *Gans, supra*; *Whalen, supra.*

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. *Whalen, supra.* So viewed, the evidence establishes that the contamination on the plaintiffs' properties originates at Derald Bargmann's service station and the Soll interests' operation. However, there is no evidence linking the contamination to any specific negligent act.

The mere fact that an injury or accident occurred does not raise any presumption of negligence. See, *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987); *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986); *Beck v. Ideal Super Markets of Nebraska, Inc.*, 181 Neb. 381, 148 N.W.2d 839 (1967); *Watenpaugh v. L. L. Coryell & Son*, 135 Neb. 607, 283 N.W. 204 (1939). "One alleging negligence has the burden to prove

such negligence. Establishing that an accident has occurred does not prove a case of negligence. [Citations omitted.] Negligence is not presumed and must be proved by evidence, direct or circumstantial." *Holden*, 224 Neb. at 474, 398 N.W.2d at 701.

Res ipsa loquitur is a qualification of the general rule that negligence is not to be presumed. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995). However, it is clear that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Because the plaintiffs alleged specific acts of negligence in their petitions, the doctrine of res ipsa loquitur is inapplicable.

The plaintiffs argue in their briefs that Derald Bargmann was negligent in not investigating the possibility of contamination after he discovered that one of his tanks was leaking. They also urge that the Soll interests were negligent in not investigating the possible contamination in the soil underneath their excavated underground tanks.

The evidence establishes that after a routine inventory check revealed a leak in one of his tanks, Derald Bargmann did not check for any possible contamination. However, it is uncontroverted that the soil surrounding this tank showed no signs of contamination and that there were no visible leaks or holes in the tank. The evidence also establishes that the underground tanks the Soll interests excavated were corroded and that some product had leaked into the soil. But not only is there no evidence as to when the corrosion developed, it is uncontroverted that the company the Soll interests hired to analyze the soil underneath the excavated tanks never told the Soll interests of any problems.

More importantly, the plaintiffs failed to present any evidence as to the standard of care owed by one in the business of storing and selling petroleum products. One who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities. *Topil v. Hub Hall Co.*, 230 Neb. 151, 430 N.W.2d 306 (1988). Noting in

*Topil* that the plaintiffs therein had offered no expert testimony to establish the skill and knowledge of framing carpenters, we held that the record failed to show a breach of any duty owed to the plaintiffs by the defendants. In *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985), the school district alleged that an architect was negligent in preparing the contract documents for the construction of a school building. We, however, held that because there was no evidence on the applicable standard of care owed by architects in preparing contract documents, the district court was correct in refusing to address the school district's allegation of negligence. See, also, *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997) (expert testimony required in negligence cases when defendant held to standard of care outside common knowledge and experience of ordinary persons).

After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. See, *Chelberg v. Guitars & Cadillacs, ante* p. 830, 572 N.W.2d 352 (1998); *Brown v. American Tel. & Tel. Co.*, 252 Neb. 95, 560 N.W.2d 482 (1997); *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995). Because with respect to Derald Bargmann the record lacks any evidence as to the applicable standard of care and because there is no evidence regarding what specific acts of negligence by him caused the contamination, the district court was correct in finding that as a matter of law the record failed to establish that he breached any duty. One cannot be negligent in failing to perform an act which one did not in the first instance have a duty or obligation to perform. *Bakody Homes & Dev. v. City of Omaha*, 246 Neb. 1, 516 N.W.2d 244 (1994). If there is no duty owed, there can be no negligence. *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 240 N.W.2d 32 (1976).

However, with respect to the Soll interests, the situation is otherwise. In that regard, there is evidence that the Soll interests' failure to close the holes resulting from the removal of the

underground tanks contributed to the contamination. Thus, the district court was incorrect in finding that as a matter of law the record failed to establish that the Soll interests breached any duty.

### 2. Nuisance

In the second and final assignment of error, the plaintiffs urge that the district court erred in ruling that the defendants were not liable for having created a private nuisance.

We have adopted the law of nuisance as articulated in the Restatement (Second) of Torts. See, *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994); *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989). Thus, in a law action one may be subject to liability for a tortious private nuisance (1) if the defendant's conduct is a proximate cause of an invasion of another's interest in the private use and enjoyment of land and (2) if the invasion is intentional and unreasonable or is otherwise actionable under rules controlling liability for negligence or liability for abnormally dangerous conditions or activities. *Hall, supra.*

There is no evidence or claim that the storing of petroleum products in tanks is an abnormally dangerous activity; thus, we need not decide whether we would impose strict liability on either defendant for abnormally dangerous, otherwise known as ultrahazardous, activities. See *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). Next, we consider whether there is any evidence that Derald Bargmann or the Soll interests acted intentionally.

An invasion is intentional if the actor acts for the purpose of causing it or knows that it is resulting or is substantially certain to result from his or her conduct. Restatement (Second) of Torts § 825 (1979). If a defendant's conduct unavoidably results in an interference with the use and enjoyment of another's property, the interference is "intentional" in the sense that the interference was " 'substantially certain to result' " from the defendant's conduct. *Hall*, 231 Neb. at 272, 436 N.W.2d at 142. There being no evidence that Derald Bargmann was negligent or acted for the purpose of causing petroleum contamination or that an invasion was substantially certain to follow from his conduct,

the district court did not err in ruling that as a matter of law he did not create a private nuisance.

However, the situation is otherwise with respect to the Soll interests. Since it cannot be determined as a matter of law that the Soll interests were not negligent, the district court erred in determining as a matter of law that they did not create a nuisance, notwithstanding a lack of evidence that they did not intentionally interfere with the plaintiffs' use and enjoyment of their property.

## V. JUDGMENT

Accordingly, the judgment of the district court is, as foreshadowed in part I, affirmed as to Derald Bargmann and reversed as to the Soll interests, and the cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., participating on briefs.
STEPHAN and MCCORMACK, JJ., not participating.

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STATE OF NEBRASKA, APPELLEE,
v. STACEY L. FLETCHER, APPELLANT.
573 N.W.2d 752

Filed February 13, 1998. No. S-97-634.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest.** To establish a violation of the Sixth Amendment based on a conflict of interest, a defendant who raises no objection at trial must demonstrate (1) that his or her lawyer actively represented conflicting interests and (2) that the actual conflict of interest adversely affected the lawyer's performance.
3. **Effectiveness of Counsel: Conflict of Interest: Proof.** While a defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, such conflict of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
4. **Effectiveness of Counsel: Conflict of Interest.** An asserted conflict of interest must be actual, rather than speculative or hypothetical.

5. **Postconviction: Appeal and Error.** Postconviction proceedings are not available to secure review of issues which were or could have been litigated on direct appeal.

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

Leonard P. Vyhnalek for appellant.

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

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

Stacey L. Fletcher appeals the district court's denial of his motion for postconviction relief. We affirm.

## BACKGROUND

On February 19, 1992, Fletcher and Ira Leon entered the Barn Store in Lincoln County, Nebraska, with the intent to rob it. When they approached the clerk and indicated their intent to rob the store, she began to yell and ran toward the backroom. Leon pummeled the clerk about the head with a tire iron, killing her. Cash was then removed from the register and split between Fletcher and Leon. Fletcher was later arrested and taken to the police department, where he confessed to his involvement in the crime.

Patrick B. Hays was the court-appointed defense counsel for Fletcher. Robert P. Lindemeier, the public defender, was representing Leon, Fletcher's codefendant. Hays rented office space from Ronald A. Ruff of the Ruff, Nisley and Lindemeier law firm. That firm was located in a building owned by Ruff and his father. Hays shared office space, certain office equipment, and secretaries with Lindemeier. Hays testified that he did not recall providing Lindemeier with any information which was not available through depositions or police reports.

Fletcher was initially charged with aiding and abetting a robbery and with first degree murder in the perpetration or attempt to perpetrate a robbery. The information was later amended to a charge of robbery and premeditated first degree murder. Fletcher, in a plea bargain, pled nolo contendere to the original

charges of felony murder and aiding and abetting a robbery. As part of that plea bargain, the State charged Fletcher with aiding and abetting a robbery rather than robbery, and with felony murder rather than premeditated murder as in the amended information. The State also agreed to dismiss three other felony charges for assaults in the jail while Fletcher was incarcerated. In addition to pleading no contest to those reduced charges as part of his consideration for the plea bargain, Fletcher agreed to give up any right he had to contest his convictions on constitutional grounds.

Fletcher then wanted to withdraw his plea, which request was denied by the trial court; this denial was appealed to the Supreme Court, which affirmed the trial court's decision in a memorandum opinion, case No. S-92-1099, filed May 20, 1993.

Fletcher filed a pro se motion for postconviction relief in the district court for Lincoln County, Nebraska, claiming that his constitutional rights had been violated because he had been sentenced for both robbery and felony murder in the perpetration of the same robbery and because he had been denied effective assistance of counsel. The trial court appointed Leonard P. Vyhnalek to represent Fletcher in his postconviction proceeding and granted Fletcher an evidentiary hearing. At the hearing, the district court took judicial notice of the complete court file in the matter and received into evidence Fletcher's deposition and testimony from Hays. After the hearing, the district court denied postconviction relief, concluding that double jeopardy did not attach and that Fletcher's claim of ineffectiveness of counsel was without merit. The district court further found that the representation of Fletcher by Hays met the highest standards associated with legal representation. Fletcher now appeals the district court's decision.

## ASSIGNMENTS OF ERROR

Fletcher assigns as error (1) the district court's finding that the Lincoln County public defender and court-appointed counsel for Fletcher did not have a conflict of interest, (2) the district court's failure to vacate the sentence for aiding and abetting a robbery when Fletcher had also been sentenced for a felony murder charge, and (3) the district court's failure to retroac-

tively apply *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996), and *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

## STANDARD OF REVIEW

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997); *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996); *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996).

## ANALYSIS

### Ineffective Assistance of Counsel

Fletcher first assigns as error the district court's finding that the Lincoln County public defender and Fletcher's court-appointed counsel worked independently of each other and did not have a conflict of interest. We disagree with this assertion.

To establish a violation of the Sixth Amendment based on a conflict of interest, a defendant who raises no objection at trial must demonstrate (1) that his or her lawyer actively represented conflicting interests and (2) that the actual conflict of interest adversely affected the lawyer's performance. *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994); *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990); *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990), *denial of habeas corpus affirmed sub nom. Schneckloth v. Dahm*, 994 F.2d 843 (8th Cir. 1993).

While a defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, such conflict of interest must be shown to have resulted in counsel's conduct detrimental to the defense. *State v. Marchese, supra.* Further, the asserted conflict of interest must be actual, rather than speculative or hypothetical. *State v. Carter, supra.*

We therefore turn to an examination of the record to determine whether Hays actually represented conflicting interests. Hays testified that although he did rent office space from a senior partner in the firm which included Lindemeier (the public defender), Hays was an independent practitioner. He testified that he did not recall sharing any information with

Lindemeier which could not have been found in police reports or in other sources. Moreover, Fletcher did not introduce any evidence to support his claim that he was prejudiced by the rental agreement. Fletcher testified that he could not prove any confidential communications he had with Hays were made known to Lindemeier. We conclude the trial court was not clearly erroneous in finding that there was no conflict between Hays and Lindemeier.

Although we conclude there is not a conflict in this case, we point out that both the trial court and the practicing bar should be cognizant of the mischief that can be created in the appointment of defense counsel who has an office-sharing arrangement with counsel for a codefendant.

## DOUBLE JEOPARDY

We now turn to a consideration of Fletcher's last two assignments of error. Fletcher argues that the district court should have vacated his sentence for aiding and abetting a robbery because a sentence for the underlying felony in a felony murder case constitutes double jeopardy. Fletcher points this court to the cases *State v. McHenry, supra*, and *State v. Nissen, supra*, which hold that sentencing for the underlying felony and felony murder constitutes double jeopardy, and argues that it was error for the district court not to retroactively apply those cases.

Fletcher's double jeopardy claim is without merit. Postconviction proceedings are not available to secure review of issues which were or could have been litigated on direct appeal. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997); *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991). The issue of double jeopardy could have been litigated on direct appeal. Therefore, review is not available for this issue in this postconviction proceeding.

Because Fletcher was procedurally barred from raising the double jeopardy issue, the district court was correct in denying Fletcher's postconviction motion requesting that his sentence for aiding and abetting a robbery be vacated. Therefore, Fletcher's second assignment of error is without merit.

We do not reach Fletcher's third assignment of error because his claim is procedurally barred.

## CONCLUSION

Having found Fletcher's first and second assignments of error to be without merit, and not having reached the third assignment of error, the decision of the district court is affirmed.

AFFIRMED.

WHITE, C.J., participating on briefs.

CAPORALE, J., concurring.

While I agree with the judgment reached by the majority, I write separately because I think writing that there was no conflict between Patrick B. Hays and Robert P. Lindemeier overstates the situation. The controlling fact is merely that there was no actual conflict which was proved detrimental to Hays' representation of Fletcher.

But I also submit that the trial bench and practicing bar are entitled to a bit more guidance than simply being advised that they should be cognizant of the mischief which can be created by the appointment of office-sharing counsel with competing interests.

Three separate canons of our Code of Professional Responsibility address the concerns such representation raises. Canon 4 requires that a lawyer preserve the confidences and secrets of a client. Canon 5 requires that a lawyer exercise independent professional judgment on behalf of a client. Canon 9 requires that a lawyer avoid even the appearance of professional impropriety. More specifically, Canon 5, DR 5-105(D), provides that if "a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate, *or any other lawyer affiliated* with the lawyer or his or her firm may accept or continue such employment." (Emphasis supplied.)

The public could well consider it difficult, if not impossible, for attorneys sharing staff, equipment, or space to preserve the confidences and secrets of clients and to exercise independent professional judgment on behalf of those clients. Thus, the American Bar Association specifically noted in ABA Comm. on Ethics and Professional Responsibility, Informal Op. 995 at 156-57 (1975): "In [the unpublished] Informal Opinion 284 we held: 'Two lawyers who share offices, although not partners, bear such close relation to one another as to bring [the canon

prohibiting the representation of conflicting interests] into play.' " A formal American Bar Association opinion issued in 1934 concluded that attorneys sharing office facilities should act as if they are members of the same firm on questions that may involve a conflict of interest. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 104 at 356 (1967) declared: "An attorney who shares a law office with a police judge, although the two are not partners, may not represent persons arraigned before the police judge." The opinion noted that "the public, knowing of their intimate relation as office associates, may infer that there is some influence operating in their establishment . . . and against inference, however unfounded, [the attorneys sharing office facilities] should guard themselves." *Id.* at 357. More recently, the Wisconsin State Bar Standing Committee on Professional Ethics concluded that "the rule that prohibits an attorney in a firm from accepting employment because another attorney in the firm is so prohibited due to a conflict of interest also extends to attorneys sharing office facilities. *Wis. B. Bull.*, June 1979 Supplement, at 94 (Memorandum Opinion 2-78, n.d.)." Olavi Maru, 1980 Supplement to the Digest of Bar Association Ethics Opinions ¶ 13222 at 619 (1982).

It is the foregoing precepts that the bench and bar need to keep in mind.

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