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# NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLANT, AND NEBRASKA INDEPENDENT TELEPHONE ASSOCIATION ET AL., INTERVENORS-APPELLEES.

590 N.W.2d 840

Filed March 19, 1999. No. S-97-1367.

1. **Public Service Commission: Administrative Law.** The Nebraska Public Service Commission is an agency within the meaning of the Administrative Procedure Act, and the Administrative Procedure Act's provisions apply to the Nebraska Public Service Commission.
2. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court's standard of review is for errors appearing on the record.
3. **Administrative Law: Legislature: Appeal and Error.** If the Legislature has provided an appellate procedure other than the Administrative Procedure Act for appeals from an administrative agency, the Administrative Procedure Act does not apply; but to the extent that another method of appeal has not been provided, the Administrative Procedure Act controls.
4. **Administrative Law: Appeal and Error.** When the Administrative Procedure Act is inapplicable because another method of appeal has been prescribed and the standard of review has not otherwise been specified, the standard of review will be to search only for errors appearing on the record.
5. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
6. **Judgments: Appeal and Error.** When reviewing an order 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.
7. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.
8. **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 conclusions independent from those of the trial court.
9. **Public Service Commission: Jurisdiction.** Neb. Rev. Stat. § 75-109 (Reissue 1996) does not provide the Nebraska Public Service Commission with general statutory jurisdiction over all common and contract carriers; rather, such jurisdiction may be exercised only as provided by law.
10. **Words and Phrases.** The phrase "provided by law" means prescribed or provided by statute.
11. **Public Service Commission: Jurisdiction.** The Nebraska Public Service Commission may regulate and exercise general control over common and, by definition, contract carriers, only when such authority is provided for by some statute other than Neb. Rev. Stat. § 75-109 (Reissue 1996).

12. **Public Service Commission.** Neb. Rev. Stat. §§ 75-604 to 75-616 (Reissue 1996) and 86-801 to 86-811 (Reissue 1994) apply only to common carriers.
13. **Constitutional Law: Statutes.** Where a statute is susceptible of two constructions, under one of which the statute is valid while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted.
14. **Constitutional Law: States: Administrative Law.** The state cannot, consistent with constitutional guaranties against infringement upon private property rights, by legislative fiat or edict or by the orders of an administrative commission, arbitrarily impose the character or status of a common carrier upon a mere private carrier or other person who has not devoted his property to such a public use.
15. **Constitutional Law: Public Service Commission: Jurisdiction.** The Nebraska Public Service Commission has the inherent constitutional authority to regulate common carriers under article IV, § 20, of the Nebraska Constitution; however, the powers enumerated in article IV, § 20, apply only to common carriers.
16. ____: ____: ____. The term "common carriers," as used in article IV, § 20, of the Nebraska Constitution, is coextensive with the meaning of that phrase at common law, and thus, the Nebraska Public Service Commission does not have constitutional authority over contract carriers.
17. **Administrative Law: Legislature.** In the absence of constitutional authority, an administrative agency has only that power which has been granted to it by the Legislature.
18. **Legislature: Public Service Commission: Jurisdiction: Statutes.** When the Legislature grants the Nebraska Public Service Commission jurisdiction over noncommon carriers, the Nebraska Public Service Commission must exercise such authority completely within the statutory scheme.

Appeal from the Nebraska Public Service Commission. Reversed and dismissed.

James A. Eske and Kile W. Johnson, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, and Harold L. Hadland for appellant.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, for intervenors-appellees.

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

CONNOLLY, J.

Appellee, the Nebraska Public Service Commission (PSC), initiated an investigation to determine whether it had jurisdiction over appellant, the Nebraska Public Power District (NPPD). The PSC determined that the NPPD was providing intrastate telecommunications services for hire as a contract

carrier and that such carriers fell within the PSC's jurisdiction. We conclude that the PSC does not have jurisdiction over telecommunications contract carriers, and therefore, we reverse, and dismiss.

## BACKGROUND

### NPPD's Internal Communications Network

The NPPD is a public corporation and political subdivision of the State of Nebraska, *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998), which operates an electrical utility system and generates, transmits, distributes, and sells electricity within its chartered territory, *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). To operate its electrical system, the NPPD requires an internal communications network, which is primarily designed to assist the NPPD in operating its protective equipment. The communications network is also used to transmit voice and data between the NPPD's offices. In the past, the NPPD and other utilities used 2-gigahertz band frequencies for analog microwave communications pursuant to Federal Communications Commission (FCC) licenses. However, in 1993, the FCC issued new rules providing policies and procedures for the mandatory and voluntary relocation of 2-gigahertz users to other frequencies on the spectrum. In response to the new FCC rules, the NPPD began converting its analog microwave network to a combination of digital microwave and fiber optics.

The fiber optics were integrated into the NPPD's overhead protection ground wire, or "shield wire." The high voltage lines used by the NPPD generally have three conductors, or "phase wires." A shield wire is situated above the phase wires to protect them from lightning strikes. The shield wire is metal and generally contains no fiber optics. However, since the NPPD and other utilities were required by the FCC to relinquish their 2-gigahertz microwave communications systems, shield wire manufacturers have put fiber optics on the inside of their metal shield wires. Shield wire containing fiber optics is thus able to protect phase wires from lightning strikes and transmit communications.

NORTHEAST COMMUNITY COLLEGE
DISTANCE LEARNING NETWORK

The Northeast Community College (NCC) campus is located in Norfolk, Nebraska. Through affiliation agreements with public and private schools, community organizations, municipal entities, business and industry, and other organizations, the NCC provides educational and training offerings throughout northeast Nebraska. The NCC's outreach program offers instruction to off-campus students via television, onsite instruction, and interactive video distance learning programs.

In 1994, a consulting firm was hired by secondary and postsecondary educational institutions in the northeast Nebraska area to conduct a feasibility study of the region's telecommunications needs. As a result of the study, an interactive video distance learning program was developed to deliver educational programming from the NCC to the Niobrara Valley Partnership, consisting of 13 school districts; the Northeast Nebraska Telepartnership, consisting of 8 school districts; and the Elkhorn Valley Partnership, consisting of 8 school districts. The distance learning programs were delivered to these partnerships by U S West at a cost of $18,420 per year.

However, the consulting firm's study indicated that the cost of providing distance learning programs to the South Sioux City area was prohibitive, since that area was in another local access transport area, or LATA. See Neb. Rev. Stat. § 86-802(9) (Reissue 1994). See, also, *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989) (explaining LATA's). Due in part to the toll charges involved in crossing a LATA "boundary," it was expected to cost $47,148 a year to provide distance learning programs to South Sioux City. Thus, according to the NCC's calculations, it would have cost 2.6 times more to provide distance learning programs to one site than it cost to reach 29 other sites.

During the course of the consulting firm's study, it was discovered that the NPPD was upgrading and replacing a service line running from its Norfolk substation to the IBP plant substation in Dakota City and that the shield wire in the NPPD's upgraded line would contain fiber optics. The NPPD's new fiber

optic line would cross the LATA boundary and would not be subject to toll charges.

The NCC contacted the NPPD to determine whether there would be enough reserve capacity in the NPPD's fiber optic network to accommodate the NCC's distance learning program needs. Meetings were held between the NPPD, the NCC, the city of South Sioux City, and other educational partners, and it was determined that there was enough excess capacity in the fiber optic network to transmit educational programs between Norfolk, Wayne, and South Sioux City.

The NPPD and the NCC entered into an agreement on July 29, 1996, to provide the NCC with access to the NPPD's fiber optic network between Norfolk and South Sioux City. The NCC, Wayne State College, and South Sioux City were to provide the connection from their facilities to "splice points" on the NPPD's fiber optic network. In addition, the NCC was to pay the NPPD an annual fee of $6,576 for the use of the NPPD's fiber optic network, which fee was designed to recover the NPPD's costs and would not result in any profit to the NPPD.

The NCC established a fiber optic line from its campus to a midspan splice point on the NPPD's network, and South Sioux City established a fiber optic line from its technology center to the NPPD's IBP substation in Dakota City. Wayne State College had not yet connected to the NPPD's network as of March 25, 1997, but planned to do so later that year.

### City of Norfolk's Internet Connection

The city of Norfolk's public library provides Internet access to its patrons, which patrons include a significant number of nonresidents. The city of Norfolk determined that its Internet service provider was unreliable, so it began looking for an alternative mechanism by which it could provide reliable, high-speed Internet access. The city of Norfolk also sought to develop an internal communications network linking its various offices.

The city of Norfolk discovered that the NPPD was providing the NCC and the city of South Sioux City with access to the NPPD's fiber optic network and asked the NPPD for similar

access. On February 3, 1997, the NPPD agreed to provide Norfolk with access to the NPPD's fiber optic network on substantially the same terms as the NPPD provided such access to the NCC and South Sioux City. CableCom of Norfolk would install fiber optic lines in Norfolk that linked the city's offices to develop an internal communications network. CableCom would also connect this network to the NPPD's fiber optic network. The city of Norfolk would then use South Sioux City's fiber optic line running from the NPPD's IBP substation to South Sioux City's technology center, where U S West would install a frame relay connection linking the technology center with Pioneer Internet. Pioneer Internet, a subsidiary of Longlines Phone Company, would act as the city of Norfolk's Internet service provider.

As of March 25, 1997, the only line that had been completed was the connection between the city of Norfolk and the NPPD's fiber optic network.

## PSC'S INVESTIGATION

Based on the NPPD's agreements with the NCC and the city of Norfolk, the PSC, on its own motion, opened an investigation to determine whether the NPPD was offering intrastate telecommunications services on a for-hire basis, such that the NPPD would be subject to the PSC's jurisdiction. Petitions for formal intervention were then filed by the Nebraska Independent Telephone Association; Benkelman Telephone Company, Inc.; Wauneta Telephone Co.; Henderson Cooperative Telephone Co.; AT&T Communications of the Midwest, Inc.; and the Nebraska Telephone Association.

The Nebraska Telephone Association asked that the PSC address whether the NPPD was eligible to receive a certificate of public convenience and necessity, considering Neb. Rev. Stat. §§ 75-604 and 70-625 (Reissue 1996) and the federal Telecommunications Act of 1996, 47 U.S.C. §§ 151 to 614 (1994 & Supp. II 1996), and that the PSC order the NPPD to cease and desist from providing telecommunications services.

The PSC held a hearing on March 25, 1997, and concluded that it had jurisdiction over the NPPD pursuant to Neb. Rev. Stat. § 75-109 (Reissue 1996). The PSC issued an order finding

that the NPPD was providing telecommunications services to the NCC and the city of Norfolk on a for-hire basis, not as a common carrier but as a contract carrier, and that the NPPD was offering these services without a certificate of public convenience and necessity, as required by § 75-604. The PSC also found that it should seek the opinion of the Attorney General as to whether the NPPD, if granted a certificate of public convenience and necessity, could continue to provide the above-described services. Accordingly, the PSC ordered that the investigation remain open until further guidance was received from the Attorney General.

The Attorney General issued an opinion on September 4, 1997, which indicated that the NPPD lacked the statutory authority to provide telecommunications services for hire under §§ 75-604 and 70-625, and that this absence of authority precluded the PSC from issuing a certificate of public convenience and necessity to the NPPD. Att'y Gen. Op. No. 97045 (Sept. 4, 1997).

On October 20, 1997, the PSC held another hearing, this time to determine which certificated carriers, if any, would be able to offer telecommunications services in place of those services being provided by the NPPD to the NCC and the city of Norfolk, and to ascertain when a carrier could do so and at what price. After hearing evidence concerning the ability of other carriers to provide services similar to those provided by the NPPD, the PSC found that U S West could provide similar services to the NCC and South Sioux City for an annual charge of $24,300.72. The PSC likewise concluded that U S West could provide similar services to the city of Norfolk. Based on the Attorney General's opinion, the PSC also concluded that the NPPD lacked statutory authority to provide telecommunications services and ordered the NPPD to cease and desist from offering such services no later than December 31.

## ASSIGNMENTS OF ERROR

The NPPD asserts that the PSC erred in (1) finding that the NPPD was offering telecommunications services to the NCC and the city of Norfolk as a contract carrier on a for-hire basis; (2) finding that the NPPD's contracts with the NCC and the city

of Norfolk fell within the PSC's jurisdiction under § 75-109; (3) finding that the NPPD's contracts with the NCC and the city of Norfolk were invalid in the absence of a certificate of public convenience and necessity issued to the NPPD by the PSC under § 75-604; (4) concluding that public power districts do not have statutory authority to provide telecommunications services; and (5) issuing the cease and desist order without proper notice and hearing contrary to due process of law, in violation of Neb. Rev. Stat. §§ 75-134 (Reissue 1996) and 84-915 (Reissue 1994).

## SCOPE OF REVIEW

This court has held that in an appeal from a decision of the PSC, an appellate court examines the record to determine whether the PSC acted within the scope of its authority and whether the evidence shows that the order in question is unreasonable or arbitrary. See, e.g., *In re Application of Northland Transp.*, 239 Neb. 918, 479 N.W.2d 764 (1992); *Union Transfer Co. v. Bee Line Motor Freight*, 150 Neb. 280, 34 N.W.2d 363 (1948). However, this court has also held that the PSC is an "agency" within the meaning of the Administrative Procedure Act (APA) and that the APA's provisions apply to the PSC. See *Yellow Cab Co. v. Nebraska State Railway Commission*, 175 Neb. 150, 120 N.W.2d 922 (1963). In an appeal under the APA, this court's standard of review is for errors appearing on the record. Neb. Rev. Stat. § 84-918 (Reissue 1994). Accordingly, we must address which standard of review applies to appeals from the PSC.

Under Neb. Rev. Stat. § 84-919 (Reissue 1994), the APA is the exclusive means of judicial review of an agency decision in a contested case, except as otherwise provided by law. Neb. Rev. Stat. § 84-917 (Reissue 1994), which governs agency appeals to the district court, is inapplicable where other provisions of law prescribe the method of appeal. Thus, if the Legislature has provided an appellate procedure other than the APA for appeals from an administrative agency, the APA does not apply, see *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988); but to the extent that another method of appeal has not been provided, the APA controls, see § 84-919.

The Legislature has indeed provided a specific method of appeal from the PSC. See Neb. Rev. Stat. §§ 75-136 to 75-137 (Reissue 1996). Section 75-136 authorizes appeals from the PSC to the Nebraska Court of Appeals when civil penalties have not been imposed, and § 75-137 prescribes the procedure for perfecting such an appeal. However, both sections are silent as to the standard of review to be applied by an appellate court. When the APA is inapplicable because another method of appeal has been prescribed and the standard of review has not otherwise been specified, the standard of review will be to search only for errors appearing on the record. *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995). Thus, the appropriate standard of review for appeals from the PSC is a review for errors appearing on the record.

When reviewing an order 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. See *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

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 conclusions independent from those of the trial court. *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

## ANALYSIS

The PSC concluded that it had regulatory jurisdiction over the NPPD under § 75-109 because the NPPD was acting as a telecommunications contract carrier for hire. The NPPD contends that § 75-109 does not, in and of itself, grant the PSC the power to regulate all providers of communications services for hire in Nebraska intrastate commerce. Section 75-109 states:

> [T]he [PSC] shall regulate and exercise general control *as provided by law* over all common carriers, which term is hereby defined as all carriers, including contract carriers, engaged in the transportation of freight or passengers for

> hire or furnishing communication services for hire in Nebraska intrastate commerce.

(Emphasis supplied.) Thus, § 75-109 does not provide the PSC with general statutory jurisdiction over all common and contract carriers; rather, such jurisdiction may be exercised only as "provided by law."

### PROVIDED BY LAW

The phrase "provided by law" means prescribed or provided by statute. *Peile v. Skelgas, Inc.*, 242 Ill. App. 3d 500, 610 N.E.2d 813, 182 Ill. Dec. 944 (1993), *reversed on other grounds* 163 Ill. 2d 323, 645 N.E.2d 184, 206 Ill. Dec. 179 (1994); *Manchin v. Browning*, 170 W. Va. 779, 296 S.E.2d 909 (1982). See *Holzendorf v. Bell*, 606 So. 2d 645 (Fla. App. 1992). Accordingly, the PSC's statutory authority over any particular common or contract carrier must be derived from some statute other than § 75-109. To hold otherwise would be to render the phrase "provided by law" superfluous, since § 75-109 would provide general authority in and of itself. See *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 922, 573 N.W.2d 460, 465 (1998) (in construing statute, "a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute"). Thus, the PSC may regulate and exercise general control over common and, by definition, contract carriers, only when such authority is provided for by some statute other than § 75-109.

Accordingly, we must determine whether the Legislature has enacted statutes to regulate telecommunications contract carriers. If so, the PSC would administer such statutes and, thus, exercise regulatory and general control over such carriers, by virtue of § 75-109.

Neb. Rev. Stat. §§ 75-604 to 75-616 (Reissue 1996) and 86-801 to 86-811 (Reissue 1994) generally govern telecommunications providers in this state. These sections, by their plain language, purport to apply to all telecommunications carriers without distinction. Nonetheless, we can conclude only that the Legislature's failure to distinguish between various types of telecommunications carriers indicates that the Legislature

intended these statutes to apply only to common carriers. Indeed, if we were to interpret these sections as providing the PSC with jurisdiction over telecommunications contract carriers, they would be of doubtful constitutional validity.

### Constitutional Limitations on Contract Carrier Regulation

Where a statute is susceptible of two constructions, under one of which the statute is valid while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted. *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982), citing *Union Stock Yards Co. v. Nebraska State Railway Commission*, 103 Neb. 224, 170 N.W. 908, *modified on other grounds* 103 Neb. 224, 172 N.W. 528 (1919). Both this court's and the U.S. Supreme Court's precedents indicate that to interpret Nebraska's telecommunications statutes as providing the PSC with the authority to regulate contract carriers as strictly as common carriers would render the statutes unconstitutional. Thus, the statutes' ambiguity must be resolved in favor of the NPPD. See, *Michigan Commission v. Duke*, 266 U.S. 570, 45 S. Ct. 191, 69 L. Ed. 445 (1925); *Frost Trucking Co. v. R. R. Com.*, 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926); *Smith v. Cahoon*, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1931); *Stephenson v. Binford*, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288 (1932); *City of Bayard v. North Central Gas Co.*, 164 Neb. 819, 83 N.W.2d 861 (1957); *Rodgers v. Nebraska State Railway Commission*, 134 Neb. 832, 279 N.W. 800 (1938).

*Michigan Commission v. Duke, supra*; *Frost Trucking Co. v. R. R. Com., supra*; and *Smith v. Cahoon, supra*, all stand for the proposition that a contract carrier cannot be constitutionally required to meet the same standards as a common carrier. The state statute in each of these cases essentially required both private contract and common motor carriers to obtain a certificate of public convenience and necessity. In each case, the Supreme Court struck down the statute. As stated by the Court in *Michigan Commission v. Duke*, 266 U.S. at 577-78:

> [I]t is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a pri-

> vate carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment.

Likewise, as we stated in *City of Bayard v. North Central Gas Co.*, 164 Neb. at 832, 83 N.W.2d at 868:

> "It is well established that the state cannot, consistent with constitutional guaranties against infringement upon private property rights, by legislative fiat or edict or by the orders of an administrative commission, arbitrarily impose the character or status of a common carrier upon a mere private carrier or other person who has not devoted his property to such a public use."

If we were to read Nebraska's statutes governing telecommunications as requiring all telecommunications providers, whether private, contract, or common, to obtain a certificate of public convenience and necessity, then those statutes would likewise be unconstitutional. Accordingly, we conclude that Nebraska's telecommunications statutes apply only to common carriers.

## PSC'S CONSTITUTIONAL AUTHORITY

Nonetheless, the intervenors contend that the Legislature's failure to specifically define the phrase "contract carrier" in the telecommunications context is of no moment, since the PSC has the right to define that phrase under article IV, § 20, of the Nebraska Constitution. Article IV, § 20, states in part:

> The powers and duties of [the PSC] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the [PSC] shall exercise the powers and perform the duties enumerated in this provision.

Clearly, the PSC has the inherent constitutional authority to regulate common carriers under this section. See, e.g., *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989). Indeed, we have stated that in the absence of specific legislation, the powers of the PSC, as enumerated in article IV, § 20, are absolute and unqualified. *Myers v. Blair Tel.*

*Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975); *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949).

However, the powers enumerated in article IV, § 20, apply only to common carriers. The term "common carriers," as used in article IV, § 20, is coextensive with the meaning of that phrase at common law. See, e.g., *State v. Union Stock Yards Co.*, 81 Neb. 67, 115 N.W. 627 (1908). Contract carriers were not considered common carriers at common law. See *City of Bayard v. North Central Gas Co., supra*. Thus, the PSC's constitutional authority over common carriers does not extend to contract carriers. *Kopf v. Public Telephone Co.*, 173 Neb. 96, 112 N.W.2d 521 (1962). See, also, *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.*, 172 Neb. 315, 109 N.W.2d 372 (1961); *City of Bayard v. North Central Gas Co.*, 164 Neb. 819, 83 N.W.2d 861 (1957); *State v. Southern Elkhorn Telephone Co.*, 106 Neb. 342, 183 N.W.2d 562 (1921).

In the absence of constitutional authority, an administrative agency has only that power which has been granted to it by the Legislature. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). When the Legislature grants the PSC jurisdiction over non-common carriers, the PSC must exercise such authority completely within the statutory scheme. See, *In re Complaint of Fecht*, 216 Neb. 535, 344 N.W.2d 636 (1984); *Consumers P. P. Dist. v. Twin Valleys P. P. Dist., supra*. Moreover, the meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995). Therefore, the intervenors' reliance on the PSC's constitutional authority in the instant case is misplaced.

We do not express any opinion as to whether the NPPD is authorized to provide telecommunications services as a contract carrier or otherwise. The dispositive fact is that the NPPD was not acting as a common carrier as determined by the PSC. Because we have already determined that the PSC's jurisdiction does not extend to telecommunications contract carriers, we conclude that the PSC lacked jurisdiction over the NPPD. Therefore, the PSC had no authority to render any order con-

cerning the NPPD. See *City of Bayard v. North Central Gas Co., supra.*

## CONCLUSION

The PSC had no jurisdiction over the NPPD. Accordingly, the PSC's orders concerning the NPPD are null and void.

REVERSED AND DISMISSED.

STEPHAN, J., not participating.

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STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. DAVID HAROLD JACOB, APPELLEE AND CROSS-APPELLANT.
591 N.W. 2d 541

Filed March 19, 1999. No. S-98-381.

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 conclusions independent from those of the trial court.
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. **Dismissal and Nonsuit.** A plaintiff may dismiss an action without prejudice, as a matter of right, at any time before final submission of the case.
4. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of the courts of the State of Nebraska, the existence of an actual case or controversy is necessary for the exercise of judicial power.
5. **Pleadings.** Under our system of pleading and practice, and the adversarial process, issues to be tried must be formed by pleadings.
6. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Appeal dismissed.

Don Stenberg, Attorney General, and J. Kirk Brown for appellant.

David H. Jacob, pro se.

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

CONNOLLY, J.

In 1986, the appellee, David Harold Jacob, pled guilty to three counts of second degree murder and two counts of use of a weapon to commit a felony. However, the information with which Jacob had been charged did not include the element of malice in the three counts of second degree murder.

Jacob brought a postconviction action challenging his murder convictions, based on the State's failure to allege malice; the constitutionality of Neb. Rev. Stat. § 28-304 (Reissue 1995); and the State's failure to grant specific performance of Jacob's plea agreement, and claiming that the information essentially charged him with manslaughter. However, prior to a hearing on these issues, Jacob moved to dismiss the case without prejudice. The trial court, in a single order, granted Jacob's motion to dismiss, and then, on its own motion, granted Jacob postconviction relief. The trial court vacated Jacob's three murder convictions and both use of a weapon to commit a felony convictions.

## ASSIGNMENT OF ERROR

The State asks this court to overrule its holdings concerning malice announced in *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), and *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996) (both decisions *overruled, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998)).

On cross-appeal, Jacob asserts that (1) § 28-304 violates the 5th, 6th, and 14th Amendments to the U.S. Constitution, (2) the trial court erred in failing to modify Jacob's convictions to three counts of manslaughter rather than vacating them, and (3) the trial court erred in failing to enforce the plea agreement.

## SCOPE OF REVIEW

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 conclusions independent from those of the trial court. *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

## 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. Silvers*, 255 Neb. 702, 587

N.W.2d 325 (1998). We note that in the instant case, the trial court granted Jacob's motion to dismiss his petition for postconviction relief. We have held that a plaintiff may dismiss an action without prejudice as a matter of right, at any time before final submission of the case. See *Gebhart v. Tri-State G. & T. Assn.*, 181 Neb. 457, 149 N.W.2d 41 (1967), *overruled on other grounds, Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972). See, also, Neb. Rev. Stat. § 25-601 (Reissue 1995). Nonetheless, the trial court, on its own motion, proceeded to vacate Jacob's convictions due to the State's failure to include the element of malice in Jacob's murder charges. The trial court lacked the authority to do so.

While not a constitutional prerequisite for jurisdiction of the courts of the State of Nebraska, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). Once Jacob's petition was dismissed, there were no pleadings before the trial court, and thus, there was no controversy between the parties for the trial court to resolve. Under our system of pleading and practice, and the adversarial process, issues to be tried must be formed by pleadings. See *Bowman v. Cobb*, 128 Neb. 289, 258 N.W. 535 (1935). If a trial court were able to render judgments on its own motion, even when no pleadings were before the court, there would be no limit to the trial court's power. A trial court simply cannot create controversies where none exist.

We conclude that the trial court lacked the authority to vacate Jacob's convictions in the absence of any pleading giving the trial court jurisdiction, and thus, the trial court's order granting postconviction relief is a nullity. When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). For this reason, we are likewise without jurisdiction in the instant case.

APPEAL DISMISSED.

# STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. BRIAN L. JOHNSON, RESPONDENT.

590 N.W.2d 849

Filed March 19, 1999. No. S-98-465.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** The charges against an attorney in a disciplinary proceeding must be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** In a disciplinary proceeding, the Nebraska Supreme Court will not consider a party's objections to findings and conclusions of the referee where the party did not take exception to those findings or conclusions in his or her response to the referee's report.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
5. ____. For purposes of determining the proper discipline in a disciplinary proceeding, we consider a party's acts both underlying the offenses and throughout the disciplinary proceeding.
6. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.
7. ____. Repeated derogatory and inflammatory statements made by a party in a disciplinary proceeding will be taken into consideration in determining an appropriate penalty.
8. ____. The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Brian L. Johnson, pro se.

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

PER CURIAM.

This is an attorney disciplinary case in which the Nebraska State Bar Association (NSBA), relator, seeks to discipline Brian L. Johnson, respondent.

On May 15, 1998, the Committee on Inquiry of the Third Disciplinary District filed formal charges against respondent. The committee alleged that while representing defendants in a criminal proceeding in 1997, respondent violated Canon 1, DR 1-102(A)(1) and (5), Canon 2, DR 2-110(A)(1) through (3), and Canon 6, DR 6-101(A)(3), of the Code of Professional Responsibility. Pursuant to Neb. Ct. R. of Discipline 10(F), the NSBA filed additional charges alleging that while representing Darrin Hofmann in a specific performance case in 1997, respondent violated the same provisions of the Code of Professional Responsibility as stated above. The relevant provisions of the Code of Professional Responsibility are as follows:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> . . . .
>
> DR 2-110 Withdrawal from Employment.
>
> (A) In general.
>
> (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
>
> (2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
>
> (3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

. . . .

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

. . . .

(3) Neglect a legal matter entrusted to him or her.

In his answer to the charges, respondent filed a counterclaim against the NSBA, seeking money damages. This court has stricken the counterclaim.

This court referred the matter to a referee, pursuant to Neb. Ct. R. of Discipline 10(J) (rev. 1996). The referee conducted a formal evidentiary hearing on August 27, 1998, which respondent did not attend. Respondent had informed the referee that he would not attend the hearing before the referee unless he was given an assurance that he would not be questioned.

The referee found that the evidence clearly and conclusively established that respondent violated his oath and violated all six disciplinary rules stated above both in his representation of the defendants in the criminal proceeding and in his representation of Hofmann. In addition to these determinations, the referee noted a concern with respondent's attitude throughout the disciplinary proceeding, finding that he "remains generally unrepentant and . . . tends to point the blame at everyone but himself, and his general decorum and responsiveness to the entire situation reflects poorly on his past and future ability to practice law." The referee recommended that respondent be suspended from the practice of law for 2 years and that he should not be readmitted without completing a course on ethics.

In his response to the referee's report, respondent took no exception to the referee's factual findings or the referee's determinations that respondent violated certain disciplinary rules. Regarding the recommended suspension, respondent agreed that he should be suspended and added that he should also be publicly censured, but asserted that the suspension should be variable and should end upon his completion of a 100-page dissertation regarding ethics, with the specific subject to be determined by this court. However, in his brief to this court, respondent (1) asserts that the referee did not consider certain mitigating evidence; (2) provides justifications for his actions; and (3) argues that in his representation of Hofmann, respon-

dent did not violate any disciplinary rule. The NSBA took no exception to the referee's report.

## STANDARD OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997); *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997). The charges against an attorney must be established by clear and convincing evidence. See *State ex rel. NSBA v. Johnston, supra.*

## FACTS

Because respondent did not attend the hearing before the referee and did not take exception to the referee's determinations other than the recommended discipline, we do not address his arguments in his brief that contest the referee's findings. See *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995). We nonetheless conduct a de novo review of the record, and upon our review, we find the following facts:

Respondent was admitted to the practice of law in the State of Nebraska on September 28, 1995. At all times relevant to this matter, respondent was engaged in the private practice of law in Madison County, Nebraska.

Respondent was retained by five individuals to represent them on minor in possession charges. They each paid him a fee in advance. Respondent appeared with his clients at their arraignments. He filed a motion to suppress evidence on behalf of each client. The hearing on the motion to suppress was scheduled for June 30, 1997. The clients appeared, but respondent did not. The clients waited at the courthouse and repeatedly tried to contact him. Eric Ford, one of the clients, testified that they reached respondent's secretary but that the secretary did not know where respondent was. Respondent did not con-

tact the court or any of his clients to explain his absence. The county court continued the hearing until July 7.

On July 3 and 7, 1997, respondent filed motions to withdraw as attorney of record for the defendants, but did not attach an affidavit stating that he informed his clients of the motions to withdraw. In fact, he did not notify any of the five clients that he was withdrawing. The motions stated that he did not attend the suppression hearing because a power failure caused his clocks to fail. Respondent explained that he could no longer represent the clients because of the sale of his office building and because of conflicts with scheduled hearings. He did not appear at the hearing on July 7, although he was still attorney of record. Some of the clients unsuccessfully asserted the motion to suppress pro se, and all of the clients eventually pled guilty. When asked by one client for his money back, respondent wrote to the client stating,

> A flat fee is non-refundable. . . . A hearing on the suppression issue would have cost you considerably more . . . .
>
> I was forced to withdraw from this case through no fault of my own. The Madison County Court Judge would not let me change my local court cases to another date, and they always conflicted with your cases in Bassett.
>
> If you have a complaint, then direct it to this judge who usurps the power of a lawyer to even request a continuance without his prior permission. I cannot help it if there are judges that will not work with attorneys and do not give them proper respect and consideration. In my opinion, this is what caused the conflict in your cases in Bassett, Nebraska. I cannot waste my time arguing with judges over scheduling matters. I have exhausted my patience with them, and with clients like you who never think they are guilty.

Ford testified that he and the other clients understood that the fee they paid would include representation up to but not including a trial. Ford's account of the fee arrangement was contradicted only by unsworn assertions in respondent's answer to the charges. The referee determined that respondent returned the fees in full, but only after the Committee on Inquiry conducted its hearing.

In the second legal matter at issue, respondent represented Hofmann in a specific performance case against Garry Pollman, Jr., in Madison County District Court. Respondent filed a petition on behalf of Hofmann. Attorney Jan Einspahr represented Pollman and filed a counterclaim in the suit. Respondent filed an answer to the counterclaim on behalf of Hofmann on May 15, 1997. A pretrial conference was scheduled for September 29.

On June 6, 1997, Einspahr sent respondent a letter indicating that their two respective clients were working out a settlement without the assistance of counsel. The letter requested respondent advise her if Hofmann had told respondent of the settlement and stated that if so, they could arrange the closing on the real estate at issue. Respondent made at least one attempt to contact Hofmann by regular mail prior to the pretrial conference date. The record indicates that Hofmann did not receive the message because he had moved out of town and did not provide respondent with a forwarding address.

In a letter dated July 25, 1997, respondent wrote Einspahr and expressly noted the scheduled pretrial conference. He stated in the letter that he had little contact with Hofmann and asked Einspahr if he needed to dismiss the case. This letter was the last communication Einspahr received from respondent prior to the pretrial conference. Einspahr testified that she called respondent daily for 2 weeks but could not reach him.

Respondent failed to appear at the pretrial conference on September 29, 1997, and did not contact the court to explain his absence. The court attempted to contact respondent at the time of the pretrial conference but reached an answering machine. The court dismissed Hofmann's petition. Respondent wrote to Hofmann in a letter dated September 30, using the last address he had for Hofmann, that the court had dismissed Hofmann's claim and that the counterclaim still existed but that respondent had not agreed to, and would not, represent Hofmann on Pollman's counterclaim.

Trial was held on Pollman's counterclaim, and on December 4, 1997, a judgment of $5,287.91 was entered against Hofmann. Respondent did not appear at the trial on the counterclaim and did not contact the court or Einspahr to explain his absence. At

no time did he request the court to permit him to withdraw as Hofmann's counsel.

Einspahr mailed the judgment against Hofmann to respondent, as attorney of record. Respondent objected, stating that he was not Hofmann's attorney and claiming that he had made no appearance on the counterclaim. Respondent asked the district court clerk to mail the judgment documents directly to Hofmann.

Hofmann later obtained other counsel and attempted to vacate the judgment against him, but was unsuccessful.

## ANALYSIS

### Disciplinary Rule Violations

After reviewing the record of the proceedings de novo, we find that the evidence clearly and convincingly shows that respondent violated DR 1-102(A)(1) and (5), DR 2-110(A)(1) through (3), and DR 6-101(A)(3) in his representation of the defendants in the criminal proceeding, in that he neglected a legal matter entrusted to him, engaged in conduct that is prejudicial to the administration of justice, withdrew from representation without permission from the court and without giving notice to his clients, and refused to promptly refund unearned fees. As to respondent's representation of Hofmann, we find the evidence clearly and convincingly shows that respondent violated DR 1-102(A)(1) and (5), DR 2-110(A)(1) and (2), and DR 6-101(A)(3), in that he neglected a legal matter entrusted to him, engaged in conduct that is prejudicial to the administration of justice, and withdrew from representation without permission from the court and without taking reasonable steps to avoid foreseeable prejudice to his client's rights. However, we find that the evidence does not clearly and convincingly support the referee's determination that respondent violated DR 2-110(A)(3) during his representation of Hofmann. The evidence indicates that respondent might not have received a fee from Hofmann beyond that necessary to pay costs of filing the petition. Thus, we dismiss the NSBA's charge that respondent violated DR 2-110(A)(3) in the course of his representation of Hofmann.

IMPOSITION OF PENALTY

We now address the appropriate disciplinary measures to be taken. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Schleich*, 254 Neb. 872, 580 N.W.2d 108 (1998); *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *State ex rel. NSBA v. Schleich, supra.* For purposes of determining the proper discipline, we consider respondent's acts both underlying the events of this case and throughout this proceeding. See *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995); *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997). Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997); *State ex rel. NSBA v. Schmeling, supra.*

We note that our analysis is limited to the record of the referee's hearing. Respondent did not attend the hearing, nor was he represented by counsel. To the extent that his brief provides explanations for his actions that are not supported within the record, those arguments will not be considered. Additionally, respondent complains in his brief that the referee did not consider a packet of documents that respondent had mailed to this court and requests us to do so. Because respondent did not offer these documents into evidence at the hearing, we, like the referee, will not consider them.

In both matters at issue, respondent neglected his duty to represent his clients by failing to make court appearances. Standing alone, these errors constituted a breach of Johnson's professional responsibility which would warrant some degree of discipline. However, respondent's subsequent acts and omis-

sions exacerbated his original misconduct and thus increased the seriousness of his disciplinary infraction.

As to the defendants in the criminal proceedings, respondent failed to call either the clients or the court to explain his absence and failed to notify the clients that he was withdrawing. Although the referee determined that respondent's actions were not the causal factor in his clients' being convicted, he nonetheless left the clients to fend for themselves at a criminal proceeding. Worse, when a client demanded a refund of the fee he paid (where the evidence clearly shows that the fee paid for at least his presence at the motion to suppress hearing), respondent not only refused to refund the fee, but proceeded to attack his client's character and chastise a judge. Thus, he wrongly retained an unearned monetary benefit at the expense of his client. Such conduct not only needs to be deterred to protect the public but also because it negatively reflects on the reputation of the entire bar.

As to the Hofmann matter, respondent neither asked the court for permission to withdraw from the case nor contacted the court to explain his absence either at the pretrial conference or at the trial on the counterclaim. He did not inform opposing counsel of his view that he was not Hofmann's attorney on the counterclaim. In summary, respondent unilaterally decided at some point that he would no longer represent Hofmann. The decision to withdraw as counsel was not solely within respondent's discretion. See DR 2-110(A). Hofmann lost the opportunity to assert his claim and had a judgment rendered against him without the benefit of legal representation. As the referee determined, respondent's conduct had a direct effect on Hofmann's civil case. This conduct reflects negatively on the reputation of the bar and should also be deterred.

Numerous facts within the record call into question respondent's present fitness to practice law. Respondent filed an affidavit in this proceeding (filed July 22, 1998) on which he signed as both the affiant and the notary. He asserts in this *civil* proceeding that he had the right to remain silent and to refuse to testify. Respondent asserts that he has no continuing responsibility to a client whom he has determined to be guilty. He

asserts, apparently misunderstanding the authority of a court order, that he did not "feel compelled to attend [the] pretrial conference, as these are mere courtesy and not even mentioned under Nebraska law . . . ." He asserts in this proceeding that he had no duty to represent a client on a counterclaim when he had entered an appearance on the counterclaim.

Yet another example indicating a lack of present fitness to practice law is respondent's objection in this proceeding to the fact that another attorney, rather than Hofmann, filed the complaint to the NSBA, asserting that it is improper for an attorney to report another attorney's conduct. Respondent fails to understand that attorneys have a *duty* to report unprivileged knowledge of another attorney's violation of the Code of Professional Responsibility—a duty that can result in disciplinary action if violated. Canon 1, DR 1-103(B), of the Code of Professional Responsibility. To conclude that respondent is simply ignorant of this rule would be lamentable enough, except that he has expressly referred to the corollary Ethical Consideration 1-4 as the "Nazi rule."

Although an attorney has the right to defend himself or herself zealously in a disciplinary proceeding, respondent's extremely negative attitude and inflammatory and derogatory remarks toward the NSBA and the disciplinary process also weigh in favor of a harsher punishment. Early in the investigation, he threatened the Counsel for Discipline, stating:

> You may expect a federal case in this issue before the expiration of the statute of limitations. Do not think for a moment that I will confine these issues to this state as there are much broader questions here, including a *pattern of harassment and discrimination* by your office, and your personal deniability and unaccountability. This is a Federal issue that goes directly to my ability to earn a fair living and to be free from the abuses and interference of government and meddling organizations like the NSBA, and addresses your seeming immunity to act without regard to the consequences, reason or the truth. . . .
>
> . . . .
>
> My second cause of action against your office is a distinct form of invidious discrimination, and your discrimi-

> natory treatment of me because of the fact that I am a descendant of the Germans from Russia, a group that is *clearly* a minority in this country. [Y]our pattern of personal harassment against me, cover-ups of unethical conduct by others you work with, and your flagrant abuse of authority is clear!

(Emphasis in original.) In his answers to the formal charges, respondent asserted a counterclaim against the NSBA for monetary damages and stated that the Counsel for Discipline "abused his authority in a way that smacks of fascism." Respondent accused the judge in the Hofmann matter of malice and corruption. He asserts in his brief that Hofmann's own negligence caused the counterclaim judgment.

We have stated, "The repeated derogatory and inflammatory statements made by respondent . . . cannot be ignored and will not be tolerated. Because such tactics reflect respondent's overall fault-finding attitude in this matter, we take them into consideration in determining an appropriate penalty." *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 51, 560 N.W.2d 150, 157 (1997).

The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors. *State ex rel. NSBA v. Schleich*, 254 Neb. 872, 580 N.W.2d 108 (1998). In the instant case, the violations were not criminal in nature, and as to the Hofmann matter, respondent did not monetarily benefit from his wrongdoing. Respondent did have difficulty contacting Hofmann to determine whether in fact the client was settling the matter without counsel. As to the defendants in the criminal proceeding, respondent admitted in the investigation that he failed to withdraw properly and that he should have told his clients he was withdrawing. We also note that at the time these violations occurred, respondent had been in practice for approximately only 2 years.

In conclusion, respondent demonstrates a current lack of character, attitude, and knowledge of his ethical duties required to continue in the practice of law. Thus, we hereby suspend respondent from the practice of law for a period of 4 years, effective immediately. Additionally, we condition his readmission to the practice upon a showing that his acts over the course

of the 4-year suspension demonstrated the level of character and fitness enumerated in Neb. Ct. R. for Adm. of Attys. 3(a) through (d) and (j) (rev. 1998).

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

GERRARD, J., concurring in part, and in part dissenting.

I concur in the majority's findings regarding respondent's conduct and the imposition upon respondent of a 4-year suspension from the practice of law with the conditions for readmission stated therein. In addition, however, I would order respondent to submit to a psychiatric evaluation and further condition his reinstatement to the bar upon satisfactory compliance with all reasonable recommendations of that evaluation.

## FACTUAL RECORD

The majority opinion persuasively sets forth several instances that not only demonstrate respondent's unfitness for the practice of law, but also seem to evidence an apparent mental instability in respondent. For example, in a letter to the referee dated July 24, 1998, respondent indicated that he would not participate in the disciplinary hearing before the referee. Respondent stated:

> I have come to the conclusion that perhaps they only intend to trap me somehow by twisting my words if I take the stand, since their evidence is scanty, at best. I think they may be desperate at this point to get me on the stand so they might twist the truth.
>
> Furthermore, they also might try to use their influence to cause further legal difficulties for me. I am not naive enough to think that the NSBA exists in a vacuum in Lincoln. I know full well the depths of this organization as I was once part of the legal community when I lived there several years ago.
>
> My reasons for this should be obvious. I have certain political and personal enemies at the Bar Association who have pursued me ever since I walked out the doors of law school, who already started to attack my character at that point. These enemies cannot prove, and in the past three

> years have failed to prove anything against me, though I know they would like to. I do not know why, though I have my suspicions. I will not state those suspicions at this time, and will not name the individuals I believe are responsible. . . .
>
> . . . .
>
> Be advised that I will not appear in Lincoln for this hearing if I am expected to take the stand against myself. I will adamantly oppose any requests or attempts to place my life in jeopardy at the hands of false accusers.

The line of thought expressed in respondent's letter to the referee was also manifested in his reply to the formal charges filed against him. In response to the formal charges, respondent alleged that the Counsel for Discipline "has abused his authority in a way that smacks of fascism" and that he was "hiding behind his cloak of immunity as if he is somehow above the law and can never be sued for this reckless conduct in attempting to destroy my life." In asserting his "counterclaim," respondent speculated, "I believe this may have something to do with my latest divorce and the fact that . . . my ex-wife, who has been married three times, is personal friends with several members of the NSBA . . . ."

Respondent later reaffirmed his counterclaim, stating:

> Respondent requests an injunction against the NSBA and that they be Ordered to ***Cease and Desist*** from contacting Respondent in any manner. Respondent requests that any immunity for these parties be lifted so that private civil suit can be brought against them for damage to Respondent's business in the amount of $2000.00 per month since October 1997 when the first investigation was started, and for other emotional distress experienced by Respondent because he cannot sleep at night and has experienced severe physical symptoms as a result of being served by the sheriff for charges from the NSBA relating to innocent acts. Respondent has developed an ulcer as a result of this harassment, and considers the actions of [the Counsel for Discipline's office] extreme and ***OUTRAGEOUS***, because they have evidence in their possession that would tend to exonerate Respondent, but that they

> choose to ignore it. Respondent asks that [the Counsel for Discipline] be removed from his position at the NSBA and made to answer for his outrageous conduct and reverse discrimination. Respondent feels that if he had been a recognized minority, like a black, Hispanic or Asian, this would have been dismissed at the outset.

(Emphasis in original.)

Respondent also sent several letters directly to the Counsel for Discipline. In a letter dated April 15, 1998, respondent stated, "As attorneys, we trust that your office will at least investigate matters that come before it, even though we know there are myriad interpretations and even many more instances of abuse and unethical conduct that teems like maggots in this society." In the same letter, respondent also attempted to explain his failure to contact or respond to contacts from Einspahr, stating:

> The reason I did not discuss these matters with Jan over the phone is because of my negative experiences with women, and especially her, in the past when I talked to her on the phone. . . . I would not discuss anything with Jan Einspahr because in my opinion, her belligerent, deceptive nature and her inability and unwillingness to compromise, w[ere] dangerous to my personal and professional position. I was equally, if not more, unwilling to speak with her about the matter until the day of trial and I tend to be quite assertive myself (not aggressive) (I'm a lawyer after all!).
>
> . . . [T]he last thing I needed, or ever need again, is to be accused falsely by a woman (or anyone). Her excuse to the judge was that I didn't answer the phone. I see no requirement for this anywhere, as *this is what a court of law is for*, and that is why I filed a petition IN COURT and not a request for a phone discussion! Important matters should NEVER be discussed over the phone. Nothing is ever, or rarely, resolved that way. (I have since sent Jan Einspahr a letter stating my new office policy that I will not speak with her on the phone or take her calls EVER again. Every conversation with her is counterproductive, as all she ever wants to do is argue and twist the truth. . . .

> I have been married twice before, and this seems to be counterproductive, to say the least.[)]

(Emphasis in original.)

Respondent, in the same letter, explained his failure to appear at the pretrial conference in the Hofmann matter, stating, "I did not attend the pretrial conference, nor would I fall into any unsuspecting trap that was not recorded by a certified court reporter. THIS IS MY RIGHT to be heard AT TRIAL, and not to have to waste my time on unproductive pretrial conferences!!"

Later in the same letter, respondent wrote:

> I am tired of the liars and losers getting protection when it is so undeserved. I have spent my life trying to prove that I do not have to be poor, only to regrettably find myself in a messed up society where all one has to do is claim to be a victim, or prove that they are poor, and the rest of us are supposed to cater to them and pay their way in life. The truth has a way of surfacing. This is the TRUTH . . . . Do what you wish with it. I have lived my life by it, and am sick and tired of pulling others around. I only hope that this stops somewhere and we stop protecting those who don't deserve so much as the time of day! . . .
>
> . . . .
>
> . . . I will take this to a higher court and do whatever I have to do, and name whomever I wish so that this all comes to a halt, if I do not get the result I not only deserve, but that I expect, even if I lose every step of the way, because . . . that is just par for the course for me.
>
> I have lost because it is the victims and the sad-sacks that get their way and win, who are so undeserving of anything, yet receive all they ask for. The government and other organizations are so generous with MY time and MY tax dollars that I would be a fool to continue in this profession when I am double taxed and tread upon. I always find myself writing discourses on why the truth should prevail. I guess I must devote all my attention to this foolishness. I might be angry at those who fail to do the right thing, but I cannot bring myself to it, as I have learned that most people don't have a clue as to what is right or wrong anymore! It is like being angry at a child who has not yet

> developed the ability to reason. How could I possibly be angry at a child?

In other correspondence addressed to the Counsel for Discipline, respondent attempted to make a complaint about the attorney who had complained about respondent's conduct in the Hofmann case. Respondent speculated that the complainant "has something to gain by removing me from practice in Norfolk as he is in direct competition for my business and he has alot [sic] more overhead than I do." Respondent also speculated that the complainant might not be "aware that I have appealed a decision . . . to the Intermediate Court of Appeals and the BIG NAMES of this town do not like me because I actually might win." After the Counsel for Discipline evidently informed respondent that his countercomplaint had no merit, respondent wrote:

> If this is not resolved to my satisfaction, then I may press a civil lawsuit against any and all of you who are involved. If you think you are immune from such a suit, think again. The US Supreme Court case of *Jones v. Clinton* makes it quite clear that immunity from civil suit while serving in any position of authority is an illusion. A complaint against your office, as well as a possible lawsuit against YOU will follow if I don't get a reasonable answer BASED ON NEBRASKA LAW AND ETHICAL CONSIDERATIONS- NOT YOUR OPINION.

Finally, respondent advanced his theory about discrimination based on his status as a descendent of "Germans from Russia," as noted in the majority opinion. Respondent concluded that discussion by writing:

> I will make a list of the injustices heaped upon the Germans from Russia by this government, including your treatment of me! . . . You have gone too far in your discrimination against me by exhibiting clear favoritism to . . . members of the majority class without giving my complaints and requests equal attention, brushing them aside without proper explanation or proper investigation. A new minority class has emerged and I demand recognition, attention and equal protection under the law!!

Respondent's filings in this court also reflect upon his mental fitness to practice law. In his findings, the referee stated that respondent "remains generally unrepentant." In his brief, respondent stated that "[r]epentance appears to be more in keeping with religious sentiments that have no place in a Court of law." Respondent continued to argue in his brief:

> Thus, for Attorney to *repent* indicates an improper impingement of religious ideas upon the state's responsibility to decide cases without religious interference. . . . That repentance seems to be more of an Inquisitional idea that has no bearing on fact finding and truth and will not help to resolve these complex issues is obvious.
>
> Even if a formal repentence [sic] were made, this case would remain controversial, and a decision would still need to be made by this Court. . . . If this court finds wrongdoing and orders repentence [sic], Attorney is prepared to do so. Until that time, that Attorney should have earlier begged the forgiveness of anyone is absurd. It has never been Attorney's attitude that he should grovel on his knees begging the forgiveness of others when they question his motives and principles, else he might have lived his entire life on his knees begging repentance.

Taken as a whole, respondent's behavior reveals a current incapacity to practice law by reason of a probable mental illness or disability. Many of respondent's written submissions demonstrate significant irrationality, and his tone shifts during the course of a single letter from defiance and hostility to outright despair. However, because nobody has specifically complained of respondent's mental status and respondent has not raised a mental illness defense in his pro se pleadings, we are left with a record devoid of competent medical evidence that would assist us in the ultimate determination of reinstatement in this cause. Nonetheless, based on the record before us, we have the power and obligation to order a psychiatric evaluation as a condition of reinstatement. For the reasons that follow, I conclude that it would be appropriate to order such a psychiatric evaluation in this case.

## APPROPRIATE REMEDY

Neb. Ct. R. of Discipline 11(A) (rev. 1996) provides, in relevant part:

> Upon a complaint that a member is incapacitated from continuing the practice of law by reason of physical or mental illness, or because of addiction to drugs or intoxicants, the appropriate Committee on Inquiry, with the assistance of the Counsel for Discipline, may prepare, verify and submit to the Court an application for the temporary suspension of the member from the practice of law.

It is further provided in Neb. Ct. R. of Discipline 11(C):

> The Court shall take or direct, consistent with fundamental fairness and due process, such action as it deems necessary and proper to determine whether the member is incapacitated from continuing the practice of law, including a direction for an examination of the member by such qualified medical experts as the Court shall designate at the cost of the Respondent.

While neither the Committee on Inquiry nor the Counsel for Discipline requested a stay of the disciplinary proceedings in order to proceed under rule 11, see *Newton v. State Bar of California*, 33 Cal. 3d 480, 658 P.2d 735, 189 Cal. Rptr. 372, (1983) (disciplinary proceedings stayed in order to proceed under rule relating to mental illness), the rules of discipline relevant to this proceeding allow us to provide a remedy that will shed light on respondent's future fitness to practice law and protect the public in doing so. Neb. Ct. R. of Discipline 10(N) (rev. 1996) provides that after hearing, "The Court may disbar, suspend, censure or reprimand the Respondent, place him or her on probation, *or take such other action as shall by the Court be deemed appropriate.*" (Emphasis supplied.) The record before us supports the propriety of ordering a mental health evaluation as a condition of reinstatement.

The Supreme Court of Colorado faced a similar situation in *People v. Fagan*, 745 P.2d 249 (Colo. 1987) (en banc). In that case, the grievance committee recommended that the respondent undergo a psychiatric evaluation as a condition of reinstatement to practice, even though the initial complaints against

the respondent were based on accusations of neglect and not mental illness. The court stated:

> This recommendation is based on the respondent's erratic behavior which we find was manifested, in part, by his conduct of the cases leading to the disciplinary action and, in part, by his conduct during the disciplinary proceedings. The hearing board observed that, at times, [respondent] performed normally and effectively but, at other times, he functioned without noticeable expression or affect and was rambling and disorganized. There also is evidence in the record that the respondent exhibited threatening conduct toward the deputy disciplinary prosecutor.

*Id.* at 253.

The court noted that proceedings in that case had not been initiated under the terms of the Colorado disciplinary rule that explicitly dealt with attorneys suffering from mental illness. *Id.* Nonetheless, the Colorado court found that it could order a mental evaluation as part of its disposition of the case. *Id.*

The court noted that an attorney suspended for more than 1 year was required, as part of a reinstatement proceeding, to demonstrate that the attorney met all the requirements set forth for initial admission to the Colorado bar, including a demonstration that the applicant is " 'mentally stable.' " *Id.* at 254. The court thus determined that the appropriate penalty in that case was a suspension of 1 year 1 day and that prior to reinstatement, the respondent was required to undergo a psychiatric evaluation in order to demonstrate his mental stability. *Id.* See, also, *In the Matter of Wallace W. Rogers, Jr.*, 263 Ga. 314, 431 S.E.2d 366 (1993); *Attorney Griev. Com'n v. Draper*, 307 Md. 435, 514 A.2d 1212 (1986); *In re M.*, 59 N.J. 304, 282 A.2d 37 (1971); *In re Richard F. Crist*, 258 Or. 88, 481 P.2d 74 (1971) (en banc).

Similarly, this court has held that an applicant for reinstatement to the bar must otherwise be eligible for admission to the bar as in an original application for admission. See *State ex rel. Sorensen v. Goldman*, 182 Neb. 126, 153 N.W.2d 451 (1967). The Nebraska rules relating to the admission of attorneys provide that an applicant must have the ability to conduct oneself reliably, communicate clearly, reason and analyze information, comply with deadlines, and conduct oneself professionally and

in a manner that engenders respect for the law and the profession. See Neb. Ct. R. for Adm. of Attys. 3 (rev. 1996). It is specifically provided that further inquiry is required where there is evidence of mental or emotional instability. Neb. Ct. R. for Adm. of Attys. appendix A (rev. 1996).

Taken together, these requirements appropriately empower us to order a respondent to submit to a psychiatric evaluation as a condition of reinstatement to the bar. In order to meet the requirements for reinstatement, a respondent at that time must demonstrate his or her mental fitness for the practice of law, and we would be precluded, as in this case, from properly evaluating a respondent's mental condition without competent psychiatric evidence on the subject. Compare *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993) (respondent placed on conditional probation based on recommendation of psychiatric report).

We have set forth similar conditions in disciplinary cases where respondents suffered from substance abuse. In *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987), we suspended the respondent for 2 years, and conditioned his reinstatement after suspension on his participation in Alcoholics Anonymous; his abstention from alcohol and drugs; and his completion of courses in legal ethics, accounting, and office management procedures. Similarly, in *State ex rel. Nebraska State Bar Assn. v. Erickson*, 204 Neb. 692, 285 N.W.2d 105 (1979), this court suspended the respondent for 1 year and conditioned his reinstatement in part on an affirmative showing that he had controlled his problem of alcoholism. I see no reason to distinguish the case of an attorney that is likely suffering from a mental illness or disability from our established precedent regarding attorneys afflicted by substance abuse.

## CONCLUSION

Therefore, while I concur in the imposition upon respondent of a 4-year suspension from the practice of law, I would, in addition to the conditions already imposed for readmission, also order respondent to submit to a psychiatric evaluation. Based upon the results of the psychiatric evaluation, this court should condition respondent's reinstatement upon satisfactory compli-

ance with all reasonable recommendations in the evaluation, such that respondent demonstrates the level of character and fitness to practice law enumerated in Neb. Ct. R. for Adm. of Attys. 3(a) through (d) and (j) (rev. 1998).

HENDRY, C.J., joins in this concurrence and dissent.

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ELI'S, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. GEORGE E. LEMEN, JR., APPELLANT AND CROSS-APPELLEE, AND WESTERN PRINTING COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.
591 N.W.2d 543

Filed March 26, 1999. No. S-97-1255.

1. **Conveyances: Fraud: Equity: Appeal and Error.** An appeal of a district court's determination that transfers of assets were in violation of the Uniform Fraudulent Transfer Act is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **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 own conclusions independent from the trial court.
4. **Actions: Parties.** Neb. Rev. Stat. § 25-301 (Reissue 1995) provides that 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).
5. **Assignments.** The assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor.
6. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
7. **Assignments: Parties.** The assignee of a chose in action is the proper and only party who can maintain the suit thereon.
8. **Actions: Parties: Standing.** The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional.
9. **Conveyances: Fraud: Assignments.** The benefit of a fraudulent conveyance statute may be claimed by one who stands in the place of, and has succeeded to the rights of,

the creditor, such as, for example, an assignee of the debt which was owed by the transferor. Suit may be maintained by the assignee even though the assignee purchased the judgment against the transferor subsequently to the execution of the conveyance which is sought to be set aside.

10. **Actions: Conveyances: Parties.** An action does not abate by the transfer of any interest therein during its pendency, if the cause of action survives or continues. In case of transfer of interest other than by death or disability of a party, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.
11. **Actions: Parties.** The transfer of interest after the action is commenced does not prevent the action from being continued to final termination in the name of the original plaintiff.
12. **Fraud: Intent: Proof: Words and Phrases.** Badges of fraud are said to be facts which throw suspicion on a transaction and which call for an explanation. More simply stated, they are signs or marks of fraud. They do not of themselves or per se constitute fraud, but they are facts having a tendency to show the existence of fraud, although their value as evidence is relative, not absolute. They are not usually conclusive proof; they are open to explanation. They may be almost conclusive or they may furnish merely a reasonable inference of fraud, according to the weight to which they may be entitled from their intrinsic character and the special circumstances attending the case. Often a single one of them may establish and stamp a transaction as fraudulent. When, however, several are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent.
13. **Conveyances: Fraud.** The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, the relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor.
14. **Debtors and Creditors: Conveyances: Fraud: Proof.** In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
15. **Assignments: Words and Phrases.** As a general rule, an assignment is a transfer vesting in the assignee all of the assignor's rights in property which is the subject of the assignment.

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

Waldine H. Olson and Amy Sherman LaFollette, of Nolan, Roach, Olson, Fieber & Lautenbaugh, for appellant.

D.C. Bradford, of Bradford, Coenen & Welsh, for appellee Eli's, Inc.

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

STEPHAN, J.

This action involves alleged fraudulent transfers of assets of Western Printing Company (Western) to George E. Lemen, Jr. (Lemen), its principal shareholder and operating officer, and other members of Lemen's family. The action was filed by Eli's, Inc. (Eli's), as the assignee of four of Western's creditors. Following a bench trial, the district court for Douglas County entered judgment in favor of Eli's in the amount of $356,652.96 plus prejudgment interest. Lemen appealed, and Eli's cross-appealed on the ground that the district court erred in not awarding certain additional sums claimed by Eli's. We transferred the appeal to our docket pursuant to our authority to regulate the caseloads of the appellate courts and now affirm the judgment of the district court.

## FACTS

Western was a closely held corporation engaged in the printing business in Omaha. Prior to transfers that occurred in 1993 which are the subject of this action, all of its stock was owned by Lemen and his three children. Western Enterprises II (Western Enterprises) was a partnership, composed of the same Lemen family members, which owned the real estate upon which Western conducted its business. Lemen held a 60-percent interest in the partnership.

Prior to the transfers at issue, Lemen conducted Western's operations and business affairs with the assistance of his son William Todd Lemen. Western experienced annual operating losses beginning in 1989, requiring Lemen to make periodic loans to Western in order to continue its operations. Western was delinquent on its $8,000 monthly rental payments to Western Enterprises for the months of February, March, and April 1993, and Lemen personally paid the mortgage payments of Western Enterprises during these months. Western's accounts payable, as shown by audited reports, increased from approximately $128,872 on June 30, 1991, to $230,611 on June 30, 1992. The record also shows that for several months prior to April 1993, Western did not pay its creditors on a timely basis

and its monthly operating losses had increased to approximately $25,000 per month.

When William Lemen informed Lemen in 1992 that he did not wish to purchase the business or continue its operation on a long-term basis, Lemen sought an outside purchaser. By November 1992, Lemen had signed a "Summary of Understanding and Intent" (summary) with Robert Gittins, whereby Gittins agreed to purchase the stock of Western for a total of $456,000. The summary stated that Lemen would receive $100,000 cash from Gittins and that Western would pay Lemen a secured installment note of $171,000. Western was also to convey to Lemen approximately $100,000, representing the cash value of life insurance policies held by Western, and 4,639 shares of Nebraska National Bank stock that was owned by Western, having an approximate value of $85,000. The summary provided for the payment of 72 monthly payments of $2,400 to Lemen as consideration for a covenant not to compete and stated that a cash advance of $22,262 made by Lemen to Western would be repaid on December 1. The summary further provided that preferred stock owned by Lemen family members would be redeemed by Western at a par value of $12,000. Finally, the summary provided that any rent in arrears as of December 1, 1992, would be paid to Lemen on that date.

In a separate transaction in December 1992, Lemen caused Western to transfer the 4,639 shares of Nebraska National Bank stock to himself in return for a promissory note in the amount of $85,000. This bank stock and the cash value of the life insurance policies had been listed as liquid assets of Western on an audited report of June 30, 1992. There were no liens against any assets of Western at the time of this report. At the time the bank stock was transferred to Lemen, Western needed cash and had unsecured creditors. Lemen never made any payments on the $85,000 note.

Field Paper Company supplied printing paper to Western. In the fall of 1992, Michael Freeland, the president of Field Paper, had several discussions with Lemen regarding Western's delinquency on its account with Field Paper. As a result of these discussions, Lemen provided Freeland with the audited report of Western's financial condition as of June 30, 1992. Freeland tes-

tified that he noticed that the $100,000 life insurance asset and the Nebraska National Bank stock were listed on this report. On behalf of Field Paper, Freeland entered into a workout agreement with Western on March 9, 1993, relying in part upon the existence of these assets which he believed to be unencumbered. On that date, the balance due Field Paper was $86,494.85. Lemen told Freeland that he was in the process of selling Western, but did not disclose the fact that Gittins was the purchaser. Freeland, who understood that the account of Field Paper would be paid in full upon the sale of Western, was acquainted with Gittins and knew that Gittins had financial problems. Freeland testified that he would not have entered into the workout agreement had he known that Western was being sold to Gittins.

During this same time period, Lemen hired an attorney, Dennis Connolly, to prepare documents for the transfer of Western to Gittins and Gittins' wife. William Urban, a certified public accountant, was Western's regular accountant but did little work for Western after preparing the audited report of June 30, 1992. Connolly contacted Urban in early April 1993 and inquired whether Western would have equity after the sale. Initially, Urban told Connolly that he could not answer that question without further analysis of the financial data. However, after arriving at some estimates, Urban and Connolly reached the conclusion that Western would have equity after the anticipated sale to Gittins.

Gittins never made the $100,000 cash payment recited in the summary of understanding. According to Gittins, the original financing was to come from VCG Credit Co. (VCG), but VCG refused to loan Gittins the amount necessary to pay Lemen. For this reason, Gittins, Western, and members of the Lemen family entered into a new agreement on April 15, 1993, which they referred to as a "redemption agreement." It was pursuant to this document that the sale of Western to Gittins was ultimately consummated. Under the redemption agreement, Lemen was to transfer his Western stock to Gittins in exchange for $371,000 in cash plus cancellation of the $85,000 note which he gave to Western when he transferred the Nebraska National Bank stock to himself. Lemen's three children were to receive a total of

$12,000 in exchange for their preferred stock. Lemen was also to receive $2,400 per month for 72 months as a noncompetition agreement and $46,000 to be paid in 48 equal monthly installments as moneys due him from Western. The latter amount included $22,000 which Lemen had previously advanced to Western and $24,000 which Western owed to Western Enterprises for rent.

In order to raise the money which Lemen was to receive for his stock, the redemption agreement provided that Connolly would hold the stock in escrow and authorized Western to sell its assets to VCG for $300,000, with a lease-back provision. The lease provided for monthly payments by Western of approximately $6,072 for a period of 72 months. The redemption agreement also provided that $271,000 would be paid to Lemen from the proceeds of the VCG sale and that $100,000 would come from the cash value of the life insurance policies held by Western. The redemption agreement also stated that Gittins would contribute cash amounts to Western if it did not have sufficient surplus to carry out the payments required in the agreement.

Lemen testified that prior to the sale, he knew little about Gittins' reputation as an individual and did not investigate his background extensively. However, Lemen also stated that he and Gittins had known each other for 20 years; that he was aware that Gittins' business, American Litho Graphic Corporation, had successfully been through chapter 11 bankruptcy; and that he believed Gittins could successfully operate Western. The record indicates that Urban and Lemen believed that Gittins was enthusiastic about purchasing the company and that he had some good ideas for making it into a viable enterprise. Lemen did not obtain updated figures from Urban prior to the sale, but he knew that Western was continuing to lose approximately $25,000 per month in early 1993 and that the accounts payable had risen approximately $100,000 between the time of the audited report of June 30, 1992, and April 1993. Regarding Gittins' ability to fund the stock redemption, Lemen testified that he believed Gittins was an honest man and assumed Gittins would raise the money. Gittins testified that he entered into the redemption agreement because he was desperate to try to save

his own company and he hoped that combining it with Western would create a viable enterprise.

In order to carry out the redemption agreement, a special account was set up at Packers National Bank with Lemen and Gittins as the only signatories. The $300,000 which Western received from VCG for the sale of its equipment was deposited in this account. After $271,000 was paid to Lemen and $12,000 paid to his children for their stock, a balance of $17,000 remained. Pursuant to the redemption agreement, Lemen's $85,000 note to Western was canceled and he was to receive an additional amount of $46,000, representing the funds he had advanced to Western and the rents owed by Western to Western Enterprises. He received three payments on the covenant not to compete, totaling $7,200. Lemen also received the cash value of the life insurance policies that had been owned by Western, although he claims that he received only $80,000 instead of the $100,000 cash value specified in the redemption agreement. Lemen testified that at one point, he offered to permit Gittins to hold the insurance policies and pay the $100,000 to Lemen's estate upon his death, but Gittins declined.

Following execution of the redemption agreement on April 15, 1993, Lemen's son William Lemen continued as the president of Western until approximately October 1993. During this period, Lemen received 22 weekly payments of $500 each and 2 payments of $1,000 each from Western. Lemen testified that this was compensation for work he performed as a consultant, but Gittins testified that these payments were unauthorized. There is some evidence that a portion of the payments may have been payments on the $46,000 for cash advances and back rents which Lemen was to receive pursuant to the redemption agreement. Lemen had been a member of the board of directors of Nebraska National Bank during the period when Western owned stock in the bank. He was aware that during this period, several other banks had made overtures to Nebraska National Bank regarding the purchase of its stock. On May 17, 1993, Lemen sold the Nebraska National Bank stock which Western had transferred to him, realizing $114,120 from this sale.

Gittins operated Western from April 15, 1993, until approximately July 1994, when the business failed. Western Enterprises

evicted Western in late summer of 1994. However, Gittins contends that he was not delinquent on the rent payments to Western, and there is conflicting evidence regarding this issue. The building was sold in October 1994, and the proceeds of the sale were disbursed to the partners of Western Enterprises.

Both Eli's and Lemen presented expert testimony on the issue of Western's financial condition before and after the transfers of Western's assets pursuant to the redemption agreement. Urban, called as a witness on behalf of Lemen, testified that Western was solvent both before and after the 1993 redemption of its stock. Urban admitted that his analysis was not prepared according to "generally accepted accounting principles" (GAAP rules), but stated that GAAP rules were not applicable to the computations he made. On cross-examination, Urban admitted that some of the company assets which he included in his analysis were never received, including the $100,000 which Gittins was to pay under the initial summary. Urban also testified that Western was delinquent on its lease payments to Western Enterprises both before and after April 15, 1993, but that in his opinion, Western could pay its debts as they became due. However, Urban stated that he made this determination based on whether he thought Western was able to pay and not on whether it actually was paying creditors. Urban also conceded that the assets which Western transferred to or for the benefit of Lemen were thereby made unavailable to creditors and that he considered the transfer of the bank stock from Western to Lemen to be outside the ordinary course of Western's business.

Ron Nebbia, a certified public accountant, testified on behalf of Eli's. He expressed his opinion that applying GAAP rules, Western was insolvent both before and after the redemption of April 15, 1993, and that in his opinion, Western did not receive equivalent value for the sale. He testified that the total stockholder equity following the redemption was a negative $265,760.33. Nebbia also testified that after April 15, 1993, Western's previously liquid assets, including its equipment, bank stock, and cash value of life insurance, were no longer assets of Western which could be used to pay unsecured creditors and that VCG and Lemen were in secured positions with

priority over Western's unsecured creditors. Nebbia stated that Lemen received a value of $645,118.49 in connection with the redemption and that after the redemption, it was virtually impossible for Western to meet its obligations as they became due.

Dennis Hein, a certified public accountant, also testified for Eli's. In Hein's opinion, Western's liabilities exceeded its assets by approximately $70,000 after the redemption. Hein also stated an opinion that Western was unable to meet its obligations on a timely basis after March 31, 1993. Hein testified regarding inaccuracies in the data upon which Urban based his opinions and stated that there was no legitimate reason for Western to enter into the redemption agreement because the value of the assets received by Lemen far exceeded the value of the stock received by Western. He further stated that the postredemption assets of Western were not sufficient for it to remain in business. Hein agreed with Nebbia that Western was insolvent after the redemption and that it could not pay its current liabilities.

Robert Kirchner, a certified fraud expert, testified that Lemen was an "insider" with respect to Western, as that term is used in the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. § 36-701 et seq. (Cum. Supp. 1992). Kirchner stated that virtually all of Western's assets were transferred under the redemption agreement and that there was no evidence the transfers were disclosed to creditors. However, Kirchner admitted that the VCG sale/lease-back transaction did include a public filing pursuant to the Uniform Commercial Code.

Eli's operated a prepress business in Omaha. Eli's, then a proprietorship, engaged Dana Bradford in 1992 for assistance with its bankruptcy proceedings. The bankruptcy was dismissed, but Eli's continued having financial difficulties. Bradford subsequently incorporated Eli's and became a minority stockholder. In 1994, Bradford pursued the possibility of merging Eli's prepress operations with Western's printing business. When Western ceased its operations in July 1994, Bradford negotiated the acquisition of its printing equipment. As a part of this transaction, Eli's took assignments of the claims of several of Western's unsecured creditors, including Diamond Die Company, Carpenter Paper Company, Field

Paper, and VCG. The combined amount of the assigned claims was approximately $282,040. Eli's paid a total of $33,863.56 for the assignments.

Asserting its interest as the assignee of Western's creditors, Eli's commenced this action on March 3, 1995, naming as defendants Lemen; his three children, George Lemen III, William Lemen, and Gail A. Lemen; Western; and Western Enterprises. Eli's prayed for judgment against Western on the indebtedness represented by the assigned claims and also sought judgment against Lemen and his children on the theory that assets of Western which they received under the 1993 redemption agreement constituted fraudulent transfers as defined in the Uniform Fraudulent Transfer Act.

On May 12, 1995, while this action was pending, the four claims were assigned by Eli's to DCB, Inc., a corporation of which Bradford is the president. The record does not reflect a motion by any party to substitute DCB for Eli's as the party plaintiff.

On October 10, 1995, Eli's obtained a default judgment on its claim against Western in the amount of $356,652.96. Subsequently, it filed its fourth amended petition in which it alleged its status as a judgment creditor of Western. In count I of its fourth amended petition, Eli's alleged violations of the Uniform Fraudulent Transfer Act. Count II alleged the improper receipt by Lemen of 4,639 shares of stock of the Nebraska National Corporation in exchange for a promissory note of $85,000. Count III alleged a double payment of rent from Western. Count IV sought a constructive trust in favor of Eli's, and count V alleged that the defendants were liable for the amount of the judgment due to violations of the Business Corporation Act. In his answer, Lemen generally denied the allegations and further alleged that counts I, II, III, and IV failed to state a claim upon which relief could be granted. Lemen also alleged that certain allegations made by Eli's were frivolous and sought attorney fees and court costs. In its reply, Eli's alleged that certain allegations in the answer were frivolous.

Following a bench trial on the fourth amended petition, the district court for Douglas County entered an order which included specific findings of fact. The district court concluded

that Western had sustained operating losses for several years prior to the transfer of its assets. The court further determined that Freeland, as president of Field Paper, would not have entered into a workout agreement if there had been a disclosure of the transfer of Nebraska National Bank stock and life insurance proceeds to Lemen. The court noted that if Gittins had injected $100,000 into Western pursuant to the original summary, the entire transaction "might have been more palatable." However, in light of the redemption agreement, the court stated that the transaction was "totally one sided," with the net effect of the agreement allowing Lemen and his family to take virtually all of Western's liquid assets, leaving Western without cash and with nearly all of its few remaining assets encumbered. The court further noted that the transaction immediately caused Western to incur a 72-month lease with payments of $6,070.50 per month in addition to the substantial losses that Western sustained on a regular basis. Noting that Urban did not utilize GAAP rules in arriving at his opinion of solvency, the district court placed credence in Eli's evidence that Western was insolvent both before and after the redemption. The court further concluded that Western was not paying its creditors on a timely basis. In regard to the Nebraska National Bank stock, the court concluded that Lemen paid inadequate consideration for it because he was "keenly aware" of the opportunity that the bank would be acquired at a higher price in the near future.

Based on these findings, the district court concluded that the transfers of Western's assets to Lemen were fraudulent pursuant to the Uniform Fraudulent Transfer Act, § 36-705(a)(1) and (2), both as transfers made "'with actual intent to hinder, delay or defraud'" creditors and as transfers made "without receiving a reasonably equivalent value in exchange for the transfer or obligation." The district court also concluded that the claims based upon violation of the Business Corporation Act were proved. However, the court denied Eli's claims regarding double payment of rent and the request for an imposition of a constructive trust. Noting that the findings were directed almost solely to the actions of Lemen, the court entered judgment against only Lemen in the amount of $356,652.96 plus interest. The district court denied Eli's claim for attorney fees.

## ASSIGNMENTS OF ERROR

Lemen assigns as error, reordered, that (1) the trial court lacked jurisdiction; (2) the assignments from Western's creditors to Eli's are void and against public policy; (3) the evidence was insufficient to support a finding that Lemen violated the Uniform Fraudulent Transfer Act; (4) the court failed to consider the actions or inactions of Gittins, which were the proximate cause of the insolvency of Western following the redemption; and (5) the court failed to apply principles of equity in assessing the actual amount of Eli's damages.

On cross appeal, Eli's assigns that (1) the trial court erred in failing to find that Lemen had improperly taken money from Western and (2) the trial court erred in failing to sanction Lemen for filing a frivolous pleading.

## STANDARD OF REVIEW

An appeal of a district court's determination that transfers of assets were in violation of the Uniform Fraudulent Transfer Act is equitable in nature. *Dillon Tire, Inc. v. Fifer, ante* p. 147, 589 N.W.2d 137 (1999); *Wolf v. Degner*, 243 Neb. 702, 502 N.W.2d 440 (1993). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998).

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 own conclusions independent from the trial court. *Rice v. Adam*, 254 Neb. 219, 575 N.W.2d 399 (1998).

## ANALYSIS

### JURISDICTION

Lemen contends that the district court lacked jurisdiction because DCB, not Eli's, was the real party in interest. Neb. Rev.

Stat. § 25-301 (Reissue 1995) provides that subject to an exception not involved in this case, "[e]very action must be prosecuted in the name of the real party in interest . . . ." See, also, *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Krohn v. Gardner*, 248 Neb. 210, 533 N.W.2d 95 (1995); *Misle v. Misle*, 247 Neb. 592, 529 N.W.2d 54 (1995). "The assignee of a thing in action may maintain an action thereon in his own name and behalf, without the name of the assignor." Neb. Rev. Stat. § 25-302 (Reissue 1995). Accord *Krohn v. Gardner, supra.*

> To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.

*Misle*, 247 Neb. at 596, 529 N.W.2d at 58. "The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted." *Id.* We have said that "[t]he assignee of a chose in action is the proper and only party who can maintain the suit thereon." *Krohn v. Gardner*, 248 Neb. at 214, 533 N.W.2d at 98.

The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional. *Rice v. Adam, supra.* Lemen argues that the assignments from Western's creditors to Eli's were contrary to public policy and therefore void. Although the record does not reflect that this issue was raised in the district court, we address it on appeal because if the assignments were void, Eli's could not have been the real party in interest when it commenced this action, and neither the district court nor this court would have subject matter jurisdiction.

Lemen first argues that the assignments should be held void under an extension of our cases holding that an assignment of a legal malpractice claim is contrary to public policy and therefore void in its entirety. See, *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998); *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994). The holding in these cases is an exception to the general

rule, recognized in *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 488-89, 264 N.W.2d 827, 829 (1978), quoting 6A C.J.S. *Assignments* § 29 (1975), that " '[s]ubject to certain exceptions in case of contracts involving relations of personal confidence or trust or being for personal services all contracts are assignable.' " In *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. at 802, 523 N.W.2d at 257, we reasoned that legal malpractice claims were not assignable "because of public policy considerations concerning the personal nature and confidentiality of the attorney-client relationship."

There is nothing in the record to suggest that the claims assigned to Eli's involve "personal services" or "personal confidence and trust" of the nature found in the attorney-client relationship. The assigned claims relate to the unpaid balances of general commercial accounts, not contracts for personal services, and the fact that the assignee seeks to recover under a theory of fraudulent transfer does not alter the nature of the underlying contractual indebtedness.

Although Lemen cites cases from other jurisdictions holding that a cause of action for fraud is personal and therefore not assignable, our law is otherwise. We held in *Stroman v. Atlas Refining Corporation*, 112 Neb. 187, 199 N.W. 26 (1924), that an action in tort for fraud survives in this state and is assignable. Although we have not had previous occasion to do so, other jurisdictions have specifically held that a cause of action seeking to set aside a fraudulent transfer is assignable. *Coleman v. Daniel*, 253 S.C. 363, 170 S.E.2d 665 (1969); *Webb v. Pillsbury*, 23 Cal. 2d 324, 144 P.2d 1 (1943).

In *Webb v. Pillsbury, supra*, the plaintiff sued as the assignee of an estate administrator's statutory right to set aside conveyances made by the decedent in fraud of creditors. The Supreme Court of California noted that " 'assignability of things [in action] is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party.' . . ." *Id.* at 327, 144 P.2d at 3. The court specifically held that a creditor may assign a right of action to set aside a fraudulent conveyance. *Id.*

Likewise, in *Coleman v. Daniel, supra*, it was argued that an action based upon a fraudulent conveyance could not be

assigned on the basis of public policy. The Supreme Court of South Carolina quoted the following passage from 37 Am. Jur. 2d *Fraudulent Conveyances* § 146 (1968):

> "The benefit of a fraudulent conveyance statute may be claimed by one who stands in the place of, and has succeeded to the rights of, the creditor, such as, for example, an assignee of the debt which was owed by the transferor. Suit may be maintained by the assignee even though he purchased the judgment against the transferor subsequently to the execution of the conveyance which is sought to be set aside."

*Coleman v. Daniel*, 253 S.C. at 366, 170 S.E.2d at 667. Accordingly, the court held that the assignment did not violate public policy. We reach the same conclusion.

Having determined that the assignments from Western's creditors to Eli's were not void, we find there can be no dispute that Eli's was a real party in interest when it filed this action in March 1995. At this time, Eli's was the assignee as shown on the assignment documents included in the record. Lemen argues, however, that the district court lost jurisdiction when Eli's interests were assigned to DCB in May 1995. This issue is governed by Neb. Rev. Stat. § 25-322 (Reissue 1995), which provides:

> An action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survive or continue. In the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.

In applying § 25-322, we have held that "the transfer of interest after the action is commenced does not prevent the action from being continued to final termination in the name of the original plaintiff." *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 54, 22 N.W.2d 403, 407 (1946), citing *Vogt v. Binder*, 76 Neb. 361, 107 N.W. 383 (1906). Further, this court

has held that where promissory notes which were the subject of an action were transferred during its pendency, the action could continue in the name of the original holder of the notes. *Commercial Nat. Bank v. Faser*, 99 Neb. 105, 155 N.W. 601 (1915). See, also, *Burns v. Hockett*, 91 Neb. 546, 136 N.W. 348 (1912) (when suit was properly commenced by mortgagees, it was properly prosecuted in their names as plaintiffs to final decree, even though they transferred their interest in security and in cause of action).

We find no merit in Lemen's argument that Eli's or DCB was required by § 25-322 to move for substitution of parties following assignment of Eli's interest to DCB in order to preserve the jurisdiction of the district court over the subject matter of this action. It is undisputed that DCB acquired its interest *after* the action was commenced. In this circumstance, the plain language of § 25-322 permits the action to continue either in the name of the original plaintiff or in the name of the transferee of the original plaintiff's interest. We find nothing in the statute or in our jurisprudence which would require substitution of parties in order to preserve jurisdiction under these circumstances. If Lemen believed that substituting DCB for Eli's was in his interest, it was his burden to move for substitution under § 25-322. His failure to do so constituted a waiver of any objection based upon an alleged defect of parties. See *Armbruster v. Stanton-Pilger Drainage Dist.*, 203 Neb. 772, 280 N.W.2d 72 (1979).

### Fraudulent Transfer

We now turn to Lemen's contention that the evidence was insufficient to support the district court's finding that he violated the Uniform Fraudulent Transfer Act. The record reflects that the action was tried on the theory that the transfers from Western to Lemen as part of the redemption agreement were fraudulent as to present and future creditors under § 36-705, which provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under subdivision (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

As used in this section, "transfer" means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." § 36-702(12). A "creditor" is

defined as "a person who has a claim," and a "debtor" is "a person who is liable on a claim." § 36-702(4) and (6). With respect to a corporate debtor, the act defines an "insider" as including a director, officer, or person in control of the debtor, as well as a relative of such person. § 36-702(7)(ii)(A),(B),(C), and (G). Section 36-704 defines "value" as follows:

> (a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.
>
> (b) For the purposes of subdivision (a)(2) of section 36-705 and section 36-706, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.
>
> (c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

A debtor is considered "insolvent" under the act "if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." § 36-703(a). "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." § 36-703(b). See, also, *Dillon Tire, Inc. v. Fifer, ante* p. 147, 589 N.W.2d 137 (1999) (discussing provisions of Uniform Fraudulent Transfer Act).

Section 36-705(b) provides that factors in addition to those enumerated therein may be considered in determining actual intent under § 36-705(a)(1). We have characterized the common law indicia of fraud as follows:

> "'"'Badges of fraud' . . . are said to be facts which throw suspicion on a transaction, and which call for an explanation. . . . More simply stated, they are signs or marks of fraud. They do not of themselves or per se con-

> stitute fraud, but they are facts having a tendency to show the existence of fraud, although their value as evidence is relative not absolute. They are not usually conclusive proof; they are open to explanation. They may be almost conclusive or they may furnish merely a reasonable inference of fraud, according to the weight to which they may be entitled from their intrinsic character and the special circumstances attending the case. Often a single one of them may establish and stamp a transaction as fraudulent. When, however, several are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent . . . .'" "
>
> . . . .
>
> . . . " 'The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor. . . .' "

*Schall v. Anderson's Implement*, 240 Neb. 658, 664-65, 484 N.W.2d 86, 91 (1992). Accord *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986).

In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction. *Dillon Tire, Inc. v. Fifer, supra*; *Gifford-Hill & Co. v. Stoller, supra.* Clear and convincing evidence is " 'that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." ' " *Dillon Tire, Inc. v. Fifer, ante* at 155, 589 N.W.2d at 142. Accord *Gifford-Hill & Co. v. Stoller, supra.*

Based upon our de novo review of the record, we conclude that there is clear and convincing evidence that the transfers of assets made in conjunction with the redemption agreement were fraudulent as to the creditors whose claims were assigned to Eli's. With respect to § 36-705(a)(1), it is clear that Lemen was an "insider" as defined by the Uniform Fraudulent Transfer Act

at the time of the transfers and was directly involved in the operation of Western both before and after the transfers. We are persuaded by the testimony of Nebbia and Hein that Western was insolvent both before and after the transfers were made. However, before the transfer of the Nebraska National Bank stock to Lemen and the additional transfers which resulted from the 1993 redemption agreement, Western had unencumbered liquid assets which included the bank stock, the cash value of life insurance policies, and its printing equipment. As a result of the transfers, Western retained virtually no assets and incurred a substantial new obligation in connection with the lease of the printing equipment which it had formerly owned. This sale/lease-back transaction resulted in the transfer of Western's essential business assets to VCG, with the cash proceeds flowing to Lemen under the redemption agreement. Western retained possession of the equipment but, through the sale/lease-back arrangement, placed it out of the reach of its unsecured creditors. There is also evidence that when negotiating a workout agreement with Freeland, Lemen was less than candid regarding his plans to enter into the transaction with Gittins and did not disclose the transfer to himself of the bank stock and insurance assets shown on Western's balance sheet. We are persuaded by the testimony of Nebbia and Hein, as well as other evidence, that Western did not receive reasonably equivalent value for the assets transferred.

Based upon our de novo review, we agree with the district court's finding that other members of Lemen's family were not shown to have been responsible for the fraudulent transfers. The judgment was therefore properly entered solely against Lemen, as he was the "person for whose benefit the transfer was made." See § 36-709(b)(1). Pursuant to § 36-709(b), a creditor may recover judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever is less. The assets which we find to have been fraudulently transferred to Lemen include proceeds from the sale of Western's equipment to VCG, the life insurance policies and bank stock owned by Western as shown on its audited report of June 30, 1992, and the periodic cash payments made to Lemen by Western following redemption of his stock. The evidence estab-

lishes that the combined value of these assets exceeded the amount of the judgment against Western obtained by Eli's.

### Acts and Omissions of Gittins

Lemen assigns as error the failure of the district court to find that acts or omissions on the part of Gittins were the cause of Eli's damages, but does not cite any authority recognizing that the liability of one who fraudulently transfers assets can be diminished by the conduct of a third party. Lemen argues that Gittins failed to make a cash payment of $100,000 as stipulated in the summary as a part of the purchase of Western. However, the record clearly reflects that this failure occurred *before* Western's assets were transferred. Knowing that Gittins was unable to make the cash payment required under the parties' original summary, Lemen nevertheless entered into the 1993 redemption agreement pursuant to which the assets of Western were transferred to Lemen for his own financial benefit. Further, we note that under the analyses of Eli's expert witnesses, which we find persuasive, Western would have been insolvent following the transfer even if Gittins had made the cash payment under the parties' original summary. Based upon our de novo review, we conclude that this assignment of error lacks merit.

### Equitable Reduction of Damages

Lemen argues that under equitable principles, the amount of damages should be reduced to the amount of the "actual outlay" to Eli's or DCB in connection with the acquisition of the rights of Western's creditors, which he argues to be "in the neighborhood of $115,000.00 and $135,000.00." Brief for appellant at 30. In support of this argument, Lemen relies upon § 36-709(c), which provides that a judgment resulting from a fraudulent transfer based upon the value of the asset transferred "must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require." However, he cites no authority holding that an assignee's right to recover on an assigned claim is limited, by equitable principles or otherwise, to the amount paid for the assignment.

As a general rule, an assignment is a transfer vesting in the assignee all of the assignor's rights in property which is the sub-

ject of the assignment. *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993). While we have not addressed the specific issue, other courts have held that an assignee may recover the full value of an assigned claim regardless of the consideration paid for the assignment. See, *Aetna Casualty & Surety Co. v. McCullough*, 341 N.Y.S.2d 424, 41 A.D.2d 161 (1973); *Leavenworth S. Bank v. Wenatchee V. F. Exc.*, 118 Wash. 366, 204 P. 8 (1922). We find nothing in the record which would support Lemen's contention that the assignments of unliquidated claims to Eli's or DCB at discounted values constituted "inequitable conduct." We conclude that this assignment of error is without merit.

### CROSS-APPEAL

In its cross-appeal, Eli's contends that the district court erred in failing to find that Western made certain unauthorized payments to Lemen and Western Enterprises following the stock redemption and in failing to award attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) on the ground that Lemen had made certain allegedly "frivolous" assertions in his pleadings. Based upon our review of the record, we conclude that the assignments of error set forth in the cross-appeal are without merit.

### CONCLUSION

Based upon our independent review of the issues of law raised in this appeal and our de novo review of the issues of fact, we find no error by the district court and therefore affirm its judgment.

AFFIRMED.

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## THE STATE OF NEBRASKA, APPELLEE, V. JEREMY WHITE, APPELLANT.

590 N.W.2d 863

Filed March 26, 1999. No. S-98-560.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

2. **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.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Criminal Law: Statutes: Sentences.** All crimes in Nebraska are statutory in nature. Sentences imposed upon persons convicted of a crime are also statutory.
5. **Sentences: Final Orders: Appeal and Error.** A criminal sentence is not considered a final judgment until the entry of a final mandate from an appellate court, if an appeal has been taken.
6. **Criminal Law: Constitutional Law: Statutes.** Applying legislative amendments which disadvantage a defendant by creating or enhancing penalties which did not exist when the offense was committed is an unconstitutional ex post facto application of the new law, which this court will not allow.
7. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
8. **Sentences.** A sentencing court may impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law.
9. **Legislature: Presumptions: Statutes: Sentences.** The Legislature is presumed to know the law, including the law surrounding determinate sentences, when passing new legislation.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Affirmed.

James H. Cain for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Jeremy White appeals the sentence imposed upon him as a result of his conviction for sexual assault of a child, a Class IV felony. We affirm.

## STATEMENT OF FACTS

The crime which gave rise to the instant case occurred on or about January 6, 1997. White was then 19 years old. He was married and lived with his 24-year-old wife in an apartment in Auburn, Nebraska. He was not employed.

White and his wife had allowed their friend Catherine G. and Catherine's 11-year-old daughter, S.G., to stay with the Whites in the apartment. Catherine was experiencing financial difficulties, and she believed that if she asked her ex-husband, S.G.'s father, for financial assistance, she would lose custody of S.G. At the time of the events in question, Catherine and S.G. had been living with the Whites for approximately 3 months. Catherine and S.G. moved out of the Whites' apartment after an argument on or about January 6, 1997. After they moved, S.G. told Catherine and others that White had repeatedly sexually assaulted her.

S.G. told investigators that soon after she and her mother had moved into the Whites' apartment in October 1996, White began to sexually assault her in the basement of the apartment building. S.G. reported that at first, White pushed her up against a wall and fondled her breasts and buttocks. As the assaults continued, White penetrated S.G.'s vagina digitally and with his penis while forcibly holding S.G. against a basement wall. S.G. told the investigators that these assaults caused her to bleed vaginally and that after each assault, S.G. had to change her panties so that her mother would not see the bloody discharge.

S.G. told the investigators that White sexually assaulted her 15 to 20 times from October 1996 through January 6, 1997, when the last assault occurred. S.G. stated that she did not tell her mother about the assaults because S.G. feared White would kill her if she did so.

Based on S.G.'s allegations, an arrest warrant for first degree sexual assault was issued for White. Police officers arrested White at his apartment without incident at approximately 1 p.m. on January 9, 1997. The officers did not immediately tell White the basis for the arrest warrant, but White volunteered that he knew his arrest involved S.G. and that "I knew this was going to happen." By the time they arrived at police headquarters, White was agitated and attempted to slam his head against the building's brick wall. The officers restrained him and seated White in the police station. As they did so, White again stated that he knew that this would happen and that "that little bitch is fucking lying." The officers advised White not to say anything further until they advised him of his *Miranda* rights.

The officers read White his rights. White indicated verbally and in a written acknowledgment that he wanted to make a statement without the assistance of counsel. White denied that he had any sexual contact with S.G., and he expressed anger about allowing S.G. and Catherine to live at the Whites' apartment. White called S.G. and Catherine "pigs" who wore "see-through nightgowns." White claimed that the argument which led to Catherine and S.G.'s moving out of the apartment was a result of their refusal to share in household tasks. After White gave his statement, police took him to a jail cell.

At about the same time, White's wife arrived at the police station. Officers informed her of the reason for White's arrest, and White's wife told the officers that she thought White might have had sexual contact with S.G., although S.G. had denied it when White's wife had earlier questioned her about it. White's wife stated that she had observed White frequently "wrestle" with S.G. and that White had commented that S.G. had "a nice ass and nice legs." White's wife stated that White thought about sex constantly and that "if I don't give it to him every night he beats the shit out of me." She also stated that White had medication to control his violent tendencies. White's wife gave the officers consent to search the Whites' apartment without a warrant.

The officers returned to White's cell and recounted the information provided by White's wife. White said he wanted to talk to his wife and then he would give the police another statement. White was allowed to call his wife on the telephone. Meanwhile, law enforcement officers searched the basement of the Whites' apartment building but found nothing relating to a sexual assault or a sexual contact between White and S.G. At approximately 7:45 p.m., White's wife called the investigating officers. Sobbing, she told them that White had called her and confessed to having sexual contact with S.G.

At 9:50 p.m., White indicated to the officers that he was willing to give the police another statement. He was reminded of his *Miranda* rights but again elected to give a statement without consulting counsel. White admitted that on the morning of January 6, 1997, he had sexual contact with S.G. in the basement of the apartment building. He claimed that S.G. initiated the contact by kissing him and rubbing his penis. White admit-

ted that he removed his pants and began to have intercourse with S.G., but he claimed he soon recognized that the encounter was wrong and he pushed S.G. aside and returned to his apartment. White agreed to write a statement regarding these events, and he began working on it at about 9:55 p.m. At about 11:30 p.m., after speaking with another investigator, White admitted that he had had at least two other incidents of sexual contact with S.G.

White was initially charged with one count of first degree sexual assault, a Class II felony. Pursuant to a plea agreement, White was charged with one count of sexual assault of a child, a Class IV felony in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1995). White pled guilty to one count of sexual assault of a child, and the trial court sentenced him to a determinate term of 5 years' imprisonment. In an unpublished opinion, *State v. White*, 97 NCA No. 47, case No. A-97-474 (not designated for permanent publication), the Nebraska Court of Appeals reversed White's conviction on direct appeal based upon error in the trial court's acceptance of White's guilty plea.

Upon remand to the trial court, on April 20, 1998, White entered a guilty plea to a single count of sexual assault of a child, a Class IV felony. Before accepting White's plea and adjudging him guilty of the crime with which he was charged, the trial court properly ascertained that White's plea was knowingly and voluntarily entered. The trial court then ordered that the presentence report prepared for White's first sentencing hearing be updated.

White appeared with counsel in the trial court on May 4, 1998, for resentencing. After the hearing began, the trial court took a recess so that White and his counsel could review the presentence report, including the amendments thereto. Upon resumption of the proceedings, White and his counsel agreed that the presentence report was accurate and complete. To the extent that information from this presentence report is necessary to our analysis, it is set forth below.

At the time of the resentencing hearing on May 4, 1998, White had served approximately 1 year of the 5-year term of incarceration to which he was originally sentenced. White's counsel stated that White had received counseling while in

prison, that he could obtain gainful employment if sentenced to a term of less than 5 years' imprisonment, and that White wanted to resume family life with his wife. White also appealed for a lesser sentence based upon his age, which was 19 at the time he committed the crime. White's counsel noted that S.G. now lived with her father in Missouri and that the likelihood of an encounter between White and S.G. was remote.

The trial court was unpersuaded by White's request for a punishment less than the 5-year sentence which the court had originally imposed upon White. The trial court sentenced White to a determinate term of 5 years' imprisonment, with credit given for time which White had already served. The trial court advised White that as a result of recent amendments in sentencing laws, White was considered eligible for parole immediately because there was no statutorily mandated minimum punishment for Class IV felonies. The trial court also advised White of the maximum amount of time he could be incarcerated before attaining his mandatory discharge, as well as the length of time White would actually be incarcerated if he qualified for all of the "positive time" allowed by Nebraska statutes. The trial court immediately remanded White to the custody of the sheriff to resume serving his sentence of imprisonment.

White appeals.

## ASSIGNMENT OF ERROR

White claims that his sentence is excessive and that the trial court abused its discretion in sentencing him to 5 years' imprisonment.

## STANDARD OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Urbano, ante* p. 194, 589 N.W.2d 144 (1999); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998); *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). 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. Hill, supra.*

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Urbano, supra*; *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

## ANALYSIS

All crimes in Nebraska are statutory in nature. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). Sentences imposed upon persons convicted of a crime are also statutory. *Pattno, supra.* A criminal sentence is not considered a final judgment until the entry of a final mandate from an appellate court, if an appeal has been taken. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997); *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995). Penal statutes are strictly construed. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

We first consider the classification of the offense for which White stands convicted. White was convicted in the trial court of the crime of sexual assault of a child, which, at the time of its commission, was a Class IV felony for the first offense. Repeated convictions for this crime increased from Class IV to Class III felony status. See § 28-320.01(2).

Operative July 1, 1998, during the pendency of White's appeal, first offense sexual assault of a child was reclassified as a Class IIIA felony and repeated convictions of this offense were reclassified as Class IC felonies by virtue of legislative amendments to § 28-320.01. See 1997 Neb. Laws, L.B. 364. The Class IV felony crimes reclassified as Class IIIA felonies generally involved greater violence, in particular, violence committed against other persons. *Id.*

The reclassification of the crime of which White was convicted obviously increases the severity of the classification. It also increases the potential punishment. The present maximum penalty for both Class IIIA and Class IV felonies is 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 1998). The minimum portion of a Class IIIA felony indeterminate sentence is unrestricted. That is, there is no upper limit on the minimum term of a Class IIIA felony indeterminate sentence. However, the maximum minimum term

of a Class IV felony indeterminate sentence cannot now exceed one-third of the maximum sentence allowed by law, i.e., the maximum minimum term cannot exceed 20 months' incarceration. *State v. Urbano, supra*; Neb. Rev. Stat. §§ 29-2204 and 83-1,105.01 (Cum. Supp. 1998). For the sake of completeness, we note that during the period of July 1 to 14, 1998, while this appeal was pending, a Class IV felony sentence was subject to a mandatory minimum term of 6 months' imprisonment. See, 1997 Neb. Laws, L.B. 364; 1998 Neb. Laws, L.B. 1266.

The statutory reclassification of White's crime by virtue of the 1997 amendment to § 28-320.01 did not become operative until after every material stage of the judicial process in the trial of this case had been completed. The amendment to § 28-320.01 reclassifies the crime of which White was convicted as more severe and creates a potentially harsher minimum punishment than that which is permitted for Class IV felonies. Applying legislative amendments which disadvantage a defendant by creating or enhancing penalties which did not exist when the offense was committed is an unconstitutional ex post facto application of the new law which this court will not allow. *State v. Urbano, ante* p. 194, 589 N.W.2d 144 (1999). Therefore, as we analyze White's excessive sentence claim, we do not reclassify his crime as a Class IIIA felony, but, rather, construe his conviction as a Class IV felony, and we examine his sentence within the applicable statutory framework for Class IV felonies.

White was sentenced to a term of 5 years' imprisonment. White's sentence obviously exceeds the 0-year minimum punishment for Class IV felonies and does not exceed the 5-year maximum term permitted by statute. The sentence is, on its face, within the lawful statutory range of penalties permitted for Class IV felonies.

White claims on appeal that the 5-year sentence imposed upon him is excessive and must be reduced due to the 1997 and 1998 amendments to § 29-2204 and the 1997 amendment to § 83-1,105.01, which amendments impose, inter alia, the condition that the minimum term of a Class IV felony indeterminate sentence should not exceed one-third of the maximum term. Because White's sentence was determinate, White's claim,

based on the statutory revisions relevant to Class IV indeterminate sentences, is without merit.

By their terms, §§ 29-2204 and 83-1,105.01 govern indeterminate sentences, and they are, therefore, inapplicable to White's determinate sentence. In reaching this conclusion, we are guided by the principle that statutory language is to be given its plain and ordinary meaning. *Neb. Account. & Disc. v. Citizens for Resp. Judges, ante* p. 95, 588 N.W.2d 807 (1999).

In the instant case, the trial court articulated a single term of years as White's sentence. This was a determinate sentence. We observe that in contrast, when imposing an indeterminate sentence, a sentencing court ordinarily articulates either a minimum term and maximum term or a range of time for which a defendant is to be incarcerated. *State v. Urbano, supra.* Because White's sentence was determinate, the sentencing provisions in §§ 29-2204 and 83-1,105.01 regarding maximum minimum terms for indeterminate sentences are inapplicable to White.

A criminal sentence is not considered a final judgment until entry of a final mandate from an appellate court, if an appeal is taken. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997). Thus, although White's sentence is not affected by statutory amendments relevant to Class IV felony indeterminate sentences, we, nevertheless, must evaluate the effect, if any, of recent amendments to the sentencing statutes as they may pertain to White's determinate sentence at the time of the resolution of White's case on appeal.

Sections 29-2204 and 83-1,105.01 have consistently provided that a trial court may impose a determinate sentence upon a criminal defendant. Following legislative enactments in 1997 and 1998, §§ 29-2204 and 83-1,105.01 both presently provide in substance that a sentencing court may "[i]mpose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law." Thus, because there is no statutorily mandated minimum punishment for a Class IV felony, the minimum term of a Class IV felony determinate sentence such as that which White received is the minimum provided by law, which is 0 year's imprisonment. Applying the current terms of §§ 29-2204 and 83-1,105.01, the

determinate sentence of 5 years' imprisonment imposed upon White is effectively a sentence with a maximum term of 5 years' imprisonment and by operation of law, a minimum term of 0 year's imprisonment.

We note that the terms of §§ 29-2204 and 83-1,105.01 governing determinate sentences as currently amended are substantially similar to the terms of Neb. Rev. Stat. § 83-1,105 (Reissue 1987) as that section existed prior to its 1993 repeal. In interpreting those terms, this court held that the minimum term of a determinate sentence was considered to be the minimum term provided by law and that thus, for a crime such as a Class IV felony which had no statutorily mandated minimum punishment, the minimum term of a determinate sentence is considered to be 0 year's imprisonment. *State v. Blazek*, 199 Neb. 466, 259 N.W.2d 914 (1977); *State v. Hedglin*, 192 Neb. 545, 222 N.W.2d 829 (1974).

Although the Legislature has indicated an intention by statutory reclassification to treat certain formerly Class IV felony behavior more severely for both classification and sentencing purposes, application of ex post facto principles prevent this court from punishing White more severely than the law allowed at the time the crime was committed. With respect to the minimum sentence applicable to a Class IV felony, the Legislature by statute provided for 0 year's imprisonment as a minimum when the crime in this case was committed, required a 6 months' mandatory minimum sentence from July 1 to 14, 1998, and reverted to 0 year's imprisonment as a minimum sentence on July 15, 1998. After July 15, 1998, the Legislature did not change the effect of a determinate Class IV felony sentence, which sentence shall be the term imposed by the court as a maximum term with a minimum term as provided by law, which in the case of Class IV felonies is 0 year's imprisonment. The Legislature is presumed to know the law, including the law surrounding determinate sentences, when passing new legislation. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). See, also, *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). With respect to indeterminate Class IV felony sentences, after July 15, 1998, the Legislature has provided that the maximum minimum limit shall not exceed 20

months' imprisonment. By its legislation, the Legislature has signaled that Class IV felony behavior which has not been reclassified as a Class IIIA felony crime should be treated prospectively with more leniency with respect to the maximum minimum portion of an indeterminate sentence than prospective Class IIIA felonies for which there is no maximum minimum limit in an indeterminate sentence. Although we recognize that the act White committed would be a Class IIIA felony had it been committed on or after July 1, 1998, because such act was a Class IV felony at the time it was committed on January 6, 1997, White is treated on appeal as a defendant who has committed a Class IV felony.

At White's resentencing hearing, the trial court correctly advised White that as a result of the determinate 5-year sentence of imprisonment which it was imposing upon him, the maximum term was 5 years' imprisonment and the minimum term of the sentence was considered to be 0 year's imprisonment, since there was no statutorily mandated minimum punishment for a Class IV felony. The trial court also correctly followed § 29-2204 by advising White on the record that since there was no minimum punishment for a Class IV felony, he was immediately eligible to be considered for parole. The trial court also advised White of the amount of time he had to serve on his maximum term before attaining mandatory release, assuming White did not lose any "good time" for which he was eligible. See § 29-2204(1)(b) and (c). We conclude, therefore, that the sentence imposed by the trial court was within statutory limits, the associated explanation of the effect of the sentence was accurate, and the resolution of White's appeal after the operative dates of recent amendments to §§ 28-105, 29-2204, and 83-1,105.01 does not alter the sentence imposed upon White by the trial court. White received a determinate sentence of 5 years' imprisonment for his Class IV felony conviction, and pursuant to §§ 28-105, 29-2204, and 83-1,105.01, the minimum portion of his sentence is deemed to be 0 year's imprisonment.

Finally, we consider White's argument that we should reduce his sentence pursuant to this court's authority to modify criminal sentences on appeal. See Neb. Rev. Stat. § 29-2308 (Reissue 1995). We decline to do so.

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. Urbano, ante* p. 194, 589 N.W.2d 144 (1999); *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

It is undisputed that White admitted to the officers that on multiple occasions he had sexual contact with S.G., an 11-year-old girl, and that the facts of these incidents amounted to the crime of sexual assault of a child. White claims on appeal, however, that his sentence should be reduced because S.G. was not "physically injured" and she "did not suffer any mental anguish." Brief for appellant at 5.

We reject White's assertions which trivialize the crime and its effect upon the child he assaulted. In affirming a sexual assault of a child conviction, we have previously rejected similar arguments and observed, "To claim, as [appellant] does, that this crime was 'not of a violent nature' is to ignore reality . . . ." *State v. Stephens*, 237 Neb. 551, 559-60, 466 N.W.2d 781, 787-88 (1991). White's sexual assault of S.G. for which he stands convicted was an act of violence, the nature of which the trial court obviously considered in imposing sentence upon White. In the instant case, the trial judge commented that upon resentencing, he could not justify a lesser sentence than 5 years' incarceration.

We have noted that a trial court has the opportunity to observe a defendant throughout the judicial process and is in a better position than this court to determine the most appropriate sentence, including, inter alia, whether the defendant is suited for probation. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances of the defendant's life. *Id.*

A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in mat-

ters submitted for disposition. *Id.* See, also, *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998); *State v. Chojolan, supra.*

The sentence imposed upon White is not excessive, and the trial court did not abuse its discretion by imposing upon White a determinate sentence of 5 years' incarceration.

## CONCLUSION

White's sentence of 5 years' incarceration based upon his conviction of the Class IV felony crime of sexual assault of a child is not excessive. As a result of recent statutory sentencing amendments, the determinate sentence of 5 years' incarceration imposed upon White amounts to a sentence with a maximum term of 5 years' imprisonment and, by operation of law, a minimum term of 0 year's imprisonment. The trial court did not err in imposing a 5-year term of imprisonment, and, accordingly, we affirm.

AFFIRMED.

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ROBERT E. KROLL, APPELLANT, V.
DEPARTMENT OF MOTOR VEHICLES, APPELLEE.
590 N.W.2d 861

Filed March 26, 1999. No. S-98-574.

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 conclusions independent from those of the trial court.
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. **Administrative Law: Judgments: Jurisdiction: Appeal and Error.** Orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable. Likewise, an administrative order requiring further action of the parties is conditional and therefore not appealable.
4. **Jurisdiction: Appeal and Error.** When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Nemaha

County, ROBERT T. FINN, Judge. Judgment of Court of Appeals affirmed, and cause remanded with directions.

Timothy W. Nelsen, of Fankhauser, Nelsen & Werts, P.C., for appellant.

Don Stenberg, Attorney General, and Paul N. Potadle for appellee.

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

STEPHAN, J.

On or about April 30, 1997, the Nebraska Department of Motor Vehicles (Department) notified Robert E. Kroll that his Georgia operator's license was under suspension or revocation and that failure to obtain a clearance letter from that state would result in summary revocation of his Nebraska operator's license which had been issued on March 28. Upon receipt of this notification, Kroll filed a "Petition for Review of an Administrative Decision" in the district court for Nemaha County. On February 23, 1998, the district court entered an order reciting that trial was held on January 26 and determining that "the decision of Alvin Abramson, Director of the Department of Motor Vehicles which in substance provides for the administrative revocation of the Plaintiff Robert E. Kroll's drivers [sic] license under and pursuant to Neb. Rev. Stat. § 60-487 [(Reissue 1998)] is hereby reversed and vacated." The order further directed the Department to reinstate Kroll's driving privileges and enjoined the Department "from removing those privileges in the future as a result of the suspension of his driving privileges in the State of Georgia." No appeal was taken from this order.

Subsequently, on April 10, 1998, the district court entered an order reciting that trial was held on January 26, but finding in favor of the Department. This order included a specific finding "[t]hat the revocation of [Kroll's] operator's license by the Nebraska Department of Motor Vehicles pursuant to Neb. Rev. Stat. § 60-487 [(Reissue 1998)] is affirmed." However, it made no reference to the order of February 23 in which it had reached the opposite result.

Upon entry of the April 10, 1998, order, Kroll filed a motion for new trial, which was denied. He then appealed to the Nebraska Court of Appeals, which on September 9, 1998, summarily dismissed the appeal pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 1996), stating: "Order filed April 10, 1998, is declared void for lack of jurisdiction in view of trial court's order of February 23, 1998, from which no appeal was taken." We granted the Department's petition for further review.

## ASSIGNMENTS OF ERROR

The Department asserts the Court of Appeals erred in dismissing the case for lack of jurisdiction and in reinstating the district court's order of February 23, 1998.

## SCOPE OF REVIEW

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 conclusions independent from those of the trial court. *State v. Jacob, ante* p. 492, 591 N.W.2d 541 (1999); *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

## 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. Jacob, supra*; *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). The Motor Vehicle Operator's License Act is codified at Neb. Rev. Stat. §§ 60-462 to 60-4,1888 (Reissue 1993, Cum. Supp. 1996, & Supp. 1997). See § 60-462. The act defines "revocation" of a license as "the termination by a court of competent jurisdiction or by formal action of the Department of Motor Vehicles of a person's operator's license, which termination shall not be subject to renewal or restoration." § 60-476.01. Specifically, the act provides in part, "No person shall be licensed to operate a motor vehicle by the State of Nebraska if such person has an operator's license currently under suspension or revocation in any other state or jurisdiction in the United States." § 60-486. The act authorizes the director of the Department to summarily revoke a license if his or her official records affirmatively show

that the person to whom such license was issued was not eligible to receive the license. § 60-487.

The letter Kroll received from the Department in April 1997 advised him to contact officials in Georgia for information regarding the requirements for clearing the status of his operator's license in that state and instructed him to mail or fax the necessary information to the Department by June 16. The letter specifically informed Kroll that "[f]ailure to receive [sic] a clearance letter to this Department by the above date will result in the summary revocation of [Kroll's license] pursuant to Nebraska Revised Statute 60-487." On the same day that Kroll filed his "Petition for Review of an Administrative Decision," the Department received from him a money order in the amount of $205 to cover "the bond and the cost of the transcript required under Section 60-4,105 Nebraska Revised Statute."

Section 60-4,105 provides for appeals from certain orders of the Department. The statutory language makes it clear that appeals must be from final orders of the Department, providing in part, "The ruling, order, or decision of the director in refusing to issue or reinstate such license or in suspending, canceling, or revoking the same shall be as final and binding as the final order or judgment of a court of general jurisdiction." § 60-4,105. The threshold issue, therefore, is whether the letter Kroll received from the Department was a final, appealable order.

Orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable. *Deuth v. Ratigan, ante* p. 419, 590 N.W.2d 366 (1999) (order stating that foreign judgment would be enforced in Nebraska unless party had it set aside by foreign court is conditional order); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997) (judgment awarding attorney fees in amount to be determined at later date is conditional and not final, appealable order). Likewise, an administrative order requiring further action of the parties is conditional and therefore not appealable. *Garber v. State*, 241 Neb. 523, 489 N.W.2d 550 (1992) (order of Nebraska Motor Vehicle Industry Licensing Board terminating franchise agreement

" 'effective when a replacement dealer is found and the Board is notified' " is conditional and not final, appealable order).

We conclude that in the present case, the April 30, 1997, letter was conditional because it contemplated further action by the parties. The letter specifically provided that summary revocation of Kroll's license would occur only if no clearance letter from the State of Georgia was received by June 16. This cannot be considered a formal, final action by the Department because it "does not perform in praesenti, and thus leaves to speculation and conjecture what its final effect may be . . . ." *Id.* at 524, 489 N.W.2d at 551. See §§ 60-476.01 and 60-4,105. Although the letter expressed the Department's intent to revoke Kroll's operator's license if he did not take the requested remedial action, the record contains no order actually revoking the license pursuant to § 60-487. Because there was no final, appealable administrative order, the district court never acquired jurisdiction and both of its conflicting orders are thus void. See *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim. *Henderson v. Department of Corr. Servs., ante* p. 314, 589 N.W.2d 520 (1999).

Thus, although not for the reason it articulated, we agree with the Court of Appeals that the district court's order of April 10, 1998, was void and that the appeal from that order should be dismissed. We also determine that the district court's order of February 23, 1998, was void and remand the cause to the Court of Appeals to vacate the judgment of the district court because of that court's lack of subject matter jurisdiction.

AFFIRMED AND REMANDED WITH DIRECTIONS.

# STATE OF NEBRASKA, APPELLEE, v. CAREY DEAN MOORE, APPELLANT.

591 N.W.2d 86

Filed April 2, 1999. No. S-97-511.

1. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
3. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution.
4. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the movant is entitled to no relief.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used to obtain further review of issues already litigated.
6. **Constitutional Law: Criminal Law: Homicide: Lesser-Included Offenses: Jury Instructions.** The U.S. Constitution does not require that the jury in a felony murder case be instructed as to lesser-included offenses where the crime, as defined by state law, does not include any lesser offenses.
7. **Postconviction: Effectiveness of Counsel: Pleas: Proof.** When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of his or her attorney's actions or inactions.
8. **Trial: Appeal and Error.** An issue not presented to or decided by the trial court is not an appropriate issue for consideration on appeal.
9. **Constitutional Law: Death Penalty.** Prolonged incarceration on death row, in and of itself, does not violate the Eighth Amendment to the U.S. Constitution.
10. **Constitutional Law: Criminal Law.** With reference to cruel and unusual punishment, the Nebraska Constitution does not require more than does the Eighth Amendment to the U.S. Constitution.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Edward F. Fogarty, of Fogarty, Lund & Gross, and Larry W. Myers for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

GERRARD, J.

## I. NATURE OF CASE

Carey Dean Moore filed a motion for postconviction relief in the district court for Douglas County. The district court denied relief, without an evidentiary hearing, and Moore appealed. For the reasons stated herein, we affirm the judgment of the district court.

## II. FACTUAL BACKGROUND

In a 4-day span during August 1979, Moore robbed and murdered two Omaha taxi drivers. Moore was convicted of two counts of first degree murder, based on a felony murder theory, and was sentenced to death by a three-judge panel in 1980. We affirmed the convictions and sentence in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864 (*Moore I*). The facts of the underlying crimes are more fully set out in that opinion.

Moore filed his first state postconviction action in 1982, alleging, inter alia, that his trial counsel was ineffective and that Nebraska's death penalty procedures were unconstitutional. On appeal, we rejected these arguments. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984) (*Moore II*).

Moore then filed a federal habeas corpus action and was granted a writ of habeas corpus based upon his constitutional challenge to Nebraska's death penalty procedures. The U.S. Court of Appeals for the Eighth Circuit affirmed the order of resentencing, and this order was reaffirmed by the Eighth Circuit on denial of rehearing. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *rehearing denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992).

On remand, this court determined that it would decline to itself resentence Moore, but would instead remand the cause to the state district court for resentencing. *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993) (*Moore III*). Moore was again

sentenced to death, and on direct appeal from his resentencing, he again alleged, inter alia, that Nebraska's death penalty statutes and procedures were unconstitutional. We rejected those arguments. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *cert. denied* 520 U.S. 1176, 117 S. Ct. 1448, 137 L. Ed. 2d 554 (1997) (*Moore IV*).

On March 3, 1997, this court set an execution date of May 9 for Moore. Moore filed the present state action for postconviction relief on April 30. On May 5, this court stayed Moore's execution in light of *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996), *rev'd* 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998). On the same date, the district court denied Moore's motion for postconviction relief, without an evidentiary hearing. This appeal followed, and because this is a capital case, the appeal was placed on our docket. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

## III. ASSIGNMENTS OF ERROR

Moore alleges, restated, that the district court erred in (1) not concluding that Moore was denied due process of law as guaranteed to him by the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution because in determining innocence and guilt, the original trial court gave no consideration to lesser-included offenses to murder in the first degree and was not permitted to give consideration to lesser offenses by existing Nebraska case law; (2) not concluding that Moore was denied his right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution when at the original trial, his attorney allowed the waiver of a jury and thus lost the opportunity for instruction on lesser-included offenses to murder in the first degree and the right to preserve such error on appeal; (3) not concluding that Moore was denied his right to effective assistance of counsel, violating the federal and state Constitutions, when at his original trial, no defense was raised that Moore could be found guilty of a lesser offense than murder in the first degree and no particular effort was made to present evidence supporting such a theory; (4) not concluding that Moore was denied due process of law under the

federal and state Constitutions because the 1995 resentencing panel failed to give Moore advance notice of which definition of the "exceptional depravity" aggravator the panel would use; (5) not concluding that Moore was denied his right to effective assistance of counsel, violating the federal and state Constitutions, at his 1995 resentencing because if a constitutionally adequate definition of "exceptional depravity" was ascertainable from the case law, his counsel failed to ascertain it; (6) applying the "exceptional depravity" aggravator which, as recited in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1995) and elaborated upon in case law and as fashioned by the sentencing court, remains vague and indefinite, in violation of the due process and freedom from cruel and unusual punishment protections provided to Moore by the 5th, 8th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 9, of the Nebraska Constitution; and (7) not finding that Moore has been subjected to cruel and unusual punishment, in violation of his rights under the Eighth Amendment to the U.S. Constitution and under article I, § 9, of the Nebraska Constitution, by virtue of his long confinement in isolation on death row, the repeated death warrants issued and then stayed, and the delays essentially not caused by him, but, rather, by the State.

## IV. STANDARD OF REVIEW

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998). A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *Id.*

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). However, an evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the movant is entitled to no relief. See *id.*

## V. ANALYSIS

### 1. Ineffective Assistance of Trial Counsel

Moore's first three assignments of error all relate to the alleged ineffective assistance of counsel at his original trial. This argument, however, has already been addressed by this court. In his first postconviction action, *Moore II*, Moore based his postconviction motion in part on the assertion that his trial counsel was "inadequate and incompetent." *Id.* at 609, 350 N.W.2d at 15. This court stated that "we have examined the record and find no evidence to support the charge of inadequate counsel." *Id.* at 610, 350 N.W.2d at 16.

We have repeatedly stated that a motion for postconviction relief may not be used to obtain further review of issues already litigated. *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). See, also, *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998), *disapproved on other grounds, State v. Silvers, supra*; *State v. Fletcher*, 253 Neb. 1029, 573 N.W.2d 752 (1998).

Moore's first three assignments of error were not only available to be raised in his first postconviction action, but they were raised and rejected in that action. If there is any basis for a claim of ineffective assistance of counsel that was not available to Moore at the time of his first postconviction motion, he does not identify it in the present case. Consequently, his claims relating to ineffective assistance of his trial counsel are procedurally barred, and we do not consider them here.

We additionally note that even if these arguments were not procedurally barred, all three assignments of error are premised on the alleged constitutional infirmity of the trial court's failure to give instruction on lesser-included offenses to felony murder. Since Moore's brief was filed, the U.S. Supreme Court has clarified that the U.S. Constitution does not require that the jury in a felony murder case be instructed as to lesser-included offenses where the crime, as defined by state law, does not include any lesser offenses. See *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998), *rehearing denied* ___ U.S. ___, 119 S. Ct. 5, 141 L. Ed. 2d 766. That being the case, even were

Moore's arguments not procedurally barred, they would be without merit.

### 2. Exceptional Depravity Aggravator

#### (a) Ex Post Facto Claim

Moore's fourth, fifth, and sixth assignments of error relate to the use of the aggravating circumstance of "exceptional depravity" to support his death sentence. See § 29-2523(1)(d). Again, we have previously addressed these arguments.

Moore alleged on direct appeal from his resentencing that the sentencing panel

> "committed reversible error by applying an unconstitutionally vague statutory aggravating circumstance . . . and by fashioning their [sic] own new definition of the aggravating circumstance in an ex post facto manner thereby depriving [Moore] of notice of the elements of the aggravating circumstance and further depriving him of the opportunity to respond and present evidence to rebut the facts necessary to establish the presence of the newly defined aggravating circumstance."

*Moore IV*, 250 Neb. at 815, 553 N.W.2d at 129-30. Moore's argument, essentially, was that the resentencing panel had redefined § 29-2523(1)(d) in a way that Moore was not prepared to rebut. While we noted that the resentencing panel had formulated new standards for § 29-2523(1)(d), we found that those standards were based on existing case law, and we determined that "because Moore received sufficient notice and an opportunity to present evidence at the resentencing hearing, there was no violation of due process." *Moore IV*, 250 Neb. at 826, 553 N.W.2d at 136.

In fact, we stated:

> Moore received even greater notice than constitutionally required. He knew from the Eighth Circuit's opinion in *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992), that the scope of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) would be an issue in the resentencing proceedings. Thus, he

> could hardly have been surprised when the resentencing panel *further narrowed* the definitions of exceptional depravity precisely along the lines suggested by the federal courts.

(Emphasis supplied.) *Moore IV*, 250 Neb. at 826, 553 N.W.2d at 135.

Moore's fourth assignment of error in the present action does nothing more than reiterate the ex post facto argument presented to and rejected by this court in *Moore IV*. In accord with the principles set forth above, Moore's fourth assignment of error is procedurally barred, and we do not consider it.

(b) Ineffective Assistance of Counsel

Moore's fifth assignment of error, however, is not procedurally barred. The record reveals that the same attorney represented Moore at his 1995 resentencing hearing and on appeal from that resentencing. Moore alleges that this attorney provided ineffective assistance of counsel. This claim was not available to Moore on direct appeal, and this is Moore's first postconviction motion since his direct appeal from resentencing. Therefore, this is Moore's first opportunity to present the claim, and it is not procedurally barred.

When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of his or her attorney's actions or inactions. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998).

In the present case, we need not determine if Moore's attorney at resentencing was ineffective, because we find that Moore has not sufficiently shown how he was prejudiced by this alleged ineffectiveness.

Moore's argument is premised on our determination in *Moore IV*, 250 Neb. at 826, 553 N.W.2d at 135:

> [T]he resentencing panel's reformulation of the aggravating circumstance was accomplished by isolating the previous applications of the exceptional depravity prong of aggravating circumstance § 29-2523(1)(d). This is by definition a narrowing of the information which Moore had regarding this aggravating circumstance prior to the resentencing hearing. As such, it was neither unforeseeable nor did it expand the reach of that aggravating circumstance beyond information that Moore was on notice to prepare for concerning such aggravating circumstance.

Moore's claim is that since his attorney claimed on appeal that the definition of "exceptional depravity" was not ascertainable in advance, his attorney must have failed to foresee that which this court said was foreseeable and, therefore, that his attorney failed to effectively counsel him. Without commenting on the veracity of this claim, we find that even if we assume it to be true, Moore has identified no facts supporting a finding that Moore was prejudiced thereby.

Moore's claim in his motion for postconviction relief is simply that "if the definition of the aggravator was reasonably foreseeable as extrapolated from previous Nebraska Court decisions giving definition to the aggravator, counsel should have known of this possibility and by failing to do so provided ineffective assistance of counsel." In neither his petition nor his appellate brief does Moore claim how this alleged ineffectiveness in any way prejudiced him at resentencing.

Moore does not claim, for example, that his counsel failed to present, or was prevented from presenting, evidence rebutting salient aspects of the narrowed definition of "exceptional depravity" relied upon by the sentencing panel. Since *Moore I*, every sentencing panel and reviewing court has cited Moore's cold, calculated planning of the victims' deaths and, in particular, selection of the victims based on particular characteristics as *the* integral part of the exceptional depravity prong. The *Moore I* court quoted from the findings made by the sentencing panel, which findings were fully supported by uncontroverted evidence:

> "The defendant's own statements, in his confession to Officers O'Donnell and Thompson while in custody at

Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the Van Ness homicide. Apparently on the evening prior to the Van Ness murder, the defendant had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. The defendant then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, i.e., not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, the defendant's plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded 'wasn't too old,' the defendant would just not identify himself as the fare for which the cab had been summoned. When Mr. Van Ness arrived at the Smoke Pit on August 22, 1979, the defendant determined that this was the driver who would be robbed and shot because 'he wasn't too young'.

"A similar pattern of events unfolded on August 26, 1979. The defendant went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening, and, when he saw a lone cab with an older driver parked at the taxi stand outside the depot, he got into the cab and directed the driver to take him to the Benson area. According to the defendant, this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of the defendant's being identified, and because the driver was an older man. The defendant then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected." In his confessions the defendant stated that he killed each of the victims in order that the victim would not be able to identify him as the robber.

*Id.* at 461-62, 316 N.W.2d at 36-37.

Moore has not set forth in his motion for postconviction relief or in his brief what evidence he would present to rebut his

own confession or the narrowed definition of exceptional depravity utilized by the sentencing panel. Moore has had ample notice and opportunity to explain the circumstances or present mitigating evidence with reference to the cold, calculated planning of the victims' deaths, and he has failed to do so. Additionally, our review of the records and files presented provides us with no basis to show that Moore was prejudiced by any alleged ineffectiveness of counsel or that he is entitled to postconviction relief on this claim. We determine that Moore's fifth assignment of error is without merit.

(c) Application of Exceptional Depravity

Moore's sixth assignment of error is that the district court "erred by applying the 'exceptional depravity' aggravator," because, as defined, it continues to violate the 5th, 8th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 9, of the Nebraska Constitution. Brief for appellant at 7-8.

This assignment of error is without merit. First, in the present postconviction action, the district court did not "apply" the exceptional depravity aggravator. In fact, the underlying validity of § 29-2523(1)(d) is not even raised as an issue in Moore's motion for postconviction relief. To the extent that the assignment of error might erroneously refer to the "district court" where Moore intended to refer to the application of "exceptional depravity" by the 1995 resentencing panel, this issue was again not presented to the trial court in the present case. An issue not presented to or decided by the trial court is not an appropriate issue for consideration on appeal. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 219, 142 L. Ed. 2d 180.

Even had Moore properly presented the underlying validity of § 29-2523(1)(d) to the trial court in this case, we note that the argument would be procedurally barred. The alleged infirmities of § 29-2523(1)(d), as applied, could have been, and were, raised as error on direct appeal from the resentencing. The precise argument raised here was rejected by this court in *Moore IV*. Even if properly presented to a postconviction court, Moore's arguments regarding § 29-2523(1)(d) are procedurally barred, as they were resolved against him on direct appeal.

*Moore IV*. Thus, Moore's sixth assignment of error is without merit.

### 3. *Lackey* Claim

Moore claims that he has been subjected to cruel and unusual punishment by virtue of his now nearly 20-year confinement on Nebraska's death row. Essentially, Moore claims that it is cruel and unusual punishment to keep a person confined with the knowledge that he is to be executed and then to prolong that process pursuant to legal machinations. Moore's argument is completely without merit.

Arguments similar to Moore's have been raised in this country for nearly 40 years. See, *Chessman v. Dickson*, 275 F.2d 604 (9th Cir. 1960); *Andrews v. Shulsen*, 600 F. Supp. 408 (D. Utah 1984), *aff'd* 802 F.2d 1256 (10th Cir. 1986), *cert. denied* 485 U.S. 919, 108 S. Ct. 1091, 99 L. Ed. 2d 253 (1988), *rehearing denied* 485 U.S. 1015, 108 S. Ct. 1491, 99 L. Ed. 2d 718. The issue has most recently been revived in a memorandum opinion respecting a denial of certiorari by Justice Stevens, joined by Justice Breyer. *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995). See, also, *Elledge v. Florida*, ___ U.S. ___, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998) (Breyer, J., dissenting from denial of certiorari); *Gomez v. Fierro*, 519 U.S. 918, 117 S. Ct. 285, 136 L. Ed. 2d 204 (1996) (Stevens, J., joined by Breyer, J., dissenting from denial of certiorari). In his memorandum opinion in *Lackey v. Texas, supra*, Justice Stevens noted his interest in the question whether prolonged confinement on death row could constitute cruel and unusual punishment and stated that one of the justifications for denying a writ of certiorari was so that the issue, having been called to the attention of appellants, could be considered by the lower courts prior to being addressed by the U.S. Supreme Court.

Other jurisdictions have considered the Eighth Amendment claim that long confinement on death row constitutes cruel and unusual punishment and have soundly rejected such claims. See, *Chambers v. Bowersox*, 157 F.3d 560 (8th Cir. 1998); *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996), *rehearing and suggestion for rehearing en banc denied* 85 F.3d 627 (5th Cir.), *cert. denied* ___ U.S. ___, 117 S. Ct. 275, 136 L. Ed. 2d 198;

*Stafford v. Ward*, 59 F.3d 1025 (10th Cir. 1995), *cert. denied* 515 U.S. 1173, 115 S. Ct. 2640, 132 L. Ed. 2d 896; *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995), *cert. denied* 514 U.S. 1136, 115 S. Ct. 2019, 131 L. Ed. 2d 1017; *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995), *adopted on rehearing en banc* 57 F.3d 1493 (9th Cir.), *cert. denied* 514 U.S. 1104, 115 S. Ct. 1840, 131 L. Ed. 2d 846; *Williams v. Chrans*, 50 F.3d 1363 (7th Cir. 1995); *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995), *rehearing and suggestion for rehearing en banc denied* 58 F.3d 642 (11th Cir.); *Knight v. State*, 721 So. 2d 287 (Fla. 1998); *People v. Frye*, 18 Cal. 4th 894, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998), *cert. denied* No. 98-7620, 1999 WL 150823 (U.S. Cal. Mar. 22, 1999); *State v. Schackart*, 190 Ariz. 238, 947 P.2d 315 (1997), *cert. denied* ___ U.S. ___, 119 S. Ct. 149, 142 L. Ed. 2d 122 (1998); *Ex Parte Bush*, 695 So. 2d 138 (Ala. 1997), *cert. denied* ___ U.S. ___, 118 S. Ct. 418, 139 L. Ed. 2d 320; *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (1996), *cert. denied* 522 U.S. 905, 118 S. Ct. 410, 139 L. Ed. 2d 314 (1997); *Bell v. State*, 938 S.W.2d 35 (Tex. Crim. App. 1996), *cert. denied* 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 46 (1997); *Stafford v. State*, 899 P.2d 657 (Okla. Crim. App. 1995), *cert. denied* 515 U.S. 1173, 115 S. Ct. 2640, 132 L. Ed. 2d 896.

In addition, a similar claim was presented to this court in *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997), *cert. denied* 522 U.S. 992, 118 S. Ct. 555, 139 L. Ed. 2d 397. In that case, we noted that we had previously remanded the cause to the district court for additional factual findings and that in so doing, we had implicitly rejected the other errors assigned in the previous appeal. *Id.* The errors implicitly rejected included the appellant's *Lackey* claim. In that opinion, however, we did not discuss the reasoning behind our rejection of the argument. We find it appropriate to do so here.

Moore has not claimed that the State has set up a scheme to prolong the period of his incarceration or purposefully resentenced Moore in order to torment him. The delay in carrying out the sentence of death has been caused by the fact that Moore has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances. That this differs from the practice at common law, where exe-

cutions could be carried out on the dawn following the pronouncement of the sentence, is a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences. See *McKenzie v. Day, supra*. Indeed, most of these procedural safeguards have been imposed by the U.S. Supreme Court in recognition of the fact that the common-law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty. *Id.*, citing *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). We, therefore, hold that prolonged incarceration on death row, in and of itself, does not violate the Eighth Amendment to the U.S. Constitution. It would be a mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it.

Moore argues that the delay in this case was not caused by Moore's appeals, but by the State's legal maneuvers. However, as noted by the U.S. Court of Appeals for the Eighth Circuit in a similar case, "there is no evidence, not even a claim, that the State has deliberately sought to convict [the defendant] invalidly in order to prolong the time before it could secure a valid conviction and execute him." *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998). The record supports the fact that the State has not caused any intentional delay or sought to convict Moore invalidly in order to prolong the time before the sentence is carried out.

We are also mindful that sustaining Moore's claim would dramatically alter the calculus in granting stays of execution in death penalty cases. By and large, we have erred on the side of caution in granting stays of execution when death row inmates present claims that have not been given consideration by this court. The philosophy of erring on the side of caution would lose much of its vitality in a regime where the state risks being pushed permanently out of bounds if the execution is too long deferred by the process of adjudication. See *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995), *adopted on rehearing en banc* 57 F.3d 1493 (9th Cir.), *cert. denied* 514 U.S. 1104, 115 S. Ct. 1840, 131 L. Ed. 2d 846. Sustaining a claim such as Moore's,

under these circumstances, would wreak havoc with the just administration of the death penalty by placing a substantial premium on speed rather than accuracy.

Based on these considerations, we conclude that Moore has not stated a claim which, if proved, constitutes a denial or violation of his rights under the Eighth Amendment, and as we have previously indicated, with reference to cruel and unusual punishment, the Nebraska Constitution does not require more than does the U.S. Constitution. See, *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985); *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985). Moore's final assignment of error is without merit.

## VI. CONCLUSION

For the foregoing reasons, we determine that all of Moore's assignments of error are either procedurally barred or without merit. Consequently, the judgment of the district court denying Moore postconviction relief is affirmed.

AFFIRMED.

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MARY SHEARER, APPELLANT, V. DONALD S. LEUENBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS THE DIRECTOR OF THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES, ET AL., APPELLEES.
591 N.W.2d 762

Filed April 2, 1999. No. S-97-852.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **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.
3. **Summary Judgment: Appeal and Error.** The denial of a summary judgment motion is neither appealable nor reviewable, except where adverse parties have each moved for summary judgment and the trial court has sustained one of the motions.
4. **Constitutional Law: Jurisdiction: States.** Although the states have concurrent jurisdiction to entertain actions pursuant to 42 U.S.C. § 1983 (1994), as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling and preempts any conflicting state law in determining these claims.

5. **Civil Rights: Tort Claims Act.** Where a civil rights claim is advanced under federal law, the plaintiff need not comply with the procedural requirements of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994).
6. **Constitutional Law: Civil Rights: Pleadings.** Under federal law, only two factual allegations are necessary to state a cause of action under 42 U.S.C. § 1983 (1994): (1) a defendant's deprivation of a plaintiff's right secured by the Constitution and laws of the United States and (2) that the deprivation occurred under color of law.
7. **Constitutional Law: Immunity.** Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §§ 1983 or 1985(3) (1994) cannot be immunized by state law.
8. **Constitutional Law: States: Public Officers and Employees.** Neither a state nor its officials acting in their official capacities are "persons" under 42 U.S.C. § 1983 (1994).
9. **Constitutional Law: Public Officers and Employees: Liability.** Under 42 U.S.C. § 1983 (1994), public officials sued in their individual capacity are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
10. **Constitutional Law: Public Officers and Employees: Proof.** For a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right.
11. **Constitutional Law: Words and Phrases.** A plaintiff prevails within the meaning of 42 U.S.C. § 1988 (1994) when actual relief on the merits of his or her claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.
12. **Records: Appeal and Error.** 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.
13. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Brett McArthur for appellant.

Don Stenberg, Attorney General, Royce N. Harper, and Michael J. Rumbaugh, Special Assistant Attorney General, for appellee.

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

GERRARD, J.

The appellant, Mary Shearer, was charged with child neglect after her 4-year-old son, J.S., disobeyed her instruction not to play in the cab of a pickup truck parked in her driveway. The

child apparently moved the gearshift, allowing the truck to roll down the driveway and strike a parked car. The criminal charges against Shearer were dismissed, but the case was still investigated by Jodine Allen, an investigator with the then Nebraska Department of Social Services (DSS). Shearer, on the advice of her attorney, refused to allow Allen to interview Shearer or Shearer's children, and Allen, basing her conclusion solely on the police report of the incident, identified Shearer as a potential child abuser in the Abused or Neglected Child Registry (Registry) maintained by DSS. Shearer sued the appellees in the instant action, Allen and Donald Leuenberger, the director of DSS, in their individual and official capacities, and DSS itself. After the district court entered an injunction against DSS, Shearer's name was permanently expunged from the Registry. Shearer maintained her suit, seeking damages for emotional distress and loss of reputation allegedly resulting from violations of her constitutional rights. The district court entered judgment in favor of the appellees and dismissed Shearer's suit. The initial question presented in this case is whether Shearer's action is barred by sovereign immunity. For the reasons that follow, we conclude that Shearer's action is barred by sovereign immunity, and we affirm the judgment of the district court.

## I. FACTUAL BACKGROUND

On June 28, 1995, Shearer's child C.S., then 5 years old, went outside to play. C.S. had asked Shearer if he and some neighbor children could play in a pickup truck that was parked outside. The truck belonged to Shearer's boyfriend and was parked in the driveway of the Shearer residence. Shearer told C.S. that he was not allowed to play in the cab of the truck, but that he and his friends could play in the bed of the truck.

Nonetheless, a few minutes later, C.S. came back into the house and reported that the truck had "rolled out of the driveway and hit [a parked] car" belonging to a friend of Shearer's who was visiting at the time. C.S.'s brother J.S., then 4 years old, had climbed into the cab of the truck and played with the gearshift, evidently shifting the truck out of gear so that it rolled down the driveway. J.S. had been in the cab of the truck, while C.S. and at least three neighbor children had been in the bed of

the truck at the time. One child reportedly struck her head, but no serious injuries were reported. There was minor damage to the car, but no one at the Shearer residence called the police.

The police nevertheless appeared about 20 minutes later, apparently having been called by a neighbor, and Shearer was cited for misdemeanor child abuse and neglect for leaving children unattended in a vehicle. The criminal charges were ultimately dismissed on October 11, 1995.

On August 21, 1995, Shearer was contacted by Allen, a caseworker with DSS. Allen stopped at the Shearer residence and finding no one home, left a note for Shearer asking her to contact Allen. Shearer did not do so, and on August 31, Allen contacted Shearer by telephone. Allen explained to Shearer that Allen's duty was to follow up on the police report, and Shearer told Allen that Shearer would not speak with Allen, on advice of counsel, and that Allen should contact Shearer's attorney.

Allen called Shearer's attorney the same day and explained that she wanted to meet with Shearer and her children; Shearer's attorney asked a few questions and said that he would talk to Shearer. Allen did not hear from Shearer or her attorney, so Allen called Shearer's attorney again on September 28, 1995. Shearer's attorney told Allen to send a list of specific questions that she wanted to ask Shearer. Allen explained that she did not typically ask a specific set of questions, but she did send Shearer's attorney DSS' "Child At Risk Field" risk assessment tool.

At the same time Allen sent the risk assessment form to Shearer's attorney, Allen also asked that an interview between Allen and Shearer be scheduled by a certain date, but Allen received no response to this request. On November 8, 1995, Allen again contacted Shearer and informed her that although the criminal case had been dismissed, DSS' investigation had not been completed. Shearer again said that she needed to speak with her attorney.

On November 21, 1995, Allen sent a letter to both Shearer and her attorney, stating that unless Shearer was willing to be interviewed, Allen would close the investigation on December 4. Allen wrote that her conclusion would be based on the police report of the incident, because, without interviewing Shearer,

that would be the only evidence Allen had. Allen further indicated, in essence, that the police report, standing alone, would substantiate the charge of child neglect.

On December 4, 1995, not having met with Shearer or her attorney, Allen closed the investigation. Allen then sent Shearer a letter informing her that her name had been entered into DSS' "Central Registry" for reported child abuse and neglect. The report relating to Shearer was categorized as "inconclusive," meaning that the investigation indicated "by a preponderance of the evidence that maltreatment has occurred." The letter also informed Shearer of the procedures available if she wanted her name removed from the Registry. The letter, however, was sent by certified mail, and Shearer did not pick up the letter.

Shearer nonetheless discovered in late December that her name had been placed in the Registry. Shearer said that she was "devastated" by this discovery and was "humiliated, depressed, angry, just stressed."

Shearer sued in the district court, seeking an injunction directing DSS to remove her name from the Registry. Shearer also sought damages from DSS and Leuenberger and Allen, in both their individual and official capacities. Shearer's petition alleged two "causes of action," the first based on alleged violation of her right to remain silent under Nebraska law and the 5th Amendment to the U.S. Constitution and the second based on violation of her rights under the Due Process Clause of the 14th Amendment to the U.S. Constitution. Shearer alleged damages in the form of attorney fees, emotional distress, loss of enjoyment of life, and harm to her reputation.

The district court entered a temporary injunction preventing DSS from having Shearer's name in the Registry. The appellees asked the district court to reconsider, alleging, as they had in their answer to Shearer's petition, that the court lacked jurisdiction by virtue of the appellees' sovereign immunity.

Both Shearer and the appellees subsequently filed motions for summary judgment. The district court overruled Shearer's motion for summary judgment entirely and partially overruled the appellees' motion for summary judgment. The district court dismissed Shearer's first cause of action, relating to her right to remain silent, finding that the first cause of action alleged a tort

and that Shearer's noncompliance with the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994), was fatal to her claim. Shearer does not argue the first cause of action on appeal.

The district court also dismissed the "portion of [Shearer's] action that seeks a Declaratory Judgment against the State," but did not dismiss the action in that regard as against the individual appellees. Finally, the district court dissolved the temporary injunction against DSS, by agreement of the parties, as the removal of Shearer's name from the Registry had mooted the issue.

The matter proceeded to trial on the second cause of action, the issue being whether Shearer could demonstrate that she had been damaged by DSS' actions. Prior to trial, Shearer asked the court for a jury trial, but this was denied, based on the district court's finding that the remaining cause of action was pled in equity. The case was tried to the court, and the district court found that since Shearer could demonstrate no damage to her reputation, she had not established the violation of a liberty interest protected by the Due Process Clause and that judgment should therefore be entered in favor of the appellees. Shearer timely appealed to the Nebraska Court of Appeals, and we removed the case to our docket on our own motion.

The record also reveals that Shearer filed motions for attorney fees on May 12 and July 24, 1997, and that DSS filed a responsive motion for attorney fees and costs on August 5. The record does not reveal, however, how these claims were resolved by the district court.

## II. ASSIGNMENTS OF ERROR

Shearer alleges that the district court erred in (1) overruling her motion for summary judgment, (2) denying her a trial by jury, (3) finding that she had not met her burden of proof as to the material elements of the case, and (4) denying her motion for attorney fees and costs.

## III. SCOPE OF REVIEW

When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent

conclusion irrespective of the decision of the court below. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (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. *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998); *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

## IV. ANALYSIS

We note that Shearer's first assignment of error is an appeal from a pretrial denial of her motion for summary judgment. Shearer does not assign as error, however, the district court's entry of summary judgment with reference to her first cause of action, and her appellate brief makes clear that she is claiming error only regarding the denial of summary judgment on her due process claim.

The denial of a summary judgment motion is neither appealable nor reviewable, except where adverse parties have each moved for summary judgment and the trial court has sustained one of the motions. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). In the present case, this exception does not apply, because summary judgment was granted only as to Shearer's first cause of action and she does not claim this as error on appeal. Instead, she claims error regarding the denial of summary judgment on her second cause of action, relating to due process. Because this matter proceeded to trial on that cause of action, there is no applicable exception to the rule that the denial of a summary judgment is not reviewable on appeal, and we do not consider Shearer's assignment of error. See *id.*

Before addressing Shearer's remaining assignments of error, we must resolve two preliminary issues: We must determine precisely what Shearer has claimed, and we must consider the appellees' contention that all of Shearer's claims are barred by sovereign immunity.

Shearer's pleadings in the district court are, to put it kindly, rather difficult to decipher. Shearer identifies who she believes violated her rights and what rights she believes were violated, but the statutes under which she is claiming relief are unidenti-

fied. Shearer does not state whether her claims are predicated on state or federal law. We are reluctant to accept Shearer's apparent invitation to wander through the Nebraska Revised Statutes and U.S. Code seeking a statute under which her petition might be construed to state a claim. At oral argument, however, Shearer's counsel indicated that Shearer's claim is based on 42 U.S.C. § 1983 (1994). In accordance with the liberal pleading requirements for a federal civil rights action, we will so construe Shearer's petition.

### 1. Nebraska Law

Before addressing federal law, we must consider two state statutory provisions: the statutes establishing the Registry, Neb. Rev. Stat. §§ 28-715 and 28-718 et seq. (Reissue 1995), and the special child abuse immunity provision of Neb. Rev. Stat. § 28-716 (Reissue 1995).

#### (a) Registry

DSS is directed by § 28-715 to "file each report of suspected abuse or neglect in a special state Abused or Neglected Child Registry to be maintained in the department." It is further provided by § 28-720 that all cases should be classified in one of these categories: "(1) Court substantiated; (2) petition to be filed; (3) investigation inconclusive; or (4) unfounded report, whichever the case may be." It is stated in § 28-720 that "information identifying the subjects of unfounded reports shall be expunged from the register forthwith." Shearer's case was initially classified "inconclusive," but has since been expunged.

According to §§ 28-722 and 28-726, access to information from cases of any classification is strictly limited to persons whose access is authorized by statute, such as subjects of the reports themselves; parents, guardians, or guardians ad litem of subjects; law enforcement agencies investigating a report of abuse or neglect; county attorneys preparing an abuse, neglect, or termination petition; a physician treating a child whom he or she reasonably believes may have been abused or neglected; an agency having legal responsibility for the welfare of an abused or neglected child; the State Foster Care Review Board, when the records relate to a child placed for foster care; and certain government agencies responsible for the protection of disabled

and mentally ill subjects. Access is also provided by § 28-726 to persons engaged in research or auditing, but under those circumstances requires the removal of any information that would identify any subjects of the reports. The statutes do not provide for dissemination of Registry information to potential employers or the public at large. There is no evidence in the record indicating that information from Shearer's case was released to anyone.

It is provided by Neb. Rev. Stat. § 28-713.01 (Reissue 1995) that when DSS completes an investigation, it shall notify the subject of the report regarding DSS' determination of the case. It is further established, in § 28-723, that any subject may, after the completion of an investigation, ask DSS to amend or expunge the report from the Registry and that if DSS does not do so within 30 days, the subject has the right to a fair hearing within DSS, at which the burden is on DSS to sustain the accuracy of the report. The statute also provides that DSS' decision may be appealed under the Administrative Procedure Act. The record in this case does not indicate that Shearer availed herself of this remedy.

(b) Child Abuse Immunity Statute

The appellees defended in the district court on the basis of § 28-716 and direct our attention to the statute, which states in pertinent part: "Any person participating in an investigation or the making of a report pursuant to the provisions of sections 28-710 to 28-717 . . . shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed, except for maliciously false statements."

It is clear that the investigation of Shearer and the placement of her name in the Registry were conducted pursuant to the provisions of Neb. Rev. Stat. §§ 28-710 through 28-717 (Reissue 1995). Shearer does not allege, nor does the record reveal, any "maliciously false statements" by the appellees. Therefore, by the plain language of this statute, Leuenberger and Allen, in their individual capacities, are immune from liability under state law.

Although Shearer does not expressly challenge the constitutionality of § 28-716, we note that the U.S. Supreme Court has

specifically approved a similar statute from California which granted public employees immunity from liability resulting from determinations of whether to parole or release prisoners from the California penal system. See *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980). We also note that other jurisdictions have held statutes similar to § 28-716 to be valid and enforceable. See, e.g., *Lux by Lux v. Hansen*, 886 F.2d 1064 (8th Cir. 1989); *B.W. v. Meade County*, 534 N.W.2d 595 (S.D. 1995); *Elmore v. Van Horn*, 844 P.2d 1078 (Wyo. 1992); *Dept. of Health and Rehab. v. Dougherty*, 700 So. 2d 77 (Fla. App. 1997), *review denied* 717 So. 2d 530 (Fla. 1998); *Davis v. Durham City Schools*, 91 N.C. App. 520, 372 S.E.2d 318 (1988); *Storch v. Silverman*, 186 Cal. App. 3d 671, 231 Cal. Rptr. 27 (1986).

2. FEDERAL LAW

In relevant part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Although the states have concurrent jurisdiction to entertain § 1983 actions, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling and preempts any conflicting state law in determining these claims. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). Because Shearer's civil rights claim is advanced under federal law, she need not comply with the procedural requirements of the State Tort Claims Act. See, *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (holding that Wisconsin's state tort notice-of-claim statute could not defeat § 1983 action filed in state court). Compare *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995) (holding that failure to file notice of claim to Commission of Industrial Relations did not defeat § 1983 action filed in state court).

Under federal law, only two factual allegations are necessary to state a cause of action under § 1983: (1) a defendant's deprivation of a plaintiff's right secured by the Constitution and laws of the United States and (2) that the deprivation occurred under color of law. *Wichman v. Naylor*, 241 Neb. 249, 487 N.W.2d 291 (1992) (citing *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972); *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Cooper v. Pate*, 378 U.S. 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964)). See, also, *Gordon v. Community First State Bank, supra*. Shearer's petition meets the liberal pleading standard for § 1983.

Contrary to the appellees' contention, the immunity from liability under state law provided by § 28-716 does not apply to a claim advanced under federal law, even if that claim is litigated in a Nebraska court. The U.S. Supreme Court has held that

> "[c]onduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . ."

*Martinez v. California*, 444 U.S. at 284 n.8.

(a) Sovereign Immunity for State Appellees

We first consider whether § 1983 abrogates traditional sovereign immunity for states and state officials. In this regard, the U.S. Supreme Court has specifically held that

> a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself. . . .
>
> We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983.

(Citations omitted.) *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). See, also, *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).

Given the foregoing authority and finding no waiver of the State's immunity that is properly applied in this case, we determine that Shearer cannot bring a § 1983 action against DSS or against Leuenberger and Allen in their official capacities.

(b) Qualified Immunity for Individual Appellees

The district court ultimately decided that Shearer had failed to establish a violation of due process because she failed to sufficiently prove that she had been damaged by the appellees' conduct. Before we reach that issue, however, we must first consider whether Allen and Leuenberger in their individual capacities are immune from liability under § 1983.

Under § 1983, public officials sued in their individual capacity " 'are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Davis v. Scherer*, 468 U.S. 183, 191, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Whether an official may prevail in his or her qualified immunity defense depends upon the " 'objective reasonableness of [his or her] conduct as measured by reference to clearly established law.' " *Id.*

> In order to determine whether a defendant is entitled to qualified immunity, we engage in a two-part analysis. . . . First, we must determine whether the plaintiff has alleged the violation of a constitutional right. . . . Second, we must determine whether that right was clearly established at the time of the alleged violation.

(Citations omitted.) *Manzano v. South Dakota Dept. of Social Services*, 60 F.3d 505, 509 (8th Cir. 1995).

As noted above, Shearer's petition, when liberally construed, alleges the violation of a constitutional right. Hence, our analysis turns to whether or not that right was "clearly established" at the time of the alleged violation.

> For a constitutional right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." . . . "This is not to say an official action is protected by qualified immunity unless

> the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

(Citation omitted.) *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

The U.S. Court of Appeals for the Eighth Circuit, in the context of a child abuse investigation, has noted that

> an imperfect investigation without more does not deprive the investigators of qualified immunity. . . . ("The question is whether the state of the law was such that a reasonable person would have known [his or her] actions were unconstitutional. Furthermore, a reasonable person is not expected to act as a legal scholar and predict the future direction of the law. Closely analogous cases, decided before the defendant acted . . . are often required to find that a constitutional or statutory right is clearly established.")

*Myers v. Morris*, 810 F.2d 1437, 1460 (8th Cir. 1987), *cert. denied* 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58, *abrogated on other grounds, Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991).

In a series of cases, the Eighth Circuit has held that parental liberty interests are not clearly established in the context of reasonable suspicion of child abuse, even where that suspicion results in the wrongful placement of the children into foster care. See, e.g., *Thomason v. SCAN Volunteer Services, Inc.*, 85 F.3d 1365 (8th Cir. 1996); *Manzano v. South Dakota Dept. of Social Services, supra*; *Lux by Lux v. Hansen*, 886 F.2d 1064 (8th Cir. 1989); *Doe v. Hennepin County*, 858 F.2d 1325 (8th Cir. 1988), *cert. denied* 490 U.S. 1108, 109 S. Ct. 3161, 104 L. Ed. 2d 1023 (1989); *Myers v. Morris, supra.*

We also note that several other jurisdictions have confronted due process challenges to child abuse registry schemes similar to that established in Nebraska. Appellate courts that have confronted similar facts to those in the instant case have generally found that those circumstances comport with due process. See, e.g., *Watso v. Dept. of Social Services*, 841 P.2d 299 (Colo. 1992); *Roth v. Reagen*, 422 N.W.2d 464 (Iowa 1988); *Mary L. v. State Dept. of Social Services*, 244 A.D.2d 133, 676 N.Y.S.2d 704 (1998); *Physical Abuse at Blackacre Acad.*, 304 N.J. Super.

168, 698 A.2d 1275 (1997); *J.P. v. Carter*, 24 Va. App. 707, 485 S.E.2d 162 (1997); *Johnston v. Michael Shea and Associates*, 425 N.W.2d 263 (Minn. App. 1988).

Those appellate courts that have found child abuse registry systems to violate due process have done so on facts that are distinguishable from those found in the Nebraska scheme and in the present case. See, e.g., *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Lee TT. v. Dowling*, 87 N.Y.2d 699, 664 N.E.2d 1243, 642 N.Y.S.2d 181 (1996) (finding due process violated because burden of proof in substantiating allegations was not placed on investigating agency); *Richardson v. Chevrefils*, 131 N.H. 227, 552 A.2d 89 (1988); *Wilson v. State Dept. of Human Services*, 969 P.2d 770 (Colo. App. 1998) (finding due process violated because no notice was given to suspected abuser); *Matter of East Park High School*, 314 N.J. Super. 149, 714 A.2d 339 (1998) (finding due process violated by denial of fair administrative hearing); *Cavarretta v. DCFS*, 277 Ill. App. 3d 16, 660 N.E.2d 250, 214 Ill. Dec. 59 (1996) (finding due process implicated by 598-day delay in completing appeals process).

Furthermore, those cases determined that due process interests were strongly implicated because the information contained in the registry was more widely disseminated than under Nebraska's law. See *id.* In the instant case, DSS gave notice to Shearer before her name was placed in the Registry, was required to find that the claim was supported by the preponderance of the evidence, and proceeded without unreasonable delay. Had Shearer chosen to pursue her administrative remedies, she would have been entitled to a fair hearing in which the burden would have been on DSS to sustain its action. There is no evidence that information regarding Shearer was disseminated, even to the limited degree permitted by the Nebraska statutes. The concerns iterated by the above-cited cases are not implicated in this appeal. We, therefore, conclude that the procedures in this case did not violate any "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Davis v. Scherer*, 468 U.S. 183, 191, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). Consequently, Shearer has not pled facts that breach Allen's and Leuenberger's qualified immunity under § 1983.

### 3. Attorney Fees

Shearer claims on appeal that the trial court erred in denying her motion for attorney fees. Shearer filed two motions for attorney fees in the trial court, and the State also filed its own motion for attorney fees.

The State argues that Shearer is not entitled to attorney fees because she lost in the trial court. Shearer's argument on appeal is based on 42 U.S.C. § 1988(b) (1994), which provides, in relevant part: "In any action or proceeding to enforce a provision of [section] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The State's argument misperceives the circumstances in which a plaintiff may recover attorney fees under § 1988. The U.S. Supreme Court has held that a plaintiff "prevails" when actual relief on the merits of his or her claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). In that regard, the U.S. Supreme Court has said:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e. g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

*Hewitt v. Helms*, 482 U.S. 755, 760-61, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987). Accord, *A.J. by L.B. v. Kierst*, 56 F.3d 849 (8th Cir. 1995); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. 1980).

In this case, Shearer succeeded in having her name expunged from the Registry, and the record would support the conclusion that this occurred because of Shearer's lawsuit.

We are prevented from ruling on the issue of attorney fees, however, by the failure of Shearer to present a record that would allow us to make an informed decision. The record indicates

that a hearing on the motions for attorney fees was scheduled for August 8, 1997, at 8 a.m. Shearer's notice of appeal was filed on August 8 at 10:52 a.m. The record does not contain any indication of how the motions were ruled upon by the trial court or what the basis for those rulings may have been.

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. *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997); *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997). Because the record does not reveal how the trial court ruled on the issue of attorney fees, we have no basis to do anything other than affirm the district court's judgment on this particular issue.

## V. CONCLUSION

For the foregoing reasons, we conclude that Shearer's § 1983 action is completely barred by the sovereign immunity of DSS and the appellees in their official capacities and the qualified immunity of the appellees in their individual capacities. Although the district court erred in not so finding, a proper result will not be reversed merely because it was reached for the wrong reasons. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998). We are precluded by the infirmity of the record from addressing Shearer's assignment of error regarding attorney fees. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

CONNOLLY, J., concurring.

I concur. The majority correctly sets forth the analysis used to determine whether a defendant is entitled to qualified immunity. However, I believe that the majority has incorrectly applied that analysis by failing to consider whether Shearer's allegations, taken as true, stated a legally cognizable claim for the violation of a constitutional right. I conclude that Shearer was denied due process because she was not provided a hearing before her name was put in the Abused or Neglected Child Registry. I nonetheless conclude that the doctrine of qualified immunity bars Shearer's claim because her right to a predeprivation hearing was not clearly established at the time the due process violation occurred.

## I. THRESHOLD QUESTION IN QUALIFIED IMMUNITY ANALYSIS

First, we must address whether Shearer's allegations, taken as true, state a claim upon which relief may be granted. See *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). The majority avoids this threshold question, merely stating that "Shearer's petition, when liberally construed, alleges the violation of a constitutional right." However, *alleging* the violation of a constitutional right is not equivalent to *stating a legally cognizable claim* for the violation of such a right. A theory of recovery is not itself a cause of action. *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995). Thus, the mere invocation of "due process" is not sufficient to pass the threshold.

In *Siegert*, the U.S. Supreme Court granted certiorari to clarify the "analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity asserted in a motion for summary judgment." 500 U.S. at 231. The plaintiff, a former government employee, had received an extremely unfavorable review from his supervisor. That review caused a potential employer to deny the plaintiff a position. The plaintiff brought an action against his former supervisor, alleging, inter alia, that the supervisor's review was a malicious, defamatory statement that infringed the plaintiff's liberty interests, in violation of the Due Process Clause of the Fifth Amendment. The supervisor asserted the defense of qualified immunity.

The U.S. Court of Appeals assumed, without deciding, that if the supervisor's alleged defamatory statement was malicious, the supervisor's statement violated the plaintiff's due process rights. The appellate court nonetheless determined that the allegations in the plaintiff's petition were insufficient to state a claim, due to the " 'heightened pleading standard' " in defamation actions. 500 U.S. at 227. Accordingly, the court of appeals held that the supervisor should be granted qualified immunity.

The Supreme Court, noting that the court of appeals had relied on a "heightened pleading standard," held that the plaintiff's claim "failed at an analytically earlier stage of the inquiry into qualified immunity: His allegations, even if accepted as true, did not state a claim for violation of any rights secured to

him under the United States Constitution." 500 U.S. at 227. The Court determined that the court of appeals had erred in assuming, without deciding, that if the plaintiff satisfactorily alleged that the supervisor's unfavorable review was written with malice, a constitutional claim would be stated. "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." 500 U.S. at 232.

In analyzing the qualified immunity question, the Court first addressed whether the plaintiff had stated a legally cognizable claim for the violation of a constitutional right. The Court held that the plaintiff's reputation was not constitutionally protected, even if the alleged defamatory statements were maliciously made, and that the plaintiff had failed to state such a claim. The Court never reached the question of whether the right, alleged by the plaintiff to have been violated, was clearly established. Indeed, the Court could not have determined whether the right was clearly established when that right did not exist.

*Siegert* demonstrates the distinction between the existence of a constitutional right and whether the existence of that right is clear to a government official. To state a claim for the violation of a constitutional right, that right must exist. If there is no such right, or if the alleged facts, taken as true and construed most favorably to the plaintiff, would not entitle the plaintiff to relief for the violation of a constitutional right, a court need not proceed to the next step in a qualified immunity analysis. It is the next step that determines whether that right was clearly established when the conduct occurred.

This analysis was affirmed in *County of Sacramento v. Lewis*, 523 U.S. 833, 841-42 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), wherein the Court stated:

> [T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question. . . .

> JUSTICE STEVENS suggests that the rule of *Siegert* should not apply where, as here, the constitutional question presented "is both difficult and unresolved." . . . But the generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity *requires some determination about the state of constitutional law* at the time the [defendant] acted. What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional. In practical terms, escape from uncertainty would require the issue to arise in [future suits] . . . . [T]herefore the better approach is to determine the right before determining whether it was previously established with clarity.

(Emphasis supplied.) (Citations omitted.)

Consequently, the threshold question in a qualified immunity case is not whether the plaintiff has alleged, in a colloquial sense, the violation of a constitutional right, but, rather, whether the plaintiff's allegations, taken as true, are sufficient to state a legally cognizable claim for the violation of such a right. See, *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994); *Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir. 1994).

> This threshold inquiry is purely a question of law . . . and though this inquiry takes place in the context of a qualified immunity defense, *the same rules governing dismissal of complaints apply*. We "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." . . . A complaint may be dismissed for failure to state a claim "only when it appears that the plaintiff can prove no set of facts in support of the claim[] that would entitle the plaintiff to relief."

(Emphasis supplied.) *Bella v. Chamberlain*, 24 F.3d at 1254. See, also, *Hollingsworth v. Hill*, 110 F.3d 733 (10th Cir. 1997); *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642 (10th Cir. 1988). "If the plaintiff is unable to marshal evidence indicating that the conduct complained of violated the law as *presently interpreted*, it is unnecessary to consider whether the law was clearly established at the time such conduct occurred." (Emphasis supplied.) *Snell v. Tunnell*, 920 F.2d 673, 696 n.21 (10th Cir. 1990).

Because the majority failed to do so, I analyze whether Shearer's allegations, taken as true, stated a legally cognizable claim for the violation of a constitutional right.

## II. DUE PROCESS

Shearer contends that the requirements of due process were not met by the procedures used by DSS in connection with the placement in and removal of her name from the Registry. Although Shearer's petition does not specify whether the alleged deprivation of due process is procedural or substantive in nature, Shearer's brief argued that the deprivation was procedural. Moreover, the brief's argument was limited to the deprivation of a liberty interest. Thus, liberally construed, Shearer's petition alleges that DSS deprived her of a liberty interest by failing to provide her with fair notice and a hearing prior to putting her name in the Registry.

Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998). When examining a claim that one is being deprived of a liberty interest without due process of law, a three-stage analysis is employed. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *overruled on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). The question at the first stage is whether there is a protected liberty interest at stake. *Id.* If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required.

*Id.* Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which is due. *Id.*

1. LIBERTY INTEREST

In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971), the Supreme Court addressed the constitutionality of a state statute that permitted government officials to post notices banning the sale of intoxicating liquors to certain individuals who exhibited certain traits. The statute did not provide the individual in the posting with notice and a hearing. The Court held that the statute violated due process, stating that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. at 437.

However, in *Paul v. Davis*, 424 U.S. 693, 697, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1975), the Court approved the posting of the plaintiff's name and photograph on a flyer displaying "'active shoplifters'" that city and county police distributed to local merchants. The Court stated that while it had previously

> pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts . . . reputation alone, apart from some more tangible interests such as employment, is [n]either "liberty" [n]or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

424 U.S. at 701. The Court distinguished *Constantineau*, noting that the governmental action in that case had done more than damage the individual's reputation; the action had "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." 424 U.S. at 708. The Court stated that it was the alteration of the individual's legal status in *Constantineau*, combined with the injurious defamation, which "justified the invocation of procedural safeguards." 424 U.S. at 709.

"Although *Paul* is the foundation for all subsequent cases dealing with governmental defamation, its meaning is not

unambiguous." *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir. 1989). Nonetheless, when faced with the task of interpreting *Paul*, courts have held that to establish a constitutional violation, one must establish a stigma resulting in the impairment of some right other than reputation, or " 'stigma plus.' " *Id.* Therefore, the question is, Does the placement of an individual's name in the Registry cause "stigma plus"?

In *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), the court held that the inclusion of the plaintiff's name in New York's central register resulted in stigma, i.e., public opprobrium and damage to reputation. The court noted that inclusion in the register brands an individual a "child abuser, which certainly calls into question [one's] 'good name, reputation, honor, or integrity.' " *Id.* at 1000, quoting *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The court noted that even the limited disclosure of information contained in the register was sufficient to establish stigma because New York's scheme required certain employers to consult the register.

The court also held that inclusion in the register met *Paul*'s "plus" requirement. The court noted that *Paul*'s holding requiring more than mere defamation to support a cognizable liberty interest indicates that the normal repercussions of a poor reputation, including loss of employment opportunities, are likewise insufficient to establish a liberty interest. " '[S]o long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not [constitutionally] recoverable . . . .' " (Emphasis omitted.) *Valmonte v. Bane*, 18 F.3d at 1001, quoting *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

However, the court noted that the inclusion of the plaintiff's name in New York's register did more than merely defame the plaintiff, it placed a "tangible burden on her employment prospects." *Id.* This conclusion was based on New York's requirement that all child-care providers consult the register when hiring. Thus, by operation of law, potential employers would be informed of the plaintiff's inclusion on the register. "This is not just the intangible deleterious effect that flows from a bad reputation. Rather, it is a specific deprivation of her opportunity to seek employment caused by a statutory impedi-

ment established by the state." *Id.* at 1001. Accordingly, the court held that the plaintiff had established a liberty interest.

The Eighth Circuit has addressed a similar statutory scheme and held that identifying individuals as child abusers gives rise to a liberty interest. *Bohn v. County of Dakota*, 772 F.2d 1433 (8th Cir. 1985). However, the Eighth Circuit did not base this conclusion on an impairment of employment rights; rather, the "plus" was the impairment of the Bohns' familial rights.

> [T]he Bohns have a protectible [sic] interest in their reputations at stake in this case. By identifying the Bohns as child abusers, investigating the quality of their family life, and maintaining data on them, the County Department [of Social Services] exposed them to public opprobrium and may have damaged their standing in the community. . . .
>
> . . . When the County Department found Bohn to be a child abuser, it drove a wedge into this family and threatened its very foundation. The stigma Mr. Bohn suffers as a reported child abuser undoubtedly has eroded the family's solidarity internally and impaired the family's ability to function in the community. In light of these clear adverse effects on familial integrity and stability, we find that Mr. Bohn's reputation is a protectible [sic] interest. Because this stigma strikes so directly at the vitality of the family, we find the reputation interest at stake to be clearly distinguishable from the respondent's record of petty crimes in *Paul* [*v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1975)], which was tied to no other protectible [sic] interest.

*Bohn v. County of Dakota*, 772 F.2d at 1436 n.4.

Several state courts that have addressed whether central register statutes violate due process have also held that the inclusion of one's name on such a register implicates a liberty interest, either under the federal or a state constitution. See, e.g., *Petition of Preisendorfer*, 719 A.2d 590 (N.H. 1998); *State v. Jackson*, 269 Ga. 308, 496 S.E.2d 912 (1998); *A.Y. v. Com., Dept. of Public Welfare*, 537 Pa. 116, 641 A.2d 1148 (1994); *Watso v. Dept. of Social Services*, 841 P.2d 299 (Colo. 1992); *Matter of East Park High School*, 314 N.J. Super. 149, 714 A.2d 339 (1998).

However, several courts have held to the contrary. See, e.g., *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994); *Arkansas Dep't of Human Servs. v. Heath*, 312 Ark. 206, 848 S.W.2d 927 (1993); *Carter v. Gordon*, 28 Va. App. 133, 502 S.E.2d 697 (1998). In *Hodge v. Jones, supra*, the court addressed whether the government's maintenance of records of a child abuse investigation of the plaintiffs implicated the plaintiffs' liberty interest in familial privacy. The court held that no such interest attached, since the maintenance of such records has no significant impact on the child-parent relationship or on the family's ability to function. *Id.* The court distinguished *Bohn v. County of Dakota, supra*, in a footnote, noting that in *Bohn*, the social workers had "repeatedly met with the Bohn family in an attempt to halt the purported abuse and related problems, thereby engaging in a campaign of intrusive conduct," whereas in *Hodge*, once the investigation was complete, the record was allowed to "lie fallow." 31 F.3d at 164.

The *Hodge* court's attempt to distinguish *Bohn* is unpersuasive. Neb. Rev. Stat. § 28-713 (Reissue 1995) requires DSS to investigate child abuse allegations and to "provide such social services as are necessary and appropriate under the circumstances to protect and assist the child and to preserve the family." Thus, DSS is required to engage in an "intrusive campaign" of repeated meetings with the family, as in *Bohn*, if such a campaign is necessary and appropriate under the circumstances. DSS' involvement is not limited to making reports that are designed to "lie fallow." See Neb. Rev. Stat. § 28-713.01 (Reissue 1995). Rather, Nebraska's statutory scheme mandates the type of comprehensive involvement that was at issue in *Bohn*.

In *Arkansas Dep't of Human Servs. v. Heath, supra*, the Arkansas Supreme Court likewise held that the inclusion of one's name in a register of child abusers does not implicate a liberty interest, relying on the U.S. Supreme Court's decision in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1975). The plaintiff in *Heath* had appealed his inclusion in the register as a " 'substantiated' " abuser through administrative channels and then to a court, which court concluded that the allegations of abuse were " 'unsubstantiated.' " 312 Ark. at 208,

848 S.W.2d at 928. Nonetheless, the statutes governing the register required the administrative agency to retain "unsubstantiated" reports for a period of 3 years. In a dissenting opinion, Justice Corbin noted the seeming inconsistency between the administrative and judicial processes.

> What a hollow victory it is for Mr. Heath. He is declared innocent of child abuse in our state court system which utilized concepts of due process, but is still forced for three years to carry the label of child abuser by an administrative agency of the state acting under the auspices of the state legislature. . . .
>
> Surely, the courts have the inherent power to provide a remedy to one whose rights have been violated by the capricious exercise of legislative power as in the instant case. What good does it do to provide Mr. Heath procedural due process in our court system but deny him a remedy or any sense of justice?

*Arkansas Dept. of Human Services v. Heath*, 312 Ark. at 219, 848 S.W.2d at 933-34 (Corbin, J., dissenting).

In *Carter v. Gordon, supra*, the court rejected the plaintiff's claim that inclusion in a central registry involved the plaintiff's liberty interest in employment. The court noted that it was the action of the plaintiff's employer that deprived the plaintiff of employment, not the administrative agency responsible for the register. The court found it significant that the plaintiff had pointed to no rule that inclusion in the register automatically disqualified an applicant for a particular position.

This argument ignores the fact that *Paul*'s "plus" requirement requires only the *impairment* of a right. In *Matter of East Park High School*, 314 N.J. Super. 149, 714 A.2d 339 (1998), the court noted that the inclusion in a central registry is inextricably intertwined with the capacity to obtain employment in a vast array of jobs involving children. The court held that the fact that the plaintiff had not asserted an interest in changing jobs at that point in time was of no consequence to the court's liberty interest analysis. "The inclusion of her name in the Central Registry is a kind of Sword of Damocles poised above her head. Its clear effect is to inhibit her from even considering any life changes for fear of disclosure." *Id.* at 163, 714 A.2d at 347.

Neb. Rev. Stat. § 28-726 (Reissue 1995) ensures that employers dealing with children have access to the Registry. Subsection (4) provides access to any "agency having the legal responsibility or authorization to care for, treat, or supervise an abused or neglected child . . . who is the subject of a report." The word "agency" is not limited to governmental agencies, nor is it limited to agencies specializing in the care of abused or neglected children. When addressing a similar statute, the New Jersey Superior Court held that the word "agency" applied to the New Jersey Department of Education, since that department has the responsibility to " 'supervise' the care and treatment" provided to students while they are under temporary guardianship at a day school. *Physical Abuse at Blackacre Acad.*, 304 N.J. Super. 168, 179-80, 698 A.2d 1275, 1281 (1997). Thus, schools, hospitals, day care facilities, and virtually any other agency authorized to supervise children would have the right, when caring for a child known to be in the Registry, to access the Registry (a point DSS impliedly concedes in its brief).

Finally, insofar as one's familial rights are concerned, Neb. Rev. Stat. § 43-107 (Reissue 1993) prohibits the entry of an adoption decree until a check of the Registry is on file with the court. Although the inclusion of one's name in the Registry does not, per se, prohibit one's adoption of a child, it most certainly would impede any adoption.

The placement of Shearer's name in the Registry in the instant case was required by state law. It had the imprimatur of official action, which usually implies that the information at issue has been tried and tested according to the dictates of due process. This is unlike the posting in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1975), which was, at most, a local effort by certain police officers. An employer would be expected to place much greater reliance on a listing in an official government repository than the obviously makeshift postings of local law enforcement. Thus, the instant case is easily distinguishable from *Paul*—the plaintiff in the instant case was faced with "stigma plus."

Inclusion in the Registry is a stigma that fundamentally alters an individual's relation to employers and family and thus, curtails the most basic liberties that a citizen by right may

enjoy. Therefore, I conclude that Shearer's liberty interests were implicated in the instant case and thus, that the due process clause applies.

2. PROCEDURAL PROTECTIONS DUE

Having concluded that the Due Process Clause applies, the question is, What process is due? The majority correctly points out that under Neb. Rev. Stat. § 28-723 (Reissue 1995), an individual whose name is placed in the Registry may ask DSS to amend or expunge the report from the Registry, and that if DSS does not do so within 30 days, the individual is entitled to a fair hearing. However, this hearing is available only *after* the individual's name has already been included in the Registry. See §§ 28-713.01 and 28-723. Shearer argues that she was entitled to notice and a fair hearing *before* her name was added to the Registry. Thus, the question is whether due process entitled Shearer to a predeprivation hearing, as opposed to a postdeprivation hearing.

As a general rule, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard *before* the government deprives them of their liberty interest. See, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). However, "[w]e tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in ' "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." ' " *United States v. James Daniel Good Real Property*, 510 U.S. at 53, quoting *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). See, also, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (noting that postdeprivation process may be sufficient when state must necessarily act quickly or it is impractical to provide predeprivation process). Whether such an exception applies requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings. *United States v. James Daniel Good Real Property, supra.* In this regard, we consider (1) the

private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*; *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

(a) Private Interest

An individual's liberty interest in employment is clearly substantial, e.g., *Petition of Preisendorfer*, 719 A.2d 590 (N.H. 1998), as is an individual's liberty interest in familial relationships, e.g., *Petition of Bagley*, 128 N.H. 275, 513 A.2d 331 (1986).

(b) Risk of Erroneous Deprivation

Even more clear is the enormous risk of erroneous deprivation presented by allowing DSS to place names, and more important, its "case status determination" in the Registry without a predeprivation hearing. See *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994). Nebraska statutes do not provide any specific standards that must be met prior to the placement of information in the Registry. Neb. Rev. Stat. § 28-720 (Reissue 1995) states only that all cases in the Registry shall be classified as either (1) court-substantiated, (2) petition to be filed, (3) investigation inconclusive, or (4) unfounded report, whichever the case may be. DSS has enacted a regulation establishing when a particular case shall be entered into the Registry. According to state regulation 390 Neb. Admin. Code ch. 4 § 008.01 (1995), once the "initial assessment phase" is complete, the protective services worker will make a "case status determination." The regulation states that "[t]he decision at this point is whether there is *credible evidence* to support the finding that child abuse or neglect as defined by state statute has occurred." (Emphasis supplied.) *Id.* The "case status determinations" available are identical to those classifications listed in § 28-720. Once a case status determination is made, the "case status determination

will be entered into the Child Welfare Information System in a timely manner." *Id.*

In *Valmonte v. Bane*, 18 F.3d at 1004, the court held that the "'some credible evidence'" standard led to an unacceptably high level of risk.

> The "some credible evidence" standard does not require the factfinder to weigh conflicting evidence, merely requiring the local DSS to present the bare minimum of material credible evidence to support the allegations against the subject. . . .
>
> The "some credible evidence" standard is especially dubious in the context of determining whether an individual has abused or neglected a child. Such determinations are inherently inflammatory, and "unusually open to the subjective values of" the factfinder. . . . They are especially open to such subjectivity when the factfinder is not required to weigh evidence and judge competing versions of events, and where one side has the greater ability to assemble its case.

*Id.*

The obvious lack of judgment on the part of the caseworker in the instant case demonstrates the high risk of error in Nebraska's system. One simply does not base a judgment *solely* on the hearsay contained in a police report without expecting error to occur. If such a system is followed, error is inevitable.

(c) State Interest

DSS undoubtedly has a strong interest, under the doctrine of parens patriae, in the protection of children within its borders. See *In re Interest of R.G., supra.* However, we need not weigh the "fiscal and administrative burdens" that any additional procedural requirement would entail, since the statute already requires a fair hearing, with all its attendant costs. Shearer is not asking for *more* procedure but an *earlier* procedure. Consequently, the more pertinent question in the instant case is what interest DSS has in a postdeprivation hearing as opposed to a predeprivation hearing.

DSS asserts that its interest in quickly registering the names of suspected child abusers to prevent further instances of such

conduct defeats Shearer's argument that such suspects have the right to a predeprivation hearing. However, it is difficult to see how DSS' interest in protecting children is more efficiently served by entering suspects' names immediately. Any risk of further harm to the child whose abuse or neglect gave rise to the involvement of DSS will already have been averted, regardless of when information is added to the Registry. See § 28-713 (stating that law enforcement agency receiving call reporting abuse and neglect shall take immediate steps to protect child). Moreover, to the extent that quickly placing information in the Registry leads to inaccuracies, DSS' interests are disserved. See *Dept. of Health & Rehab. Services v. S.*, 648 So. 2d 128 (Fla. 1995) (listing interests served by child abuse registries).

In short, the facts in the instant case belie DSS' asserted need to forgo a predeprivation hearing. The incident giving rise to Shearer's inclusion in the Registry occurred on June 28, 1995. For unexplained reasons, the DSS worker did not contact Shearer until August 21, almost 2 *months* after the child had allegedly been harmed. By the time DSS put Shearer's name in the Registry on December 4, 5 months had passed. Certainly a predeprivation administrative hearing could have taken place in that time, had DSS acted diligently.

(d) Balancing

As the above analysis demonstrates, the individual interest in the instant case is strong, the risk of error is high, and DSS' interest in forgoing a predeprivation hearing is low. If erroneous information is added to the list, the damage to the individual may be done before a postdeprivation hearing is conducted to remove that information. However, the risk of damage to DSS if a predeprivation hearing is required is low. Therefore, I conclude that due process requires a predeprivation hearing prior to the placement of information in the Registry.

3. Denial of Due Process

Having determined what process is due, the final question of the due process analysis is whether there was a denial of that process which is due in the instant case. The evidence conclusively indicates that Shearer did not receive a predeprivation

hearing before her name was placed in the Registry. Thus, her due process rights were violated.

## III. CLEARLY ESTABLISHED

Because Shearer's allegations state a legally cognizable claim for the violation of her constitutional right to due process, the next question is whether that right was clearly established at the time DSS acted. We note that this court has not previously addressed the application of due process to Nebraska's Registry statutes. By its plain language, this statutory scheme contemplates only a postdeprivation hearing. A right cannot be said to have been clearly established when the conduct at issue was authorized by statute and no court had interpreted the statute at the time that the conduct at issue occurred. *Duncan v. Gunter*, 15 F.3d 989 (10th Cir. 1994). Accordingly, the right to a predeprivation hearing was not clearly established at the time that the unconstitutional conduct occurred. Therefore, the majority properly concluded that qualified immunity applies, and I concur.

MILLER-LERMAN, J., joins in this concurrence.

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## IN RE INTEREST OF JOSHUA M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MITZI M., APPELLANT.

591 N.W.2d 557

Filed April 2, 1999. Nos. S-97-1085, S-97-1086.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de novo on the record.
2. **Juvenile Courts: Appeal and Error.** Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
3. **Statutes.** Interpretation of a statute presents a question of law.
4. **Judgments: Appeal and Error.** An appellate court reviews questions of law independent of the trial court's decision.
5. **Statutes: Legislature: Intent.** In reading 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.

6. ____: ____: ____. When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
7. ____: ____: ____. Unless the Legislature has plainly indicated a contrary purpose or intention, when a statute specifies the object of its operation, the statute excludes from its operation every object not expressly mentioned therein.
8. **Juvenile Courts: Jurisdiction: Parental Rights.** The plain language of Neb. Rev. Stat. § 43-247(6) (Cum. Supp. 1996) states that the juvenile court shall have jurisdiction of the proceedings for termination of parental rights as provided in the Nebraska Juvenile Code.
9. **Juvenile Courts: Pleadings: Parental Rights.** The Nebraska Juvenile Code provides for the filing of an original petition seeking the termination of parental rights under Neb. Rev. Stat. § 43-291 (Reissue. 1998).
10. **Juvenile Courts: Jurisdiction: Parental Rights.** Neb. Rev. Stat. §§ 43-247(6) (Cum. Supp. 1996) and 43-291 (Reissue 1998) indicate that the juvenile court properly acquires jurisdiction over an original action to terminate parental rights as provided in the Nebraska Juvenile Code without prior juvenile court action, including adjudication.
11. **Statutes: Legislature: Intent: Parental Rights.** Through the plain language of Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996), the Legislature has demonstrated its intention that under certain circumstances, prior court action or an adjudication is required before parental rights can be terminated.
12. **Parental Rights.** The plain and ordinary meaning of Neb. Rev. Stat. §§ 43-291 (Reissue 1998) and 43-292 (Cum. Supp. 1996), taken together, is that parental rights may be terminated in an original proceeding.
13. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of a statute.
14. **Constitutional Law: Parental Rights.** The integrity of the family unit is one of the fundamental rights guaranteed by the Constitution of the United States, and such rights should not lightly be alienated.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the County Court for Hall County, PHILIP M. MARTIN, JR., Judge. Judgment of Court of Appeals in No. S-97-1085 affirmed. Judgment of Court of Appeals in No. S-97-1086 reversed, and cause remanded with directions.

James A. Wagoner for appellant.

Thomas C. Wolfe, Deputy Hall County Attorney, for appellee.

Brandi Bosselman, guardian ad litem.

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

MILLER-LERMAN, J.

## I. NATURE OF CASE

These two juvenile cases in which Mitzi M.'s parental rights were terminated as to her four children were consolidated for trial and appeal. Case No. S-97-1085 involves the child Joshua M., and case No. S-97-1086 involves three children, Jonathan M., Jasmine M., and Devon M. In a combined opinion, in case No. S-97-1085, the Nebraska Court of Appeals affirmed the juvenile court's decision terminating Mitzi's parental rights to Joshua, and Mitzi did not seek further review of that decision. In case No. S-97-1086, the Court of Appeals vacated the juvenile court's order terminating Mitzi's parental rights to Jonathan, Jasmine, and Devon on the basis that the juvenile court failed to adjudicate the juveniles prior to terminating Mitzi's parental rights and the juvenile court, therefore, lacked jurisdiction over the case involving these three children. See *In re Interest of Joshua M. et al.*, 7 Neb. App. 872, 587 N.W.2d 131 (1998).

The State successfully petitioned this court for further review of both cases pursuant to Neb. Ct. R. of Prac. 2F (rev. 1997). Upon further review, we agree with the Court of Appeals in case No. S-97-1085, and the termination of Mitzi's parental rights to Joshua is affirmed. With respect to case No. S-97-1086, we determine that the juvenile court did not lack jurisdiction over the case and that the Court of Appeals' decision remanding the cause to juvenile court with directions to dismiss is reversed. Based on statutory construction, we conclude as a matter of law that when accompanied by due process safeguards, an adjudication is not required prior to termination of parental rights under Neb. Rev. Stat. § 43-292(1) through (5) (Cum. Supp. 1996) as they existed at the time of the termination hearing on August 21, 1997. Further, upon our de novo review, we find the evidence was sufficient to support the juvenile court's order terminating Mitzi's parental rights to Jonathan, Jasmine, and Devon and that termination is in the children's best interests.

The Court of Appeals' decision in case No. S-97-1086 is reversed with directions to the Court of Appeals to instruct the juvenile court to reinstate its order terminating Mitzi's parental rights to Jonathan, Jasmine, and Devon.

## II. STATEMENT OF FACTS

Mitzi is the biological mother of Joshua, Jonathan, Jasmine, and Devon. The fathers of these children are not parties to these appellate proceedings. At the time of the August 21, 1997, combined juvenile court termination hearing, Jonathan was almost 9 years old, Joshua was 4 years old, Jasmine was 2½ years old, and Devon was 1 year old.

In April 1995, while Mitzi was incarcerated, Joshua's father placed Joshua with the then Department of Social Services (DSS) (now known as the Department of Health and Human Services), stating both he and Mitzi were unable to care for Joshua. On August 25, a juvenile petition was filed on behalf of Joshua, alleging he was a child as defined under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) by virtue of being a juvenile without proper support through no fault of his parents. He was adjudicated a juvenile under § 43-247(3)(a) on November 7.

Mitzi was released from prison, but she was again arrested on October 18, 1996. She voluntarily placed Jonathan, Jasmine, and Devon with DSS for 1 day. Due to outstanding warrants, Mitzi was unable to post bond, and a juvenile petition based on § 43-247(3)(a) was filed regarding these three children on October 18. The record shows that at this point in time, the children's immunizations were out of date and that they suffered from various infections. DSS was granted temporary custody of the three children on October 18. For the sake of completeness, we note that according to the affidavit of DSS Child Protective Services worker Steve Wilson, submitted in support of the juvenile petition filed on October 18, in the case of Jonathan, Jasmine, and Devon, Mitzi's voluntary placement with DSS was for 1 day. However, because of Mitzi's continued incarceration, as Wilson stated, "the children [would] have [had] no where to go," and temporary custody with DSS was sought for placement in a group home or foster care. There is some indication in the

record that Mitzi delegated parental authority of the three children to her mother on October 18.

Mitzi has a long history of illegal drug use. She has admitted using "[c]rystal, meth, and cocaine" since the age of 17. She tested positive for drugs on at least three separate occasions while these juvenile proceedings have been pending: in December 1995, in April 1996, and in June 1997. On at least three occasions, Mitzi failed to appear for DSS drug tests scheduled by order of the juvenile court. Mark Nelson, a substance abuse counselor who testified at the termination hearing, stated that based upon his evaluation, Mitzi is dependent on methamphetamine and in his opinion, Mitzi was using drugs at the time of the termination proceedings. At the time of the termination hearing, Mitzi had yet to complete any substance abuse treatment program.

Mitzi has been incarcerated periodically since the inception of the juvenile court proceedings involving Joshua in April 1995. She was incarcerated from April 19 to November 6, 1995; from December 28, 1995, to the end of January 1996; for the night of April 18, 1996; for 1 month in October 1996; for 2 days in March 1997; and from March 31 through the termination proceedings on August 21, 1997, with a projected release date of February 1998. During this same time period, Mitzi had been charged with driving under the influence, shoplifting, unauthorized use of credit cards, forgeries, possession of marijuana and methamphetamine, and unauthorized use of a vehicle. Over the 2 years preceding the termination hearing, Mitzi worked for 1 day.

## III. PROCEDURAL BACKGROUND

As stated above, a juvenile petition regarding Joshua was filed on August 25, 1995, alleging he was a juvenile as defined under § 43-247(3)(a) and requesting juvenile court jurisdiction over Joshua. On November 7, Mitzi admitted that Joshua was without proper support, and Joshua was adjudicated a child as defined under § 43-247(3)(a). Joshua has remained in out-of-home placement since that time. On October 18, 1996, a juvenile court petition regarding Jonathan, Jasmine, and Devon was filed, alleging that these three children were juveniles as

defined under § 43-247(3)(a). An ex parte order of temporary custody in DSS was issued on October 18. Although Devon and Jasmine were placed in foster care with Joshua, and Jonathan was placed with his paternal grandmother, the three children were not adjudicated. The three children have remained in out-of-home placement since October 1996.

As part of Joshua's case, three separate case plans were adopted by the court. A December 1996 report prepared by DSS refers to goals in connection with the three children in addition to Joshua. The terms of the case plans and the report to the court, not repeated here, generally provided for treatment for Mitzi's drug addiction and enhancement of parenting skills. Mitzi failed to complete any of these plans.

On March 14, 1997, the State filed separate motions to terminate Mitzi's parental rights as to all of the children. The motion filed in Joshua's case sought termination based upon § 43-292(2), neglect; § 43-292(4), unfitness; § 43-292(6), failure to correct conditions leading to adjudication; and § 43-292(7), out-of-home placement for 18 months or more and failure to correct conditions leading to out-of-home placement. The motion filed on behalf of Jonathan, Jasmine, and Devon sought termination of parental rights pursuant to § 43-292(2), neglect, and § 43-292(4), unfitness.

A combined termination hearing was held on August 21, 1997, at which Mitzi appeared and was represented by counsel. At the hearing, Mitzi, the DSS case manager assigned to the case, two counselors who had evaluated Mitzi, a Child Protective Services employee, and Mitzi's mother all testified. Numerous exhibits were received relating generally to the case plans adopted in Joshua's case, an alcohol and drug evaluation of Mitzi, and two urine analyses performed on Mitzi.

The evidence at trial established a pattern of conduct whereby Mitzi put her drug dependency needs ahead of the needs of her children. In ordering termination, the juvenile court judge observed:

> [T]he mother's defense to this predicament presents a tragic and apparently never ending circle of circumstances. The mother is in jail because she uses drugs. On the other hand, the mother cannot get treatment because

she is in jail. This cycle has not been broken by the mother during the pendency of either of these cases and the children cannot be left indefinitely in a situation that all evidence would indicate is highly unlikely to be corrected.

The evidence at the termination hearing showed that during the pendency of the juvenile court proceedings, Mitzi had demonstrated no effort either to rehabilitate herself or to remedy her situation. She was frequently late or absent altogether for visitation with her children. When the court offered Mitzi the chance for unsupervised visitation with her children upon Mitzi's completion of an evaluation for alcohol and drug use, she did not complete the evaluation. Mitzi also failed to avail herself of numerous opportunities offered by DSS to regain control of her life and her children.

On September 23, 1997, the juvenile court entered an order terminating Mitzi's parental rights as to all four children. The court found that the two allegations contained in the petitions to terminate Mitzi's parental rights that related to all the children, § 43-292(2) and (4), had been proved by the State by clear and convincing evidence. The juvenile court ruled that Mitzi had substantially, continuously, or repeatedly neglected the children and had refused to provide them necessary parental care and protection due to her frequent and lengthy incarcerations and that termination was justified under § 43-292(2). The juvenile court also determined Mitzi was unfit by reason of her habitual use of narcotic drugs and that her conduct was seriously detrimental to the health, morals, and well-being of all the children, a condition justifying termination under § 43-292(4).

As to Joshua, the juvenile court made two additional findings. The juvenile court found that Joshua was a juvenile as defined under § 43-247(3)(a) (Cum. Supp. 1996), and despite reasonable efforts directed by the court, no amelioration of the conditions that had led to the adjudication had occurred, a condition justifying termination under § 43-292(6). The court also found that Joshua had been in out-of-home placement for more than 18 months and that Mitzi had failed to correct the conditions leading to that placement, a condition justifying termination under § 43-292(7). As to all the children, the juvenile court found that termination of Mitzi's parental rights was in the children's best interests.

On appeal, the Court of Appeals affirmed the juvenile court's termination of Mitzi's parental rights as to Joshua in case No. S-97-1085, stating:

> [T]he evidence clearly and convincingly established that Mitzi had substantially and continuously or repeatedly neglected Joshua. See § 43-292(2). In addition, we find that the evidence also established that Mitzi was unfit by reason of habitual use of illegal drugs, which conduct was seriously detrimental to the health, morals, and well-being of the children. See § 43-292(4). . . .
>
> . . . The evidence shows that given Mitzi's lengthy history of drug dependency, it would be a significant length of time before Mitzi would be in a position to parent her children, even if Mitzi committed to turning her life around. The professionals involved in this case opined that given Mitzi's circumstances and the circumstances of the children, it was in the children's best interests that Mitzi's parental rights be terminated. Based upon our de novo review of the record, we conclude that termination of Mitzi's parental rights is in the best interests of Joshua.

*In re Interest of Joshua M. et al.*, 7 Neb. App. 872, 879, 587 N.W.2d 131, 136-37 (1998).

As to the three children subjects in case No. S-97-1086, the Court of Appeals reversed the juvenile court's order of termination of Mitzi's parental rights and directed the juvenile court to dismiss the case due to a lack of jurisdiction over the children because the juvenile court failed to adjudicate the three children prior to the entry of its order terminating Mitzi's parental rights. The Court of Appeals reasoned, "While a court need not hold a separate adjudication hearing, and while such hearing can be held at the same time as a termination hearing, it is nonetheless necessary that the court make such an adjudication before proceeding to terminate parental rights." *Id.* at 880, 587 N.W.2d at 137. The State successfully petitioned for further review of both cases.

## IV. ASSIGNMENT OF ERROR

In its petition for further review, the State has assigned only one error, that the Court of Appeals erred in case No. S-97-1086

in vacating the juvenile court's order terminating Mitzi's parental rights to Jonathan, Jasmine, and Devon, contrary to statutory language.

## V. STANDARD OF REVIEW

In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998); *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). Interpretation of a statute presents a question of law. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998); *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). An appellate court reviews questions of law independent of the trial court's decision. *In re Interest of Amber G. et al., supra.*

## VI. ANALYSIS

### 1. Interpretation of Statutes

The issue presented in this case is one of first impression. The question is, Under what conditions pursuant to Nebraska's Juvenile Code, codified at Neb. Rev. Stat. ch. 43, art. 2 (Reissue 1993 & Cum. Supp. 1996), must the juvenile in question be adjudicated prior to the termination of parental rights? For the reasons set forth below, we hold that based upon a plain and ordinary reading of the Nebraska Juvenile Code provisions relating to the termination of parental rights, where the parent has been afforded procedural due process, it is not necessary to adjudicate a child as a juvenile under the Nebraska Juvenile Code prior to the termination of parental rights under § 43-292(1) through (5) as those provisions existed at the time of the termination hearing, which in this case was on August 21, 1997. For the sake of completeness, we note that § 43-292 was amended operative July 1, 1998, and we do not undertake to interpret § 43-292 as recently amended.

In reaching our decision, we are guided by fundamental rules of statutory interpretation. We have stated, "In reading 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." *PLPSO v. Papillion/La Vista School Dist.*, 252 Neb. 308, 312, 562 N.W.2d 335, 338 (1997). We have also stated, "When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible." *Baker's Supermarkets v. State*, 248 Neb. 984, 991, 540 N.W.2d 574, 579 (1995). Finally, we have observed that "unless the Legislature has plainly indicated a contrary purpose or intention, when a statute specifies the object of its operation, the statute excludes from its operation every object not expressly mentioned therein." *PLPSO v. Papillion/La Vista School Dist.*, 252 Neb. at 314, 562 N.W.2d at 339. See, also, *State v. Wragge*, 246 Neb. 864, 867, 524 N.W.2d 54, 57 (1994) (holding that "a statute which specifies the object of its operation excludes therefrom every object not expressly mentioned (expressio unius est exclusio alterius)"); *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 769, 478 N.W.2d 270, 274 (1992) (recognizing "the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute").

### 2. Interpretation of Nebraska Juvenile Code Provisions Regarding Termination of Parental Rights

Guided by the foregoing principles of statutory interpretation, we review the Nebraska Juvenile Code provisions regarding termination of parental rights applicable to these cases. Regarding the filing of termination proceedings, § 43-291 provides in relevant part:

> Facts may also be set forth in the *original petition*, a supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights. After a petition, a supplemental petition, or motion has

> been filed, the court shall cause to be endorsed on the summons and notice that the proceeding is one to terminate parental rights, shall set the time and place for the hearing, and shall cause summons and notice, with a copy of the petition, supplemental petition, or motion attached, to be given in the same manner as required in other cases before the juvenile court.

(Emphasis supplied.)

Section 43-292 sets forth the statutory grounds for termination. The version of § 43-292 which was in effect at the time of these proceedings listed seven separate conditions, the existence of any one of which when combined with the best interests of the juvenile supports a decision to terminate parental rights. Section 43-292 states in part that the juvenile court may terminate parental rights between the parents and the child when one of the following conditions exists:

> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> (3) The parents, being financially able, have willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her health, morals, or welfare or have neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court;
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;
>
> (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period;

(6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination; or

(7) The juvenile has been in an out-of-home placement for eighteen or more consecutive months and the parents have failed to correct the conditions leading to the juvenile's out-of-home placement in spite of reasonable efforts and services to the parents ordered by the court or offered by the Department of Health and Human Services or other designated agency.

We are aware that § 43-292 has been amended, providing additional grounds for termination of parental rights and amending certain of the foregoing provisions. The proceedings in the instant case, however, occurred prior to the operative date of the amendments.

Section 43-247 sets forth the juvenile court's jurisdiction. Section 43-247 (Cum. Supp. 1996) provides in pertinent part:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> (1) Any juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance;
>
> (2) Any juvenile who has committed an act which would constitute a felony under the laws of this state;
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupa-

> tion dangerous to life or limb or injurious to the health or morals of such juvenile or (b) who, by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent, guardian, or custodian; who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school;
>
> (4) Any juvenile who has committed an act which would constitute a traffic offense as defined in section 43-245;
>
> (5) The parent, guardian, or custodian who has custody of any juvenile described in this section;
>
> (6) The proceedings for termination of parental rights as provided in the Nebraska Juvenile Code;
>
> (7) The proceedings for termination of parental rights as provided in section 42-364; and
>
> (8) Any juvenile who has been voluntarily relinquished, pursuant to section 43-106.01, to the Department of Health and Human Services . . . .

We note that this section was amended pursuant to 1997 Neb. Laws, L.B. 307 and L.B. 622. The additional amendments provided by L.B. 622 became operative on September 13, 1997, after the date of the termination hearing, and are not relevant to the analysis of this case. The amended sections were not relied upon by the juvenile court in reaching its decision to terminate Mitzi's parental rights to Jonathan, Jasmine, and Devon and are not relevant to our analysis.

The plain language of § 43-247(6) states that the juvenile court shall have jurisdiction of "[t]he proceedings for termination of parental rights as provided in the Nebraska Juvenile Code." The Nebraska Juvenile Code provides for the filing of "the original petition" seeking the termination of parental rights under § 43-291. Thus, the juvenile court acquires jurisdiction of a case for termination of parental rights brought on, inter alia, in an original petition filed under § 43-291 of the Nebraska Juvenile Code. By its terms, "the original petition" to terminate parental rights under § 43-291 is an initial filing and does not require prior action in or by the juvenile court. Taken together, §§ 43-247(6) and 43-291 indicate that the juvenile court prop-

erly acquires jurisdiction over an original action to terminate parental rights as provided in the Nebraska Juvenile Code without prior juvenile court action, including adjudication.

In meeting our obligation to read the collection of statutes contained in the Nebraska Juvenile Code in pari materia and giving meaning to all the sections, we examine the remaining relevant Nebraska Juvenile Code sections regarding termination of parental rights to determine whether juvenile court involvement is required prior to the juvenile court's acquisition of jurisdiction of the proceedings for termination of parental rights. We, therefore, examine § 43-292.

Section 43-292 provided seven bases for termination of parental rights when these cases were pending. Only two of the seven provisions of § 43-292 explicitly or implicitly require juvenile court action prior to the termination of parental rights and by inference require a prior adjudication. Subsection (6) of § 43-292 explicitly requires a prior adjudication under § 43-247(3)(a), and subsection (7) implicitly seems to require a prior adjudication by virtue of its reference to prior court-ordered efforts and services. Subsection (6) provides that parental rights can be terminated where reasonable efforts "under the direction of the court" have failed to correct the conditions leading to the prior determination that the juvenile was one as described under § 43-247(3)(a). Subsection (7) of § 43-292 permits the termination of parental rights as to a juvenile who has been in out-of-home placement for 18 or more consecutive months and the parents have failed to correct the conditions leading to the placement "in spite of reasonable efforts and services to the parents ordered by the court or offered by" an appropriate agency. For the sake of completeness, we note that the last phrase of § 43-292(3) refers to court-ordered support, which we understand to encompass noncustodial support orders in nonjuvenile cases, such as dissolution. See, e.g., Neb. Rev. Stat. § 42-364(7) (Reissue 1998).

Unlike § 43-292(6) and (7), § 43-292(1) through (5) do not require, imply, or contemplate juvenile court involvement, including adjudication, prior to the filing of the petition for termination of parental rights. Instead, subsections (1) through (5) each concern historical actions or conditions of the parents such

as abandonment, neglect, unfitnesses, and mental deficiency. There is no requirement of longitudinal involvement of the juvenile court under § 43-292(1) through (5), much less a prior adjudication. Under § 43-291, an original petition may be filed seeking termination of parental rights and the juvenile court acquires jurisdiction of the termination proceeding brought on by an original action under § 43-247(6) without prior juvenile court involvement, except where required by the Nebraska Juvenile Code.

Through the plain language of § 43-292, the Legislature has demonstrated its intention that under certain circumstances, prior court action or an adjudication is required before parental rights can be terminated. See § 43-292(6) and (7). Conversely, in this same statutory section, the Legislature has listed other conditions justifying parental termination, dependent not upon prior juvenile court action but upon the actions or conditions of the parents. The Legislature's obvious inclusion of prior court action under certain conditions demonstrates a clear intention that such action is necessary only under the enumerated circumstances.

The plain and ordinary meaning of §§ 43-291 and 43-292, taken together, is that parental rights may be terminated in an original proceeding. To hold that an adjudication must occur prior to the termination of parental rights would render portions of the provisions of these sections meaningless. It is well established that in construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of a statute. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

In reading the provisions of the Nebraska Juvenile Code, we are mindful that the terms "adjudicate" and "adjudication" are liberally distributed throughout the code and have been the object of judicial comment. Nothing in the jurisprudence surrounding the interpretation of "adjudication" precludes our conclusion that an adjudication is not required prior to termination under § 43-292(1) through (5).

With regard to the adjudication and dispositional phases of juvenile proceedings, this court has previously stated that the "purpose of the adjudication phase of the proceeding is to protect the interests of the child; the purpose of the dispositional phase is to determine placement and the rights of the parties in the action." *In re Interest of Amber G. et al.*, 250 Neb. 973, 980, 554 N.W.2d 142, 148 (1996). "Adjudication" means that a child "is a juvenile within the meaning of the [Nebraska Juvenile Code]," whereas a disposition addresses "promotion and protection of a juvenile's best interests." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 263, 417 N.W.2d 147, 156 (1987). This court has held that under the Nebraska Juvenile Code, the adjudication and dispositional phases may be combined into one hearing. *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990).

This court recognized in a case arising before enactment of § 43-292(7), which subsection pertains to out-of-home placement and failure to correct conditions leading to out-of-home placement, that

> the juvenile court may terminate parental rights under the various grounds specified in [the] subsections . . . of § 43-292 without providing the parent with a reasonable opportunity to rehabilitate himself or herself. . . . It is only to terminate parental rights pursuant to subsection (6) of § 43-292 [as it then existed] that the State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so.

*In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 712, 457 N.W.2d 274, 280 (1990).

In *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992), we held that the juvenile court failed to acquire jurisdiction over the child through an adjudication hearing and, therefore, was without jurisdiction to act with regard to a motion for termination of parental rights due to failure to follow a rehabilitation plan. See § 43-292(6). In that case, the basis for the termination of parental rights was the parent's failure under § 43-292(6) to comply with court-ordered plans aimed at correcting the circumstances that led to purported juvenile court

jurisdiction. This holding in *In re Interest of D.M.B.*, as well as the observation in *In re Interest of L.C., J.C., and E.C.* quoted above, is consistent with our conclusion that § 43-292(6) anticipates a prior adjudication by the juvenile court; however, other provisions of the code, with the exception of § 43-292(7), do not.

With respect to the adjudicative phase of juvenile proceedings, we are aware that the version of § 43-278 in effect at the time of the proceedings herein provided, "All cases filed under subdivision (3) of section 43-247 shall have an adjudication hearing not more than ninety days after a petition is filed." We have held that the language of § 43-278 is directory, not mandatory. *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990). The petition filed under § 43-247(3)(a) on October 18, 1996, sought a determination that the three children in case No. S-97-1086 had been abandoned and lacked parental care by reason of their mother's drug addiction and frequent incarceration. The children were taken into detention on October 18, 1996, and remained "detained" on August 21, 1997, the date of the termination hearing. No action was taken to adjudicate Jonathan, Jasmine, and Devon. While we do not condone the failure to seasonably adjudicate the three children in case No. S-97-1086 pursuant to § 43-278, see *In re Interest D.M.B., supra*, nothing in § 43-278 required that the children be adjudicated as a prerequisite to parental termination under § 43-292(2) and (4), and the failure to conduct a detention hearing or to adjudicate them is not fatal to the termination proceedings brought on by the petition filed March 14, 1997, seeking termination under § 43-292(2) and (4).

In the Nebraska Juvenile Code sections addressing the termination of parental rights, the statutory language explicitly permits the filing of an original petition to initiate a parental rights termination proceeding without regard to prior juvenile court action, see § 43-291, thus vesting jurisdiction of the case in the juvenile court under § 43-247(6) and, furthermore, five of the seven bases by which parental rights can be terminated under § 43-292 make no mention explicitly or implicitly of prior juvenile court involvement. We thus conclude that under the statutes in effect during these proceedings, an adjudication was not

required prior to the termination of parental rights sought under § 43-292(1) through (5) and that the Court of Appeals' determination that an adjudication was required prior to termination under § 43-292(2) and (4) in case No. S-97-1086 was incorrect.

We have long recognized that " '[t]he integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed by the Constitution of the United States,' " *In re Interest of L.J., J.J., and J.J.*, 220 Neb. 102, 115, 368 N.W.2d 474, 483 (1985) (quoting *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979)), and that such rights "should not lightly be alienated," *id.* at 115-16, 368 N.W.2d at 483. Additionally, in *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 264, 417 N.W.2d 147, 156 (1987), we quoted *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), where the U.S. Supreme Court stated: " 'The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.' " Accordingly, in connection with our conclusion that the language of the Nebraska Juvenile Code permits a juvenile court to proceed with a hearing on the termination of parental rights without a prior adjudication hearing where such termination is sought under § 43-292(1) through (5), we further require that such proceedings be accompanied by due process safeguards, as statutory provisions cannot abrogate constitutional rights. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). See, also, § 43-279.01.

### 3. Application to Instant Case

We now address the merits of the instant cases. Initially, we note that the circumstances of Mitzi's life leading to the termination of her parental rights are the same for all four children. Mitzi's drug addiction and the corresponding frequent and lengthy absences from her children due to incarceration have a negative effect on all four children. While incarceration alone is not a basis for termination of parental rights, see *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992), we note that Mitzi's incarceration has contributed to the neglect of her children.

(a) Case No. S-97-1085: Joshua

Mitzi's parental rights to Joshua in case No. S-97-1085 were terminated based on § 43-292(2), (4), (6), and (7). Neither Mitzi nor the State challenge the Court of Appeals' decision affirming the termination. The Court of Appeals' decision affirming the termination of Mitzi's parental rights to Joshua in case No. S-97-1085 is affirmed.

(b) Case No. S-97-1086: Jonathan, Jasmine, and Devon

The motion seeking the termination of Mitzi's parental rights as to Jonathan, Jasmine, and Devon was based on § 43-292(2), neglect, and (4), unfitness, which subsections, as stated above, require no prior adjudication or court involvement prior to termination of parental rights and instead are triggered by and established by proof of the actions or conditions of the parent.

The clear and convincing evidence adduced at the termination hearing and reviewed de novo by this court leads to the conclusion that Mitzi is unfit by reason of her drug use and consequent incarceration to provide the care, subsistence, and protection needed by Jonathan, Jasmine, and Devon and, in fact, has neglected to provide for them. The evidence establishes that Mitzi has neglected the children as defined by § 43-292(2) and is unfit as defined by § 43-292(4). The record adequately demonstrates that even when given the chance to rehabilitate herself, Mitzi is either unwilling or unable to forgo her drug addiction. Affording Mitzi yet another opportunity at rehabilitation is neither necessary nor recommended. Instead, the time has come to end the procedural limbo for Jonathan, Jasmine, and Devon. The record amply supports the conclusion that it is in the best interests of these three children to terminate Mitzi's parental rights.

In case No. S-97-1086, the Court of Appeals concluded that the failure to adjudicate the three children deprived the juvenile court of jurisdiction to terminate Mitzi's parental rights as to these three children and ordered the case dismissed. We have found this conclusion to be incorrect. Accordingly, we reverse the decision of the Court of Appeals in case No. S-97-1086 with instructions to the Court of Appeals to direct the juvenile court

to reinstate its order terminating Mitzi's parental rights to Jonathan, Jasmine, and Devon.

## VII. CONCLUSION

Based upon our de novo review of the facts in these cases and upon our independent duty to decide questions of law, we find that Mitzi's parental rights as to Joshua were properly terminated in case No. S-97-1085 and that the Court of Appeals' decision is affirmed. As to Jonathan, Jasmine, and Devon, we conclude that Mitzi's parental rights as to these three children in case No. S-97-1086 were properly terminated by the juvenile court without a prior adjudication by the juvenile court. We reach this conclusion based on statutory construction and our legal conclusion that a prior adjudication is not required for the termination of parental rights brought under § 43-292(1) through (5) when accompanied by due process safeguards and our further determination that the evidence is sufficient to terminate Mitzi's parental rights under § 43-292(2) and (4) and that it is in the children's best interests to do so. The decision of the Court of Appeals is reversed in case No. S-97-1086 with directions to the Court of Appeals to instruct the juvenile court to reinstate its order terminating Mitzi's parental rights to Jonathan, Jasmine, and Devon.

JUDGMENT IN NO. S-97-1085 AFFIRMED.
JUDGMENT IN NO. S-97-1086 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.

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REBECCA DAU McLAUGHLIN, APPELLANT, V.
LESLIE C. HELLBUSCH, M.D., APPELLEE.
591 N.W.2d 569

Filed April 2, 1999. No. S-97-1091.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. ____. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will

sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.

3. **Malpractice: Physician and Patient: Expert Witnesses: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. The burden of establishing these elements rests upon the plaintiff's introduction of expert medical testimony.
4. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.

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

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellant.

William M. Lamson, Jr., and David J. Schmitt, of Lamson, Dugan & Murray, for appellee.

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

CONNOLLY, J.

In this medical malpractice action, a jury returned a verdict in favor of defendant-appellee, Leslie C. Hellbusch, M.D. Plaintiff-appellant, Rebecca Dau McLaughlin, appeals the district court's denial of her motion for directed verdict. McLaughlin asserts that after Hellbusch performed two surgeries on her, he failed to refer her to a physician who could treat progressive, or abnormal, kyphosis of the spine. Because there existed a factual dispute, the district court was correct in denying McLaughlin's motion for directed verdict. We affirm.

## BACKGROUND

### MEDICAL TREATMENT

McLaughlin, when 14 years old, was not recovering properly from the last of two surgeries performed following two separate knee injuries and was reporting numbness in her feet. One of her attending physicians, William M. Walsh, M.D., an orthopedic surgeon who specialized in sports medicine, referred McLaughlin to a neurologist, who in turn referred her to

Hellbusch, a specialist in neurosurgery. Hellbusch first saw McLaughlin on February 15, 1988, and in that initial visit he discovered a cyst on McLaughlin's spine. He immediately performed laminectomy surgery and drained the cyst and sealed a hole in the lining of McLaughlin's spinal cord. The cyst recurred, and Hellbusch performed surgery in May to remove the cyst and repair another hole that had developed in the spinal cord lining. Small portions of bone were removed in both surgeries, and the surgeries were successful. Hellbusch continued to monitor McLaughlin's recovery from surgery until August 11.

Hellbusch testified that in his last visit with McLaughlin, he informed her and her mother of the increased risk of progressive kyphosis and suggested that McLaughlin see a spine orthopedist. Hellbusch stated that upon McLaughlin's mother's inquiry as to whether Walsh could do the needed monitoring and x rays, Hellbusch advised her that Walsh could. The next day, Hellbusch sent a letter to L. Joseph Fisher, M.D., McLaughlin's pediatrician, and sent a copy of the letter to Walsh, stating, "We should be on the lookout for any evidence of thoracic scoliosis or kyphosis" as a result of the surgeries. The letter further stated, "I suggested that she might ask Dr. Walsh to do spine x-rays at intervals, perhaps on a yearly basis since she will be seeing him for her knee problem anyway." The evidence is in dispute as to whether Hellbusch's oral statements to McLaughlin and her mother and the letter were sufficient to constitute a referral.

Fisher periodically treated McLaughlin after the surgeries for unrelated ailments. During a visit on February 14, 1990, Fisher testified that he physically examined McLaughlin and noted a lack of abnormal kyphosis. Fisher told McLaughlin at that visit that she needed to check back with Walsh. However, McLaughlin never went to see Walsh at any time after the August 11, 1988, conversation with Hellbusch.

The record reflects that McLaughlin had a normal spine prior to the surgeries that Hellbusch performed. A magnetic resonance imaging performed between the two surgeries showed that McLaughlin still had a normal spine, and she had a normal spine on August 11, 1988, when Hellbusch last saw her. However, she subsequently developed progressive kyphosis,

which is an abnormally increased posterior curvature of the thoracic spine. She was diagnosed with this condition in July 1990. Progressive kyphosis is a known postsurgical risk in children who have undergone the type of surgery that Hellbusch performed, and Hellbusch was aware of that risk. McLaughlin underwent corrective surgery in May 1991, which has improved but not eliminated the condition.

### Trial Proceedings

McLaughlin sued Hellbusch, asserting that Hellbusch committed malpractice by failing to provide appropriate postoperative care including the monitoring, diagnosis, and treatment of progressive kyphosis. Robert B. Winter, M.D., a specialist in orthopedic surgery, testified as an expert for McLaughlin. Winter stated that a physician cannot detect kyphosis by a physical examination only. He stated that detection of kyphosis is done by taking certain x rays of the spine at regular intervals and measuring the spine. Winter testified that Hellbusch breached the standard of care because Hellbusch failed to refer McLaughlin to a spine specialist who could monitor her for the development of progressive kyphosis. He stated that Walsh did not have the expertise to properly detect kyphosis as early as a spine specialist would.

Daniel L. McKenney, M.D., a neurosurgeon, testified as an expert for Hellbusch. He stated that Hellbusch met the standard of care. He stated that Hellbusch's recommendations to McLaughlin's mother, Fisher, and Walsh were sufficient to meet the standard of care. He stated that Walsh was competent to detect kyphosis.

Walsh testified he could not treat kyphosis. However, he stated that he could monitor for kyphosis by ordering the necessary spinal x rays and having a radiologist measure the kyphosis, although he also stated that he might have suggested someone else monitor for kyphosis if McLaughin had returned to see him after the surgeries. Fisher testified that he knew what kyphosis was and what symptoms to look for. He stated that he would see kyphosis "if it were grossly there, and I wouldn't see it if it were early there." Fisher stated that he could not treat kyphosis. Hellbusch also stated that he could not treat kyphosis.

At the end of the trial, McLaughlin moved for a directed verdict on the issue of liability. The court overruled the motion, stating that there were "abundant issues of fact for the jury to consider." The jury returned a verdict in favor of Hellbusch.

## ASSIGNMENTS OF ERROR

McLaughlin assigns, restated, that the trial court erred in failing to grant her motion for a directed verdict because (1) a physician who does not possess the requisite skill or knowledge to treat a patient's serious postsurgery medical complication has a fundamental duty as a matter of law to refer the patient to a specialist who is qualified to care for and treat that condition and (2) reasonable minds could not differ that Hellbusch failed to refer McLaughlin to a medical specialist qualified to treat the foreseeable and known, serious postsurgical complications.

## SCOPE OF REVIEW

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). See *Haag v. Bongers, ante* p. 170, 589 N.W.2d 318 (1999). The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. *Haag v. Bongers, supra*; *McWhirt v. Heavey, supra*. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *McWhirt v. Heavey, supra*.

## ANALYSIS

McLaughlin contends that she was entitled to a directed verdict. She asserts that a surgeon's standard of care includes postoperative treatment of a patient. She claims that because Hellbusch did not know how to *treat* kyphosis and referred her to physicians who did not know how to *treat* kyphosis, he breached the standard of care as a matter of law. Hellbusch argues that the issue at trial was not whether Hellbusch was negligent for failing to refer McLaughlin to a physician who could *treat* kyphosis; rather, the issue was whether Hellbusch

properly referred McLaughlin to a physician who could *monitor* for the onset of kyphosis, and as to that issue, the experts disagreed and thus created an issue of fact that was properly presented to the jury.

In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). The burden of establishing these elements " 'rests upon the plaintiff's introduction of expert medical testimony.' " *Anderson v. Moore*, 202 Neb. 452, 465, 275 N.W.2d 842, 849 (1979), quoting *Kortus v. Jensen*, 195 Neb. 261, 237 N.W.2d 845 (1976). While McLaughlin's petition left open the issue of treatment, her sole expert witness, Winter, did not testify that Hellbusch was negligent for failing to refer McLaughlin to a physician who could treat kyphosis. Winter testified as to what the generally accepted standard of care would be to *detect* the *development* of kyphosis, then testified as follows:

> Q. . . . Do you have an opinion based upon a reasonable degree of medical certainty as to whom it is that is qualified or appropriate to perform this type of *monitoring* of kyphosis?
>
> A. Yes, I do.
>
> Q. And, Doctor, who is that please?
>
> A. That should be done by a spine specialist, somebody who knows how to take the appropriate x-rays, because these are often non-standard x-rays, who knows how to measure them properly. In other words, knows what to look for on those films.
>
> . . . .
>
> Q. Now, Doctor, you testified that in your opinion, then, Doctor Hellbusch failed to meet the minimum standard of care in that he failed to take serial x-rays to *monitor* for [McLaughlin's] kyphosis; is that correct?
>
> A. Yes, he failed to do that or conversely he failed to send her to an expert who could do that.
>
> . . . .

> Q. . . . [W]ho had had the ultimate responsibility for following up this patient to ensure or *monitor* for the development of kyphosis?
>
> A. Following Doctor Hellbusch's surgery, it's his responsibility to either do the *monitoring* himself or to refer her to an appropriate person to do the *monitoring*.

(Emphasis supplied.) Winter stated that a neurologist, orthopedist, or family practitioner would not be qualified to "detect" kyphosis.

Winter then testified that a surgeon who has performed a laminectomy has a duty to *monitor* the laminectomy patient for the onset of kyphosis, either himself or herself, if qualified, or by referring the patient to an appropriate spine specialist for monitoring. Winter did not testify that Hellbusch needed to refer McLaughlin to a physician who could treat kyphosis. In fact, Winter stated on cross-examination that the person monitoring for kyphosis need not be the person who would perform the corrective surgery if the condition developed.

Notwithstanding the lack of expert testimony, McLaughlin argues that as a matter of law, a surgeon's standard of care includes subsequent, or postoperative, treatment of a patient. McLaughlin derives this duty from four of our cases: *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981); *Toman v. Creighton Memorial St. Josephs Hosp., Inc.*, 191 Neb. 751, 217 N.W.2d 484 (1974); *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964); and *Stohlman v. Davis*, 117 Neb. 178, 220 N.W. 247 (1928). These cases are distinguishable.

In *Momsen*, 210 Neb. at 56, 313 N.W.2d at 214, we stated that "'"a physician is under the duty to give his patient all necessary and continued attention as long as the case requires it, and that he should not leave his patient at a critical stage without giving reasonable notice or making suitable arrangements for the attendance of another physician."'" The patient in *Momsen* had just had a hysterectomy, and within hours of the surgery, while still in the hospital, her blood pressure dropped. The surgeon had gone home and did not return to the hospital upon receiving this information. The patient died. In the instant case, McLaughlin was not in a "critical stage" at the time

Hellbusch made the referral. She did not suffer from progressive kyphosis when she left Hellbusch's care, and if she was to develop the condition, it was not going to develop within hours. Indeed, McLaughlin was diagnosed with progressive kyphosis in July 1990 and did not have corrective surgery until May 1991, and Winter testified that McLaughlin's condition did not appreciably deteriorate further during that period between diagnosis and surgery. Further, nothing in the words "suitable arrangements" creates a duty as a matter of law that requires a referral to a physician who can *treat* a condition, especially when that condition has not yet presented itself. We conclude *Momsen* is not applicable to the instant case.

In *Stohlman*, 117 Neb. at 184, 220 N.W. at 250, we stated that " 'a physician who leaves a patient in a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty, and is liable therefor.' " In *Stohlman*, the physician left town without telling the patient. The duty that was breached was that of the physician to secure the patient's acceptance of another doctor or give the patient notice so that the patient could secure another physician or surgeon of the patient's own choice. *Id.* Again, McLaughlin was not in a "critical stage." And, if the argument is that Hellbusch never secured another physician to continue the proper care for McLaughlin, that evidence is in dispute and thus was a proper question for the jury. Again, as with *Momsen*, we do not read *Stohlman* to require as a matter of law that the "arrangements" for another physician be a referral to a physician who can treat a condition that the patient does not yet have and may not ever develop.

*Stacey, supra*, and *Toman, supra*, stated that postoperative treatment and advice by the physician to the patient are interwoven and essential parts of the physician-patient relationship. That statement, however, was made in an attempt to define when the statute of limitations begins to run for a medical malpractice action against a physician. The statement did not create a duty as a matter of law to provide particular care or treatment.

Finally, we note that McLaughlin argued in her brief that absent granting her a directed verdict, the district court erred in refusing to give four proposed instructions to the jury. That

error was not assigned. Errors which are argued but not assigned will not be considered by an appellate court. *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998); *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

## CONCLUSION

We conclude that the district court did not err in denying McLaughlin's motion for a directed verdict. The issue actually before the jury—whether Hellbusch referred McLaughlin to an appropriate physician for monitoring—was disputed by the experts and thus created a factual dispute that the jury properly considered. We affirm the district court's decision.

AFFIRMED.

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HOWARD D. VANN, APPELLANT, V. NORWEST BANK NEBRASKA, N.A., A NATIONAL BANKING ASSOCIATION, APPELLEE.
591 N.W.2d 574

Filed April 2, 1999. No. S-98-139.

1. **Res Judicata.** The applicability of the doctrine of res judicata presents a question of law.
2. **Judgments: Appeal and Error.** In reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Res Judicata: Judgments.** Under the traditional rule of res judicata, sometimes called claim preclusion, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies.
4. ____: ____. Except in special cases, the plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.
5. **Contracts: Pleadings: Claims.** A cross-claim against a coparty must arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or be connected with the subject of the action.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

Larry A. Jobeun, of Walsh, Fullenkamp & Doyle, for appellant.

Donald J. Pavelka, Jr., of Hansen, Engles & Locher, P.C., for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Howard D. Vann (Vann) commenced this action for an accounting to determine the fairness and reasonableness of fees and expenses charged to him pursuant to a written agreement between Vann and Norwest Bank Nebraska, N.A. (Norwest). The district court sustained Norwest's motion for summary judgment, finding that res judicata barred Vann's cause of action.

## SCOPE OF REVIEW

The applicability of the doctrine of res judicata to this case presents a question of law. See, *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993); *L. J. Vontz Constr. Co. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993).

In reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Goff-Hamel v. Obstetricians & Gyns., P.C., ante* p. 19, 588 N.W.2d 798 (1999).

## FACTS

In November 1989, Vann and R. Thomas Vann (the Vanns) entered into a purchase agreement with Citi-Omaha Partners II (Partners II) for the construction and sale of a 36-unit apartment building and related improvements (the apartments) on a lot owned by the Vanns.

On January 26, 1990, the Vanns obtained a 1-year construction loan from Norwest. The Vanns executed and delivered a promissory note to Norwest that was secured by a deed of trust to the apartments. In August, Partners II took possession of the apartments but did not close on the purchase agreement.

Subsequently, Partners II commenced a declaratory judgment action against the Vanns, seeking a declaration of the rights, duties, and legal relations with regard to the purchase agreement and a reasonable time in which to close on the purchase agreement. Partners II also prayed for a judgment for the cost of repairing alleged construction defects of the apartments.

In early September 1993, Partners II filed bankruptcy proceedings in the U.S. Bankruptcy Court for the Central District of California, Los Angeles Division. The Vanns agreed that any expenses or fees incurred by Norwest in relation to the Partners II bankruptcy would be considered part of the Vanns' indebtedness to Norwest. Norwest subsequently secured relief from the automatic stay in the bankruptcy court and proceeded to reschedule a trustee's sale of the apartments for July 18, 1994.

Prior to the trustee's sale, the Vanns petitioned the district court in the Partners II declaratory judgment action to appoint a receiver to manage the apartments and to collect the rents and profits during the litigation. Norwest intervened and also filed an application for the appointment of a receiver. On July 1, 1994, the court appointed a receiver to take possession and control of the apartments and authorized the receiver to enforce or modify the leases; collect the rents and profits on the property; and apply the same to expenses incurred in the protection, management, and operation of the property. The receiver was directed to deliver to Norwest on a monthly basis the rents and profits from the apartments remaining after payment of the expenses, which rents and profits were to be applied to the indebtedness secured by the apartments.

On July 18, 1994, Norwest conducted a trustee's sale, and the apartments were purchased by Vann. Subsequently, Norwest filed a motion for an order allowing it to deposit $16,170.10 with the receiver as the amount remaining from the proceeds of the trustee's sale after deduction of all trustee's fees and amounts due and owing Norwest under its deed of trust.

On October 21, 1994, the Vanns motioned the court for discharge of the receiver and for disbursement of all funds held or acquired by the receiver on the basis that Vann was the subsequent purchaser of the apartments at the trustee's sale. In addition, the receiver filed an application for approval of his closing

statement, final payment of receivership fees, and discharge from any further duties and for an order allowing him to disburse funds to the parties as their interests appeared.

The district court then issued an order directing Norwest to deposit $16,170.10 with the receiver, who was then directed to deposit that sum with the clerk of the district court for Douglas County, to be deposited in an interest-bearing account. This sum was to be held until disbursed by agreement or adjudication by the court. The court then approved the receiver's closing statement and final payment, ordered that the remaining balance of net rental income retained by the receiver be disbursed to the Vanns, and discharged the receiver.

Vann commenced this action against Norwest on August 14, 1995, asking that the district court require Norwest to render an itemized accounting of attorney fees, including costs and expenses incurred by Norwest's participation in the Partners II bankruptcy proceedings. Norwest moved for summary judgment on the basis that res judicata barred the action because Vann could have litigated these issues in the declaratory judgment action commenced by Partners II. The court sustained the motion, and Vann appeals.

## ASSIGNMENT OF ERROR

Vann asserts that the district court erred in granting summary judgment in the accounting action on the basis of res judicata.

## ANALYSIS

Under the traditional rule of res judicata, sometimes called claim preclusion, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

We have also stated that except in special cases, the plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion, but to every point which properly belonged to the subject of litigation and

which the parties exercising reasonable diligence might have brought forward at the time. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). See, also, *Baer v. Southroads Mall Ltd.*, 252 Neb. 518, 566 N.W.2d 734 (1997) (bars same parties or privies as to every matter which might with propriety have been litigated and determined in that action). However, as explained in 50 C.J.S. *Judgment* § 758 at 310-11 (1997), this rule does not mean that the prior judgment is

> conclusive of matters not in issue or adjudicated, and which were not germane to, implied in, or essentially connected with, the actual issues in the case, although they may affect the ultimate rights of the parties and might have been presented in the former action, and is not applicable to issues the trial of which rests within the discretion of the court.

The question is whether Vann's action against Norwest for an accounting should have been litigated by Vann in the Partners II declaratory judgment action. Norwest contends that when it motioned the district court to allow the deposit of the $16,170.10, Vann could have then litigated the issue of whether that amount was an accurate reflection of the proceeds of the sale after deducting costs and expenses. Evidently, Norwest argues that Vann could have filed a cross-claim asking the court to order an accounting of the attorney fees incurred by Norwest in relation to, among other things, Norwest's participation in the Partners II bankruptcy action.

Under Neb. Rev. Stat. § 25-813 (Reissue 1995), a cross-claim against a coparty must "aris[e] out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or [be] connected with the subject of the action." The court may, on its own motion, strike the cross-claim if the cross-claim "should delay trial, might tend to injure a party, or in any way jeopardize the rights of the plaintiff." *Id.*

Norwest's intervention regarding the $16,170.10 placed in issue the question of to whom the sum properly belonged. This issue is germane to the litigation between Partners II and the Vanns to determine the rights and liabilities under the purchase agreement between those parties.

In contrast, whether Norwest should be ordered to present an accounting of the fees and costs regarding the bankruptcy action so that it could be determined whether there should have been a greater surplus from the trustee's sale is not germane to the subject of the declaratory judgment action. The accounting was not related to the rights and liabilities under the purchase agreement between Partners II and the Vanns. As such, Vann was not required to litigate his action for an accounting against Norwest in the declaratory judgment action.

The district court erred in sustaining Norwest's motion for summary judgment on the basis of res judicata. We therefore reverse the judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY, J., not participating.

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GARY FRANCIS TRUMAN, APPELLEE,
v. BARBARA ANN TRUMAN, APPELLANT.
591 N.W.2d 81

Filed April 2, 1999. No. S-98-347.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Modification of Decree: Child Support.** When a divorce decree provides for the payment of stipulated sums monthly for child support, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue, and generally, courts are without authority to reduce the amounts of such accrued payments.
3. **Divorce: Child Custody: Stipulations.** Parties in a dissolution proceeding cannot control the disposition of minor children by agreement.
4. **Modification of Decree: Child Support: Proof.** Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.
5. **Modification of Decree: Child Support.** Where the requisite change in circumstances is established, the general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself

or, under some circumstances, retroactive to the filing date of the application for modification.

6. **Estoppel: Modification of Decree: Child Support.** The rule against modification of accrued child support applies unless equitable estoppel is present.
7. **Estoppel: Intent.** 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 or her injury, detriment, or prejudice.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Charles L. Caskey for appellant.

Michael J. Tasset, of Johnson and Mock, for appellee.

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

STEPHAN, J.

Barbara Ann Truman, now Barbara Ann Browne, appeals from an order of the district court for Madison County which determined that she was equitably estopped from collecting accrued child support from Gary Francis Truman, her former spouse. We find no error and affirm.

## BACKGROUND

The marriage of the parties was dissolved by a decree entered by the district court for Madison County on May 6, 1976. Custody of the couple's two minor children, Dawn Marie Truman and Gary Francis Truman II, was awarded to Browne, and Truman was ordered to pay child support "in the sum of $26.00 per week per child being an initial total amount of $52.00 per week commencing April 10, 1976 . . . ." On October 9, 1997, Truman filed an "Application for Modification of Decree and for Correction of Child Support Records." An evi-

dentiary hearing on this application was held on January 16, 1998. Truman testified at the hearing and offered documentary evidence which was received by the court. Browne appeared through counsel, and although she was present in the courthouse during the hearing, she chose not to testify or offer any evidence. Thus, the facts summarized here are uncontroverted.

Following the dissolution of the marriage, Truman moved to Dodge County, Nebraska, and Browne moved to Montana with the children. In 1977, Browne initiated an action in Dodge County under the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), Neb. Rev. Stat. § 42-762 et seq. (Reissue 1978), which has since been repealed. 1993 Neb. Laws, L.B. 500. On November 10, 1977, the district court for Dodge County entered a "Consent Support Order" requiring Truman to pay $40 per week in child support and $0 on arrearage to the clerk of the district court for Dodge County, who was required to transmit the payments to Browne through a court in Montana. This order contained no reference to the child support awarded in the Madison County decree.

In 1979, Browne filed another RURESA action in the district court for Colfax County, Nebraska, where Truman then resided. That court entered an order on March 8 requiring Truman to pay $160 per month in child support and $560 in arrearage, but continued the case until a later date to afford Truman an opportunity to submit evidence of child support payments he had made. Subsequent to the entry of this order, Truman received a letter from Browne stating that unless Truman agreed to assume custody of their son, she intended to place the son in an institution. Truman traveled to California where Browne was then residing and took custody of their then 4-year-old son, who has cerebral palsy. At that time, Truman and Browne reached a verbal agreement that because each parent would have custody of one child, neither would pay child support to the other in the future. On May 29, the district court for Colfax County entered an order in the pending RURESA proceeding which stated in part:

> Upon the facts presented, it is hereby determined by this Court that Barbara Ann Browne has relinquished custody of her minor son to her former husband, Gary Frances Truman, and that she shall no longer require child support

> payments to be made by the said Gary Frances Truman. It is therefore ordered that this matter will be dismissed and that the said Gary Frances Truman pay all back support up to the date of June 1, 1979 . . . .

This order made no reference to the child support award contained in the original decree. Truman did not specifically request that his attorney obtain a modification of the decree to conform with his agreement with Browne and the resulting order of the district court for Colfax County, but he assumed that this had been done.

Browne made no effort to collect child support from Truman after relinquishing custody of their son to him. The son remained in Truman's custody until he reached the age of 21. The daughter continued to reside with Browne until her emancipation at the age of 17.

In 1990, Truman learned that child support under the terms of the original decree was accruing on the records of the clerk of the district court for Madison County. He consulted an attorney, who filed a petition for modification on Truman's behalf but then advised him to "wait and see." The record does not reflect that any action was taken with respect to the 1990 petition for modification. After Madison County officials initiated a wage garnishment proceeding based upon the delinquent child support reflected on its records, Truman commenced this proceeding in which he requested a modification of the original decree, to terminate his child support obligation as of June 1, 1979, as well as a determination of any arrearage due and the application of the wage garnishment as a credit against that amount.

Following the hearing, the district court determined that because modification of child support orders must be prospective, it did not have authority to reduce past-due installments of child support. However, the court concluded that under principles of equity, Browne was estopped from collecting any of the support that accrued after June 1, 1979. The court then calculated that Truman owed an arrearage in the amount of $1,846.80 and entered a judgment against Truman in that amount. We removed Browne's appeal from this order to our docket on our own motion.

## ASSIGNMENT OF ERROR

Browne asserts, restated, that the district court abused its discretion in determining that she was equitably estopped from collecting child support accruing after June 1, 1979.

## STANDARD OF REVIEW

Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998); *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994).

## ANALYSIS

Browne bases her appeal on certain established legal principles. The first is that the orders of the district courts for Dodge and Colfax Counties in the RURESA enforcement action initiated by Browne had no legal effect upon the award of child support contained in the 1976 decree of dissolution entered by the district court for Madison County. Former § 42-792 provided that a RURESA support order did not operate to nullify a previous support order "unless otherwise specifically provided by the court." The 1977 support order in Dodge County and the 1979 order entered in Colfax County made no reference to the 1976 decree entered in Madison County, and thus they did not alter its terms.

Browne also relies upon the well-established rule of law that when a divorce decree provides for the payment of stipulated sums monthly for child support, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue, and generally, courts are without authority to reduce the amounts of such accrued payments. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). Parties in a dissolution proceeding cannot control the disposition of minor children by agreement. *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992). Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree

or a previous modification. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *Wulff, supra*. Where the requisite change in circumstances is established, the general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself or, under some circumstances, retroactive to the filing date of the application for modification. *Wulff, supra*; *Maddux, supra*.

However, in *Smith v. Smith*, 201 Neb. 21, 27, 265 N.W.2d 855, 859 (1978), this court recognized that the rule against modification of accrued child support applies "unless equitable estoppel is present." In that case, the child's mother was awarded custody in a 1952 decree. She subsequently remarried and, in 1957, obtained the written consent of the father to the adoption of the child by her husband, as well as the consent of the court which had issued the divorce decree. The adoption was never finalized, but this fact was not disclosed to the natural father until years later when the mother sought to collect the accrued child support. We held that under these circumstances, the mother was equitably estopped from recovering child support after the date when the adoption should have been completed. We wrote:

> The application of a doctrine of equitable estoppel herein may seem to be a departure from the rule [that courts are without authority to reduce the amount of accrued child support]. That, however, is not the case. The divorce court, upon the petition of the mother and her then husband, gave its consent to the adoption. It made a specific finding that the father of the child had given his written consent to the adoption by the then husband of the mother. A further order should have been entered terminating future installments of child support. While the adoption proceedings pending in the county court were not thereafter completed, [the father] was not aware this had not been done. He had every reason to expect they would be completed in a normal manner and that he would have no further responsibility for the support of his child.

*Id.* at 27-28, 265 N.W.2d at 860.

Subsequently, in *Williams v. Williams*, 206 Neb. 630, 294 N.W.2d 357 (1980), we reaffirmed the principle that the doc-

trine of equitable estoppel could operate to excuse the payment of accrued child support under appropriate factual circumstances. We stated that the elements of equitable estoppel are as follows:

> "As to 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; 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."

*Id.* at 637, 294 N.W.2d at 362, quoting *Chappelear v. Grange & Farmers Ins. Co.*, 190 Neb. 589, 210 N.W.2d 921 (1973). See, also, *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998).

Although this court has not previously examined the applicability of equitable estoppel under the circumstances presented in this case, other courts have applied the doctrine where parties agree to a relinquishment of custody or visitation rights in exchange for termination of child support but do not obtain the necessary judicial approval. For example, in *In Re Marriage of Webber*, 191 Ill. App. 3d 327, 547 N.E.2d 749, 138 Ill. Dec. 582 (1989), a mother was held to be estopped from collecting accrued child support for a period during which she had voluntarily relinquished custody to the father and agreed to waive his child support obligation. The court determined that "[i]n becoming the custodial parent of his son and providing for his son's needs while he lived with him," the father incurred a legal detriment in reasonable reliance upon the mother's agreement. *Id.* at 331, 547 N.E.2d at 752, 138 Ill. Dec. at 585. Similarly, in *In re Marriage of Harms v. Harms*, 174 Wis. 2d 780, 498

N.W.2d 229 (1993), the court held that where a mother removed the children in her custody from the state where the father resided, advised him in writing that she no longer expected him to pay child support, and took no legal action to enforce the original child support obligation for a period of 7 years, she was estopped from collecting accrued child support. The court reasoned that the father stopped making child support payments in reliance upon the mother's statements and gave up his right to challenge the children's removal from the state, which inhibited his visitation rights. See, also, *State v. Stephen Leo S.*, 198 W. Va. 234, 479 S.E.2d 895 (1996) (holding that extrajudicial agreement of parties regarding termination of child support obligations was enforceable under doctrine of equitable estoppel where welfare of children not adversely affected); *McNattin v. McNattin*, 450 N.W.2d 169 (Minn. App. 1990) (holding that mother's extrajudicial agreement not to seek child support in exchange for father's agreement to relinquish custody of child to her not binding upon court but was enforceable under doctrine of equitable estoppel).

We conclude that the uncontroverted facts support the application of equitable estoppel in the present case. When Browne relinquished custody of the parties' son to Truman in 1979, she agreed that Truman would not be obligated to pay child support in the future. Her intent and expectation that the agreement would be acted upon is established by the 1979 order of the district court for Colfax County making specific reference to the agreement and dismissing the RURESA proceeding which Browne had initiated. This order accurately reflected the parties' agreement but inexplicably did not include language which would have terminated the accrual of child support on the records of the district court for Madison County. It is apparent that Truman relied in good faith on this order and on his agreement with Browne in that he changed his position by assuming responsibility for the custody and care of the parties' son for the remainder of the son's minority and, in fact, thereafter. Although she had filed two enforcement actions under RURESA within 3 years of the dissolution, Browne made no effort to collect child support during the period of approximately 17 years which transpired between the entry of the order

in Colfax County reflecting the parties' agreement regarding the termination of Truman's obligation to pay child support and the initiation of this proceeding by Truman. There is no evidence that the agreement of the parties was in any way detrimental to the welfare of the children, who have both reached the age of majority. We agree with the district court that under these circumstances, it would be patently inequitable to require Truman to pay child support accruing after June 1, 1979.

For these reasons, we find no abuse of discretion by the district court and therefore affirm its judgment.

AFFIRMED.

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MARIE A. CRABB, APPELLANT, V.
BISHOP CLARKSON MEMORIAL HOSPITAL, APPELLEE.
591 N.W.2d 756

Filed April 2, 1999. No. S-98-798.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
3. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
4. **Actions: Jurisdiction.** The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
5. **Workers' Compensation: Judgments: Courts: Jurisdiction.** While it is true that in civil cases a court of general jurisdiction has the 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 Workers' 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.
6. **Workers' Compensation.** The Workers' Compensation Court's powers are properly limited to those delineated by statute.
7. ____. The Workers' Compensation Court is empowered to modify an award only by those means specifically delineated in the Nebraska Workers' Compensation Act.
8. **Workers' Compensation: Jurisdiction.** Inherent within the Workers' Compensation Court's exercise of its limited powers is the power to determine whether it has jurisdiction over the matter before it.

9. ____: ____. A determination by the trial court that it lacks jurisdiction, thereby summarily dismissing a case, is a summary proceeding within the inherent power of the Workers' Compensation Court.
10. **Jurisdiction: Appeal and Error.** When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim.

Appeal from the Nebraska Workers' Compensation Court. Appeal dismissed.

Marie A. (Crabb) Stevens, pro se.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellee.

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

WRIGHT, J.

## NATURE OF CASE

On remand, a single judge (trial court) of the Nebraska Workers' Compensation Court concluded that there was no legal or factual basis to set aside the trial court's prior order of dismissal. As a result, the petition filed by Marie A. Crabb was dismissed, and Crabb appeals.

## SCOPE OF REVIEW

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

## FACTS

On January 2, 1990, Crabb was employed by Bishop Clarkson Memorial Hospital (Hospital) when she suffered a needle-stick injury during the course of her employment. In May 1992, while in the process of donating her own blood for use in a later surgery, Crabb learned that she had hepatitis C. On January 15, 1993, Crabb filed an application for workers' compensation benefits, alleging that the needle-stick injury in 1990 caused her to contract hepatitis C.

At trial, Crabb testified that the needle with which she was stuck was not one she had been using on a patient. She asserted

that the needle had been placed on her work tray by someone else and that she had no way of knowing where the needle came from or on which patient the needle had previously been used.

At the time of the needle stick, Crabb was working on the dialysis-transplant floor of the Hospital. She administered first aid to herself and reported the incident to her supervisor. A test of Crabb's blood done at that time showed she was negative for HIV. There was no test available in January 1990 for a hepatitis C infection.

Dr. Thomas J. Safranek, state epidemiologist for the Nebraska Department of Health, testified on behalf of the Hospital. Safranek identified various risk factors associated with contracting hepatitis C. He stated that the most overwhelming risk factor for hepatitis C is blood transfusions but that other risk categories include intravenous drug use; multiplicity of sexual partners; living in a household with an individual who has hepatitis C; and occupational risks assumed by medical professionals, including dentists, surgeons, and hemodialysis nurses. He also noted that it was documented in the medical literature that transmission of hepatitis C could occur through being tattooed, as well as through other types of percutaneous exposure. Safranek stated that once contracted, the hepatitis C infection can remain undetected for a long period of time.

Crabb's medical expert, Dr. Michael F. Sorrell, testified by deposition that hepatitis C was primarily transmitted by blood transfusions, blood products, intravenous drug use, and needle sticks. He further stated that there are a number of patients with what are called community-acquired infections, in which the cause of transmission is unknown.

At trial, Crabb denied having blood transfusions at any time in her life. However, records from Ehrling Bergquist Strategic Hospital at Offutt Air Force Base showed that Dr. Edwin C. Schafer had recorded the following on Crabb's medical history: "She has had multiple head traumas, multiple surgeries for lacerations etc. She had major transfusions in 1975 in Chicago." In addition, a July 1992 medical report written by Dr. Jeremiah P. Donovan, medical director of hepatic transplantation at the University of Nebraska Medical Center (UNMC), referred

repeatedly to prior transfusions: "[S]he had a dogbite at age 2; her scalp bled fairly profusely (and was transfused.) She had blood transfusions again over 20 years ago. She has undergone a blood transfusion as recently as 1992 when she had a total vaginal hysterectomy along with a PREYRA erythroplexy [sic]." Schafer's and Donovan's overall impressions were that Crabb had chronic hepatitis C and that there were multiple reasons why she might have developed hepatitis C. Both doctors noted that Crabb had received multiple blood transfusions at times when many of the screening tests for hepatitis C were not available.

The evidence at trial also showed that Crabb had liver tests on June 7, 1982, and March 9, 1989, both prior to the needle stick, which tests showed abnormal liver function. Safranek stated that abnormal liver tests could denote prior liver disease, including a chronic hepatitis C infection. Crabb also admitted she had two tattoos. One was done in 1979 in Denver, and the other was done in 1980 in California. However, Crabb testified that each had been done in a "clean environment."

Safranek testified that based upon his review of the evidence and the literature about hepatitis C, he was unable to determine within a reasonable degree of medical certainty when Crabb acquired hepatitis C. He stated that his review of Crabb's medical records from 1982 to 1989 showed abnormal liver function tests

> in a consistent fashion without major fluctuations for approximately an eight-year period prior to the needle stick episode. The two times they were tested prior to the needle stick indicated abnormal liver function.
>
> . . . .
>
> . . . It suggested to me whatever had been going on had been going on for a number of years . . . .

Safranek was uncertain whether it was more probable than not that Crabb would have contracted hepatitis C prior to the date of the needle-stick injury. He opined that there were multiple opportunities throughout Crabb's life when she could have contracted hepatitis C and that it was impossible to say when it occurred.

Sorrell initially opined that Crabb's hepatitis C was contracted prior to the needle-stick injury. He later reversed this

opinion, stating that he had based his original opinion on the fact that Crabb's liver function tests prior to the time of the needle-stick injury were abnormal. He stated that the elevated liver enzyme reading from 1989 could have been caused by a medication prescribed for Crabb at that time for musculoskeletal complaints. Sorrell opined with a reasonable degree of medical probability that Crabb did contract hepatitis C after an inadvertent needle stick while working in the renal dialysis unit at the Hospital in 1990.

The trial court dismissed Crabb's petition because she failed to prove that the needle-stick injury caused her to contract hepatitis C, and the dismissal was affirmed by a three-judge review panel of the Workers' Compensation Court. Crabb appealed to the Nebraska Court of Appeals, which affirmed, and her subsequent motion for rehearing was overruled. This court denied Crabb's petitions for further review on November 22, 1995.

On July 5, 1996, Crabb filed another petition, claiming that the trial court's prior ruling was tainted by fraud. This second petition was filed with the same docket number as the first case. The Hospital moved to dismiss the second petition on the basis that it was barred by res judicata and that the trial court did not have jurisdiction to modify the prior dismissal. The trial court granted the motion to dismiss, and Crabb sought review by a three-judge review panel. The review panel reversed the dismissal because it concluded the trial court did not have the authority to grant a motion for summary judgment or to otherwise grant a judgment on the pleadings.

On remand from the three-judge review panel, the trial court found that the second petition recited the same allegations set forth in the first petition and, in addition, alleged that the trial court's prior ruling was tainted by fraud. Crabb's allegations of fraud were: (1) The medical notes of Donovan, of UNMC, were inserted into exhibit 16T at the original trial as part of the records of Ehrling Bergquist Strategic Hospital, rather than being included in the UNMC records which were offered; (2) Crabb's dental records were not included in the medical file that the Hospital submitted to the trial court as Crabb's entire Air Force medical record; (3) not all of Crabb's medical records were given by the Hospital's counsel to the Hospital's medical

expert, Safranek, to review for purposes of his medical causation opinion; and (4) the Hospital's counsel allegedly made untrue statements in his "trial brief/closing arguments" without knowledge of their truth or falsity.

Crabb's chief complaint involved whether she had blood transfusions prior to the time of the needle-stick injury. The trial court noted that Crabb adamantly denied ever having a blood transfusion and that Crabb had deposed Schafer to determine where Schafer obtained the medical history of Crabb's blood transfusions. In his deposition, Schafer stated that such history had been obtained from Crabb at the time Schafer interviewed her. Schafer explained that at the time of the interview, detailed handwritten notes were taken, and that after the interview was finished, a history was dictated and the handwritten notes were destroyed.

In dismissing the petition, the trial court stated that assuming it had subject matter jurisdiction to reopen the case, no factual or legal basis existed to set aside the trial court's prior order of dismissal. Crabb again filed an application for review, and the dismissal was affirmed by a three-judge review panel. Crabb filed a timely notice of appeal to the Court of Appeals, and pursuant to our power to regulate the caseloads of the appellate courts of this state, we moved the case to our docket.

## ASSIGNMENT OF ERROR

In summary, Crabb alleges that the trial court and the review panel erred by failing to set aside the trial court's prior order of dismissal.

## ANALYSIS

Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). The absence of subject matter jurisdiction may be raised

at any time by any party or by the court sua sponte. *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997).

In the Hospital's objection to Crabb's second petition, the Hospital questioned the trial court's jurisdiction to modify or vacate its prior order on the basis of fraud. We have repeatedly held that 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 Workers' 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. *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997). The Workers' Compensation Court's powers are properly limited to those delineated by statute. *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995).

The Nebraska Workers' Compensation Act (Act) provides for modification of awards, but only in limited circumstances. Neb. Rev. Stat. § 48-170 (Reissue 1998) provides: "Every 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. § 48-180 (Reissue 1998) provides in part:

> 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.

In *Thach, supra*, we addressed whether the Workers' Compensation Court's order could be modified after the court's term had ended. We concluded that based on §§ 48-170 and 48-180, if the court failed to modify its order within 10 days and the parties failed to file an application within 14 days of the original order, such order became final and binding upon the parties, and that any attempt to modify the award after these dates was beyond the statutory power of the court. We stated

that the court had clearly acted in excess of its statutorily granted powers when it modified an order after term, because it was readily apparent from a plain reading of the Act that the single judge had no authority to modify the original award after the running of the statutory time period. Since the original order of the court was final, res judicata applied to the issues involved, and the later modification was a nullity.

In *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996), an award for an injured employee was entered on February 24, 1993. The employee filed a "petition" in the same case in October 1994, seeking to extend the completion date of the February award. The court entered an award in March 1995, extending the completion date to December 22, 1994, and the employer timely appealed. We noted that while a court of general jurisdiction has the 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, which are courts of limited and special jurisdiction and have only such authority as has been conferred by statute. We did not permit the employee's attempt to correct an error in the February 1993 award, which had become final, finding that there was no statutory empowerment of the court to do so.

In *Ira v. Swift-Eckrich*, 251 Neb. 411, 558 N.W.2d 40 (1997), an employee received an award, and more than 3 years later, another award was made in the same action which modified the original award and obligated the former employer for the duration of a vocational rehabilitation plan. Nearly 2 years after the modification, the court entered another order upon petition by the former employee. The employer appealed, alleging lack of jurisdiction to alter the prior award. Relying upon *Dougherty, supra*, we reversed on the basis that the Workers' Compensation Court was not authorized to alter the prior award.

The Workers' Compensation Court is empowered to modify an award only by those means specifically delineated in the Act. Any action which is not authorized by statute is beyond the court's authority. Crabb asked the trial court to vacate its prior ruling almost 8 months after the ruling had become final. The request did not fall within the limited grounds for vacating or modifying an award provided for in §§ 48-170 and 48-180 and

Neb. Rev. Stat. § 48-141 (Reissue 1998) and, therefore, was not authorized by statute.

As part of our review on the issue of jurisdiction, we consider the order of the three-judge review panel dated January 15, 1997. As part of Crabb's application for review of the dismissal of her July 1996 petition, Crabb alleged that the trial court had no authority to grant a motion for summary judgment. The review panel agreed and, relying upon our opinion in *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995), reversed the dismissal and remanded the cause for a hearing on the merits.

In *Buckingham*, we stated: "As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute." 248 Neb. at 824, 539 N.W.2d at 649. We also stated that while the county and district courts are given specific authorization to use summary judgment procedures, no provision is made for the procedure in the Workers' Compensation Court.

We point out that inherent within the Workers' Compensation Court's exercise of its limited powers is the power to determine whether it has jurisdiction over the matter before it. A determination by the trial court that it lacks jurisdiction, thereby summarily dismissing a case, is a summary proceeding within the inherent power of the Workers' Compensation Court.

A distinction is made between a summary determination of the merits of an action and a summary determination regarding jurisdiction made by the Workers' Compensation Court. Parties cannot confer jurisdiction where none exists, and the courts of this state may determine the issue of jurisdiction sua sponte.

## CONCLUSION

In its order of August 21, 1996, the trial court correctly determined that it lacked jurisdiction and dismissed Crabb's July 5, 1996, petition. When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998). Thus, we also dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

STEPHAN, J., not participating.

# KIM TETERS, APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. SCOTTSBLUFF PUBLIC SCHOOLS, A POLITICAL SUBDIVISION AND NONPROFIT CORPORATION OF THE STATE OF NEBRASKA, APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, AND KIWANIS CLUB OF SCOTTSBLUFF, NEBRASKA, A NONPROFIT CORPORATION DOING BUSINESS AS CAMP KIWANIS, APPELLANT AND CROSS-APPELLEE.

592 N.W.2d 155

Filed April 9, 1999. No. S-96-063.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Constitutional Law: 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.
3. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
4. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
5. **Constitutional Law: Statutes: Notice.** In order to survive a vagueness challenge, a statute must (1) give adequate notice to citizens, such that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited or required, and (2) supply adequate standards to prevent arbitrary enforcement, such that there are explicit standards for those who apply it.
6. **Statutes.** A statute must not forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.
7. **Constitutional Law: Words and Phrases.** The term "rental paid" as used in Neb. Rev. Stat. § 37-734 (Reissue 1998) is unconstitutionally vague, and accordingly the last sentence of that statute is invalid.
8. **Constitutional Law: Statutes: Legislature: Intent.** Factors for consideration in determining whether an unconstitutional provision is severable from the remainder of a statute include (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether the severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Julie A. Moran, and, on brief, Brian D. Nolan, of Hansen, Engles & Locher, P.C., for appellant.

Paul W. Snyder, of The Van Steenberg Firm, P.C., for appellee Teters.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Scottsbluff Public Schools.

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

MCCORMACK, J.

This is a negligence action brought by Kim Teters against Scottsbluff Public Schools (the School) and the Kiwanis Club of Scottsbluff (Kiwanis) for injuries she sustained at Kiwanis' recreational facility, Camp Kiwanis. We affirm in part, and in part reverse and remand with directions.

## BACKGROUND

Teters was injured in 1991 while acting as a parent supervisor at an outdoor education program sponsored by the School. The School held the program at Camp Kiwanis, an outdoor recreation facility rented to the School by Kiwanis on a weekend basis. During the 2-day program, students participated in various outdoor activities, including canoeing, archery, and hiking. Teters, whose daughter was in the sixth grade at Bluffs Middle School in Scottsbluff, attended the program with her daughter following the School's request for parent volunteers.

Teters was injured while using part of the camp's obstacle course known as the slide-for-life. The slide was an apparatus that allowed its user to slide down a cable while holding onto a pulley. Teters lost her grip on the pulley and fell 15 to 20 feet to the ground when the stitching in the slide's safety harness failed. As a result, Teters suffered serious injury.

Teters brought a negligence action against the School and Kiwanis. At trial, the jury found generally for Teters in her action against Kiwanis and awarded her $66,000 in damages. The trial judge, trying the case against the School under the Political Subdivisions Tort Claims Act, also found in favor of Teters and held the School and Kiwanis jointly and severally

liable for the damages determined by the jury. The trial judge found that neither the School nor Kiwanis could invoke the protection of Nebraska's Recreation Liability Act (Act), Neb. Rev. Stat. § 37-1001 et seq. (Reissue 1993). Both Kiwanis and the School appealed to the Nebraska Court of Appeals.

On appeal, Kiwanis and the School argued that they were protected by the Act. The Court of Appeals held that Kiwanis fell under the Act's protection because Kiwanis was the owner of the land for purposes of the Act, the land was being used for recreational purposes under the broad definition found in the Act, the money paid by the School to Kiwanis was a rental rather than a charge, and Camp Kiwanis was open to the public without charge. See *Teters v. Scottsbluff Public Schools*, 5 Neb. App. 867, 567 N.W.2d 314 (1997).

The Court of Appeals further held that the School was subject to the common-law liability analysis because during its "ownership" of Camp Kiwanis it did not hold the land open to the public. However, the School, as a temporary lessee, did not owe Teters a duty to inspect for or warn of latent defects in the safety equipment used with the slide-for-life. *Id.*

The decision of the Court of Appeals was affirmed by an equally divided court without opinion in March 1998. The court, sitting with six members due to a recusal, was equally divided. The court did not reach Teters' constitutional arguments and scheduled this rehearing to address those arguments. Teters challenges as vague the portions of the Act exempting "rental paid" from the definition of a "charge" for the use of land, and defining "recreational purposes."

The Legislature has since renumbered the Act, and for clarity we will refer to the new section numbers. The former § 37-1004 is now Neb. Rev. Stat. § 37-733 (Reissue 1998), § 37-1005 is now Neb. Rev. Stat. § 37-734 (Reissue 1998), and § 37-1008 is now Neb. Rev. Stat. § 37-729 (Reissue 1998).

## ASSIGNMENTS OF ERROR

Teters assigns as error that (1) §§ 37-734 and 37-729(4) are unconstitutionally vague in that they insufficiently define rental and fail to distinguish a rental from a charge, (2) the Court of Appeals incorrectly characterized the payment scheme between

Kiwanis and the School as rental rather than a charge, (3) the phrase "or otherwise using land for purposes of the user" renders the definition of recreational purposes in § 37-729(3) unconstitutionally vague, and (4) the Court of Appeals incorrectly found that Teters and the School were using the land for recreational purposes as defined in § 37-729(3).

## STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998); *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

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. *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998); *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997).

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Andrews v. Schram, supra*; *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997). See *Ploen v. Union Ins. Co., supra*. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). See, *Ploen v. Union Ins. Co., supra*; *Andrews v. Schram, supra*.

## ANALYSIS

Teters' first assignment of error is that § 37-734 of the Act is unconstitutional because of vagueness in the term "rental paid," especially as it interacts with the term "charge" defined in § 37-729(4). Section 37-734 states:

> Nothing in sections 37-729 to 37-736 limits in any way any liability which otherwise exists . . . for injury suffered in any case where the owner of land *charges* the person or persons who enter or go on the land. *Rental paid* by a group, organization, corporation, or the state or federal government shall not be deemed a charge made by the owner of the land.

(Emphasis supplied.) Section 37-729(4) defines a charge as "the amount of money asked in return for an invitation to enter or go upon the land." Neither rental nor rent is explicitly defined in the Act.

In order to survive a vagueness challenge, a statute must (1) give adequate notice to citizens, such that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited or required, and (2) supply adequate standards to prevent arbitrary enforcement, such that there are explicit standards for those who apply it. *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991). Another wording of the same test states that a statute must not forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980). Statutes are to be evaluated under these standards using principles of flexibility and reasonable breadth. *City of Lincoln v. ABC Books, Inc., supra.*

Nebraska's Act is closely modeled upon a model act promulgated by the Council of State Governments entitled "Public Recreation on Private Lands: Limitations on Liability." 24 Council of State Governments, Suggested State Legislation 150 (1965). A comparison between the Act and the model act, §§ 5 and 6, reveals that in adopting the Act, the Legislature modified one but not the other of a matched set of provisions dealing with the leasing of recreational lands to the state or political subdivisions.

Both acts define a charge. The model act at § 2(d) states that a charge is "the admission price or fee asked in return for invitation or permission to enter or go upon the land." *Id.* at 151. Nebraska's Act defines a charge as "the amount of money asked in return for an invitation to enter or go upon the land." § 37-729(4).

Similarly, both acts relieve landowners from common-law liability when land is leased to the state, unless otherwise agreed in writing. See, § 37-733; 24 Council of State Governments, *supra.* The model act also includes political subdivisions within § 5. 24 Council of State Governments, *supra.*

Most relevant is the difference in language surrounding the rental-paid exception itself. The model act at § 6(b) subjects owners of land to common-law liability when the landowner

> charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

*Id.* at 151. Nebraska's Act also imposes common-law liability when the landowner charges for the use of the land, but then states that "[r]ental paid by a group, organization, corporation, or the state or federal government shall not be deemed a charge made by the owner of the land." § 37-734.

In the model act, the terms used in the various sections remain constant and consistent, and it is quite obvious why each part is there and what it does. Section 5 of the model act exempts from common-law liability owners of land leased to the state or a subdivision thereof for recreational purposes, and § 6 then states that a landowner will be liable under common-law principles if he or she charges for the use of the land. Recognizing that rental payments under a lease would fall within the definition of a charge, the model act specifies that consideration paid under a lease to the state or a political subdivision is excluded from the definition of charge. It is clear that the model act's exception to the definition of a charge for compensation received under leases to the state or a political subdivision was included only to resolve the tension between §§ 5 and 6, and not to otherwise expand the opportunities for a landowner to avoid common-law liability.

By contrast, Nebraska's Act uses different terminology in §§ 37-733 and 37-734, as well as expands the number of groups to which the exception to the charge rule applies. While the language of § 37-734 covers the case of leases to the state as enumerated in § 37-733, it is no longer clear from the plain language of the statute that the relevant portion is intended merely to correct tension between the two sections.

It is clear that the Legislature intended to expand the number of entities covered to include groups, organizations, corporations, and the state and federal governments. However, because

§ 37-733 was not similarly expanded, the words of the statute give the impression that the rental-paid exception, while including § 37-733, is not otherwise related to it or limited by it. Compounding this problem is the fact that, unlike the corresponding sections of the model act, the Legislature changed terminology between sections, speaking of leases in § 37-733 and rental paid in § 37-734.

We believe that the resulting confusion between the two sections is sufficient to render the rental-paid exception in § 37-734 unconstitutionally vague. The corresponding portions of the model act were meant to be read together, and when so read they result in a clear statement of legislative intent. In adopting the model act, the Legislature substantially modified § 6 of the model act without similarly modifying § 5. This created unresolvable tensions between the rental-paid exception in § 37-734, the lease provisions of § 37-733, and the definition of charge in § 37-729(4). Because these statutes make it impossible for a person of reasonable intelligence to determine in any given case whether moneys exchanged under a land-use agreement are charges or rents, we are obliged to find that the last sentence of § 37-734 is void due to vagueness.

The next step is determining whether the unconstitutional portion of the Act is severable from the remainder. This court has identified several factors for consideration in determining whether an unconstitutional provision is severable from the remainder of a statute: (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether the severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act. *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996). Looking at these factors, we conclude that the rental-paid exception is severable from the remainder of the Act, and we will apply the Act so modified to resolve the case before us.

Without the rental-paid exception, analysis of whether the Act applies is straightforward. If a landowner allows the use of his or her land for recreational purposes without charge, then the landowner is protected by the Act. If the landowner charges for the use of the land, then the landowner is not protected by the Act unless the land is leased to the state or a subdivision thereof, under § 37-733.

It is undisputed that Kiwanis received money from the School for the use of Camp Kiwanis. As there is no evidence that the arrangement between Kiwanis and the School was a lease, the moneys received by Kiwanis in exchange for the use of the camp remove Kiwanis from the Act's protection. Accordingly, the decision of the Court of Appeals as regards Kiwanis must be reversed and the judgment against Kiwanis reinstated.

## CONCLUSION

We hold that § 37-734's exception to the Act's definition of a charge is unconstitutionally vague. We also hold that the sentence containing the rental-paid exception is severable from the rest of the Act, and we apply the Act to the present case as modified. Kiwanis asked for money in return for an invitation to enter or go upon its land, and that money was not received under a lease to the state for recreational purposes. Accordingly, Kiwanis is not entitled to the protection of the Act. The decision of the Court of Appeals is reversed as regards Kiwanis, and the cause is remanded for reinstatement of the verdict against Kiwanis. We have reviewed the Court of Appeals' decision as to the School, and we agree with its reasoning as previously set forth in this opinion. The Court of Appeals' decision regarding the School is affirmed.

As this holding determines the outcome of the appeal, we need not address Teters' arguments regarding the definition of recreational purposes found in § 37-729(3).

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

STEPHAN, J., not participating.

# JANE DOE, APPELLEE, V. GUNNY'S LIMITED PARTNERSHIP, APPELLANT.

593 N.W.2d 284

Filed April 9, 1999. No. S-97-753.

1. **Directed Verdict: Appeal and Error.** With regard to the overruling of a motion for directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
2. **Negligence.** The duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent risk.
3. ____. The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
4. **Negligence: Landlord and Tenant.** Although a landlord is not an insurer of a tenant's safety, the landlord has a duty to protect the tenant against the foreseeable criminal acts of third persons.
5. **Negligence.** Evidence of prior criminal activity is a necessary component in the totality of the circumstances which must be considered in determining foreseeability.
6. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
7. **Judgments: Trial: Evidence.** A party who objects to evidence and causes it to be excluded cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded.
8. **Evidence: Appeal and Error.** In passing on the sufficiency of the evidence, an appellate court should be able to consider all the evidence offered by the plaintiff, including evidence offered but erroneously excluded by the trial court.
9. ____: ____. If the party asserting that the evidence was insufficient has caused certain evidence to be erroneously excluded by the trial court, an appellate court can review all of the relevant evidence to determine the question of whether the evidence was sufficient.
10. **Rules of Evidence: Appeal and Error.** The admission of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
11. **Jury Instructions: Appeal and Error.** It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
12. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing 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 failure to give the tendered instruction.
13. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

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

John R. Douglas and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Elizabeth A. Govaerts, of Vincent M. Powers & Associates, for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

## NATURE OF CASE

Jane Doe was sexually assaulted in a parking garage owned by Gunny's Limited Partnership (Gunny's). Gunny's appeals from a jury verdict in favor of Doe, claiming, inter alia, that there was insufficient evidence of prior criminal activity to establish a duty on the part of Gunny's to protect Doe from being sexually assaulted.

## SCOPE OF REVIEW

With regard to the overruling of a motion for directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996).

## FACTS

Gunny's is a limited partnership which owns real estate and a building located at the corner of 13th and Q Streets in Lincoln, Nebraska. The basement of the building contains a business operating as a bar, restaurant, and pool hall, which at the time of the incident was called Chesterfield, Bottomsley & Potts (Chesterfield's). The street level of the building is mall-like and contains two fast-food restaurants. Above this area is a multilevel parking garage serviced by an elevator located on the street level and flights of stairs which have an entrance located near an alley on the south side of the building.

On the night in question, Doe and a group of her friends arrived at Chesterfield's about midnight. At that time, Doe was a student at the University of Nebraska at Lincoln. While at the bar, a member of Doe's group began to feel ill, and Doe accompanied the woman outside so that she could get some fresh air. In order to exit Chesterfield's, the two women had to climb a flight of stairs and exit through the lobby of the building.

The lobby, which is part of the mall area, is located at street level. The interior of the mall is uniquely configured in a zigzag pattern with glass doors leading to 13th and Q Streets. When Doe passed through the lobby, she observed that one of the fast-food restaurants located in the mall was closed and that the employees of the other restaurant were closing for the evening. She also noticed a man standing in the lobby, whom she described as being white, thinly built, and wearing a white baseball cap.

After Doe and her friend exited the building, her friend vomited, and Doe returned to Chesterfield's to obtain water and a tissue. When Doe passed through the lobby this time, it was empty. After helping her friend, Doe returned to Chesterfield's and retrieved her purse. As Doe passed through the lobby again, a man stepped from behind a pillar, grabbed her by the arm, pointed a gun at her, and took her into the elevator.

Doe and her attacker exited the elevator on the fourth floor of the parking garage. There, the man forced Doe to remove her clothing and sexually assaulted her. Following the assault, the man permitted Doe to dress and returned her to the elevator. The man escaped via a nearby stairwell and has not been apprehended.

Doe sued Gunny's, alleging that it was negligent because it failed to use reasonable care to protect business visitors such as her from assaults by third parties. She alleged that she suffered damages as a direct and proximate cause of the negligence of Gunny's.

At trial, Jeanne Reesman, the property manager of Gunny's for 13 years, testified regarding security at the building. The lease between Chesterfield's and Gunny's contained a clause which stated that Gunny's would provide security for the premises for a monthly charge.

According to Reesman, prior to Doe's sexual assault, the owners of Chesterfield's had not complained about the security on the premises. She testified that neither Jan Gifford nor Kimberly Gifford, the owners of Chesterfield's, had ever reported to her that there were problems with transients or homeless persons in the building and that had she known transients were living in the building, she would have taken action. During cross-examination, Reesman admitted that she knew of incidents of vandalism involving broken glass and windows at the building, but she stated she did not know of any violent crimes which had been committed in the Gunny's building. Moreover, Reesman learned of the sexual assault only when she read about it in a newspaper article.

For a short period of time prior to 1991, Gunny's had employed a security guard to patrol the building from 9 p.m. to 1:30 a.m. daily. Gunny's stopped providing the security guard when it was discovered that the guard was spending most of his time talking to people in Chesterfield's. At trial, it was established that the security guard was dismissed at a time when the hourly fee to provide security personnel was about to increase.

At the time of the sexual assault, a security guard entered the building only between 9 and 9:30 p.m. to lock the back door, to walk through the lobby of the building, and to walk all floors of the parking garage. The guard returned at 1 a.m. to lock the building for the night. This guard did not know that Doe had been sexually assaulted on the premises because he was not present at the time of the assault.

According to Kimberly Gifford, when she first began managing Chesterfield's, the building had a security guard present in the lobby. Once the guard was no longer present in the lobby, the character of the building changed and homeless persons and transients began living in the building. Gifford claimed that she had complained to Reesman about the lack of security in the building and had informed Reesman that she wanted a security guard in the lobby.

Kimberly Gifford wanted more security in the building because she felt that it was necessary to ensure the safety of her patrons and employees. Kimberly Gifford did not allow her

female employees to walk out of the building at night unless accompanied by a male because she did not feel that it was safe. She testified that the building did not seem safe and that it was "just kind of eerie." She thought that a transient named "Mike" was actually living in the stairwells of the building. The stairwells themselves were described as dirty, disgusting, and full of urine. Kimberly Gifford's concerns with regard to security began when this transient started to live in the stairwells and began to frequent the public restrooms in the basement.

Barbara Felcher, an employee of Chesterfield's, testified that Reesman had made a statement after the sexual assault that it would be too expensive to have security in the building. Felcher stated that Reesman said, "[I]f there was [security], then any damage or injury [Gunny's] would be liable for . . . ."

Robert Dudash, a private investigator who surveyed the security of the Gunny's building, testified that had a security guard been present in the lobby, the sexual assault would not have occurred. Dudash cited the physical layout of the street level as one of the bases for his concern. Dudash also testified that the street level contained various "nooks and crannies" where an unwanted person could conceal himself.

Doe called Leann Remmers-Hammer, a records supervisor for the Lincoln Police Department, to lay foundation for the admission of exhibit 21. The exhibit was a data compilation of recorded dispatch information for calls requesting that police be sent to an eight-block area around the Gunny's building. Doe's offer of exhibit 21 was denied.

Prior to submission of the case to the jury, Gunny's made a motion for a directed verdict. The motion was overruled.

At the conclusion of the trial, the jury returned a verdict for Doe in the amount of $204,000. Following the verdict, Gunny's moved for judgment notwithstanding the verdict or, in the alternative, a new trial. Gunny's asserted that Doe had failed to introduce evidence of prior criminal activity in the building and that such evidence was necessary to establish the duty of Gunny's to protect Doe from an attack by a third party. The trial court overruled the motions, and Gunny's filed a timely notice of appeal. We subsequently moved the case to our docket.

## ASSIGNMENTS OF ERROR

Gunny's assigns and argues essentially four positions. Gunny's assigns as error that the trial court (1) should have directed a verdict at the close of the evidence or should have entered a judgment notwithstanding the verdict in its favor; (2) erred in admitting the testimony of Doe's expert that the presence of a security guard would have prevented the sexual assault; (3) erred in admitting a statement to the effect that if Gunny's had a security guard, then Gunny's would be liable for any damages, which statement was a legal conclusion and therefore inadmissible; and (4) erred by not giving all of the jury instructions proposed by Gunny's.

## ANALYSIS

We first address the claim that Doe failed to offer any evidence of prior criminal activity at or near the Gunny's building and therefore failed to establish a duty on the part of Gunny's to protect Doe from the criminal acts of third parties. Gunny's argues that because Doe failed to establish that Gunny's owed her a duty of care, the trial court erred in not directing a verdict or granting a judgment notwithstanding the verdict in favor of Gunny's.

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the issue and the issue should be decided as a matter of law. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). Thus, we review the evidence to see whether the trial court erred by not granting a directed verdict at the close of all the evidence or a judgment notwithstanding the verdict.

A brief discussion of the importance of evidence of prior criminal activity is warranted insofar as it relates to the issue of the duty of a landlord to protect persons from the criminal acts of third parties. For actual negligence to exist, 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 resulting from such undischarged duty. *Gans v. Parkview*

*Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997); *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994). The duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent risk. *Gans v. Parkview Plaza Partnership, 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 on the facts in a particular situation. *Gans v. Parkview Plaza Partnership, supra*; *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994).

Although a landlord is not an insurer of a tenant's safety, the landlord has a duty to protect the tenant against the foreseeable criminal acts of third persons. *Gans v. Parkview Plaza Partnership, supra*; *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987). If the criminal activity is reasonably foreseeable, it may create a duty owed by the landlord to the business invitee. In other words, the landlord has to conform to the legal standard of reasonable conduct in light of the apparent risk. Stated succinctly by Justice Cardozo many years ago in *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928), "The risk reasonably to be perceived defines the duty to be obeyed . . . ." See, also, *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., supra.*

The importance of evidence of prior criminal activity was set forth in *Gans v. Parkview Plaza Partnership, supra.* In discussing the duty of the landowner, we referred to the Restatement (Second) of Torts § 344 at 226 (1965), which provides:

> If the place or character of [a landowner's] business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Additionally, we stated:

> While liability is to be imposed only where there has been a history of criminal activity such as to make it foreseeable that such activity would occur in the future . . . it

> does not necessarily follow that the prior similar criminal activity must have taken place at the premises; it is required only that the criminal act or acts occurring near the premises in question give notice of the risk that crime may travel to the premises of the business owner . . . . Thus, it is the totality of the circumstances, not solely the number or location of prior incidents, that must be considered in determining foreseeability. . . . [I]n order to make the risk of attack foreseeable, the circumstances to be considered must have a direct relationship to the harm incurred.

*Gans*, 253 Neb. at 383, 571 N.W.2d at 267.

We stated that the law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen. *Gans v. Parkview Plaza Partnership, supra*; *Stodola v. Grunwald Mechanical Contractors*, 228 Neb. 301, 422 N.W.2d 341 (1988).

In order to establish the landlord's duty of reasonable conduct in light of the apparent risk, Doe had to present evidence of prior criminal activity which would give notice to the landlord of the risk that criminal conduct might occur in or around the Gunny's building. Evidence of prior criminal activity is a necessary component in the totality of the circumstances which must be considered in determining foreseeability. *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997); *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994).

Doe established that transients were living in the building and that the building had been vandalized in the past. Gunny's contends that this evidence is not sufficient to place it on notice that a sexual assault might occur on the premises.

At trial, Doe offered additional evidence of prior criminal activity which was excluded by the court. Exhibit 21 is a computer printout of data showing that in the 5 years prior to the assault, the Lincoln Police Department received approximately 1,700 calls requesting that police be dispatched to an eight-block area including and surrounding the Gunny's building. A dispatch is a call for service in which Lincoln police officers are

sent out to investigate. When a call is received by a police operator, the operator makes an entry in the department's computer. This information is stored in a seven-column database. Exhibit 21 is a printout of this seven-column database. The first two columns indicate the date and time of a call; the third provides the case number; the fourth gives the location where police assistance was needed; the fifth, entitled "Type of Call," indicates what type of crime allegedly occurred; and the final two columns list the name of the officer who responded to the call and indicate whether an incident report was filed. Exhibit 21 reveals that from December 18, 1988, through May 25, 1993, the Gunny's building or one of the businesses located within the building had no less than 250 reports or incidents which ranged from assault, larceny, and transients in the building to complaints regarding suspicious persons.

Doe called Remmers-Hammer, a records supervisor for the Lincoln Police Department, who testified that she performed data compilation for the police department and that each time a dispatch was sent or a call requesting service was received, she would document it in the department's computer. Remmers-Hammer testified regarding how the calls were documented and stated that the list of calls was prepared during the ordinary course of the Lincoln Police Department's activity.

Exhibit 21 was objected to as being hearsay, irrelevant, not competent evidence, not a business record, and of no probative value. In denying the admission of the exhibit, the trial court stated:

> Well, it may have some probative value as to the issues in the case. The problem — it seems to me that it certainly is a business record as to the fact that these are the calls that were received. But to go further and say there is a — some veracity or how much weight to be given to the calls themselves or the so-called reports is the problem.
>
> . . . .
>
> . . . It certainly shows the calls they received. But the calls they received are not relevant.

The trial court continued with its analysis by stating:

> The problem I have is that — as I indicated to Mr. Douglas, the defendant can't hide behind the fact they had

> no actual knowledge. They can't stick their head in the sand and say because we are unwilling to look or we are unwilling to check, we are unwilling to see whether there are any problems with this building, we don't have any actual knowledge. I don't think that's the law. But they need to make some kind of reasonable inquiries and be aware of perhaps what everybody else is aware of if there are offenses that have occurred there.
>
> The problem is is [sic] the fact there may have been phone calls, doesn't bear upon the fact as to any actual offenses. I think if you can show that there were incidents that occurred there that at least warranted investigation at the building then that's another thing. The fact there may have been phone calls, for all we know, it was a disgruntled, former spouse of the officer on duty in that area that decided that they wanted to keep him or her busy all night long. So the objection to Exhibit 21 will be sustained.

We disagree with the trial court's determination regarding exhibit 21 and conclude that it should have been admitted. Neb. Rev. Stat. § 27-803 (Reissue 1995) provides in part that the following are not excluded by the hearsay rule:

> (5) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.

Exhibit 21 meets the criteria of § 27-803(5) and, thus, falls within an exception to the hearsay rule. Remmers-Hammer, the custodian of the records, testified that all of the calls the Lincoln Police Department receives are recorded by the opera-

tors and that records of the time, content, and place of dispatch are kept in the regular course of business. Doe laid the proper foundation to have exhibit 21 admitted as a business record, and the trial court should have admitted the exhibit. See, *Graen's Mens Wear v. Stille-Pierce Agency*, 329 N.W.2d 295 (Iowa 1983); *Commonwealth v. Graver*, 461 Pa. 131, 334 A.2d 667 (1975). Pursuant to § 27-803(5), "[t]he circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight"; however, such factors do not prohibit admission of the evidence.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1995); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). Exhibit 21 shows that the Lincoln Police Department had received no less than 250 reports of criminal activity at or near the Gunny's building in the 5 years preceding Doe's sexual assault. The calls received by the police were relevant as evidence of complaints regarding criminal activity. Therefore, the trial court erred when it concluded that exhibit 21 was not relevant.

Since the trial court erroneously excluded exhibit 21, the question is whether such evidence can be considered by an appellate court when the appellant challenges the sufficiency of the evidence to support the judgment. In *Washington v. American Community Stores Corp.*, 196 Neb. 624, 244 N.W.2d 286 (1976), an athlete was injured in a car accident. Liability was not contested, and the issue of damages was submitted to the jury. The jury awarded $76,000 in damages, and the defendant appealed, claiming that there was insufficient evidence presented to support the jury's findings with regard to loss of prospective earnings of the athlete as a coach. The plaintiff had offered evidence of the earning capacity of coaches and wrestlers to prove the average starting salary of a collegiate wrestling coach and the amount that a good professional wrestler would average per week. The defendant objected to this testimony, and it was excluded by the court. We held that a

party who objects to the evidence and causes it to be excluded cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded, citing *Knudson v. Parker*, 70 Neb. 21, 96 N.W. 1010 (1903).

Here, Gunny's objected to exhibit 21, which contained evidence of prior criminal activity, and caused it to be excluded. Our holding in *Washington v. American Community Stores Corp., supra*, seems somewhat inconsistent with our rules regarding the admissibility of evidence. Evidence which is inadmissible is irrelevant and should be excluded from consideration by a court or jury. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998) (all relevant evidence is normally admissible). Therefore, our statement in *Washington v. American Community Stores Corp., supra*, needs further clarification. In passing on the sufficiency of the evidence, an appellate court should be able to consider all the evidence offered by the plaintiff, including evidence offered but erroneously excluded by the trial court. Thus, if the party asserting that the evidence was insufficient has caused certain evidence to be erroneously excluded by the trial court, the appellate court can review all of the relevant evidence to determine the question of whether the evidence was sufficient.

In *Smith v. J. C. Penney Co.*, 260 Iowa 573, 149 N.W.2d 794 (1967), the Iowa Supreme Court held that in passing on the sufficiency of the evidence, the reviewing court may consider all the evidence offered by the plaintiff, including that evidence which was improperly excluded by the trial court. In *Phillips v. Salk, Ward & Salk, Inc.*, 20 Ill. App. 3d 359, 314 N.E.2d 262 (1974), the Illinois Appellate Court noted that an exhibit which had erroneously been excluded from evidence could be reviewed to determine whether there was sufficient evidence to support the order.

Therefore, in considering whether there was sufficient evidence to establish the duty of Gunny's in this case, we will consider all relevant evidence offered by the plaintiff, including that evidence which was improperly excluded by the lower court. Obviously, inadmissible evidence which was properly excluded by the trial court is not considered.

Exhibit 21 shows that in the 5 years preceding the assault, the police responded to calls involving batteries, larcenies, disturbances, and robberies which occurred in the vicinity of the Gunny's building. Taking into consideration exhibit 21, we conclude that Doe offered sufficient evidence of prior criminal activity to establish the duty and that, therefore, the case should have been submitted to the jury. Since we conclude that there would have been sufficient evidence had the trial court not excluded exhibit 21, Gunny's, in this instance, cannot obtain a reversal of the judgment on the basis that the evidence was insufficient.

Next, Gunny's claims that it was error for Doe's expert to testify as to whether the presence of a security guard would have prevented the assault. The admission of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996).

In *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982), which was relied upon by Gunny's, the defendant, who had not been present at the bar previously, entered from the east door of the bar, walked rapidly to the dance floor, and then struck the plaintiff in the face and kicked and stomped on the plaintiff. Immediately, an off-duty, part-time employee of the tavern and other male patrons restrained the defendant and removed him from the tavern. We noted in *Harvey* that it was clear that the property owner could not have done anything to prevent the assault from occurring because it happened suddenly and unexpectedly. We held as a matter of law that the defendant was not bound to anticipate the unforeseen entry of the defendant on the premises and the totally unexpected subsequent assault upon the plaintiff.

Doe's sexual assault did not occur instantaneously, and thus, the facts of this case are distinguishable from the facts of *Harvey*. Doe's attacker was present in the lobby for a period of time. Doe testified that she observed him when she and her friend first passed through the lobby. Further, her attacker remained in the lobby long enough to hold the elevator and to

await a victim. Arguably, in light of these circumstances, the presence of a security guard in the lobby could have prevented the sexual assault.

Gunny's argues that since the security guard's job was merely to observe and report, the guard's presence could not have prevented the sexual assault. Gunny's stresses that it cannot prevent random acts of violence.

Whether Doe's attack could have been prevented was called into question at trial. Therefore, under the facts of this case, we cannot say that the trial court abused its discretion in permitting Doe's expert to give his opinion as to whether the presence of a security guard on the night that the assault occurred would have prevented the crime.

Gunny's next argues that the trial court erred in admitting the statement of Gunny's property manager to the effect that if Gunny's had a security guard, then it would be liable for any damage. Gunny's moved to strike the testimony as an erroneous legal conclusion without foundation. The objection was overruled. Gunny's claims that the testimony regarding a conversation with Reesman, its property manager, which occurred 1 year after the assault was a legal conclusion which was very prejudicial and constituted grounds for reversal.

Prior to the receipt of this testimony, Reesman had been questioned as to whether there was any connection between the increase in cost for the security guard and the decision of Gunny's to eliminate the security guard's employment from the hours of 9 p.m. to 1:30 a.m. Reesman stated that the decision to reduce the security guard's hours was not based upon an increase in his hourly wage, but was based upon the fact that Gunny's did not want to charge its tenants for security which it viewed as unnecessary. Subsequently, Doe offered the testimony of Felcher, who stated that the issue of the security guard was discussed with Reesman and that she was told by Reesman that it would be too expensive to have security and that if there was security, "then any damage or injury [Gunny's] would be liable for and that was the reason that they wouldn't [provide security in the lobby]."

The question, as framed by the testimony, was, Why did Gunny's decide not to have a security guard present in the lobby

from 9 p.m. to 1:30 a.m.? Whether the statement made by Reesman was a legal conclusion is not decisive of whether the statement was admissible. The statement was offered by Doe to establish why Gunny's had decreased its security. The statement tended to establish that Gunny's had decreased the security because it was too costly and because Gunny's believed that if they had security there, they would be liable for any damage that occurred. The evidence was relevant and admissible to show why Gunny's reduced the number of hours the security guard would be present at the building. Thus, the statement was not offered as a legal conclusion. We conclude that the admission of such evidence was not erroneous.

Gunny's asserts the trial court erred by refusing to give the jury instructions it tendered regarding evidence of prior crimes. It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997).

The trial court gave the following jury instruction No. 5:

> The owner of a place of business who holds it open to the public for entry for its 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 intentional harmful acts of third persons, if the owner 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.
>
> A business owner is not an insurer of the visitor's safety and is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct

> on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide reasonable protection.

Gunny's requested that the jury be instructed that "[l]iability may be imposed on a landlord only where there is a history of criminal activity at the leased premises sufficient to create in the landlord constructive notice of the foreseeability that such activity would recur in the future."

To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing 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 failure to give the tendered instruction. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

Gunny's does not object to the instructions that were given by the trial court, but, instead, asserts that its instructions should have been given and that the court's refusal requires reversal and a new trial. Instructions Nos. 2 through 9 offered by Gunny's deal with the issue of foreseeability. For example, instruction No. 2 offered by Gunny's stated: "A possessor of land is not required to anticipate the unforeseen acts of third persons. It is only when such acts can reasonably be anticipated that the possessor has a duty to take such precautionary measures as to protect against such independent acts." Instruction No. 3 is similar. Instruction No. 4 provided that liability may be imposed only where there is a history of criminal activity sufficient to create constructive notice of the foreseeability.

All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Tapp v. Blackmore Ranch, supra*. The jury instructions given by the trial court correctly stated the law, were not misleading, and adequately covered the issues supported by the pleadings and the evidence. We conclude that there was no prejudicial error by the trial court's failure to give the instructions tendered by Gunny's.

We therefore affirm the judgment of the district court.

AFFIRMED.

WHITE, C.J., not participating.

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STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. PAUL, APPELLANT.
592 N.W. 2d 148

Filed April 9, 1999. No. S-97-1081.

1. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
2. **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.
3. **Pleas: Right to Counsel.** To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
4. **Constitutional Law: Pleas: Waiver.** A valid guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right of confrontation, and the privilege against self-incrimination.
5. **Constitutional Law: Pleas: Waiver: Right to Counsel.** A valid guilty plea does not waive the constitutional right to counsel, because the right is not restricted to the actual trial on the merits.
6. **Criminal Law.** While criminal defendants need not be advised of the right to counsel at every separate stage of the criminal proceedings, the initial advisement must at least be accurate.
7. **Pleas: Waiver: Records.** Because the record must affirmatively show an intelligent plea, understandingly entered, the record must disclose knowledge on the part of a defendant as to what rights he or she is waiving when entering such plea.
8. **Pleas: Waiver.** A defendant must realize that by pleading guilty he or she is waiving certain rights of which the defendant has been advised.
9. **Constitutional Law: Right to Counsel: Waiver.** An effective waiver of the federal right to counsel is sufficient to waive the right to counsel under the Nebraska Constitution.
10. **Constitutional Law: Right to Counsel: Waiver: Proof.** The State has the burden of establishing a knowing and intelligent waiver of a defendant's constitutional right to counsel.
11. **Right to Counsel: Waiver.** In determining whether there has been a knowing and voluntary waiver of the right to counsel, the key inquiry is whether the defendant was

sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel.

12. **Sentences: Right to Counsel.** Where a criminal defendant is not advised of his or her right to counsel at sentencing, such omission is prejudicial.
13. **Appeal and Error.** Errors which are neither assigned nor argued will not be considered by an appellate court.
14. ____. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
15. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges, on appeal thereto from the District Court for Douglas County, RICHARD J. SPETHMAN, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Radley E. Clemens for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

HENDRY, C.J.

The State of Nebraska petitions for further review of the Nebraska Court of Appeals' decision reversing Michael E. Paul's conviction for sexual assault and battery, lewd conduct, and soliciting lewd conduct. We reverse, and remand.

## BACKGROUND

On April 7, 1997, a plainclothes officer observed Paul enter a men's restroom at "Lake Cunningham" at "96th and Rainwood." When the officer entered the restroom, Paul pulled his pants down, sat on the toilet, and told the officer to come closer. As the officer approached, Paul reached out and rubbed the officer's groin area. Paul was then arrested and charged with

sexual assault and battery, lewd conduct, and soliciting lewd conduct, in violation of §§ 20-61(d), 20-112, and 20-113 of the Omaha city ordinances.

On May 12, 1997, a group arraignment was held. During the arraignment, the following colloquy occurred, where a county court judge advised the defendants of their constitutional rights.

> THE COURT: . . . . I am going to go through the rights that apply to each one of you no matter what your charge is. Please listen very carefully to this because if you decide to plead either guilty or no contest you will give up these rights I am telling you about. So make sure you understand them before you make a decision to give them up.
>
> You have the right to trial by jury; the right to confront your accusers; to see, hear and question the witnesses against you; to bring witnesses on your side of the case if you wish. . . . You have the right to remain silent. You don't have to tell your side of the case. You don't have to answer questions about what happened if you don't want to. You have the right to a lawyer. If you cannot afford a lawyer you must tell me today. If you ask me for a lawyer I have to ask you questions about your money situation. I am not being nosey, I have to do this. If I decide you cannot pay for a lawyer I will give you one free. You are presumed innocent. The prosecutor has to prove you guilty with proof beyond a reasonable doubt overcoming your presumption of innocence. Now those are your rights.
>
> If you plead either guilty or no contest you give them up. The only rights you will still have would be the right to appeal and to have a lawyer for that appeal free if you cannot afford your own at that time.

Paul was later taken to another courtroom where his arraignment was continued before a second county court judge. The arraignment proceeded with the second judge explaining the charges brought against Paul and the possible punishments, which Paul stated he understood. The following colloquy then occurred:

> THE COURT: Were you in [the first judge's] court when she described the rights that each defendant has?
>
> MR. PAUL: I sure was, sir.

THE COURT: Did you understand all those rights?

MR. PAUL: I did so.

THE COURT: All right. No right to a jury trial. Trial will have to be to a judge only. With all of your rights in mind, how do you want to plead to these charges?

MR. PAUL: Guilty.

THE COURT: If you plead guilty you get convicted and you give up all of the rights that I described and you face the penalties that I just told you about. Do you understand that?

MR. PAUL: Yes, sir. I do.

THE COURT: Are these your free and voluntary pleas?

MR. PAUL: Yes, sir.

The State then summarized the facts leading to Paul's arrest. After hearing the facts, the court accepted Paul's guilty pleas, found him guilty, and immediately sentenced him to 30 days' incarceration on each count, to run concurrently.

On September 10, 1997, Paul filed a statement of errors with the Douglas County District Court alleging various errors, none of which questioned the validity of his plea. On September 12, the district court summarily affirmed the convictions and sentences. Paul thereafter appealed to the Nebraska Court of Appeals on October 20, 1997.

In an opinion not designated for permanent publication, filed September 15, 1998, the Nebraska Court of Appeals reversed, and remanded on two grounds, both plain error. First, relying on *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996), the court held that Paul "was erroneously instructed that he had the right to counsel, but that if he pled guilty, he gave up the right to counsel." The court determined the error was of "constitutional magnitude." Second, the court also noted plain error regarding the factual basis for the plea. The court observed that the prosecutor stated that the incident occurred at " 'Lake Cunningham.' " The court noted that the crime report established " '96th & Rainwood' " as the crime location. The court ascertained that the record failed to contain any reference to the city or county where "Lake Cunningham" or "96th and Rainwood" was located. Again relying on *State v. Dodson, supra*, the Court of Appeals concluded that the record was

insufficient to establish venue and that the trial court abused its discretion in accepting the plea.

## ASSIGNMENTS OF ERROR

Rephrased and summarized, the State claims that the Court of Appeals erred in (1) determining Paul was erroneously instructed regarding his constitutional right to counsel, (2) noting plain error regarding the factual basis for Paul's guilty plea, and (3) resolving a case on plain error without providing notice or an opportunity to be heard.

## STANDARD OF REVIEW

A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Dodson, 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. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

## ANALYSIS

### Plea of Guilty

The State first claims the Court of Appeals erred in determining Paul was erroneously advised regarding the constitutional right to counsel. The State contends the record supports the county court's finding that Paul was aware of his right to counsel and, by word and conduct, knowingly waived the right. The State essentially claims the county court complied with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and that Paul knowingly waived his right to counsel after being informed of the right by the county court.

To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.

*State v. Irish, supra*; *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

A valid guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right of confrontation, and the privilege against self-incrimination. *State v. Dodson, supra.* As most recently stated in *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997), a criminal defendant must understand that a valid guilty plea constitutes a waiver of the right of confrontation, the right to a jury trial, and the privilege against self-incrimination. However, a valid guilty plea does not waive the constitutional right to counsel, because the right is not restricted to the actual trial on the merits. *Id.*; *State v. Ninneman*, 179 Neb. 729, 140 N.W.2d 5 (1966), *cert. denied* 385 U.S. 838, 87 S. Ct. 85, 17 L. Ed. 2d 72. See, *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 2d 158 (1932). A guilty plea does not waive the right to counsel during the "critical stages" of criminal proceedings, including pleading, sentencing, and appeal. See *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974).

In the case at bar, the county court essentially informed Paul that if he pled guilty he would "give up" the right to counsel at the time of pleading. The county court also informed Paul that if he pled guilty, the only rights he retained were the rights to an appeal and to a lawyer for that appeal. The county court did not, however, inform Paul of his right to counsel at the time of sentencing. In *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996), we held that inaccurately instructing a criminal defendant regarding his or her constitutional right to counsel renders a guilty plea invalid. However, three dissenting justices reasoned that such an error was not prejudicial considering the trial record as a whole. *State v. Dodson, supra* (Wright, J., dissenting, joined by Connolly and Gerrard, JJ.).

The trial court's advisement regarding Paul's right to counsel at the time of pleading was incorrect. See *State v. Dodson, supra.* However, how was Paul prejudiced by his plea of guilty? As reasoned in the dissent to *State v. Dodson,* 250 Neb. at 595-96, 550 N.W.2d at 355-56:

> Whether Dodson could have a lawyer after he pled guilty is clearly not the issue. The trial court's instruction

to Dodson that he had a right to counsel, but that if he pled guilty, he did not have a right to counsel, even if incorrect, clearly did not prejudice Dodson.

Paul complains he was prejudiced and, as a consequence, that he should be allowed to withdraw his plea of guilty. See *State v. Jipp*, 214 Neb. 577, 334 N.W.2d 805 (1983) (holding defendant must allege and prove that omission by trial court has resulted in prejudice to him or her constituting manifest injustice that would require that defendant be given opportunity to withdraw plea). However, we fail to see how Paul was prejudiced by the entry of his plea of guilty. What prejudice or inducement befell Paul by the subsequent discovery that he retained his right to counsel even after he entered his plea of guilty? If any prejudice did occur, such prejudice would exist only as to those critical stages of the proceeding as to which Paul was not advised of his right to counsel. Under the record presented, that would be at sentencing. As such, we determine the county court did not abuse its discretion in accepting Paul's plea of guilty. See *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

As noted previously, the county court's advisement to Paul indicated that once he entered his plea of "either guilty or no contest . . . [t]he only rights you will still have would be the right to appeal and to have a lawyer for that appeal . . . ." This advisement was incorrect. While criminal defendants need not be advised of the right to counsel at every separate stage of the criminal proceedings, *State v. Harig, supra*, the initial advisement must at least be accurate, *State v. Dodson, supra*. The advisement given to Paul indicated that by pleading guilty he waived the right to counsel not only at the pleading stage, but also at the sentencing stage. The issue then becomes whether this error was prejudicial. See *State v. Jipp, supra*.

In *State v. Tweedy*, 209 Neb. 649, 652, 309 N.W.2d 94, 97 (1981), we stated: "If we concede that the record must affirmatively show an intelligent plea, understandingly entered, it is difficult to imagine how this can be demonstrated unless that same record discloses knowledge on the part of a defendant as to *what rights* he is waiving when entering such plea." (Emphasis supplied.) "It is implicit in this reasoning that a

defendant must realize that by pleading guilty he is waiving *certain rights* of which he has been advised." (Emphasis supplied.) *State v. Hays*, 253 Neb. 467, 473, 570 N.W.2d 823, 828 (1997).

An effective waiver of the federal right to counsel is sufficient to waive the right to counsel under our state Constitution. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). The State has the burden of establishing a knowing and intelligent waiver of a defendant's constitutional right to counsel. *Id.* (citing *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)). In determining whether there has been a knowing and voluntary waiver of the right to counsel, the key inquiry is whether the defendant was *sufficiently aware* of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). The waiver of constitutional rights must be done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

Where a criminal defendant is not advised of his or her right to counsel at sentencing, such omission is prejudicial. See, *Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954) (stating that even though defendant has previously waived right to counsel at prior stages, he or she may request and receive counsel at sentencing); *Mathis v. Burke*, 307 F. Supp. 429, 431 (E.D. Wis. 1969) (stating that "[t]he right to counsel at sentencing is an important one which is carefully guarded," citing *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967)); *Rini v. Katzenbach*, 403 F.2d 697, 699-700 (7th Cir. 1968) (stating that "[s]entencing is a crucial point in the criminal process at which counsel should be present, if the right is not waived").

The importance of counsel at sentencing was made emphatically clear by the Supreme Court in *McConnell v. Rhay*, 393 U.S. 2, 3-4, 89 S. Ct. 32, 21 L. Ed. 2d 2 (1968), where the Court stated that the right to counsel at sentencing

> relates to "the very integrity of the fact-finding process." . . . As we said in *Mempa* [*v. Rhay*, 389 U.S. 128, 88 S. Ct.

> 254, 19 L. Ed. 2d 336 (1967)], "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent."

We therefore hold that an advisement to a criminal defendant which indicates he or she has no constitutional right to counsel at the time of sentencing is prejudicial error, and as such, Paul is to be resentenced after being advised of his right to counsel.

### FACTUAL BASIS FOR PLEA

The State next claims the Court of Appeals erred in noting plain error regarding the factual basis for Paul's plea of guilty. The record discloses the incident occurred at "Lake Cunningham" at "96th and Rainwood." The record does not, however, contain any reference to the city or county where "Lake Cunningham" or "96th and Rainwood" is located. Relying on our holding in *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996), the Court of Appeals noted plain error regarding the factual basis of Paul's plea of guilty.

We have recently reaffirmed several basic precepts regarding the doctrine of plain error. Errors which are neither assigned nor argued will not be considered by an appellate court. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998). Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

Assuming, without deciding, that the record does not clearly establish that Paul's admitted offense occurred in Douglas County, we find plain error did not occur. Paul did not raise, assign, or argue the failure to establish venue in either the district court or the Court of Appeals. We therefore conclude that,

under the record presented, no miscarriage of justice occurred which would result in damage to the integrity, reputation, and fairness of the judicial process.

The Court of Appeals' determination that plain error occurred with respect to venue is reversed, and the county court's finding that an adequate factual basis had been shown for the acceptance of the guilty plea is hereby reinstated. To the extent *State v. Dodson, supra*, is inconsistent with this opinion, it is overruled.

### Plain Error With Notice

Finally, the State argues the Court of Appeals erred in resolving a case on plain error without providing notice or an opportunity to be heard. This portion of the State's argument has been addressed above and need not be considered further.

## CONCLUSION

The failure of the county court to advise Paul of his right to counsel at sentencing was not prejudicial error with respect to the acceptance of his guilty plea. However, the incomplete advisement was prejudicial to Paul's rights at the time of sentencing, and he must therefore be resentenced after being advised of his constitutional right to counsel at that stage of the proceeding. We therefore reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals, directing the court to remand the cause to the district court with directions to remand the cause to the county court for resentencing.

Reversed and remanded.

Miller-Lerman, J., not participating.

Gerrard, J., concurs in the result.

# NATIONAL BANK OF COMMERCE TRUST & SAVINGS ASSOCIATION, APPELLEE, V. RICHARD L. HAM, APPELLANT, AND SANDRA S. HAM, APPELLEE.

# NATIONAL BANK OF COMMERCE TRUST & SAVINGS ASSOCIATION, APPELLEE, V. RICHARD L. HAM, APPELLANT.

___N.W.2d___

Filed April 9, 1999. Nos. S-97-1120, S-97-1121.

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. **Contracts: Acceleration Clauses: Limitations of Actions.** In the absence of a contractual provision allowing acceleration, where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due.
3. **Contracts: Acceleration Clauses: Limitations of Actions: Debtors and Creditors.** Where a contract contains an option to accelerate, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that the creditor has elected to exercise the option.
4. **Bankruptcy: Limitations of Actions.** The pendency of bankruptcy proceedings does not have the effect of prolonging a state statute of limitations for an equivalent length of time after the bankruptcy is dismissed.
5. ____: ____. Title 11 U.S.C. § 108(c) (1994) extends a statute of limitations for 30 days after an automatic stay expires by operation of law or is lifted by an order of a bankruptcy court.
6. ____: ____. Apart from extending a statute of limitations for 30 days after an automatic stay expires by operation of law or is lifted by order of a bankruptcy court, 11 U.S.C. § 108(c)(2) (1994) by itself does not provide for the tolling of any externally imposed time bars; rather, the language of § 108 merely incorporates the suspension of deadlines that are expressly provided in other federal or state statutes.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Stanley H. Foster for appellee National Bank of Commerce.

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

WRIGHT, J.

## NATURE OF CASE

These appeals present an issue of first impression as to whether the applicable statute of limitations for a breach of contract claim is tolled during the period that the plaintiff is subject to an automatic stay by the U.S. Bankruptcy Court.

## SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Wood v. McGrath, North, ante* p. 109, 589 N.W.2d 103 (1999).

## FACTS

On July 5, 1989, Richard L. Ham entered into a personal money reserve plan (PMRP) agreement with National Bank of Commerce Trust & Savings Association (National). Under the agreement, Richard was to repay in monthly installments money lent to him. Richard borrowed $1,000 under the PMRP agreement and made several payments. However, he failed to make payments in January, March, and May 1990 and thereafter. On approximately August 15, National prepared and delivered to Richard a letter informing him that National was exercising its option to demand immediate payment in the full amount of $808.08. The letter demanded payment by August 27. Richard has not paid the balance due under the PMRP agreement.

On July 26, 1989, Richard executed and delivered to National a security agreement and a level payment note in the total sum of $24,003. He failed to pay the installment due on March 17, 1990, and all subsequent installments. National accelerated the balance due and exercised its right to repossess the collateral set forth in the security agreement. National sold the collateral, and on August 29, notified Richard of an alleged deficiency balance owed, which Richard has not paid.

On September 26, 1989, Richard and Sandra S. Ham executed and delivered a promissory note in the amount of $55,544.79 to National. This note was due and payable on November 30. Richard and Sandra defaulted on this note.

On November 5, 1990, Richard filed a petition in the U.S. Bankruptcy Court for the District of Nebraska. Pursuant to 11

U.S.C. § 362 (1988 & Supp. V 1993), National was subject to an automatic stay enjoining it from either commencing or continuing any lawsuit in order to enforce its rights. The stay remained in effect until the bankruptcy petition was dismissed on February 13, 1992.

On February 22, 1994, Richard and Sandra filed a second petition in the bankruptcy court, and National was again subject to an automatic stay until the bankruptcy petition was dismissed on December 28. The combined period for which National was subject to the automatic stays by the bankruptcy court amounted to 774 days.

On July 14, 1995, National sued Richard to recover amounts due under the PMRP agreement and the level payment note. On the same date, National sued Richard and Sandra to recover on the September 26, 1989, promissory note. In response, Richard and Sandra asserted the affirmative defense of the statute of limitations.

On September 16, 1997, National obtained a summary judgment against Richard and Sandra in its action on the promissory note. National also obtained a summary judgment regarding the PMRP agreement and a partial summary judgment on the level payment note. The district court concluded that the applicable statute of limitations for the actions against Richard and Sandra was tolled during the 774-day pendency of the bankruptcy stays. Richard appeals from the summary judgment orders regarding the PMRP agreement and the promissory note.

## ASSIGNMENTS OF ERROR

In both cases, which have been consolidated on appeal, Richard asserts that the district court erred in (1) finding that the time in which National had to commence suit was tolled while he was under the protection of the federal Bankruptcy Code, (2) finding that there were no issues of material fact in dispute as to whether National's claim was time barred, and (3) granting summary judgment.

## ANALYSIS

The issue presented is whether the district court erred in concluding as a matter of law that National's claims were not barred by the statute of limitations. When reviewing a question

of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Wood v. McGrath, North, ante* p. 109, 589 N.W.2d 103 (1999).

### PMRP AGREEMENT

The statute of limitations for an action on a written contract is 5 years. Neb. Rev. Stat. § 25-205 (Reissue 1995). We first address the July 5, 1989, PMRP agreement. In the absence of a contractual provision allowing acceleration, where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due. See, *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Becker v. Lammers*, 193 Neb. 839, 229 N.W.2d 557 (1975). Where a contract contains an option to accelerate, the statute of limitations for an action on the whole indebtedness due begins to run from the time the creditor takes positive action indicating that he has elected to exercise the option. See, *State Security Savings Co. v. Pelster*, 207 Neb. 158, 296 N.W.2d 702 (1980); *Hatch v. Ely*, 131 Neb. 882, 270 N.W. 480 (1936); *Santini v. Fritkin*, 240 Md. 542, 214 A.2d 578 (1965).

National's PMRP agreement with Richard provided that if any payment was not made when due, all sums due and owing to National "shall immediately become due and payable, without demand or notice." Regarding such a "self-operative" acceleration clause, authorities are split as to whether the statute of limitations begins to run automatically upon default or whether it begins to run upon affirmative election by the creditor to accelerate. See 51 Am. Jur. 2d *Limitation of Actions* § 133 (1970). Here, if the statute of limitations began to run automatically upon default, then the statute began to run in January 1990, when Richard first missed a monthly payment. If this is the case, then National failed to bring its action within 5 years. On the other hand, if affirmative action is necessary to accelerate the whole indebtedness due, then the statute of limitations did not begin to run until August, when National prepared and delivered a written demand informing Richard it was exercising its right to demand immediate payment of the whole indebtedness due. If the latter is true, National's action was brought within the 5-year limitations period.

In *Moorehead v. Hungerford*, 110 Neb. 315, 193 N.W. 706 (1923), we stated that a provision in a mortgage given to secure a promissory note stating that the whole debt would immediately become due if any interest payment was not made was permissive only and not self-operative. See, also, *McCarthy v. Benedict*, 89 Neb. 293, 131 N.W. 598 (1911); *Lowenstein v. Phelan*, 17 Neb. 429, 22 N.W. 561 (1885).

Courts in other jurisdictions have opined that the better-reasoned authorities hold that an acceleration provision, although absolute in its terms, is not self-operative. See, e.g., *Fogle v. King*, 132 W. Va. 224, 51 S.E.2d 776 (1948). The rationale is that the debtor, by defaulting, should not be permitted to force the maturation of an indebtedness which was intended as an investment for a given period. In *Grozier v. Post Publishing Co.*, 342 Mass. 97, 172 N.E.2d 266 (1961), the court stated that to hold such an acceleration provision to be self-operative would prohibit the creditor from exercising leniency toward the debtor.

We therefore conclude that National's cause of action for the unpaid balance of the PMRP agreement accrued when National gave written notice of its election to accelerate the unpaid balance due. Thus, National's action on the PMRP agreement was brought within the 5-year statute of limitations, and we affirm the district court's order granting summary judgment as to the PMRP agreement.

### Promissory Note

Richard defaulted on the September 26, 1989, promissory note on November 30, and National clearly did not commence its action within 5 years of the default. National argues, however, that the district court was correct in its conclusion that the 5-year statutory period was extended or tolled by the 774 days during which National was subject to the bankruptcy stays involving Richard and Sandra.

Conversely, Richard argues that the statute of limitations was not tolled by the bankruptcy stays. He asserts that pursuant to 11 U.S.C. § 108(c) (1994), National was allowed 30 days to file suit after it received notice of the dismissal of the bankruptcy, and that because the evidence is unclear as to when National received notice of the stay's termination, the district court erred in granting summary judgment in favor of National.

We have not previously determined whether the applicable statute of limitations is tolled day for day by the period of time during which a creditor is subject to a stay in bankruptcy.

Section 362 provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.

Section 108(c) provides:

> [I]f applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . .

Our reading of §§ 108(c)(2) and 362 indicates that neither section tolls the applicable statute of limitations.

In *In re Baird*, 63 B.R. 60 (Bankr. W.D. Ky. 1986), the court held that the pendency of the bankruptcy proceedings for several months did not have the effect of prolonging a state statute of limitations for an equivalent length of time after the bankruptcy was dismissed. The court stated that § 108 did not in and of itself suspend the state statute of limitations. Rather, § 108(c) extends the statute of limitations for 30 days after the automatic stay expires by operation of law or is lifted by order

of the court. The court explained that the reference in § 108(c)(1) to the " 'suspension of such period' " (emphasis omitted), *In re Baird*, 63 B.R. at 62, referred not to the operation of bankruptcy law, but to other specialized " 'suspension' " statutes, such as the Internal Revenue Code, *id.* at 63. In support of its conclusion, the court quoted the following legislative history of § 108(c):

> "Subsection (c) extends the statute [of] limitations for creditors. Thus, if a creditor is stayed from or continuing an action against the debtor because of the bankruptcy case, then the creditor is permitted an additional 30 days after notice of the event by which the stay is terminated, whether that event be relief from the automatic stay under proposed 11 U.S.C. § 362 or 1301, the closing of the bankruptcy case (which terminates the stay), or the exception from discharge of the debts on which the creditor claims.
>
> . . . .
>
> "The House amendment adopts Section 108(c)(1) of the Senate amendment which expressly includes any special suspensions of statutes of limitation periods on collection outside bankruptcy when assets are under the authority of a court. For example, Section 6503(b) of the Internal Revenue Code suspends collection of tax liabilities while the debtor's assets are in the control or custody of a court, and for six months thereafter. . . ."

(Emphasis omitted.) *In re Baird*, 63 B.R. at 62-63.

Similarly, the court in *Grotting v. Hudson Shipbuilders, Inc.*, 85 B.R. 568 (W.D. Wash. 1988), concluded that there is no language in either the automatic stay provision of § 362 or the extension of time provision of § 108(c) that suspends a statute of limitations from running. The court stated that the automatic stay provision of § 362 "merely prohibits a cause of action from being commenced" against a debtor, while the extension of time provision of § 108(c) "merely provides an extra 30 days to file a claim if the claims' limitation period expired before the automatic stay was lifted." *Grotting*, 85 B.R. at 569. The court explained that such interpretation of the federal Bankruptcy Code was especially reasonable in light of the fact the prede-

cessor statute expressly provided for the "suspension" of any statute of limitations during the pendency of the bankruptcy proceedings and that Congress could have similarly provided in the new statute. Moreover, the court explained that the interpretation that the applicable statute of limitations is not tolled by the automatic stay in bankruptcy "comports best with expeditious and fair administration of a bankrupt's estate. The parties have more certain knowledge of when claims will expire, and the potential claims period is not unduly extended because of the length—which may be great in complex cases—of the bankruptcy proceedings." *Grotting*, 85 B.R. at 570.

In *In re Confidential Investigative Consultants, Inc.*, 178 B.R. 739 (Bankr. N.D. Ill. 1995), the court explained that § 108(c) prevents a debtor from filing bankruptcy and then using the expiration of the limitations period during the bankruptcy stay as a complete defense. However, apart from the 30-day period under § 108(c)(2), this section by itself " 'does not provide for tolling of any externally imposed time bars . . . rather, this language merely incorporates suspension of deadlines that are expressly provided in other federal or state statutes.' " (Emphasis omitted.) *In re Confidential Investigative Consultants, Inc.*, 178 B.R. at 749 (quoting *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993)). See, also, *Bennett v. U.S. Lines, Inc.*, 64 F.3d 62 (2d Cir. 1995); *Skywark v. Isaacson*, 202 B.R. 557 (S.D.N.Y. 1996); *In re Crysen/Montenay Energy Co.*, 166 B.R. 546 (S.D.N.Y. 1994); *Thurman v. Tafoya*, 895 P.2d 1050 (Colo. 1995); *Swartzman v. Harlan*, 535 So. 2d 605 (Fla. App. 1988); *J.T. Industrial Contractors, Inc. v. Hargis Railcar, Inc.*, 217 Ga. App. 679, 458 S.E.2d 702 (1995); *Weaver v. Hamrick*, 907 S.W.2d 385 (Tenn. 1995); *Hazel v. Van Beek*, 135 Wash. 2d 45, 954 P.2d 1301 (1998). But see, *In re Hunters Run Ltd. Partnership*, 875 F.2d 1425 (9th Cir. 1989); *In re Martin-Trigona*, 763 F.2d 503 (2d Cir. 1985); *Garbe Iron Works, Inc. v. Priester*, 99 Ill. 2d 84, 457 N.E.2d 422, 75 Ill. Dec. 428 (1983); *Major Lumber v. G & B Remodeling*, 817 S.W.2d 474 (Mo. App. 1991).

We note, however, that states are not precluded from granting more than the 30 days provided by § 108(c) or from providing for the tolling of an applicable statute of limitations period dur-

ing the pendency of a bankruptcy stay. In *Panzella v. Hills Stores Co.*, 171 B.R. 22 (E.D. Pa. 1994), the court explained that Congress explicitly allowed for state statutes or other applicable nonbankruptcy law to provide additional time for the plaintiff to file suit if the defendant was in bankruptcy. Likewise, in *Pettibone Corp. v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991), the court stated, "Federal law assured the plaintiffs 30 days in which to pick up the baton; if states want to give plaintiffs additional time, that is their business."

Other courts have considered whether relevant state law provides for additional time to file suit beyond the 30-day period prescribed in § 108(c). For example, in *Rogers v. Corrosion Products, Inc.*, 42 F.3d 292 (5th Cir. 1995), the court held that neither the bankruptcy statute nor Louisiana law tolled the prescriptive period on the accident victim's claim during the period of the bankruptcy stay. The court so held despite its common-law doctrine that " '[n]o prescription runs against a person unable to bring an action.' " *Id.* at 294 n.2. The court explained that the common-law doctrine was based in equity, and it found no inequity in limiting the plaintiff's right to file suit to 30 days after termination of the stay when the statute had run during the stay and the plaintiff failed to obtain relief from the stay in the bankruptcy court.

In *Nativo v. Grand Union Co.*, 315 N.J. Super. 185, 717 A.2d 429 (1998), the court held that neither § 108(c) nor applicable common-law principles operated to toll the state's personal injury statute of limitations during the time the bankruptcy law's automatic stay provision was in effect. The court noted that there was no evidence that the defendant was in any way responsible for the plaintiff's late filing of the complaint.

Similarly, in *Hazel v. Van Beek, supra*, the court held that the state statutory 10-year lifespan for execution of a judgment was not tolled to account for the 6-month period of a bankruptcy stay. The court rejected the creditor's argument that the statute should be equitably tolled under state common law. While the stay prevented the creditor from enforcing her judgment during the period of the stay, it did not prevent her from enforcing the judgment during the statutory lifetime.

In *Thurman v. Tafoya*, 895 P.2d 1050 (Colo. 1995), the court held that state law provided no reason to toll the statute of limitations during the 432 days the defendants were in bankruptcy and the automatic stay was in effect. The court rejected the plaintiff's claim that the statute of limitations was tolled under the common-law doctrine of equitable estoppel.

In *Weaver v. Hamrick*, 907 S.W.2d 385 (Tenn. 1995), the court found no provision under state law which would toll the statutory lien enforcement period during a bankruptcy stay. The court noted that the applicable state statute mentioned tolling only during an appeal of the underlying judgment. The court concluded that any judgment creditor had three options: (1) move the bankruptcy court to lift the stay; (2) execute on the judgment after the bankruptcy proceedings terminate, if the period has not yet expired; or (3) execute on the judgment during the § 108(c) 30-day "grace period" following the lifting of the stay or termination of the bankruptcy proceeding.

In contrast, the court in *Peterson v. Texas Commerce Bank-Austin*, 844 S.W.2d 291 (Tex. App. 1992), held that the pendency of the federal bankruptcy proceeding tolled the applicable statute of limitations in a creditor's action to recover deficiency on a note. The court relied on state common law which had recently reaffirmed that " '[w]here "a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right." ' " *Id.* at 294.

In *Statewide Funding Corp. v. Reed*, 925 P.2d 578, 581 (Okla. App. 1996), the state's common law provided:

> "Where the character of legal proceedings is such that the law restrains one of the parties from exercising a legal remedy against another, the running of the statute of limitations applicable to the remedy is postponed, or if it has commenced to run, is suspended, during the time the restraint incident to the proceedings continues." . . . " '[W]henever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against

him in determining whether the statute of limitations has barred his right.' "

The court concluded that the statutory period for filing a motion for deficiency was tolled during the pendency of the bankruptcy stay.

In *Panzella v. Hills Stores Co.*, 171 B.R. 22 (E.D. Pa. 1994), the court relied upon a state statute to conclude that the limitations period for a products liability action was tolled during the bankruptcy stay. The statute provided: " 'Where the commencement of a civil action or proceeding has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action . . . must be commenced.' " (Emphasis omitted.) *Id.* at 24.

In *Turner & Boisseau, Chtd. v. Lowrance*, 18 Kan. App. 2d 332, 335, 852 P.2d 517, 519 (1993), the relevant state statute provided: " 'Whenever the commencement of any action shall be stayed by an injunction of any court, the time during which such injunction shall be in force shall not be deemed any portion of the time limit for the commencement of such action.' " Under state common law, the term "injunction" had been interpreted broadly, and the court concluded that the applicable statute of limitations was tolled during the automatic stay in bankruptcy. See, also, *St. Joseph Development Corp. v. Sequenzia*, ___ Kan. App. 2d ___, ___, 968 P.2d 682, 684 (1998) (holding that dormancy period for recovery on judgment lien was tolled by bankruptcy stay, relying on state statute which stated that relevant time " 'does not run during any period in which the enforcement of the judgment by legal process is stayed or prohibited' "); *Trustmark Nat. Bank v. Pike Co. Nat. Bank*, 716 So. 2d 618, 620 (Miss. 1998) (holding that statute of limitations was tolled where state statute provided that " 'the time during which the execution of a judgment or decree shall be stayed or enjoined by supersedeas, injunction or other process, shall not be computed as any part of the period . . . .' " (emphasis omitted)).

While there is no statutory law in Nebraska addressing the issue presented here, National argues that under Nebraska common law, the applicable statute of limitations should be tolled

for the period of time during which National was subject to the bankruptcy stays. In *First Nat. Bank of Plattsmouth v. Gibson*, 74 Neb. 236, 105 N.W. 1081 (1906), the creditor successfully litigated its right to set aside a conveyance as fraudulent, but because it was unable to recover from the resultant forced sale of the property, the creditor brought a later action in equity to reach the rents and profits from the land. We held that the latter action was not time barred, stating:

> In this action it was necessary to show that the land had been fraudulently transferred. No recovery could be had without the existence of that fact. While that question was being litigated in the courts, the statute of limitations as to any claim that depended upon the questions there in controversy would not run in favor of one party in that controversy and against the other.

*Id.* at 242, 105 N.W. at 1083.

In *Macke v. Jungels*, 102 Neb. 123, 166 N.W. 191 (1918), we held that it would be inequitable to allow the statute of limitations to run on a claim for damages during the pendency of an action enjoining the plaintiff from bringing suit on that claim.

In *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943), defendants in a mortgage foreclosure appealed a decree of foreclosure in favor of the plaintiff. The foreclosure was commenced June 7, 1928. On December 17, 1930, the case was removed from the docket but remained pending with leave to reinstate pursuant to a federal court order restraining the plaintiff from proceeding further. The action was subsequently reinstated, and the defendants contended that the plaintiff was barred by the applicable statute of limitations. We concluded that the plaintiff having been restrained from proceeding further by a paramount authority, the period thereof should not be considered in computing the time for the statute of limitations to run, and that the plaintiff was not so barred.

The above cases were based upon equitable principles and are not directly applicable to the case at bar. Section 108(c) prevents a debtor from filing bankruptcy in order to let the statute of limitations run and then using the expiration of the limitations period as a defense. Section 108(c) provides an extra 30 days to file a claim if the claim expired before the automatic

stay was lifted or the bankruptcy was dismissed. We agree with those courts which have concluded that the 30-day period is a more sensible approach than a day-by-day tolling because it promotes certainty as to the statute of limitations. Therefore, we conclude as a matter of law that the stay in bankruptcy does not toll the statute of limitations relating to the written notes and obligations at issue.

Here, we find no inequity in requiring National to commence its action within 30 days following the termination or dismissal of the bankruptcy. Unlike situations which might require an equitable tolling of the statute of limitations, such as fraudulent concealment or equitable estoppel, the creditor subject to the bankruptcy stay is, by definition, aware of its potential claim against the debtor. At the very least, the creditor can prepare to file the suit during the pendency of the stay.

There is a material issue of fact as to whether National received notice of the termination of the stay or dismissal of the bankruptcy petition, or when in fact that occurred. Therefore, we reverse the district court's order granting summary judgment as to the promissory note and remand the cause for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

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## ALLIED MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLEE, V. ACTION ELECTRIC COMPANY, INC., AND CONNIE W. EMRY, PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS D. EMRY, DECEASED, APPELLANTS.

593 N.W.2d 275

Filed April 9, 1999. No. S-97-1223.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of the determination made by the lower court.
2. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and

conditions upon its obligation under the contract not inconsistent with public policy or statute.

3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Insurance: Contracts: Motor Vehicles: Statutes: Public Policy: Highways.** A provision drawn by an insurer to comply with the statutory requirements of uninsured or underinsured motorist coverage must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways.
6. **Insurance: Contracts: Motor Vehicles.** The purpose of the Uninsured and Underinsured Motorist Insurance Coverage Act is to give the same protection to a person injured by an uninsured or underinsured motorist as the person would have had if he or she had been injured in an accident caused by an automobile covered by a standard liability policy.
7. **Insurance: Contracts: Statutes.** Where a statutory omnibus provision is in conflict with the provisions of an insurance policy, the statute and not the policy provision is controlling.
8. **Insurance: Contracts.** Whether an insurance contract is ambiguous and, therefore, in need of construction is a question of law.
9. **Insurance: Motor Vehicles.** A causal relationship or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for an incident to fall within the meaning of the phrase "arising out of the ownership, maintenance, or use of a vehicle."

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions.

David Geier, of Healey & Wieland Law Firm, for appellants.

James A. Snowden and Michael A. England, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Action Electric Company, Inc. (Action), and Connie W. Emry, personal representative of the estate of Thomas D. Emry

(Emry's estate), appeal from a summary judgment granted in favor of Allied Mutual Insurance Company (Allied) on the grounds that Emry was not "using" the vehicle for purposes of insurance coverage at the time he was struck and killed by another vehicle. The issue presented is whether a person who has stopped and exited a vehicle in order to assist victims of a traffic accident is "using" the vehicle for purposes of a policy of automobile insurance.

## SCOPE OF REVIEW

The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of the determination made by the lower court. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

## FACTUAL BACKGROUND

Thomas Emry (Emry) died September 17, 1993, while attempting to help persons involved in an automobile accident which Emry witnessed. Emry and his family had been to a high school football game and were returning home, traveling southbound on Highway 31. While stopped at a stop sign at the crossroads of Highways 31 and 36, Emry witnessed a car and a pickup truck collide in the intersection.

Emry exited his vehicle, telling his family he was going to see if anyone was hurt. As Emry approached the intersection, he raised his hands to warn other drivers, and he was struck by an underinsured automobile which traveled through the intersection at approximately 55 m.p.h. Emry was approximately 25 feet from his vehicle at the time he was struck.

The vehicle Emry was driving was covered by a "business auto policy" issued by Allied to Action. Emry was not listed as an insured on the policy, but he was using the insured vehicle with permission. The policy included the following provisions:

> **SECTION II - LIABILITY COVERAGE**
>
> **A. COVERAGE**
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident"

and resulting from the ownership, maintenance or use of a covered "auto."

. . . .

1. WHO IS AN INSURED

The following are "insureds":

a. You for any covered "auto."

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow . . . .

. . . .

**NEBRASKA UNDERINSURED MOTORISTS COVERAGE**

. . . .

**A. COVERAGE**

1. We will pay all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle". . . .

. . . .

**B. WHO IS AN INSURED**

1. You.

2. If you are an individual, any "family member".

3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". . . .

. . . .

**F. ADDITIONAL DEFINITIONS**

The following are added to the DEFINITIONS Section:

. . . .

2. "Occupying" means in, upon, getting in, on, out or off.

PROCEDURAL BACKGROUND

Emry's estate and Action filed a claim with Allied for underinsured motorist benefits, and Allied filed this action for declaratory judgment, seeking a determination of the scope of coverage under the policy. The issue before the trial court was whether the commercial automobile insurance policy issued by Allied provided underinsured motorist coverage for the damages resulting from the death of Emry. Allied contended that the policy was unambiguous and provided underinsured motorist

coverage for Emry as a permissive driver only if he was "occupying" the covered vehicle, since he was not a named insured under the policy. Emry's estate and Action conceded that he was not a named insured under the policy. However, they asserted that under Neb. Rev. Stat. § 60-577 (Reissue 1993) (now codified at Neb. Rev. Stat. § 44-6408 (Reissue 1998)), Allied could not limit underinsured motorist coverage to persons "occupying" the vehicle, when the liability portion of the policy covered persons "using" the vehicle. Emry's estate and Action contended that Emry was using the vehicle at the time he was struck and that, thus, he should be covered by the underinsured motorist portion of the policy.

The trial court found that even assuming that the coverages must be identical for insureds under the policy, Emry was not "using" the vehicle when he was struck and killed by the underinsured driver. The court distinguished between named insureds and their family members who are protected when they are operating or are passengers in a motor vehicle, as well as when they are engaged in other activities, and a permissive driver's coverage under a policy extending underinsured motorist coverage which depends on and is connected to use of the vehicle to which the policy applies. Relying upon *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997), and *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966), the court concluded that the injuries to and the death of Emry did not arise out of the "use" of the insured vehicle.

The trial court found that Emry was struck at least 25 feet from the vehicle and was not engaged in activities connected to use of the vehicle such as changing a flat tire, loading or unloading materials or other articles carried by the vehicle, or other actions that were causally related to its use. Rather, the court determined that the vehicle was merely the means by which Emry arrived at the location of the accident. The court concluded that under the policy issued, the underinsured motorist coverage was not applicable to the accident that resulted in Emry's death and entered judgment accordingly in favor of Allied. Emry's estate and Action appeal.

## ASSIGNMENT OF ERROR

Emry's estate and Action claim the trial court erred in finding that the commercial automobile insurance policy issued by Allied did not provide coverage for the damages resulting from the death of Emry.

## ANALYSIS

### UNDERINSURED MOTORIST STATUTE

It is conceded that Emry was not a named insured under the policy issued by Allied. The policy states that underinsured motorist coverage is provided only for persons "occupying" the insured vehicle, which is defined in terms which imply actual contact or close physical proximity to the insured vehicle.

Emry's estate and Action argue that under the plain language of § 60-577(1) and public policy, the underinsured motorist coverage provided must apply to the same persons who are insured under the liability provisions of the policy. Allied contends that such limitation does not violate the language of § 60-577(1) or public policy.

Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). 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. *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999). 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. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of the determination made by the lower court. *American Family Ins. Group v. Hemenway, supra.*

A provision drawn by the insurer to comply with the statutory requirements of uninsured or underinsured motorist coverage must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. The purpose of the Uninsured and Underinsured Motorist Insurance Coverage Act is to give the same protection to a person injured by an uninsured or underinsured motorist as the person would have if he or she had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose. See *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968).

Where a statutory omnibus provision is in conflict with the provisions of the insurance policy, the statute and not the policy provision is controlling. *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963).

At the time Emry was struck and killed, the relevant portion of the Underinsured Motorist Insurance Coverage Act provided: "[N]o policy insuring against liability . . . shall be delivered . . . unless coverage is provided for the protection of persons insured who are legally entitled to recover compensatory damages from the owner or operator of an underinsured motor vehicle . . . ." § 60-577(1).

The question is whether § 60-577 required Allied to provide underinsured motorist coverage to all persons insured under the liability provisions of its policy. In particular, Emry's estate and Action argue that under § 60-577, the phrase "persons insured" refers to the class of persons insured under the liability provisions of a given policy.

The court in *Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92 (Colo. 1995), addressed a similar question. In that case, the liability provision of a business automobile policy covered permissive "users" of insured automobiles, while the uninsured and underinsured provision covered only permissive "occupiers." The relevant uninsured and underinsured statute required that policies provide uninsured and underinsured coverage " 'for the protection of persons insured thereunder.' " (Emphasis

omitted.) *Id.* at 96. The Supreme Court of Colorado held that the statute required that insurers offer uninsured and underinsured coverage to a class of persons as extensive as the class covered under the liability provision of an automobile insurance policy.

The court explained that read in the context of the rest of the statute, the plain meaning of the phrase "for the protection of persons insured thereunder" meant that insurers must provide uninsured and underinsured coverage for the protection of persons insured under the liability policy that the insurer was issuing. The court noted that this interpretation of the statute comported with the policies behind the uninsured and underinsured statute, which were to protect individuals from loss caused by financially irresponsible motorists and to make such coverage widely available. The court stated that absent such a reading of the statute, "[c]onsumers unaware of or unschooled in the vagaries of insurance contracts could be misled into believing they have purchased coverage when in reality they have not." *Id.* at 98.

Likewise, in *First Sec. Bank v. Doe*, 297 Ark. 254, 760 S.W.2d 863 (1988), the uninsured motorist endorsement provided coverage for persons "occupying" the vehicle, while the basic liability policy covered persons "using" the vehicle. The relevant uninsured motorist statute stated that insurers were required to provide uninsured motorist coverage in their policies for the protection of " 'persons insured thereunder.' " *Id.* at 257, 760 S.W.2d at 865. The Supreme Court of Arkansas concluded that the uninsured motorist statute required coverage if the policy covered liability arising from the use of the vehicle, because the statute expressed the intent to include in uninsured motorist coverage the persons included in liability coverage.

In *Kaysen v. Federal Ins. Co.*, 268 N.W.2d 920 (Minn. 1978), the comprehensive liability insurance coverage of a company vehicle provided in part that an "insured" included executive officers while the vehicle was being used in the business of the company. In contrast, the uninsured motorist portion of the policy did not include executive officers in the definition of an "insured." The statute in question provided that insurers were required to provide uninsured motorist coverage in their poli-

cies " 'for the protection of persons insured thereunder . . . .' " (Emphasis omitted.) *Id.* at 924.

The Supreme Court of Minnesota concluded that under the relevant statute, uninsured motorist coverage was required to be coextensive with the coverage afforded under the comprehensive liability portion of any given policy. The court concluded that this was the most sensible reading of the phrase "persons insured thereunder" as provided in the uninsured motorist statute. The court explained: "If insurers are allowed to designate a separate and smaller category of persons insured under uninsured motorist coverage, then the broad-based protection which the legislature intended to require could be contractually restricted at the whim of insurers." *Id.* at 924-25. See, also, *First Sec. Bank v. Doe, supra*; *Hornick v. Owners Ins. Co.*, 511 N.W.2d 370 (Iowa 1993); *Kats v. American Family Mut. Ins. Co.*, 490 N.W.2d 60 (Iowa 1992); *McMichael v. Aetna Ins. Co.*, 878 P.2d 61 (Colo. App. 1994); *Bertini v. State Farm Mutual Auto. Ins.*, 48 Ill. App. 3d 851, 362 N.E.2d 1355, 6 Ill. Dec. 435 (1977); *Roach v Central Nat'l Ins Co*, 60 Mich. App. 40, 230 N.W.2d 297 (1975); *Rau v. Liberty Mut. Ins.* Co., 21 Wash. App. 326, 585 P.2d 157 (1978).

We conclude that under the plain language of § 60-577, "persons insured" are those persons insured under the liability provisions of a motor vehicle policy. As such, Allied was required to provide underinsured motorist protection for persons "using" the vehicle and could not limit coverage to the smaller class of persons "occupying" the vehicle.

### WHETHER EMRY WAS "USING" VEHICLE

The next issue is whether Emry was "using" the vehicle under the terms of the liability portion of the policy. Again, this is a question of law, in connection with which we have an obligation to reach conclusions independent of the determination made by the court below. See *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). Also, whether an insurance contract is ambiguous and, therefore, in need of construction is a question of law. *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997).

In previous cases, we have generally held that a causal relationship or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for an incident to fall within the meaning of the phrase "arising out of the ownership, maintenance, or use of a vehicle." See *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). In *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, we held that a passenger's injury from a dogbite while in the insured's vehicle did not fall under the insurance policy's limitation that the injury arise out of the ownership, maintenance, or use of the automobile. We stated that we have defined the words "arising out of the use" as very broad, general, and comprehensive terms that are ordinarily understood to mean originating from, growing out of, or flowing from and that "but for" causation was required. We concluded that there was no causal connection between the vehicle itself or its permanent attachments and the dogbite, requiring that something peculiar to the vehicle itself causally contribute to the accident. Heretofore, we have not addressed whether a person who has witnessed a traffic accident and has stopped and exited a vehicle in order to assist victims of the accident is using the vehicle for purposes of a policy of automobile insurance.

In *Rau v. Liberty Mut. Ins. Co., supra*, a truckdriver was struck by an uninsured motorist after he briefly left his truck to inquire about directions. The driver parked the truck at the curb of the southbound lanes, crossed four lanes of traffic on foot to ask for directions from another truckdriver, and in returning was struck by an uninsured motorist. The court concluded that the truckdriver was using the vehicle at the time he was struck, explaining it was common sense that the parties contemplated the driver of a delivery truck on his route might have occasion to leave the truck to ask for directions.

The court in *Rau* discussed what it means to "use" a vehicle within the contemplation of an uninsured motorist endorsement. Citing *Hartford Accident & Indem. Co. v. Booker*, 140 Ga. App. 3, 230 S.E.2d 70 (1976), the court pointed out that the "use" of a vehicle depends upon the factual context of each case. The term does not imply remoteness but does extend beyond physical contact at least to the point where control over

the vehicle is easily or reasonably at hand and, particularly, when it is still being utilized. The court described that among other factors to be considered in determining whether a person is "using" a vehicle is whether the person is " 'vehicle oriented' " at the time of the injury. *Rau v. Liberty Mut. Ins. Co.*, 21 Wash. App. 326, 334, 585 P.2d 157, 162 (1978).

In *Monroe Guar. Ins. Co. v. Campos*, 582 N.E.2d 865 (Ind. App. 1991), an employee of a tow-truck company had driven his tow truck to a parking lot to confer with a police officer about towing a vehicle. The employee waited in the police cruiser for the results of a Breathalyzer test to determine whether the vehicle would need to be towed. After being informed that he was to tow the vehicle, the employee exited the police cruiser with the intention of proceeding to the vehicle to be towed to determine how it could safely be removed from the roadway. As he was exiting the police cruiser, the employee was struck and injured by an uninsured motorist.

The court determined that the tow-truck employee was using the tow truck at the time he was struck. The court explained that reasonable persons would expect that a tow-truck company employee must engage in activities during the towing process which require that the employee exit the tow truck. The court concluded that the employee was "using" the tow truck in a manner contemplated by the parties to the insurance contract.

In *Harris v. Magee*, 573 So. 2d 646 (Miss. 1990), the crew of a construction company was dispatched to a jobsite. A slow-moving crane departed first, followed by the job foreman in a company truck and two other employees in company vehicles. The vehicles encountered the crane on the side of the road after it had mechanical difficulties. The foreman parked his vehicle approximately 75 feet from the crane, exited the vehicle, and attempted to repair the crane. While crawling from beneath the crane, he was struck and killed by an uninsured motorist. The court held that the foreman was "using" the company truck when he was struck and concluded that stopping to repair the crane was a necessary aspect of the truck's operation.

Similarly, in *Federated Mutual Implement & Hardware Ins. Co. v. Gupton*, 241 F. Supp. 509 (E.D. S.C. 1965), the court held that an employee of a gas station was using the company vehi-

cle while pouring gasoline into another vehicle stranded on the shoulder of a roadway. The court explained that the exact definition of the term "use" was elusive and not capable of a definition which would leave everyone comfortable. Whether or not an injury arises from the use of a motor vehicle within a liability policy or statute depends upon the factual context of each case. The court considered whether the injury to the gas station employee was a reasonable consequence of the use of the company vehicle and concluded it was obvious that it was within the contemplation of the parties that the vehicle would be used as a service station truck and that the operation of delivering gasoline on the highways was a necessary and incidental adjunct.

The court in *Hartford Accident & Indem. Co. v. Booker*, 140 Ga. App. 3, 230 S.E.2d 70 (1976), held that a sanitation service employee was using a garbage truck when he was struck approximately 30 feet from the truck. The court explained that in defining the word "use," one must look to the contemplation of the parties entering into the insurance contract. The court concluded that common sense dictated that the parties contemplated the truck would be loaded and unloaded and that it would be necessary for the driver to walk down the side of the road near his truck in order to collect garbage.

In *Stevens v. United States Fid. & Guar. Co.*, 345 So. 2d 1041 (Miss. 1977), the court held that a wrecker operator's injuries arose out of the use of the wrecker when he was struck after having exited the wrecker and begun to sweep away debris from the vehicle he was going to tow. The court noted it was obvious that the wrecker would be used for removing disabled vehicles from the highway and that removing debris from the highway was a necessary part of that operation. The court explained that the operator's "temporary absence" from the wrecker did not amount to abandonment of the use of the wrecker. *Id.* at 1044.

In *Great American Ins. Co. v. Cassell*, 239 Va. 421, 389 S.E.2d 476 (1990), a firefighter was struck by an uninsured motorist while standing in an intersection completing a required fire report after a fire had been extinguished. The firefighter was 20 to 25 feet away from the firetruck, but the court held that the firefighter's death arose out of the use of the truck. The court noted that the report was part of the firefighter's mission and

that the mission had not been completed when the accident occurred.

In *Falls v. N.C. Farm Bureau Mut. Ins. Co.*, 114 N.C. App. 203, 441 S.E.2d 583 (1994), the court held that the driver was "using" the insured vehicle when he was hit by an underinsured motorist while walking along the road in search of mechanical assistance after the vehicle had broken down. Although the driver was approximately one-half mile from the vehicle at the time he was injured, the court concluded that there was a causal connection between the driver's injury and his use of the vehicle. The court stated: "But for the vehicle becoming disabled, the journey would not have been abandoned." *Id.* at 208, 441 S.E.2d at 585. See, also, *Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92 (Colo. 1995); *Randall v. Liberty Mut. Ins.* Co., 255 Va. 62, 496 S.E.2d 54 (1998); *Oberkramer v. Reliance Ins. Co.*, 650 S.W.2d 300 (Mo. App. 1983); *Maring v. Hartford Casualty Ins. Co.*, 126 N.C. App. 201, 484 S.E.2d 417 (1997); *Nationwide Mutual Ins. Co. v. Davis*, 118 N.C. App. 494, 455 S.E.2d 892 (1995).

From the above cases, we conclude that whether a person is "using" a vehicle depends upon the factual context of each case and upon the contemplation of the parties to the contract. One factor in determining "use" is whether the activity can reasonably be expected to occur in relation to the operation of the vehicle. Another factor is whether the person is still "vehicle oriented" at the time of the occurrence. See *Rau v. Liberty Mut. Ins. Co.*, 21 Wash. App. 326, 585 P.2d 157 (1978).

Under the facts presented, we conclude that Emry was "using" the company vehicle at the time he was struck and killed by the underinsured motorist. Emry's journey home was suddenly and unexpectedly interrupted by an accident in the intersection he was about to cross. Emry exited the vehicle temporarily to see whether anyone was hurt. He had not completed his intended journey and would have soon continued to drive home had he not been struck.

Such an activity could reasonably be expected to occur in relation to Emry's use of the vehicle. As part of the operation of the insured vehicle, a driver could reasonably be expected to temporarily exit the vehicle in order to assist victims of a traf-

fic accident which the driver had just witnessed and which occurred in the driver's intended path. Thus, Emry's actions were part of the reasonably expected use of the vehicle as contemplated by the parties.

## CONCLUSION

We reverse the judgment of the trial court, and remand the cause thereto with directions that the court enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., concurring in part, and in part dissenting.

I agree with the majority opinion that Allied was required to provide underinsured motorist protection for persons "using" the vehicle and could not limit coverage to the smaller class of persons "occupying" the vehicle. However, I respectfully dissent from the majority's conclusion that Emry was "using" the vehicle at the time he was struck. The majority opinion recognizes that a causal relationship or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for an incident to fall within the meaning of the phrase "arising out of the ownership, maintenance, or use of a vehicle." The majority opinion correctly cites *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997), for the proposition that "but for" causation is required. However, the majority ignores the test as set out in *Farmers Union Co-op Ins. Co.*

In *Farmers Union Co-op Ins. Co.*, we noted that we "require that something peculiar to the vehicle itself causally contribute to the accident." *Id.* at 183, 569 N.W.2d at 440. The cases cited by the majority in the instant case all support this general proposition. It is a peculiar characteristic of delivery trucks that their drivers will need to ask for directions, of tow trucks that their drivers will need to tow cars, of construction vehicles that a foreman will need to stop and repair construction equipment, of gas station trucks that a gas station attendant will need to pour gasoline into a stranded car, of garbage trucks that a garbage collector will need to pick up garbage, of a firetruck that a firefighter will complete a fire report, and of any vehicle that the driver will need to go for help if the vehicle breaks

down. However, it is not a peculiar characteristic of an ordinary vehicle that such a vehicle will be used to help the victims of an accident involving another vehicle. Such a use would be peculiar to an ambulance, but that is not the type of vehicle at issue here.

Nonetheless, the majority concludes that the vehicle was "used" in the instant case. The majority accomplishes this feat by deleting the peculiarity requirement, stating that in determining "use," we need only consider whether the activity can reasonably be expected to occur in relation to the operation of the vehicle and whether the person was "vehicle oriented." The majority's failure to include a peculiarity requirement in its new test renders the test meaningless. Indeed, one could contemplate that stopping for ice cream will occur in relation to the operation of a vehicle and that such a stop would be "vehicle oriented." Likewise, one could conclude that a dogbite will occur in relation to the operation of a vehicle when a dog is in the vehicle and that the dogbite would be "vehicle oriented." Thus, by adopting the "vehicle oriented" test, the majority has implicitly overruled this court's holding in *Farmers Union Co-op Ins. Co.* and started a descent down the proverbial slippery slope.

STEPHAN, J., joins in this concurrence and dissent.

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STATE OF NEBRASKA, APPELLEE, V. SCOTT L. SMITH, APPELLANT.
592 N.W.2d 143

Filed April 9, 1999. No. S-98-390.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
4. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allega-

tions which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution.

5. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
6. ____. An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief.
7. **Postconviction: Effectiveness of Counsel: Proof.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, a defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
8. ____: ____. The two-prong test for an ineffective assistance of counsel claim need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
9. **Criminal Law: Mental Competency.** Nebraska does not recognize the concept of irresistible impulse as a defense.
10. ____: ____. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
11. **Criminal Law: Insanity.** For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.
12. **Judges: Trial.** As a general rule, a judge is required to be present at all stages of a trial.
13. ____: ____. The absence of the trial judge from the courtroom is not always prejudicial.

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

Julie E. Bear, of Reinsch & Slattery, P.C., for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Scott L. Smith appeals from the trial court's dismissal, without an evidentiary hearing, of his motion for postconviction relief.

## SCOPE 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. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998).

## BACKGROUND

Smith was convicted in 1991 of the first degree murder of his mother, Linda D. Smith; the first degree murder of his sister, Amy Smith; and the attempted first degree murder of his father, Lynn Smith. Additionally, Smith was convicted of the use of a firearm in the commission of each of the felonies.

On direct appeal the only error raised was the trial court's denial of Smith's pretrial motion to suppress his confession. This court affirmed Smith's conviction. See *State v. Smith*, 242 Neb. 296, 494 N.W.2d 558 (1993).

Smith subsequently filed a motion for postconviction relief pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). Smith was appointed new counsel to assist him in his attempt to gain postconviction relief. In his motion, Smith contends he was denied effective assistance of counsel because his trial counsel failed to object to the jury instructions on the lesser-included offenses of second degree murder and/or attempted second degree murder, as those instructions did not contain the element of malice. Additionally, Smith contends that the trial court erred by refusing to submit jury instructions regarding the defenses of insanity and irresistible impulse and erred in directing a verdict precluding submission of these defenses to the jury. Smith also contends that the trial court erred in "permitting comment upon invocation of his right to remain silent." Finally, Smith alleges that his trial counsel was "deficient" in assigning only a single error on direct appeal and that Smith was prejudiced by the trial judge's failure to remain present in the courtroom during all phases of the trial.

The trial court issued an order denying Smith's motion without an evidentiary hearing. This appeal followed.

## ASSIGNMENT OF ERROR

Smith assigns that the district court erred in finding, without an evidentiary hearing, that Smith was not entitled to postconviction relief.

## ANALYSIS

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Ditter, supra.* A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *Id.*

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). However, an evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law. *Id.* Also, an evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

Smith first alleges in his motion for postconviction relief that he was denied effective assistance of counsel in that his trial counsel failed to object to the jury instructions for the lesser-included offenses of second degree murder and/or attempted second degree murder, as those instructions did not contain the element of malice.

In order to establish a right to postconviction relief based on a claim of ineffective counsel, a defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Ditter,* 255 Neb. 696, 587 N.W.2d 73 (1998). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* The two prongs of this test need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,

that course should be followed. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998).

On Smith's ineffective assistance of counsel claim, the trial court concluded that the failure to include malice in the second degree murder instructions was harmless error because the jury found Smith guilty of first degree murder and attempted first degree murder, and thus, the jury would never have reached the second degree murder instructions. Therefore, the trial court found that "[Smith] was not prejudiced by a missing element in the lesser-included offense instruction." At the time the trial court rendered its decision, this court followed a line of cases which held that malice is a necessary element of second degree murder and, by implication, attempted second degree murder. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). However, subsequent to the trial court's decision, this court held that all prior decisions interpreting Neb. Rev. Stat. § 28-304(1) (Reissue 1995) to include malice as a necessary element of the crime of murder in the second degree were clearly erroneous and are therefore overruled. See *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Therefore, we need not decide whether the trial court's reasoning was erroneous, because malice is not a necessary element of second degree murder or of attempted second degree murder. Thus, in considering the second prong of an ineffective assistance of counsel claim, we find Smith was not prejudiced by the absence of malice in the second degree murder instructions, and the failure of Smith's trial counsel to object to the instructions did not constitute ineffective assistance of counsel.

Next, Smith alleges in his motion for postconviction relief that his rights were violated by the trial court's refusal to submit an instruction to the jury regarding the defenses of insanity and irresistible impulse and that his right to present insanity as a defense was hindered by the trial court's directing a verdict upon the State's motion to prevent the jury from considering insanity as a defense.

Smith's allegation regarding irresistible impulse is without merit, as Nebraska does not recognize the concept of "irresistible impulse" as a defense. See *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984). Further, Smith has not alleged facts

which, if proved, would have entitled him to an instruction on insanity as a defense. Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989). For an insanity defense, the insanity must be in existence at the time of the alleged criminal act. *Id.* Therefore, Smith needed to allege facts to show that there was evidence that he did not know right from wrong at the time the crimes were committed. Stated differently, Smith needed to show that there was evidence to support an instruction on insanity. Smith failed to allege any facts to support his conclusion that his rights were violated.

Smith's motion further alleges that his trial counsel was deficient in assigning a single assignment of error on Smith's direct appeal. Smith's motion states this conclusion but fails to set forth any facts to support it. Smith does not allege what other assignments of error his trial counsel should have raised, nor does he allege how he was prejudiced by his counsel's allegedly deficient performance.

Smith also alleges that his rights were violated by "permitting comment upon invocation of his right to remain silent." Again, Smith's motion does not state facts to support this conclusion. Smith needed to set forth what facts he was relying on, such as who made the comments, when the comments were made, what comments were made, and how the comments violated his rights.

Finally, Smith alleges that he was prejudiced by the trial judge's failure to be present in the courtroom during all phases of the trial. This allegation refers to the judge's absence from the courtroom while Smith's taped confession was played to the jury. As a general rule, a judge is required to be present at all stages of a trial. *Bright v. State,* 165 Tex. Crim. 291, 306 S.W.2d 899 (1957). However, this court has previously held that the absence of the trial judge from the courtroom is not always prejudicial. In *Shaffer v. State*, 124 Neb. 7, 244 N.W. 921 (1932), the defendant contended that the temporary absence of the trial judge from the courtroom during parts of the arguments to the

jury constituted reversible error. The court concluded that the record did not affirmatively show that any prejudicial error resulted, and as such, the judge's absence was not of such nature as to amount to reversible error. *Id.* See, also, *People v. Perkins*, 229 A.D.2d 981, 645 N.Y.S.2d 693 (1996) (right to trial by jury does not necessarily follow that absence of judge entitles defendant to new trial when judge's absence is de minimis and defendant has not suffered any prejudice); *McIntyre v. State*, 266 Ga. 7, 463 S.E.2d 476 (1995) (temporary absence of trial judge without suspension of trial is not basis for reversal unless complaining party shows prejudice resulting from absence); *State v. Arnold*, 314 N.C. 301, 333 S.E.2d 34 (1985) (absence of judge from proceedings will not constitute reversible error unless record shows that something occurred which would harm defendant); *Bright v. State, supra* (judge's absence from courtroom is not ground for reversal unless injury or prejudice is shown to have resulted therefrom, and judgment will not be reversed if appellant's bill of exceptions fails to show occurrence of anything of objectionable character during judge's absence).

In Smith's case, the record clearly reflects that outside the presence of the jury, the trial judge informed counsel that he was required to testify in a Douglas County Court first thing in the afternoon; that he would be willing to save time by having Smith's confession played to the jury in his absence if counsel and Smith agreed to this procedure; that the members of the jury would each be provided a copy of the transcript of the tape being played; that the court reporter would be present; and that there would be no comment at all by counsel during the playing of the taped confession. The State had no objection to this procedure, and after a recess was taken to allow defense counsel to confer with Smith, defense counsel reported to the trial court that neither he nor Smith had any objection to this procedure. The judge addressed the jury, telling them:

> Let me explain to you what we anticipate doing now. I have to be in Douglas County to be a witness in a case at twelve thirty. Actually be up there at twelve thirty. I may not testify until one or one thirty. I have spoken with counsel and this taped statement that's eighty some minutes

> long or approximately eighty minutes long, it's appropriate to play it for you. It's not necessary that I be present, but I want you to understand that outside my presence then, of course, counsel are not allowed to make any comments or offer anything, and even though the reporter will be here, he won't be taking the statement down. There is going to be a transcript of the statement, a copy provided for each of you so you can follow along while the statement — while the taped statement is being played. With that in mind then, what we are going to do is take a luncheon recess. I am going to ask the bailiff to bring you back at about one fifteen. Come back in and at that time the statement will be played. Transcripts will be provided for you. Mr. Irwin will give them to the bailiff and she will give them to you once you get in the courtroom, and the statement will be played for you. I may sneak back in during the statement, depending on when I get back, or if in fact I am unable to get back by the time the statement is played, then you will simply automatically go back into recess until I get back here. Just so you understand what we are doing. With that understanding being given to you, then we will be in recess accordingly.

The record reflects that the judge returned before the tape ended. Further, Smith made no factual allegation of any activity during the judge's absence which would have resulted in prejudice. Smith's motion simply states the conclusion that "[Smith] was prejudiced by the Court's failure to remain present in the courtroom during all phases of the proceeding."

We disapprove of the trial being conducted in the absence of the judge. A recess should have been called while the trial judge was absent. In view of the fact, however, that Smith and his counsel specifically approved of this procedure and further that the record reflects that nothing other than the playing of the tape occurred during the trial judge's absence, we find that there was no prejudice to Smith.

In summary, Smith did not plead any facts in his motion for postconviction relief. Smith's motion alleges only conclusions of law. An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.

*State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Therefore, Smith's pleadings do not allege sufficient facts to justify an evidentiary hearing.

## CONCLUSION

Since Smith's motion for postconviction relief alleges only conclusions of law, the trial court properly denied Smith's motion without an evidentiary hearing.

AFFIRMED.

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# LEA M. HOLSTE, PERSONAL REPRESENTATIVE OF THE ESTATE OF TIMOTHY V. ANDERSON, DECEASED, APPELLEE, V. BURLINGTON NORTHERN RAILROAD COMPANY, A DELAWARE CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, CINDA MARIE BRANON, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD LEE BRANON, DECEASED, PLAINTIFF AND THIRD-PARTY DEFENDANT, APPELLEE, AND THOMAS PETERSON-MORE, INTERESTED PARTY, APPELLANT. IN RE ESTATE OF DONALD L. BRANON, DECEASED. KAPLAN LAW CORPORATION, A CALIFORNIA PROFESSIONAL CORPORATION, APPELLANT, V. BURLINGTON NORTHERN RAILROAD COMPANY ET AL., APPELLEES.

592 N.W.2d 894

Filed April 16, 1999. Nos. S-97-412, S-97-509, S-97-533.

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. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
3. **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.
4. **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.
5. **Receivers.** Under Neb. Rev. Stat. § 7-108 (Reissue 1997), money in the hands of a court-appointed receiver is not in the hands of an adverse party.

6. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right 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.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Final Orders: Appeal and Error.** 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.
9. ____: ____. An order overruling a special appearance is not a final order from which an appeal can be taken.
10. ____: ____. The right not to be bound by a judgment can be vindicated in an appeal from the final judgment and is not a substantial right for the purpose of determining the appealability of an order.
11. **Final Orders: Parties: Appeal and Error.** An order directing the joinder of an additional party is not a final, appealable order.
12. **Appeal and Error.** The notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.
13. **Dismissal and Nonsuit.** Voluntary dismissal may properly be conditional where it would deprive or endanger a right accrued to the adverse party in the very cause sought to be dismissed.
14. **Parties: Words and Phrases.** A necessary or indispensable 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 the court from making a final determination concerning the controversy without affecting such party's interest.
15. **Courts: Jurisdiction: Parties: Waiver.** The presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.
16. **Jurisdiction: Proof.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
17. **Due Process: Jurisdiction: States.** The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether a defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
18. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself or herself acted in a manner which created substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.
19. ____: ____. If a defendant established minimum contacts with a forum state, then a court must consider the burden on the defendant, the interests of the forum state, the

plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.

20. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
21. **Courts: Jurisdiction.** Where jurisdiction is concurrent, basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court.
22. **Courts: Equity: Jurisdiction.** Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
23. **Actions: Judicial Notice: Records.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
24. ____: ____: ____. A court may take judicial notice of a document in a separate but related action concerning the same subject matter in the same court.
25. **Judicial Notice: Records: Appeal and Error.** An appellate court may take judicial notice of the record on appeal in a companion case which has been consolidated for the purpose of appeal.
26. **Due Process: Property: Notice.** The requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it; if a person has access to the courts for protection of his or her rights, it cannot be said that such a person has been deprived of property without due process of law.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Appeal in No. S-97-412 dismissed. Judgment in No. S-97-509 affirmed as modified.

Appeal from the County Court for Morrill County: JAMES L. MACKEN, Judge. Judgment in No. S-97-533 affirmed.

W. Patrick Betterman and Mary Lou Perry, of Betterman & Perry, for appellant Peterson-More.

Laurice M. Margheim for appellee Branon.

Jeanelle R. Robson and Robert A. Cannon, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellee Burlington Northern.

WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ., and HANNON, Judge.

GERRARD, J.

## I. NATURE OF CASE

The estate of Donald Lee Branon was opened in the county court for Morrill County. Donald Branon's widow, Cinda Marie Branon (Branon), the personal representative of that estate and an appellee herein, filed a wrongful death action which was eventually brought in the district court for Box Butte County. After the case was settled, several of Branon's former attorneys sought payment from the proceeds, and by the terms of the settlement, a cash sum was paid in to the county court pending resolution of the claims by the district court. Kaplan Law Corporation (Kaplan), a California law firm and one of the appellants, filed an attorney's lien in the county court before the county court paid out the funds. Before final disposition of all the funds by the district court, Thomas Peterson-More, an attorney associated with Kaplan, tried to voluntarily dismiss his then-pending quantum meruit claim. After appearing in court on that claim and participating in adducing evidence, Peterson-More claimed that the court lacked personal jurisdiction over him.

This appeal presents several questions: Could the district court properly retain jurisdiction over the actions for fees and then issue orders to the county court regarding disposition of the funds? If the county court paid out funds without itself notifying Kaplan, were Kaplan's due process rights violated, even though Kaplan had notice of the district court hearing at which the dispute over fees was actually to be litigated? Could the district court properly exert personal jurisdiction and disallow Peterson-More's voluntary dismissal, in order to expediently resolve the competing claims? If so, was this an appealable order, such that the filing of notice of appeal terminated the jurisdiction of the trial court to decide the issues?

## II. FACTUAL BACKGROUND

Appellee Branon is the personal representative of the estate of her deceased husband, Donald Branon. She was the plaintiff

in an action in the district court against Burlington Northern Railroad for the wrongful death of Donald Branon. Donald Branon's estate was probated, however, in the county court.

Branon was initially represented in a lawsuit in the U.S. District Court for the District of Nebraska by Charles Collins, an attorney from Minnesota. Collins associated with Michael Javoronok, a Nebraska attorney, as local counsel. The case was certified from the U.S. District Court to the district court for Box Butte County, where it was consolidated with a wrongful death action brought by the personal representative of the estate of Timothy V. Anderson, who had been killed in the same train collision that was the subject of the Branon lawsuit. Paul Snyder, of Scottsbluff, Nebraska, represented the Anderson estate.

Branon later fired Collins and retained Kaplan to represent her. Peterson-More, of counsel with Kaplan, assumed the specific responsibility for her representation. He also associated with Javoronok as local counsel and was admitted to practice pro hac vice in Nebraska on April 22, 1996.

Peterson-More, Javoronok, and Snyder jointly worked to develop the common elements of their cases. Javoronok later became dissatisfied with the amount and quality of the work that Peterson-More was performing on the case. Javoronok asked Branon to make him lead counsel instead of Peterson-More and told her that if she was unwilling to make him lead counsel, then he wanted to be discharged as counsel. Branon discharged Javoronok per his request.

Snyder then negotiated a settlement on behalf of the Anderson estate in that case. He refused, for much the same reason as Javoronok, to associate with Peterson-More as local counsel in the Branon lawsuit.

Subsequent events are the subject of some dispute. Peterson-More asserted that he had negotiated a settlement for his client in October 1996. In December, Peterson-More introduced Branon to Susan Haines, a Colorado attorney specializing in structured settlements. Haines was retained to represent Branon and prepared settlement documents on Branon's behalf, although there was some question as to whether Haines had been hired by Branon or by Kaplan as outside counsel. Haines

associated with Jerald Ostdiek as local counsel, but Ostdiek refused to file the settlement documents that Haines had prepared.

Branon later became dissatisfied with the lack of progress in her case. In January 1997, she fired Kaplan, and in February, she fired Haines. Branon then retained Laurice Margheim, of Alliance, Nebraska, as her sole counsel.

Branon, through counsel, then completed settlement negotiations and submitted the settlement for approval by both the district court and the county court. It was approved by both courts on March 5, 1997. The district court approved the settlement, but retained jurisdiction over a dispute regarding the attorney fees to be paid from the proceeds of the settlement. The settlement agreement provided that a cash sum was to be paid to the clerk of the county court, pending resolution of the dispute.

The present controversy arises from the competing claims for attorney fees arising from the settlement. Snyder filed attorney's liens in both the county court and the district court, seeking reimbursement for some of the common expenses incurred while jointly preparing the consolidated Anderson and Branon cases. Snyder's claim was settled when Kaplan agreed to compensate him for those expenses. Javoronok also filed for fees and expenses. Ingebritson & Associates filed a claim for the work performed by Collins, but this claim was settled on March 27, 1997. Haines filed for fees, claiming that her work formed the basis of Margheim's work. Finally, Kaplan filed an attorney's lien on March 5 and an amended attorney's lien on March 24. Both of these documents were signed by Peterson-More; neither was signed by a Nebraska attorney.

Initially, a sum of $515,333 was paid in to the county court to guarantee the lien claims. On March 26, 1997, the court released $78,000 to Branon and, upon Branon's stipulation, also released $75,820.41 to Ingebritson & Associates in satisfaction of their claim. Remaining were Javoronok's claim for $69,282.03, Haines' claim for $14,369.16, and Kaplan's claim for $274,000, the latter being based on Kaplan's assertion that it was entitled to the contingency fee for the total amount of the eventual settlement.

On April 2, 1997, a scheduled hearing was held regarding the dispute among Branon and her former attorneys. Present were Javoronok, Haines, Branon, and Peterson-More as counsel for Kaplan. The district court struck Kaplan's amended attorney's lien, finding that it had not been presented by a Nebraska attorney as required by Neb. Rev. Stat. § 7-103 (Reissue 1997). The district court then stated that "in regard to the attorneys of quantum meruit, Mr. Peterson-More is allowed to proceed pro se in this court in regard to his services that he rendered." The hearing proceeded with the examination of Javoronok as a witness, including a lengthy cross-examination of Javoronok by Peterson-More, until the hearing was adjourned because Peterson-More was unprepared to continue with the presentation of evidence. Peterson-More was scheduled to present evidence at a hearing on April 18. On April 9, the district court, upon Branon's motion, authorized the release of another $100,000 to Branon, leaving $261,512.59 in the county court.

On April 11, 1997, Kaplan and Peterson-More each filed an "Entry of Appearance and Notice of Dismissal." In these filings, the Omaha firm of Betterman & Perry entered appearances as counsel for both Peterson-More and Kaplan. The filings purported to withdraw and dismiss without prejudice any claims advanced by Peterson-More and Kaplan in the Branon case, pursuant to Neb. Rev. Stat. § 25-602 (Reissue 1995). Branon filed a response on April 15, objecting to the purported dismissals. Argument on the issue was scheduled for April 18.

On April 15, 1997, Kaplan requested a stay in the county court. The reason for the request was that Kaplan had, on the same day, filed a complaint in the U.S. District Court for the District of Nebraska, seeking a judgment on its claim for fees from Branon both personally and as personal representative of the estate. The hearing on the stay application was to be held on May 28. On April 17, Kaplan filed a second amended attorney's lien, this time filed by its Nebraska counsel.

On April 17, 1997, Kaplan and Peterson-More each also filed a "Special Appearance," objecting on several grounds to the hearing regarding the voluntary dismissals of Peterson-More and Kaplan. The bases for the objections were, inter alia, that the district court was divested of jurisdiction by the prior vol-

untary dismissals and that the district court lacked personal jurisdiction over Peterson-More and Kaplan.

A telephonic hearing was held on April 18, 1997, with Javoronok, counsel for Branon, and counsel for Haines present personally, and counsel for Kaplan and Peterson-More appearing telephonically. The special appearance of Kaplan was determined to be moot, as Kaplan had no valid attorney's lien. The special appearance of Peterson-More was overruled. The district court then stated, while counsel for Peterson-More and Kaplan was still connected, "I'm telling you I'm going ahead today to decide what, if any, fees should be allowed to Thomas Peterson-More as he was working with the Kaplan Law Firm or whatever and so I am going ahead in that regard, do you understand?" In response to this direct question, counsel for Peterson-More and Kaplan replied, "Yes, Your Honor."

At 9:59 a.m. on April 18, 1997, Peterson-More filed a notice of appeal from the district court's vacation of his voluntary dismissal and the overruling of his special appearance. This is on appeal here as case No. S-97-412. Counsel for Kaplan and Peterson-More did not participate in the presentation of evidence that was conducted during the remainder of the April 18 hearing, following the overruling of their special appearances.

That afternoon, the district court found that Peterson-More was not entitled to a contingency fee. Peterson-More was allowed attorney fees in the amount of $26,000, from which was deducted $12,000 in fees awarded to Haines. This figure was further reduced by $14,000, to be paid to Branon, which the district court determined to be the "value of the loss of use" of the settlement proceeds due to Peterson-More's lack of diligence in reducing the settlement to writing. Peterson-More was also awarded fees and costs in the amount of $31,152.56; from this, the district court subtracted $833 and $237.20, awarded respectively to Snyder and another attorney witness, Paul Hofmeister, for "witness fees and expenses of waiting to testify and having to return another day due to a continuance requested by Thomas Peterson-More." Javoronok was awarded $69,272.

On April 21, 1997, the findings of the district court were filed in the county court, and the county court entered an order

releasing the funds as specified by the district court; the remaining funds were released to Branon.

On May 9, 1997, Peterson-More filed another notice of appeal in the district court, appealing from the final judgment entered by the district court on April 18. This became case No. S-97-509. On May 19, Kaplan filed a notice of appeal in the county court, appealing from the April 21 distribution of funds. This is case No. S-97-533. Cases Nos. S-97-412, S-97-509, and S-97-533 have been consolidated on appeal, and all three cases were removed to this court when we granted Branon's motion to bypass the Nebraska Court of Appeals.

## III. ASSIGNMENTS OF ERROR

Peterson-More assigns that the Box Butte County District Court erred in (1) overruling his special appearance, (2) setting aside his voluntary dismissal made under Neb. Rev. Stat. § 25-601 (Reissue 1995), (3) setting aside his voluntary dismissal under § 25-602, (4) finding that it had subject matter jurisdiction, (5) finding that it had personal jurisdiction over Peterson-More, (6) proceeding to determine the alleged claims of Peterson-More after his voluntary dismissal, (7) awarding witness fees in excess of the statutory amount, (8) issuing orders to the Morrill County Court, and (9) proceeding to determine attorney fees after the perfection of an appeal.

Kaplan assigns that the Morrill County Court erred in (1) distributing estate funds without notice to interested parties and an opportunity for them to be heard and (2) distributing estate funds without first determining the amount and extent of Kaplan's attorney's lien.

## IV. SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Divis v. Clarklift of Nebraska, ante* p. 384, 590 N.W.2d 696 (1999).

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will

be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *In re Interest of Kelley D. & Heather D., ante* p. 465, 590 N.W.2d 392 (1999); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

## V. ANALYSIS

We must first consider the character of the action underlying these appeals and the nature of the issues presented. The present appeals concern claims made by various attorneys pursuant to Neb. Rev. Stat. § 7-108 (Reissue 1997), which provides:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

In the present case, the lien claimants sought disbursement of funds that were not in their own possession, but in the possession of the county court. It would appear that the parties were attempting to create and enforce charging liens under the last clause of this statute, providing that right when funds are in the hands of an "adverse party."

The rule is well established, however, that under § 7-108, money in the hands of a court-appointed receiver is not in the hands of an adverse party. *Lewis v. Gallemore*, 175 Neb. 279, 121 N.W.2d 388 (1963). See, also, *U.S. v. Olson*, 4 F.3d 562 (8th Cir. 1993), *cert. denied, Needler v. Olson* 510 U.S. 1024, 114 S. Ct. 636, 126 L. Ed. 2d 594; *Culhane v. Anderson*, 17 F.2d 559 (8th Cir. 1927); *Anderson v. Farmers Co-op Elevator Ass'n, Inc.*, 874 F. Supp. 989 (D. Neb. 1995). See, also, generally, 7 Am. Jur. 2d *Attorneys at Law* § 361 (1997). This rule applies

with equal if not greater force where the receiver is the court itself.

Consequently, none of the parties on appeal can claim to have had valid attorney's liens under § 7-108, because the funds they sought were not in the hands of an "adverse party" within the meaning of that statute. We have held, however, that "[w]hile a court under certain circumstances may allow attorney's fees from funds in the hands of a receiver, it is done under the equitable powers of the court and not by virtue of an attorney's lien." *Lewis v. Gallemore*, 175 Neb. at 283, 121 N.W.2d at 391-92.

Therefore, the district court did not err in allowing attorney fees from the received funds despite the lack of valid attorney liens. The district court did not act pursuant to statute, but instead exercised its inherent equitable powers.

1. Determining Fees After Notice of Appeal

Peterson-More contends that it was improper for the trial court to evaluate the merits of the competing claims after Peterson-More filed his first notice of appeal in case No. S-97-412. Branon responds that the denial of Peterson-More's special appearance was not a final, appealable order, so the district court retained jurisdiction. We must first decide if the denial of the special appearance was appealable. This presents a jurisdictional question of law, regarding which we make our own determination independent of the trial court's judgment. See, *In re Interest of Kelley D. & Heather D., ante* p. 465, 590 N.W.2d 392 (1999); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

It is clear that the order in this case denying Peterson-More's special appearance did not prevent a judgment, nor was it made

by summary application after the judgment was rendered. The question, then, is whether the denial of the special appearance affected a substantial right in a special proceeding.

A substantial right is an essential legal right, not a mere technical right. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). 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. *Id.*

Peterson-More argues that "[t]here can be no question that both the right to due process and the right of [sic] to dismiss his claims were substantial rights possessed by Thomas Peterson-More." Brief for appellant in cases Nos. S-97-412 and S-97-509 at 26. Peterson-More offers little in the way of authority to support this claim. We will nonetheless consider each of Peterson-More's claimed "substantial rights."

(a) Personal Jurisdiction

Peterson-More argued at the hearing on his special appearance that the district court lacked personal jurisdiction over him consistent with the Due Process Clause of the 14th Amendment to the U.S. Constitution, and he appealed from the overruling of this special appearance. This court has held, however, that an order overruling a special appearance is not a final order from which an appeal can be taken. *State v. Jones*, 209 Neb. 296, 307 N.W.2d 126 (1981) (dealing with subject matter jurisdiction); *In re Estate of Greenamyre*, 133 Neb. 693, 276 N.W. 686 (1937) (dealing with personal jurisdiction). See, also, *Ranch & Farm Lines, Inc. v. Dressman*, 185 Neb. 328, 175 N.W.2d 299 (1970); *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965); *Ruse v. Navajo Freight Lines, Inc.*, 178 Neb. 670, 134 N.W.2d 807 (1965); *Erdman v. National Indemnity Co.*, 178 Neb. 312, 133 N.W.2d 472 (1965) (cases holding that order sustaining special appearance based on personal jurisdiction is not final, appealable order, unless it results in dismissal of action).

We have not, however, directly confronted the interlocutory appeal of an order overruling a special appearance contesting personal jurisdiction under the Due Process Clause. There are Nebraska cases in which appeals have been taken from the over-

ruling of such special appearances, but those appeals were taken after the entry of a judgment on the merits. See, e.g., *Grand Island Hotel Corp. v. Second Island Development Co.*, 191 Neb. 98, 214 N.W.2d 253 (1974); *Stucky v. Stucky*, 186 Neb. 636, 185 N.W.2d 656 (1971).

The initial issue confronting this court, then, is whether the overruling of a special appearance contesting personal jurisdiction on due process grounds affects a substantial right. We conclude that it does not.

The U.S. Supreme Court addressed a similar issue in *Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988). In that case, the Court addressed the propriety of an interlocutory appeal from the denial of a motion to dismiss on the grounds of the principle of specialty and forum non conveniens. *Id.* The Court noted:

> In the context of due process restrictions on the exercise of personal jurisdiction, this Court has recognized that the individual interest protected is in "not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful 'contacts, ties, or relations.'" [Citation omitted.] Similarly, we believe petitioner's challenge to the District Court's exercise of personal jurisdiction because he is immune from civil process should be characterized as the right not to be subject to a binding judgment of the court. Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order.

486 U.S. at 526-27, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), and citing *Catlin v. United States*, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945). Compare *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 109 S. Ct. 1976, 104 L. Ed. 2d 548 (1989).

The right asserted by Peterson-More is a right guaranteed by the U.S. Constitution, and in that context, the U.S. Supreme Court has drawn a clear distinction between the right to be free from litigation in a particular forum and the right not to be subject to a binding judgment from such a forum. *Id.* The Court has

also indicated clearly that the right protected by the Due Process Clause is the right not to be subject to a binding judgment. *Id.* Accord *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). Thus, we conclude that the right not to be bound by a judgment can be vindicated in an appeal from the final judgment and is not a substantial right for the purpose of determining the appealability of an order; it does not affect 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. See *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Having made this determination, we need not address whether a special appearance is a "special proceeding." We also need not address whether the overruling of a special appearance raising a due process challenge to personal jurisdiction would support the issuance of a writ of mandamus, as that issue is not before us.

(b) Voluntary Dismissal

Peterson-More also appealed from the district court's vacation of the voluntary dismissal of his claim, and he argues that this appeal also divested the district court of jurisdiction to proceed. Peterson-More directs us to no authority supporting the proposition that the vacation of his voluntary dismissal is an appealable order. Here, as above, the trial court's order did not prevent a judgment, nor was it made by summary application subsequent to the judgment. Therefore, the question again is whether the vacation of Peterson-More's voluntary dismissal affected a substantial right in a special proceeding.

For reasons that will be analyzed more completely *infra*, we determine that the district court's vacation of Peterson-More's voluntary dismissal was appropriate; Peterson-More was a necessary party to the determination of the action, and the district court's order had effectively the same effect as ordering that a necessary party be brought into the action. In a case presenting analogous circumstances, we have held that an order directing the joinder of an additional party was not a final, appealable order. *Lund v. Holbrook*, 157 Neb. 854, 62 N.W.2d 112 (1954).

In *Lund v. Holbrook*, 157 Neb. at 856, 62 N.W.2d at 113-14, we determined that "an order requiring, or permitting, or refusing to permit, the joinder of additional parties is not appealable, since it is interlocutory and not final in nature." See, also, *Kaplan v. City of Omaha*, 100 Neb. 567, 160 N.W. 960 (1916); *Hall v. Vanier*, 7 Neb. 397 (1878). We stated that it was "obvious" that the trial court's order "did not determine the action, nor did such ruling prevent a judgment or affect a substantial right." *Lund v. Holbrook*, 157 Neb. at 857, 62 N.W.2d at 114.

Similarly, in the present case, the district court's vacation of Peterson-More's voluntary dismissal did not affect the subject matter of the litigation. See *SID No. 1 v. Nebraska Pub. Power Dist., supra*. The district court's order did not diminish any of the claims or defenses that were available to Peterson-More prior to the order from which the appeal was taken. See *id.* Thus, we conclude that no substantial right of Peterson-More was affected by the district court's order. This being the case, the district court's order was not appealable. Having so determined, we need not consider whether the vacation of Peterson-More's voluntary dismissal occurred in the context of a special proceeding.

In short, none of Peterson-More's substantive claims or defenses were diminished by the overruling of his special appearance, and the overruling of Peterson-More's special appearance and voluntary dismissal was not a final, appealable order. The appeal in case No. S-97-412 must therefore be dismissed.

(c) Trial Court's Jurisdiction

There remains the question whether Peterson-More's notice of appeal, however ineffectual, served to deprive the district court of jurisdiction to enter a final judgment. In *Doolittle v. American Nat. Bank of Omaha*, 58 Neb. 454, 78 N.W. 926 (1899), this court faced a situation in which a defendant attempted to appeal the trial court's order striking portions of the defendant's answer. We found that to be a nonfinal order and dismissed that appeal, but in the meantime, the trial court had proceeded to address the merits of the case. *Id.* In the appeal

from the final judgment, we affirmed the judgment of the trial court, holding:

> The order [to strike portions of the answer] was not a final [order], and that there had been an attempt to lodge an error proceeding in this court to review it furnished no reason for any delay in the trial of the cause on its merits in the district court.

*Id.* at 456, 78 N.W. at 927.

In the intervening years, the rule established in other jurisdictions has been consistent with our holding in *Doolittle v. American Nat. Bank of Omaha, supra.* See, e.g., *U.S. v. Green*, 882 F.2d 999 (5th Cir. 1989); *United States v. Bastanipour*, 697 F.2d 170 (7th Cir. 1982), *cert. denied* 460 U.S. 1091, 103 S. Ct. 1790, 76 L. Ed. 2d 358 (1983); *United States v. Garner*, 663 F.2d 834 (9th Cir. 1981), *cert. denied* 456 U.S. 905, 102 S. Ct. 1750, 72 L. Ed. 2d 161 (1982); *Cochran v. Birkel*, 651 F.2d 1219 (6th Cir. 1981), *cert. denied* 454 U.S. 1152, 102 S. Ct. 1020, 71 L. Ed. 2d 307 (1982); *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980), *cert. denied* 451 U.S. 908, 101 S. Ct. 1975, 68 L. Ed. 2d 295 (1981); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied* 429 U.S. 1096, 97 S. Ct. 1113, 51 L. Ed. 2d 543 (1977); *Hodgson v. Mahoney*, 460 F.2d 326 (1st Cir. 1972), *cert. denied* 409 U.S. 1039, 93 S. Ct. 519, 34 L. Ed. 2d 488; *United Accounts v. Teladvantage, Inc.*, 499 N.W.2d 115 (N.D. 1993); *S. C. Public Service Authority v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986); *Spaeth v. City of Plymouth*, 344 N.W.2d 815 (Minn. 1984); *Knox v. Dick*, 99 Nev. 514, 665 P.2d 267 (1983); *Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 361, 230 S.E.2d 671 (1976); *Welch v. City of Evanston*, 181 Ill. App. 3d 49, 536 N.E.2d 866, 129 Ill. Dec. 816 (1989), *appeal denied* 127 Ill. 2d 644, 545 N.E.2d 134, 136 Ill. Dec. 610; *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Idaho App. 1984); *Sakian v. Taylor*, 18 Ohio App. 3d 62, 480 N.E.2d 822 (1984); *Yaeger v. Vance*, 20 Ariz. App. 399, 513 P.2d 688 (1973); *Smiley v. Atkinson*, 12 Md. App. 543, 280 A.2d 277 (1971), *aff'd* 265 Md. 129, 287 A.2d 770 (1972). See, also, generally, 5 Am. Jur. 2d *Appellate Review* § 424 (1995). But see *Swain Constr. v.*

*Ready Mixed Concrete Co.*, 4 Neb. App. 316, 542 N.W.2d 706 (1996).

As noted by the Court of Special Appeals of Maryland:

> [A]ny other rule would be utterly unthinkable. Any party would then be able, at any time before final judgment, to bring the trial of a case to an abrupt halt by merely filing an order for appeal from any ruling of the court. Control of the judicial process would thus pass from the courts to the parties and their counsel. Mistrials and continuances would be available without limitation at the whim of any party. The trial court must have, and does have, the power to determine whether its jurisdiction to proceed has been ousted. Should any abuse of that power ever arise, such abuse could undoubtedly be corrected by prompt appellate action.

*Smiley v. Atkinson*, 12 Md. App. at 550-51, 280 A.2d at 282. We agree.

Thus, we conclude that the notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court. Therefore, Peterson-More's assignment of error is without merit.

While we are without jurisdiction to consider Peterson-More's appeal in case No. S-97-412, the issues raised in that appeal are nonetheless presented to us in case No. S-97-509. Peterson-More argues that the district court lacked jurisdiction to enter the judgment from which appeal No. S-97-509 was taken, because of Peterson-More's attempt at voluntary dismissal and because of the district court's alleged lack of personal jurisdiction over him.

### 2. Voluntary Dismissal

Peterson-More's first, second, third, fourth, and sixth assignments of error all address the same issue. All of these assignments of error are predicated on the same assertion—that the district court erred in denying Peterson-More's voluntary dismissal of his claims. This presents a question of law, regarding which we reach a conclusion independent of the lower court's

ruling. See *Divis v. Clarklift of Nebraska, ante* p. 384, 590 N.W.2d 696 (1999).

Peterson-More contends that the trial court had no discretion to disallow his attempt to voluntarily dismiss his claims. Branon contends that Peterson-More was a necessary party and that a trial court has the authority to keep Peterson-More as a party to the action. We must decide whether a trial court has the authority to deny a voluntary dismissal under the circumstances presented here.

The ability of a plaintiff to voluntarily dismiss his or her claim without prejudice is codified in §§ 25-601 and 25-602. It is provided in § 25-601 that "[a]n action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury . . . ." It is further provided in § 25-602 that

> [t]he plaintiff, in any case pending in the district or Supreme Court of the state, shall, when no counterclaim or setoff has been filed by the opposite party, have the right in the vacation of any of said courts to dismiss his said action without prejudice, upon payment of costs, which dismissal shall be, by the clerk of any of said courts, entered upon the journal and take effect from and after the date thereof.

It is well established that the right of a plaintiff to voluntary dismissal is a right that is " 'not a matter of judicial grace or discretion.' " *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 1016, 524 N.W.2d 559, 561 (1994). See, also, *Dawson v. Papio Nat. Resources Dist.*, 210 Neb. 100, 313 N.W.2d 242 (1981).

This right, however, is not absolute. We have held that dismissal may properly be conditional where it would deprive or endanger a right accrued to the adverse party in the very cause sought to be dismissed. *Schroeder v. Schroeder*, 223 Neb. 684, 392 N.W.2d 787 (1986). See, also, *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951). In some circumstances, the court may attach conditions to the dismissal where justice and equitable principles so require. *Dawson v. Papio Nat. Resources Dist., supra.* See, also, *Feight v. Mathers, supra.*

We have also "heretofore affirmed that when justice to the court or to its officers or to any of the parties requires imposi-

tion of terms or retention of the cause on the docket, the court in its discretion may impose such terms or refuse to permit dismissal." *Tuttle v. Wyman*, 149 Neb. 769, 777-78, 32 N.W.2d 742, 748 (1948).

In the present case, Branon argues that Peterson-More's dismissal would prejudice her because Peterson-More is a necessary party and that her rights would be prejudiced by his absence because it would prevent the final determination of her claims and the claims against her.

A necessary or indispensable 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 the court from making a final determination concerning the controversy without affecting such party's interest. *Taylor Oil Co. v. Retikis*, 254 Neb. 275, 575 N.W.2d 870 (1998); *Hall Cty. Pub. Defenders v. County of Hall*, 253 Neb. 763, 571 N.W.2d 789 (1998).

> An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

*Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 169-70, 498 N.W.2d 325, 329 (1993).

The presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. *Taylor Oil Co. v. Retikis, supra*; *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

It is clear, therefore, that Peterson-More was a necessary party to the dispute between Branon and her former attorneys. Branon and her former counsel were disputing the division of a fixed sum of money, with Branon entitled to any funds left over after the attorneys were compensated. Under those circumstances, any money distributed to any of the attorneys necessarily came at the expense of Branon. Thus, Branon and all of the

claimant attorneys were necessary parties because their interests were adverse and mutually exclusive.

Neb. Rev. Stat. § 25-323 (Reissue 1995) states in part:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

See, also, e.g., *Vaccaro v. City of Omaha*, 254 Neb. 800, 579 N.W.2d 535 (1998); *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992).

If Peterson-More were allowed to dismiss his claim, then the district court would have been deprived of jurisdiction to consider the remaining claims.

While the district court did not explicitly state that Peterson-More was a necessary party, the court's order denying the special appearance states, "Thomas Peterson-More should not be allowed to dismiss his claim for attorney's fees to the prejudice of other parties involved in this action . . . ." This is a clear reference to the fact that, given the situation, a determination of Peterson-More's claim was necessary to resolving the claims of the other attorneys and so also necessary to release the balance of the settlement proceeds to Branon.

Because Peterson-More was a necessary party, his absence from the action would simply have required the district court to bring him back into the suit in order to resolve everyone else's claims. Moreover, his dismissal threatened the rights of Branon and the other attorneys to have their claims finally determined and the settlement proceeds disbursed. Under those circumstances, the district court did not err in refusing to allow Peterson-More's voluntary dismissal.

### 3. Personal Jurisdiction

Peterson-More contends that the district court lacked personal jurisdiction over him consistent with the Due Process Clause, as interpreted in *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and its progeny. Branon argues that Peterson-More's actions subjected him to

the jurisdiction of the Nebraska courts. This issue presents both legal issues regarding the standards to be applied to personal jurisdiction and factual determinations regarding Peterson-More's contacts with Nebraska. When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *In re Interest of Kelley D. & Heather D., ante* p. 465, 590 N.W.2d 392 (1999); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

The Nebraska long-arm statute provides: "A court may exercise personal jurisdiction over a person: (1) Who acts directly or by an agent, as to a cause of action arising from the person: (a) Transacting any business in this state; (b) Contracting to supply services or things in this state . . . ." Neb. Rev. Stat. § 25-536 (Reissue 1995).

Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Crete Carrier Corp. v. Red Food Stores, supra.*

It is clear that under § 25-536(1)(a) and (b), Peterson-More is subject to the terms of Nebraska's long-arm statute. We must therefore determine if the exercise of this jurisdiction comports with due process requirements.

We have held that the benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether a defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998); *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995). Whether the forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the

result of unilateral acts performed by someone other than the defendant, or whether the defendant himself or herself acted in a manner which created substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state. *Wagner v. Unicord Corp., supra.*

If the defendant established minimum contacts with Nebraska, then a court must consider the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Crete Carrier Corp. v. Red Food Stores, supra*, citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1982), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Peterson-More was of counsel to Kaplan, which contracted to provide legal services in Nebraska to Branon and her husband's estate. Peterson-More personally came to this state several times in order to provide those services, was admitted to practice pro hac vice in the Nebraska courts, contracted with counsel in a companion case to share common expenses, filed pleadings signed in his name, and participated at length in an evidentiary hearing after the district court made it clear to him that he was proceeding pro se to determine to what he, personally, might be entitled in quantum meruit. In that regard, Peterson-More utilized the Nebraska courts for his own interests. It can hardly be said that he could not anticipate being haled into a Nebraska court or that his actions were not personally instigated.

Furthermore, the burden, if any, on Peterson-More of litigating in this forum was not sufficiently discouraging to prevent him from contracting to litigate in Nebraska on Branon's behalf, from pursuing his quantum meruit claim, from retaining local counsel, or from pursuing on Kaplan's behalf an action against Branon in the U.S. District Court for the District of Nebraska. Peterson-More has identified no forum with an interest in these matters greater than Nebraska's.

Overall, the record clearly establishes support for the district court's factual finding that Peterson-More had established minimum contacts with this forum; that finding was not clearly incorrect and will not be disturbed on appeal. The remaining considerations, of the burden on Peterson-More and the interests of this forum and others in resolving the dispute, weigh in favor of this forum's exercising jurisdiction.

Peterson-More argues in his brief that he did not conduct business on his own behalf, but acted only as an agent for Kaplan. Even if true, this is not relevant. Nebraska has rejected the fiduciary shield doctrine as a bar to personal jurisdiction. See, *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995); *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987). Under Nebraska law, the focus is on the defendant's actions regardless of the capacity in which those actions were undertaken.

### 4. Witness Fees

Peterson-More argues that the trial court abused its discretion in ordering witness fees in excess of the amount provided by statute. Branon argues that the fees assessed were assessed not as costs but as sanctions for Peterson-More's delays. Neb. Rev. Stat. § 25-824(4) (Reissue 1995) provides in part:

> The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment.

In ordering awards to Snyder and Hofmeister, the district court specifically indicated that the awards were "witness fees and expenses of waiting to testify and having to return another day due to a continuance requested by Thomas Peterson-More." The trial judge's statements reveal that the awards were intended to be a sanction, assessed against an attorney who, in the opinion of the district court, abused the judicial process with unnecessary delays. The amount of such sanctions is not fixed, but left to the discretion of the trial court, and the question presented on appeal is whether the trial court abused its discretion.

*Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998).

The record contains affidavits from Snyder and Hofmeister regarding the time, mileage, and expenses wasted when opposing counsel was unready for their testimony at the time that it had been scheduled to occur. The affidavit from Snyder relates to his activities on April 2, 1997. On that date, a scheduled hearing was ended prematurely because Peterson-More claimed that he was not prepared to proceed with the introduction of evidence, despite clear notice provided to Peterson-More that the hearing on that date was to be evidentiary. Under such circumstances, it was not an abuse of discretion to assess expenses for Snyder's extra day of travel to testify, when those expenses were necessitated by Peterson-More's unpreparedness.

The affidavit from Hofmeister, however, relates to a hearing held on April 11, 1997. Peterson-More was not present at this hearing, personally or through counsel, nor is there any indication in the record that he was expected to appear. The hearing began at 1:30 p.m. and Hofmeister was called to testify at 4 p.m., but counsel for Haines asked that the proceedings be ended then so that Haines could return to Scottsbluff in time to catch a plane. The district court granted the request, but indicated that if a request for costs was made, it would probably be granted.

It is clear from the record that the delay in Hofmeister's testimony was not caused by Peterson-More, but by Haines. We determine, therefore, that it was an abuse of discretion to charge Peterson-More for Hofmeister's expenses from the April 11, 1997, hearing.

### 5. Order to County Court

Peterson-More asserts that the trial court erred in issuing its judgment to the county court, arguing that this was improper because there is no authority granting jurisdiction to a district court to issue an order to a county court except on direct appeal. This is a question of law, on which we reach a conclusion independent of the lower court's ruling. See *Divis v. Clarklift of Nebraska, ante* p. 384, 590 N.W.2d 696 (1999).

It is well established that in common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991); *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985). Where jurisdiction is concurrent, basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court. *In re Estate of Kentopp. Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980). Additionally, where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. *Dillon Tire, Inc. v. Fifer, ante* p. 147, 589 N.W.2d 137 (1999).

In this case, the settlement agreement provided that money was to be paid in to the county court, but that the district court where the case had been filed would retain jurisdiction over the fees generated by the case. There is little practical distinction between the county court in this case and any other court-appointed receiver available to the district court. Under those circumstances, the district court did not err in retaining jurisdiction over the attorneys' dispute and in issuing orders to the county court regarding dispensation of the funds.

### 6. Distribution of Funds Without Notice

Kaplan argues that the distribution of funds by the county court occurred without notice to it, thereby violating Kaplan's due process rights. Branon raises several challenges, mostly relating to improper jurisdiction and standing. This also presents a question of law, on which we reach a conclusion independent of the lower court's ruling. See *Divis v. Clarklift of Nebraska, supra.*

Resolution of this issue is simplified by the fact that Kaplan had actual notice of the action in which its claim for fees would be resolved. The evidence of that notice is contained in the record of the district court proceeding in which the dispute over attorney fees was actually resolved.

It is provided by statute that judicial notice may be taken of any fact not subject to reasonable dispute, as such fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neb. Rev. Stat. § 27-201(2)(b) (Reissue 1995). It is well established that where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996). Similarly, we have held that a court may take judicial notice of a document in a separate but related action concerning the same subject matter in the same court. *State Security Savings Co. v. Pelster*, 207 Neb. 158, 296 N.W.2d 702 (1980).

It is, therefore, appropriate for this court to take judicial notice of the record on appeal in a companion case which has been consolidated for appeal with the instant case. Thus, we judicially notice the facts set forth in the district court record for purposes of resolving Kaplan's appeal from the county court proceeding. In that appeal, Kaplan complains that it did not get notice from the county court that funds were to be disbursed. The district court record, however, shows that Kaplan did have notice of when and how the decisions regarding those funds were to be made by the district court.

" '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 might enjoy that right, they must first be notified.' " *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 912-13, 573 N.W.2d 143, 146 (1998), quoting *Dannehl v. Department of Motor Vehicles*, 3 Neb. App. 492, 529 N.W.2d 100 (1995). The requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it; if a person has access to the courts for protection of his or her rights, it cannot be said that such a person has been deprived of property without due

process of law. *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995). Accord *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

Counsel for Kaplan was informed by the district court exactly what was going to happen with reference to the funds in the county court. Therefore, Kaplan had actual notice of the proceedings, and its due process rights were not violated. Kaplan's assignment of error is without merit.

### 7. Kaplan's Attorney's Lien in County Court

Kaplan further assigns that the county court erred in distributing funds without determining the extent of Kaplan's lien. For the reasons set forth above, we determine as a matter of law that Kaplan did not have an effective attorney's lien, because the funds at issue were not in the hands of an adverse party within the meaning of § 7-108. Kaplan had notice of the district court hearing at which such issues were resolved and was entitled to no notice from the county court, because no valid attorney's lien was filed in that court. The county court committed no error.

## VI. CONCLUSION

At the conclusion of closing arguments in the district court, the district court judge told Branon that he would like to "apologize for the judicial system and how you've been put upon in this case, because I do think that you have." We totally agree with the district court. As former U.S. Supreme Court Chief Justice Burger observed, "[L]awyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice." Warren E. Burger, Delivery of Justice at 175 (1990). The conduct by some of the lawyers in this case, particularly Peterson-More and Kaplan, has not only resulted in hardship to Branon, but engaged this court, the district and county courts, and the federal courts in a significant waste of judicial resources. In the hope that our decision will bring an end to this litigation, we determine that all of Peterson-More's and Kaplan's assignments of error, save one, are without merit.

Peterson-More's appeal in case No. S-97-412 is taken from a nonappealable order and is dismissed. Peterson-More's assignments of error in case No. S-97-509 are meritless, except that the district court erred in awarding sanctions in the amount of $237.20 to Paul Hofmeister, and that portion of the judgment is vacated. Otherwise, the district court's judgment in case No. S-97-509 is affirmed. Kaplan's assignments of error to the county court in case No. S-97-533 are entirely meritless, and that judgment is affirmed.

APPEAL IN NO. S-97-412 DISMISSED.
JUDGMENT IN NO. S-97-509 AFFIRMED AS MODIFIED.
JUDGMENT IN NO. S-97-533 AFFIRMED.

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

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MATTHEW R. KOLTES, APPELLANT, V.
VISITING NURSE ASSOCIATION ET AL., APPELLEES.
591 N.W.2d 578

Filed April 16, 1999. No. S-97-1331.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Negligence.** For actionable negligence to exist, 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 resulting from such undischarged duty.
4. **Negligence: Words and Phrases.** In the context of a negligence action, duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. The existence of a duty depends upon whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk.
5. **Negligence.** Determining whether a legal duty exists is a question of law dependent upon the facts in a particular situation.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

James R. Brown and Mark J. Curley, of Brown & Brown, P.C., and David J. Cullan for appellant.

Raymond E. Walden and, on brief, James W. Ambrose II, of Lamson, Dugan & Murray, for appellees St. Pius X/St. Leo and Roncalli.

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

STEPHAN, J.

Matthew R. Koltes brought this personal injury action against several parties, including St. Pius X/St. Leo Grade School and Roncalli High School (collectively the schools). The district court for Douglas County granted the schools' motion for summary judgment based upon its determination that the schools were not liable to Koltes as a matter of law, and Koltes appealed. We find no error and therefore affirm the judgment of the district court.

## BACKGROUND

### PLEADINGS

In his operative second amended petition, Koltes alleged that during periods when he was enrolled as a student at St. Pius X/St. Leo Grade School (Pius) and subsequently at Roncalli High School (Roncalli), both located in Douglas County, he underwent periodic physical examinations conducted on school premises by nurses employed by the Visiting Nurse Association (VNA), a codefendant in the original action. Koltes alleged that these examinations revealed an abnormal curvature of his spine and that the schools were negligent in failing to provide his parents written notification of this condition and advise them of "the necessity of professional attendance" for this condition. Koltes alleged that as a proximate result of the schools' alleged negligence, and that of the other named defendants, he suffered serious and permanent bodily injuries for which he was entitled to damages. In their joint answer, the schools denied that they

were negligent and asserted that the second amended petition failed to state a cause of action against them. After certain discovery was completed, the schools filed a motion for summary judgment.

## UNCONTROVERTED FACTS

Koltes was enrolled as a student at Pius from 1985 through 1989 and then enrolled at Roncalli. During his years as a student at the schools, he was periodically screened for abnormal spinal conditions by nurses who were employed by VNA. VNA provided health services to the schools pursuant to its contract with Douglas County, which compensated VNA for such services.

On or about January 27, 1986, while Koltes was a student at Pius, he underwent a scoliosis screening performed by a VNA nurse on the school premises. His records indicate the results of the screening test as "Scol. watch . . . ." On or about February 13, 1989, Koltes again underwent a scoliosis screening by a VNA nurse while at Pius. The nurse noted: "Scoliosis screening watch . . . ."

Koltes' health records were sent from Pius to Roncalli when he enrolled there in the fall of 1989. On May 21, 1990, while attending Roncalli, Koltes underwent another scoliosis screening administered by a VNA nurse. His records indicate the scoliosis was improved but a slight kyphosis was noted. Employees of the schools did not review student health records, which were compiled by VNA nurses and kept on the school premises.

Dr. James D. Crew was Koltes' family physician throughout the relevant time period. Dr. Crew's records indicate he examined Koltes approximately nine times from 1982 to 1993. While conducting a physical examination on Koltes for school in August 1987, Dr. Crew found Koltes' skeletal development to be normal. Dr. Crew's records state that poor posture was discussed following an examination in 1990 of Koltes' back, similar to those performed by VNA nurses. Dr. Crew's records for August 1991 state that Koltes' musculoskeletal system was normal. On March 1, 1993, Dr. Crew first noted a condition of Koltes' back which he diagnosed as a slight kyphosis. Dr. Crew again examined Koltes on May 6, and at that time, he referred Koltes to a Dr. Franco, who placed Koltes in a brace for 12

months in an attempt to stop the progression of the kyphosis. Ultimately, Koltes underwent two surgeries, a week apart, in an attempt to correct his abnormal spinal condition.

## DECISION OF DISTRICT COURT

The district court granted the schools' motion for summary judgment. It found no evidence that the schools knew of Koltes' abnormal spinal condition or that VNA nurses had not reported their findings to Koltes' parents. The district court further determined, as a matter of law, that the schools had no duty to supervise the VNA nurses and had a right to rely upon them to perform their professional responsibilities. Finally, notwithstanding its finding that no legal duty was owed by the schools, the district court found that there was no showing that any failure to report Koltes' condition to his parents was a proximate cause of his damages.

## 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. *Boyle v. Welsh, ante* p. 118, 589 N.W.2d 118 (1999); *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998).

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. *Ag Servs. of America v. Empfield*, 255 Neb. 957, 587 N.W.2d 871 (1999).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998).

## ASSIGNMENT OF ERROR

Koltes contends, restated and summarized, that the district court erred in granting summary judgment to the appellee schools.

## ANALYSIS

For actionable negligence to exist, 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 resulting from such undischarged duty. *Doe v. Gunny's Ltd. Partnership, ante* p. 653, 593 N.W.2d 284 (1999); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998). We focus upon the question of whether the schools owed a legal duty to Koltes with respect to in-school screening for abnormal spinal conditions.

In the context of a negligence action, duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994). The existence of a duty depends upon whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk. *Id.* Determining whether a legal duty exists is a question of law dependent upon the facts in a particular situation. *Doe v. Gunny's Ltd. Partnership, supra*; *Popple v. Rose, supra.*

Koltes argues that the schools had a duty to notify his parents of the findings by VNA nurses pursuant to the statute then applicable, Neb. Rev. Stat. § 79-4,133 (Reissue 1994), which provides in part:

> Every school district shall, separately and carefully, cause every child under its jurisdiction to be inspected . . . to ascertain if such child is suffering from (1) defective sight or hearing, (2) dental defects, or (3) other conditions as prescribed by the Department of Health. If such inspection determines that any child has such condition, it shall be the duty of the school to notify the parent of the child, in writing, of such condition and explain to such parent the necessity of professional attendance for such child.

In support of his argument that a statutory duty exists under the facts of this case, Koltes relies on the affidavit of Eileen Heitman, R.N., and an attached manual published by the then

Nebraska Department of Health and the Nebraska Department of Education entitled "Health Services in Nebraska Schools—Policies and Procedures." This document includes a discussion of scoliosis screening by school nurses and states that if signs of scoliosis are recognized, "[m]edical consultation with the child's physician should be recommended to parents." Based on this manual, her examination of various depositions, and her familiarity with standards of nursing care, Heitman opined that the applicable standard of care required that "when a student is observed to have an abnormal spinal curvature that this information be recorded in the student's health record and to provide the student and/or his parents a report of the observed abnormality," including such conditions as kyphosis and scoliosis.

The manual relied upon by Koltes clearly states that it is intended "as a guide for Nebraska school systems in developing, improving and maintaining their health service programs." James C. Dills, who is employed by the Nebraska Department of Health and Human Services as the director of health promotion and education, stated in an affidavit that the manual is intended to be used as a guide and "has never been adopted as regulation by the Department of Health and serves only to provide the schools with recommendations in developing their own program." There is nothing in the record establishing that the Department of Health and Human Services has ever, by regulation or otherwise, exercised its authority under § 79-4,133, now codified at Neb. Rev. Stat. § 79-248 (Reissue 1996), to require school districts to screen students for abnormal spinal conditions. Thus, neither the Heitman affidavit nor the attached manual afford a basis for recognition of a legal duty to perform this type of screening under either § 79-4,113 or the current § 79-248, and we conclude as a matter of law that no such duty exists.

Alternatively, Koltes argues that the schools had a duty not to permit negligent conduct to occur on their premises when they knew or reasonably should have known that the negligent conduct presented an unreasonable risk of harm to students. We recognized the general validity of this theory in *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996), and *Greening v. School Dist. of Millard*, 223 Neb. 729, 393

N.W.2d 51 (1986), both of which involved the provision of health services on school premises. However, we determined as a matter of law that no duty existed under the facts presented in each case.

In *Greening*, an elementary school student suffered a fracture while participating in a physical therapy program administered at an elementary school by physical therapists who were employed by the State of Nebraska. The school district's supervisory personnel had no involvement in the development of the therapy program. Medical evidence established that the program was improper and caused the student's injury, but there was no evidence that the school district's supervisory personnel were aware of the specific nature of the therapy or its inherent dangers. We held that under these circumstances, the school district had no duty to take affirmative steps to ensure the safety of the physical therapy services which were provided on its premises. We reasoned that

> [t]he district was entitled to rely upon the competence of a professional therapist, licensed, paid, and supplied by the state. To hold otherwise would require a school district to independently verify the safety of a program developed by a professional who is entrusted by the state with the responsibility of carrying out such program.

223 Neb. at 739, 393 N.W.2d at 59.

Relying on *Greening*, we held in *Crider*, 250 Neb. at 786, 553 N.W.2d at 155, that "[a] school district, educational service unit, or human service center does not have a duty derived from common law to monitor the care of a physical therapy patient or to report any proposed changes in care to the patient's parents," notwithstanding the fact that therapy was being provided on the school premises. We reasoned that school officials were entitled to rely upon the competence of a licensed physical therapist who provided services to a special education student pursuant to a contractual arrangement and that in the absence of actual knowledge of the dangers associated with the continuance or discontinuance of the physical therapy program, the school district owed no common-law duty to take any action with respect to such services.

Applying the rationale of *Greening* and *Crider*, we conclude, under the uncontroverted facts of this case, that the schools had no duty to supervise or monitor the VNA nurses, or to take any affirmative steps to ensure that the nurses were carrying out their professional responsibilities to Koltes. It is clear from the record that no agency relationship existed between the schools and VNA. The nurses were licensed professionals, performing services pursuant to a contractual arrangement with VNA and Douglas County, and the schools had a right to rely upon VNA and its nurses to perform their duties in a competent manner in the absence of actual knowledge to the contrary. The record reflects that the schools had no actual knowledge of the nurses' findings with respect to Koltes' spinal condition or the fact that VNA or its nurses may not have communicated their findings to Koltes or his parents. Under these circumstances, we conclude that the schools owed no duty to Koltes with respect to the services provided by VNA and its nurses.

Because we agree with the district court on the dispositive issue that no legal duty existed, we need not review its analysis on the issue of proximate cause. For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT, V. TERRY L. BENNETT, APPELLEE.
591 N.W.2d 779

Filed April 16, 1999. No. S-98-016.

1. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a plaintiff seeking postconviction relief has different counsel on appeal than at trial, the plaintiff's motion for postconviction relief is procedurally barred if the plaintiff (1) knew of the issues assigned in the postconviction motion at the time of the plaintiff's direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.
2. **Postconviction: Judicial Notice: Appeal and Error.** A reviewing court considering a motion for postconviction relief may take judicial notice of the record in the direct appeal.

3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
4. **Postconviction: 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. Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, an appellate court's refusal to do so does not bar a later motion for postconviction relief.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Reversed and dismissed.

Darryl R. Lowe, Deputy Douglas County Attorney, on brief, for appellant.

Emil M. Fabian, of Fabian & Thielen, for appellee.

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

CONNOLLY, J.

The State appeals the district court's decision granting postconviction relief to the appellee, Terry L. Bennett. The district court concluded that Bennett's trial counsel had rendered ineffective assistance of counsel at trial in the following respects: Counsel was ineffective per se because he was fraudulently readmitted to the bar, counsel failed to object to evidence of Bennett's prior bad acts, and counsel failed to call alibi witnesses. We reverse, and dismiss because Bennett had different counsel on direct appeal than at trial and, therefore, his postconviction ineffective assistance of counsel claims could have been raised on direct appeal. Because they were not, his claims are procedurally barred.

## BACKGROUND

Bennett was charged with the offenses of robbery and assault in the first degree on October 2, 1991. Bennett retained attorney Charles M. Radosevich to represent him. At trial, Bennett and other witnesses were questioned concerning Bennett's prior bad acts, including his alleged ties to a certain street gang, his

alleged status as a drug dealer, his alleged failure to file tax returns, his being wounded in a drive-by shooting, and his lavish drug-financed lifestyle. Radosevich did not object to the above questioning or testimony, nor did he file any motions in limine to exclude the use of prior bad acts evidence at trial. Radosevich also did not call certain alibi witnesses at trial. After a jury verdict, Bennett was convicted on both charges. Bennett was sentenced on June 3, 1992, to concurrent terms of imprisonment for 16⅔ to 20 years and 6⅔ to 20 years.

Bennett appealed his convictions to the Nebraska Court of Appeals, asserting that the trial court had committed reversible error by excluding certain evidence and that Bennett's sentences were excessive. The Court of Appeals affirmed Bennett's convictions and modified the terms of Bennett's imprisonment on November 9, 1993. *State v. Bennett*, 2 Neb. App. 188, 508 N.W.2d 294 (1993).

On August 21, 1992, while Bennett's appeal was pending, disciplinary proceedings were filed in this court against Radosevich. Radosevich had been disbarred by the Colorado Supreme Court on October 30, 1989, for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Radosevich, who had let his membership in the Nebraska State Bar Association lapse, applied for reinstatement on January 13, 1991, but did not inform the Nebraska bar of his disbarment in Colorado. The Nebraska State Bar Association returned Radosevich to active membership on February 22, 1991. Following disciplinary proceedings, Radosevich was disbarred by this court on June 11, 1993.

On August 19, 1997, Bennett filed an amended motion for postconviction relief. An evidentiary hearing was held, and the trial court granted Bennett's motion. The trial court found that Radosevich's representation of Bennett was ineffective in that (1) Radosevich had been disbarred in Colorado and obtained readmission to the Nebraska bar by fraudulent means, which is per se insufficient to satisfy the Sixth Amendment's guarantee of the right to counsel; (2) Radosevich failed to object to evidence concerning Bennett's prior bad acts; and (3) Radosevich failed to call certain alibi witnesses.

## ASSIGNMENTS OF ERROR

The State asserts that the district court erred in (1) granting Bennett's motion for postconviction relief because the issues raised in Bennett's postconviction motion were procedurally barred by Bennett's failure to raise them on direct appeal; (2) concluding that Bennett's trial counsel was ineffective per se because of a prior, unrelated disciplinary action for professional misconduct in another state; and (3) finding that Bennett's trial counsel was ineffective because of his decisions of trial strategy.

## ANALYSIS

The State argues that Bennett could have litigated the issues he raised in his postconviction motion in his direct appeal and, thus, that Bennett's postconviction motion is procedurally barred, citing *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). In *Whitmore*, the plaintiff sought postconviction relief based upon an alleged conflict concerning his trial counsel's representation of a codefendant. This court noted that the plaintiff had different counsel on appeal than he had at trial and that the plaintiff had not assigned as error that his appellate counsel's failure to raise the conflict of interest claim amounted to ineffective assistance of counsel. We also noted that the plaintiff and his appellate counsel knew of the alleged conflict of interest at the time of the plaintiff's direct appeal. Based on these circumstances, this court held that the conflict issue could have been raised on direct appeal and that the plaintiff's motion for postconviction relief was therefore procedurally barred.

In the instant case, it is clear that Bennett has not assigned as error that his appellate counsel on direct appeal provided ineffective assistance. The questions are whether Bennett's counsel on direct appeal was different than his counsel at trial, and whether Bennett and his counsel on direct appeal were aware of the facts underlying his claims for postconviction relief.

A reviewing court considering a motion for postconviction relief may take judicial notice of the record in the direct appeal. See, *State v. Whitmore, supra*; *State v. Vann*, 2 Neb. App. 946, 519 N.W.2d 568 (1994). The record in Bennett's direct appeal clearly indicates that Bennett had different counsel on direct

appeal and that Bennett and his appellate counsel were aware of the issues Bennett raised in his motion for postconviction relief.

Radosevich filed Bennett's notice of appeal and a brief on Bennett's behalf. However, during the pendency of the appeal, the Court of Appeals was informed that Radosevich had been suspended from the practice of law. The Court of Appeals ordered the district court to hold an in forma pauperis hearing and appoint new counsel if necessary. Another attorney was appointed to argue Bennett's appeal by the district court. Bennett's new appellate counsel filed a motion to extend the brief date and to amend Bennett's brief. In her supporting affidavit, appellate counsel on direct appeal stated that she "has carefully reviewed both the trial transcripts and the appellate briefs in this matter" and that she has "spoken with [Bennett] regarding various issues in his appeal." The affidavit also stated that Radosevich had been suspended from the practice of law by this court on March 10, 1993.

Thus, Bennett and his new attorney, by virtue of the new attorney's appointment, were aware of the issue concerning Radosevich's improper reinstatement to practice. The new attorney's review of the record would have revealed Radosevich's failure to object to evidence concerning prior bad acts. Finally, Bennett himself would have been aware of Radosevich's refusal to call certain alibi witnesses and could have related as much to his new appellate counsel. Had Bennett or his new appellate counsel thought that any of these issues had merit, they could have assigned them as error in Bennett's direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998). Moreover, if Bennett thought that his new appellate counsel's failure to do so amounted to ineffective assistance of counsel, he could have asserted as much in his motion for postconviction relief.

It is of no moment that certain issues raised by Bennett in his motion for postconviction relief, had they been raised in his direct appeal, might have required an evidentiary hearing. 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. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999). Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, *id.*, an appellate court's refusal to do so does not bar a later motion for postconviction relief.

We conclude that Bennett's postconviction motion is procedurally barred because Bennett could have litigated the issues he raised in his postconviction motion on direct appeal. Therefore, the trial court erred in addressing the merits of Bennett's postconviction motion.

## CONCLUSION

Bennett's postconviction motion was procedurally barred, and therefore, we reverse, and dismiss.

REVERSED AND DISMISSED.

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## STATE OF NEBRASKA, APPELLEE, V. PEDRO D. GARZA, APPELLANT.

592 N.W.2d 485

Filed April 16, 1999. Nos. S-98-057, S-98-058.

1. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
2. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Trial: Joinder.** There is no constitutional right to a separate trial. The propriety of a joint trial involves two questions: whether there were appropriate grounds for consolidation and whether such consolidation would prejudice the defendant.
4. **Trial: Joinder: Proof: Evidence: Appeal and Error.** A defendant opposing joinder of charges has the burden of proving that joinder will be prejudicial to the defendant. A defendant is not prejudiced by the joinder of charges where the evidence relating to both offenses would be admissible in a trial of either offense separately.
5. **Prior Convictions: Weapons: Evidence: Proof.** Evidence of a defendant's prior felony conviction is admissible to prove one of the elements of possession of a deadly weapon by a felon.

6. **Criminal Law: Statutes: Words and Phrases.** Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
7. **Criminal Law: Weapons: Proof.** To sustain a conviction under the use prong of Neb. Rev. Stat. § 28-1205 (Reissue 1995), the State must show that a defendant actively employed a deadly weapon for the purpose of committing a felony.
8. **Criminal Law: Controlled Substances: Weapons.** A defendant cannot be charged under the use prong of Neb. Rev. Stat. § 28-1205 (Reissue 1995) merely for storing a weapon near drugs or drug proceeds.
9. **Evidence: Proof.** Actual possession is synonymous with physical possession. However, constructive possession may be proved by mere ownership, dominion, or control over contraband itself, coupled with the intent to exercise control over the same.
10. **Controlled Substances: Words and Phrases.** The term "possession," as used in the narcotics context, includes both physical (actual) and constructive possession with knowledge of the presence of a drug and of its character as a narcotic.
11. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
12. **Words and Phrases.** In ordinary understanding, the term "possession" means that a person has possession when he or she has physical control.
13. **Criminal Law: Statutes.** A penal statute is to be construed in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
14. **Criminal Law: Weapons: Words and Phrases.** The term "possession," as used in Neb. Rev. Stat. § 28-1205 (Reissue 1995), includes only actual possession. In this context, actual possession is defined as including only those weapons on one's person or within one's immediate control, which is the area within which one might immediately gain possession of a weapon.
15. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. However, a conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which the accused finds himself or herself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.
16. **Criminal Law: Convictions: Evidence: Trial.** When the evidence adduced at trial is legally insufficient to sustain the conviction, a criminal charge may not be retried, but must be dismissed.

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

Thomas C. Riley, Douglas County Public Defender, and Marcena M. Hendrix for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

CONNOLLY, J.

The appellant, Pedro D. Garza, was convicted by a jury of several drug-related offenses, possession of a stolen firearm, use of a firearm to commit a felony, and use of a deadly weapon to commit a felony. Garza appeals, contending that the district court erred in, inter alia, determining that the evidence was sufficient to find Garza guilty of the use of a firearm and use of a weapon counts. We conclude that to sustain a conviction for "use" of a weapon under Neb. Rev. Stat. § 28-1205 (Reissue 1995), the State must show that a defendant actively employed the weapon for the purpose of committing the predicate felony. To sustain a conviction for "possession" of a weapon under § 28-1205, the State must show that the weapon was on one's person or within one's immediate control, which is the area within which one might immediately gain possession of a weapon, during the commission of the predicate felony. The State failed to show that the weapons in the instant case were actively employed by Garza or that they were on his person or within his immediate control during the commission of a felony. Therefore, we vacate Garza's convictions for use of a firearm and use of a deadly weapon to commit a felony, and affirm the judgment in all other respects.

## I. BACKGROUND

### 1. INVESTIGATION

On July 21, 1995, officers of the Omaha Police Division and the Bureau of Alcohol, Tobacco, and Firearms executed a search warrant at 3911 North 55th Street, a residence owned by Garza. Garza was present at the residence during the search.

The officers seized $360, consisting of 13 $20 bills, from Garza's person; a .22-caliber pistol, which was found in a bed-

room closet; and an additional $5,600 in cash. In addition, the officers found a scale; plastic bags, some of which contained trace amounts of methamphetamine; inositol and Fruit Fresh containers; and other miscellaneous items that may be used in drug operations. There was a total weight of approximately 1.2 grams of methamphetamine at the residence.

On May 24, 1996, approximately 10 months later, while Garza was apparently out on bond, officers executed a second search warrant at 8088 Keystone Drive, another residence owned by Garza. Once again, Garza was present during the search. This time, $446 was seized from Garza's person, which consisted of bills in varying denominations, including two $100 bills. The officers also seized a 9-mm handgun, which was found in the bottom of a bedroom dresser drawer and was identified as stolen; five antique rifles; plastic bags containing trace amounts of controlled substances; inositol; and a police scanner. Approximately 13 grams of amphetamine, trace quantities of methamphetamine and cocaine, and a marijuana cigarette were seized from this residence.

An information was filed against Garza on August 16, 1995, in docket 137 page 552, charging Garza with unlawful possession with intent to deliver a controlled substance. This charge was based on the items seized at the North 55th Street residence. Another information was filed against Garza on June 19, 1996, in docket 139 page 725, charging Garza with another count of unlawful possession with intent to deliver a controlled substance. This charge was based on the items seized at the Keystone Drive residence.

On April 14, 1997, the State requested and obtained leave to amend both informations and to consolidate both informations for trial. The amended information in docket 137 page 552 added two counts: *use* of a firearm to commit a felony and possession of a firearm by a felon. The amended information in docket 139 page 725 added five counts: two counts of possession of a controlled substance, one for cocaine and another for methamphetamine; possession of a stolen firearm; *use* of a deadly weapon to commit a felony; and possession of a deadly weapon by a felon. A preliminary hearing was held on the new charges in both amended informations, and the trial court found

that probable cause existed to bind Garza over for trial as to each of the additional counts.

2. TRIAL

On direct examination, the prosecution made reference to Garza's alleged status as a prior felon while questioning a police officer as to a certified copy of the judgment and sentence from Garza's alleged prior conviction. The certified copy of the conviction was never received into evidence. On cross-examination of Garza, the prosecution asked whether Garza had been convicted of a felony. Garza denied having been so convicted. The prosecution later attempted to introduce a certified copy of the file, including the judgment and sentence, from Garza's alleged prior conviction. Defense counsel objected to the admission of the file, arguing that although the name of the person who had been previously convicted was the same, there was no proof such as fingerprints or testimony of a handwriting expert that it was the same "Garza" as the defendant. The trial court sustained defense counsel's objection and then determined that there was insufficient evidence to support a jury's finding that Garza was a prior felon. Consequently, the trial court did not submit the possession of a firearm by a felon and possession of a deadly weapon by a felon charges to the jury.

In docket 137 page 552, the jury found Garza guilty of the unlawful possession of a controlled substance (a lesser-included offense of possession with intent to deliver) and use of a firearm to commit a felony. Garza was sentenced to 2 to 4 years' imprisonment as to the unlawful possession of a controlled substance conviction and 2 to 4 years' imprisonment as to the use of a firearm to commit a felony conviction, to be served consecutively. In docket 139 page 725, the jury found Garza guilty of unlawful possession with intent to deliver a controlled substance, possession of a controlled substance, possession of a stolen firearm, and use of a deadly weapon to commit a felony. Garza was sentenced to 2 to 4 years' imprisonment as to the unlawful possession with intent to deliver a controlled substance conviction, 1 to 3 years' imprisonment as to the possession of a controlled substance conviction, 1 to 3 years' imprisonment as to the possession of a stolen firearm conviction, and

3 to 5 years' imprisonment as to the use of a deadly weapon to commit a felony conviction, the first and last sentences to be served consecutively, and the remaining two sentences to be served concurrently.

Garza appeals both judgments to this court. On appeal, docket 137 page 552 became case No. S-98-057 and docket 139 page 725 became case No. S-98-058.

## II. ASSIGNMENTS OF ERROR

Garza asserts that (1) the consolidation of the two separate informations filed against him for a single trial was prejudicial to his rights pursuant to Neb. Rev. Stat. § 29-2002 (Reissue 1995); (2) prosecutorial references made to the jury regarding Garza's unproven status as a felon were unfairly prejudicial; and (3) § 28-1205 requires the active employment of a firearm or deadly weapon in relation to the predicate offense in light of the U.S. Supreme Court ruling in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995).

## III. SCOPE OF REVIEW

A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Torres, ante* p. 380, 590 N.W.2d 184 (1999).

## IV. ANALYSIS

### 1. CONSOLIDATION

There is no constitutional right to a separate trial. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). However, Garza contends that the consolidation of the two separate informations filed against him was prejudicial pursuant to § 29-2002. Section 29-2002 states:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint . . . if the offenses

> charged . . . are of the same or similar character or are . . . constituting parts of a common scheme or plan.
>
> (2) The court may order two or more indictments, informations, or complaints . . . to be tried together if the offenses could have been joined in a single indictment, information, or complaint . . . .
>
> (3) If it appears that a defendant . . . would be prejudiced by a joinder of offenses . . . in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

Thus, the propriety of a joint trial involves two questions: whether there were appropriate grounds for consolidation and whether such consolidation would prejudice the defendant. See *State v. Brunzo, supra.*

(a) Grounds for Consolidation

Clearly, the two informations in the instant case consisted of offenses of the same or similar character. The information in docket 139 page 725 contained charges equivalent to those included in the information in docket 137 page 552. Although the information in docket 139 page 725 did contain three additional charges, those charges were closely related in subject matter, dealing with the possession of controlled substances and the possession of a firearm; the difference was that the controlled substances were not intended to be delivered and that the firearm was stolen. We conclude that there were appropriate grounds for consolidation.

(b) Prejudice

Having concluded that there were appropriate grounds for consolidation, we must next consider whether the consolidation nonetheless prejudiced the defendant. A defendant opposing joinder of charges has the burden of proving that joinder will be prejudicial to the defendant. *State v. Freeman, supra.* A defendant is not prejudiced by the joinder of charges where the evidence relating to both offenses would be admissible in a trial of either offense separately. *Id.*; *State v. Thompson*, 231 Neb. 771,

438 N.W.2d 131 (1989). We conclude that the trial court did not abuse its discretion in determining that evidence relating to both offenses would have been admissible in a trial of either offense separately and, thus, that Garza failed to meet his burden of establishing prejudice in the instant case.

### 2. Garza's Status as Felon

Garza next argues that the trial court erred in allowing the prosecution to make reference to his alleged status as a prior felon. Garza urges this court to require that to mention a defendant's status as a convicted felon, a motion in limine should first be held outside the presence of the jury. Then the court could determine whether evidence concerning a defendant's alleged status as a felon is admissible prior to its being referenced by the prosecution. The State responds by arguing that the prosecution did not err in attempting to prove Garza was a prior felon, since the State was required to prove as much to convict Garza of the charges of possession of a firearm or a deadly weapon by a felon.

The State is correct in its assertion that evidence of a defendant's prior felony conviction is admissible to prove one of the elements of possession of a firearm or a deadly weapon by a felon. *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994). In the instant case, Garza was charged with two such counts, each of which required the State to establish such. The prosecution made a reference to Garza's status as a prior felon on direct examination of a State witness and asked a question of Garza concerning such status, each of which references amounts to an accusation that Garza had previously been convicted of a felony.

We fail to see how these accusations unfairly prejudiced Garza, when the State was required to prove Garza's status as a felon to convict him of certain charges. In effect, such an accusation and any accompanying prejudice to Garza had already occurred when Garza was charged with possession of a firearm or a deadly weapon by a felon, since, presumably, the jury would have been informed that possession of a firearm or a deadly weapon by a felon was one of the charges it would be asked to decide. Thus, the State's later repetition of the accusa-

tion embodied in the charge was merely a reiteration of a charge that the jury had already heard. We conclude that Garza was not unfairly prejudiced by the State's attempts to prove Garza's alleged status as a prior convicted felon at trial.

### 3. Use or Possession of Deadly Weapon

#### (a) Use of Deadly Weapon

Garza argues that the evidence was insufficient to support his convictions for use of a firearm and use of a deadly weapon to commit a felony. At the outset, we note that Garza's use of a firearm as alleged in docket 137 page 552 occurred on July 21, 1995. Neb. Rev. Stat. § 28-1205 (Reissue 1989) was amended operative September 9, 1995, to provide a harsher penalty for a conviction of use of a firearm than for use of a deadly weapon which is not a firearm. Thus, Garza's conviction for use of a firearm as alleged in docket 137 page 552 was prosecuted under § 28-1205 as it existed prior to the 1995 amendment, whereas his conviction for use of a deadly weapon as alleged in docket 139 page 725, which use allegedly occurred on May 24, 1996, was prosecuted under § 28-1205 as it existed after the 1995 amendment. See § 28-1205 (Reissue 1995). However, because the amendment to § 28-1205 is irrelevant to our analysis in the instant case, we proceed under § 28-1205 as amended.

Garza asserts that under § 28-1205, the term "use" means "active employment," citing *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). This court has never been asked to interpret § 28-1205 in light of *Bailey v. United States*.

Section 28-1205 states: "Any person who uses a firearm . . . to commit any felony . . . *or* who unlawfully possesses a firearm . . . during the commission of any felony . . . commits the offense of using a deadly weapon to commit a felony." (Emphasis supplied.)

In *Bailey v. United States*, the Court interpreted 18 U.S.C. 924(c)(1) (1994), a federal statute which in relevant part imposed a term of imprisonment upon a person who " 'during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.' " 516 U.S. at 138. The issue before the Court was whether "evidence of the proximity and

accessibility of a firearm to drugs or drug proceeds is alone sufficient to support a conviction for 'use' of a firearm during and in relation to a drug trafficking offense" pursuant to § 924(c)(1). 516 U.S. at 138-39.

The Court held that § 924(c)(1) "requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey v. United States*, 516 U.S. at 143. The Court noted that the " 'accessibility and proximity' " standard adopted by the District of Columbia Circuit Court of Appeals, 516 U.S. at 141, would render the term "use" coextensive with the term "possession," such that nearly every possession by a person engaged in drug trafficking would satisfy the standard. The Court determined that the term "'use' must connote more than mere possession of a firearm by a person who commits a drug offense." 516 U.S. at 143. According to the Court, had "Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided." 516 U.S. at 413. In sum, "[a]n evidentiary standard for finding 'use' that is satisfied in almost every case by evidence of mere possession does not adhere to the obvious congressional intent to require more than possession to trigger the statute's application." 516 U.S. at 144.

Having determined that the term "use" requires more than mere possession, the Court addressed what the government must show, beyond mere possession, to establish "use" under § 924(c)(1). The Court noted that the plain meaning of the term "use" implied action and implementation. The Court also noted that if "Congress had intended to deprive 'use' of its active connotations, it could have simply substituted a more appropriate term—'possession'—to cover the conduct it wished to reach." 516 U.S. at 148. Finally, the Court noted that to interpret "use" broadly would render the term "carries" superfluous. Therefore, the Court held that "use" requires that a firearm be actively employed in a way that makes it an operative factor in the offense, such as by brandishing, displaying, striking with, or firing or attempting to fire the firearm.

In the instant case, a plain reading of § 28-1205 clearly indicates that the Legislature intended the term "use" to mean more

than mere possession. Section 28-1205 criminalizes both the "use" of a deadly weapon to commit a felony and the "possession" of a deadly weapon during the commission of a felony. If "use" were interpreted coextensively with "possession," the effect would be to render the term "possession" superfluous. Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

We are persuaded by the Supreme Court's reasoning in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), and determine it is applicable to § 28-1205. We conclude that "[t]o sustain a conviction under the 'use' prong of [§ 28-1205], the [State] must show that the defendant actively employed," 516 U.S. at 150, a deadly weapon for the purpose of committing a felony, see *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989). The question, then, is whether the evidence in the instant case was sufficient to show that Garza actively employed the seized firearms in his drug operation.

The .22-caliber pistol seized at the North 55th Street residence was located in a box in a bedroom closet. The 9-mm handgun seized at the Keystone Drive residence was located in the bottom of a bedroom dresser drawer, and the antique rifles seized at that residence were found in an upstairs bedroom closet. No evidence of the firearm's active employment was offered by the State.

> [T]he inert presence of a firearm, without more, is not enough to trigger [§ 28-1205]. Perhaps the nonactive nature of this asserted "use" is clearer if a synonym is used: storage. A defendant cannot be charged under [the use prong of § 28-1205] merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession.

*Bailey v. United States*, 516 U.S. at 149.

In *U.S. v. Friend*, 101 F.3d 557 (8th Cir. 1996), the police found a handgun with a large quantity of drugs and cash in a secret safe at the home of a person with whom the defendant had conspired. Applying the definition of "use" set forth in

*Bailey v. United States, supra*, the Eighth Circuit Court of Appeals concluded that the fact that this conspiracy stored a weapon with its hoard of drugs and cash was insufficient "use" to support a conviction. *U.S. v. Friend, supra.*

Likewise, in the instant case, the State has shown only that Garza stored weapons at residences where he dealt drugs. Thus, the evidence was insufficient to support Garza's convictions for use of a firearm and use of a deadly weapon under § 28-1205.

(b) Possession of Deadly Weapon

The State argues that even if Garza could not have been found guilty of the "use" of a weapon under § 28-1205, he could have been found guilty of the "possession" of a weapon under § 28-1205, since Garza had constructive possession of the weapons. The State contends that the term "possession" is defined as including both actual and constructive possession, citing several cases involving the possession of narcotics, including *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993).

Actual possession is synonymous with physical possession. See *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976). See, also, Black's Law Dictionary 1163 (6th ed. 1990) (stating that actual possession exists where thing is in immediate occupancy and physical control of party). However, constructive possession may be proved by mere ownership, dominion, or control over contraband itself, coupled with the intent to exercise control over the same. *State v. Garcia*, 216 Neb. 769, 345 N.W.2d 826 (1984).

This court has long held that the term "possession," as used in the narcotics context, includes both physical (actual) and constructive possession with knowledge of the presence of a drug and of its character as a narcotic. See, e.g., *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967). However, the fact that this court has interpreted the term "possession" to include both actual and constructive possession in the narcotics context is of little persuasive value in the instant case, which involves the possession of a weapon during the commission of a felony.

It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *State v. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996). In *Boyd v. Travelers Fire Ins. Co.*, 147 Neb. 237, 22 N.W.2d 700 (1946), we stated that when there is no evidence that the term "possession" is to be applied in any way other than its ordinary sense, it should be given its ordinary meaning. We stated that "[i]n ordinary understanding the term means that a person has possession when he has *physical* control." (Emphasis supplied.) *Id.* at 241, 22 N.W.2d at 702. See, also, *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 200 N.W.2d 1 (1972). Likewise, in *People v. Garcia*, 595 P.2d 228 (Colo. 1979), the court noted that the term "possession" was a common term that should be given its generally accepted meaning as well as the benefit of commonsense understanding. The court stated that the commonsense definition of "possession," as used in a statute prohibiting the possession of a firearm while under the influence of intoxicating liquor or drugs, "is the actual or physical control of a firearm." *Id.* at 231. The State has failed to indicate why § 28-1205, which does not define the term "possession," should be read more broadly than in its ordinary sense.

Moreover, to hold that the term "possession," as used in § 28-1205, includes constructive possession would be manifestly inconsistent with the purpose of § 28-1205. See *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989). In *State v. Ring*, 233 Neb. at 724, 447 N.W.2d at 911, this court stated that the "purposes behind § 28-1205 are to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies [the 'use' prong] and to discourage persons from *carrying* deadly weapons while they commit felonies [the 'possession' prong]." (Emphasis supplied.) In *Mack v. State*, 312 A.2d 319 (Del. Super. 1973), the Delaware Superior Court addressed whether the term "possession," as used in a statute prohibiting the possession of a deadly firearm during the commission of a felony, could be construed to include constructive possession. The court held that the general " 'dominion, control, and authority' " (constructive possession) definitions applied in cases involving the possession of drugs and recently stolen goods were inapplicable. *Id.* at 322. See,

also, *Barnett v. State*, 691 A.2d 614 (Del. Super. 1997) (following *Mack v. State, supra*). The court noted that in such cases, the possession of contraband, per se, actual or constructive, is the crux of the matter. However, when it is the possession of a firearm during the commission of a felony that is prohibited, it is the availability of the weapon *under certain circumstances*, i.e., during the commission of a felony, that is at issue.

A penal statute is to be construed in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997). Interpreting the term "possession" in § 28-1205 to mean constructive possession, such as possession in one's home while one is committing a felony, does not serve the purpose of § 28-1205. The purpose of § 28-1205 is to prevent the threat of violence and accompanying danger to human life that is present whenever one has a deadly weapon within one's immediate control during the commission of a felony. See *State v. Rieger*, 26 Wash. App. 321, 613 P.2d 163 (1980) (adopting limited constructive possession standard), *reversed in part on other grounds* 96 Wash. 2d 546, 637 P.2d 236 (1981).

Because defining the term "possession" to include constructive possession would be inconsistent with the plain meaning of possession and the purpose of § 28-1205, we conclude that the term "possession," as used in § 28-1205, includes only actual possession. In this context, we define actual possession as including only those weapons on one's person or within one's immediate control, which is the area within which one might immediately gain possession of a weapon. See, *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (holding that passenger compartment of vehicle is within occupant's immediate control). As the rationale in *Chimel v. California* and *New York v. Belton* indicates, weapons that are not on one's person or within one's immediate control do not present the danger to human life that § 28-1205 seeks to prevent. Thus, for the purpose of determining whether one is in possession of a weapon during the commission of a

felony, we adopt the Fourth Amendment test applied in searches incident to an arrest.

(c) Sufficiency of Evidence

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). However, a conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which the accused finds himself or herself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. *State v. Hulshizer*, 245 Neb. 244, 512 N.W.2d 372 (1994). When the evidence adduced at trial is legally insufficient to sustain the conviction, a criminal charge may not be retried, but must be dismissed. *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995).

In the instant case, the .22-caliber pistol was found in a bedroom closet of the North 55th Street house. No controlled substances were found in the closet. No evidence was presented as to whether Garza had actual possession of the firearm at any time while he was in possession of any controlled substances. None of the officers had any idea how long the pistol was at the North 55th Street residence, nor does the evidence indicate how long the controlled substances had been there. Thus, it is pure speculation as to whether the pistol was ever on Garza's person or within his immediate control while Garza had possession of any controlled substances. Accordingly, we conclude that the evidence was insufficient, as a matter of law, to convict Garza of possession of a firearm during the commission of a felony as alleged in docket 137 page 552.

Likewise, there was no evidence that Garza had gone anywhere near the 9-mm handgun or the antique rifles taken from the Keystone Drive residence while Garza had possession of any controlled substances. The weapons were not located near any controlled substances, and there was no evidence as to how long the weapons or the controlled substances had been at the residence. Although Garza had constructive possession of the 9-mm handgun for purposes of his conviction of possession of a stolen firearm, there is no evidence that he ever had actual possession of it while in possession of controlled substances or otherwise. Once again, one must engage in pure speculation to conclude that the weapons at the Keystone Drive residence were on Garza's person or within his immediate control during Garza's commission of a felony. Accordingly, we conclude that the evidence was insufficient, as a matter of law, to convict Garza of possession of a deadly weapon during the commission of a felony as alleged in docket 139 page 725.

## V. CONCLUSION

We conclude that the trial court did not err in consolidating the informations against Garza and in allowing the State to attempt to prove Garza was a prior felon. However, the trial court did err in overruling Garza's motion to dismiss the use or possession of a firearm or a deadly weapon charges due to the insufficiency of the evidence. We vacate Garza's convictions for use of a firearm and use of a deadly weapon to commit a felony. In all other respects, we affirm the judgment.

AFFIRMED IN PART, AND IN PART VACATED.

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MARY E. SCHINDLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GERALD R. SCHINDLER, APPELLANT AND CROSS-APPELLEE, V. RICHARD WALKER, M.D., APPELLEE AND CROSS-APPELLANT, AND DOUGLAS M. MONASEBIAN, M.D., ET AL., APPELLEES.

592 N.W.2d 912

Filed April 23, 1999. No. S-97-073.

1. **Trial: Jurors.** The decision to retain or reject a juror is a matter of discretion with the trial court.

2. **Trial: Jurors: Appeal and Error.** The trial court's decision to retain or reject a juror is reviewed for an abuse of discretion.
3. **Judges: Words and Phrases.** An abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
5. **Trial: Appeal and Error.** Generally, an appellate court will dispose of a case on the theories which were presented in the trial court.
6. **Rules of the Supreme Court: Pretrial Procedure.** Neb. Ct. R. of Discovery 26(e) (rev. 1996) provides that a party has a duty to seasonably supplement his or her discovery responses as to any question addressed to the identity of an expert and the subject matter and substance of an expert's testimony and as to any prior responses that he or she knows were incorrect when made or, although correct when made are no longer true, and under the circumstances, the failure to amend would be in substance a knowing concealment.
7. ____: ____. As a general rule, the range of sanctions imposed for violations of the discovery rules is a matter within the discretion of the trial court.
8. **Courts: Pretrial Procedure: Evidence.** While there is no applicable rule or statute governing a trial court's exclusion of evidence, a trial court's exclusion of evidence can be sustained as an exercise of a trial court's inherent powers.
9. **Courts: Pretrial Procedure.** A district court's inherent powers include the broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial; without such inherent power, a court would be powerless to deal with discovery violations that do not specifically involve a court order.
10. **Courts.** When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the courts' inherent power fills the gap.
11. **Courts: Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
12. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
13. ____. Errors which are argued but not assigned will not be considered by an appellate court.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Judgment of Court of Appeals affirmed.

Daniel B. Cullan and Paul W. Madgett, of Cullan & Cullan, for appellant.

John P. Mullen and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellees University of Nebraska Medical Center and Monasebian.

Joseph F. Bataillon and Kelly K. Brandon, of Sodoro, Daly & Sodoro, for appellee Walker.

William M. Lamson, Jr., and William R. Settles, of Lamson, Dugan & Murray, for appellee Patil.

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

MCCORMACK, J.

## NATURE OF CASE

This is an action for wrongful death as a result of alleged medical negligence and for negligent infliction of emotional distress brought by appellant, Mary E. Schindler (Schindler), as personal representative of the estate of Gerald R. Schindler, and Schindler, individually, against appellees Richard Walker, M.D.; Douglas M. Monasebian, M.D.; Arun Angelo Patil, M.D.; and the University of Nebraska Medical Center (UNMC) (collectively appellees) for failure to properly treat a C1 neck fracture sustained by Gerald following a diving accident at an Omaha swimming pool. We affirm.

## BACKGROUND

On July 10, 1992, Schindler and her husband, Gerald, and their children were swimming at the Field Club swimming pool in Omaha. Gerald dove into the pool and hit his head, resulting in a neck injury. Gerald remained conscious, walked himself to the car, and was driven to the hospital. Gerald arrived at UNMC conscious and alert, and spoke with the treating staff in the emergency room concerning the diving accident.

In the emergency room, Gerald was treated by Walker. Walker ordered x rays and diagnosed Gerald's injury as a "Jefferson fracture" of his neck. Walker contacted Monasebian, a resident in the neurosurgery department, for a neurological opinion. Monasebian conducted a neurological examination and had Gerald admitted to a patient room in the hospital. Monasebian then contacted Patil for another neurological opinion.

After being admitted, Gerald became drowsy and dozed off. According to Schindler's testimony, Gerald was a restless

sleeper. As Gerald fell asleep, he started moving his arms and legs, and family members attempted to hold him still to prevent movement. Gerald then stopped breathing. After being revived, he was taken to the intensive care unit, where it was concluded that he had suffered a stroke. Gerald remained alive on respirators for approximately 1 week before he died.

Walker is a medical doctor in the emergency department at UNMC and is also an assistant professor in the department of surgery. Patil is a neurosurgeon and a full-time professor of neurosurgery at UNMC. Monasebian is described as a resident in the neurosurgery department and, therefore, as a resident, is employed by UNMC.

Juror David Smith is an associate professor of pharmacology employed at UNMC. Smith said he did not have a professional relationship with Walker, Patil, or Monasebian, but does serve on committees with physicians at UNMC. Smith said he could be a fair and impartial juror.

In Schindler's fifth amended petition, which the case proceeded on, she alleged that appellees had deviated from the standard of care by failing to properly stabilize and protect Gerald's spinal cord. On this basis, Schindler sought recovery for wrongful death and negligent infliction of emotional distress.

Pursuant to Neb. Rev. Stat. § 81-8,214 (Reissue 1996) of the State Tort Claims Act (Act), Schindler's claims against UNMC and Monasebian were tried to the court. Schindler's claims against Walker and Patil were tried to a jury. After trial, the court found in favor of UNMC and Monasebian on Schindler's wrongful death claim and the jury found in favor of Walker and Patil on both of Schindler's claims. The trial court, however, found in favor of Schindler and against UNMC on Schindler's negligent infliction of emotional distress claim and awarded Schindler $15,000.

Schindler filed a motion for new trial which was overruled by the trial court. Schindler appealed the verdicts rendered against her, contending that the trial court erred in failing to remove certain potential jurors from the jury pool, erred in disallowing testimony concerning an autopsy, erred in failing to give a requested instruction concerning missing x rays, and erred in

denying Schindler's motion for new trial. The Nebraska Court of Appeals, in *Schindler v. Walker*, 7 Neb. App. 300, 582 N.W.2d 369 (1998), found no merit to any of Schindler's assigned errors and affirmed the judgments entered against Schindler.

UNMC cross-appealed, challenging the portion of the judgment by the trial court in favor of Schindler on the allegation of negligent infliction of emotional distress. The Court of Appeals declined to address the merits of UNMC's cross-appeal because UNMC failed to comply with the procedural rules for bringing a cross-appeal. We granted Schindler's and UNMC's petitions for further review.

## STANDARD OF REVIEW

The decision to retain or reject a juror is a matter of discretion with the trial court. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998). Thus, the trial court's decision to retain or reject a juror is reviewed for an abuse of discretion. *Id.*

An abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

Appellate review of a district court's use of inherent power is for an abuse of discretion. See *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

## ASSIGNMENTS OF ERROR

Schindler assigns that the Court of Appeals erred in concluding that the trial court did not abuse its discretion when it (1) failed to strike juror Smith, a coemployee of Walker and Patil and an employee of UNMC, from the venire; (2) did not allow Schindler's expert witness, Dr. Matthias I. Okoye, to testify during Schindler's case in chief about an autopsy; and (3) did not allow Okoye to testify in rebuttal after appellees had offered a defense which had been scientifically disproved by Okoye's autopsy.

Restated, UNMC assigns that the Court of Appeals erred in (1) refusing to address the merits of UNMC's cross-appeal because UNMC failed to comply with Neb. Ct. R. of Prac.

9D(1) and (4) (rev. 1996), and (2) failing to find plain error existed in regard to the trial court's award of $15,000 for negligent infliction of emotional distress in the absence of any finding of negligence against UNMC and the absence of severe emotional distress.

## ANALYSIS

### Jury Selection

We have carefully examined the record and, particularly, the testimony of Walker and Patil on the issue of their employment. An examination of the testimony of Walker on direct examination shows the following:

> Q. After you completed your training in emergency medicine, where did you — where did you go?
>
> A. I came back to Omaha.
>
> Q. And started practicing where?
>
> A. At St. Joseph Hospital associated with Creighton University.
>
> Q. In the emergency room?
>
> A. That's correct.
>
> Q. How long were you with them?
>
> A. I was at St. Joseph Hospital until September of 1989.
>
> Q. And then after being at St. Joseph's Hospital, where did you go to work?
>
> A. I went to work at University of Nebraska Medical Center in the emergency department.

As to Patil, an examination of his testimony shows:

> Q. All right. Doctor, as an associate — now full professor in the department of neurosurgery at the University of Nebraska, do you see patients?
>
> A. That's my primary duty, to see patients.
>
> . . . .
>
> Q. All right. How many neurosurgeons were there in the entire city of Omaha, in 1992?
>
> A. I think probably about ten or eleven.
>
> Q. And six of you were associated with university; is that correct?
>
> A. That's correct.

Q. All right. The other four surgeons would have been associated with which hospitals, if you know?

A. Well, at Creighton, St. Joseph's Hospital and then Bergan Mercy.

Q. All right. Okay. We've established there were three full-time professors at the department of neurosurgery and three part time. In addition to yourself, who was full time in 1992?

A. Well, then we have the resident who is a full time.

. . . .

Q. Doctor, tell us when you first moved to Omaha.

A. I moved to Omaha in, I think, September or October of '87. I have been in Omaha now for nine years.

Q. And when you moved to Omaha, was that to take a position with the university?

A. That's correct.

Q. What position did you take with the university when you came to Omaha?

A. When I came to Omaha, I came as associate professor of surgery in the department of neurosurgery.

Q. Were you recruited to come to Omaha?

A. I was.

Q. And who recruited you to the university?

A. Well, the — actually the regents recruit you, but I was recruited through the section of neurosurgery.

Q. And would that be Dr. Leibrock primarily?

A. Right.

Q. And just tell us, if you will, what the department of neurosurgery consists of at the University Hospital.

A. The department of neurosurgery is a teaching department. Like most departments at the university, we have attending, we have professors and associate professors, assistants.

We also have clinical professors, and our basic function is, number one, they're primarily doctors, medical doctors that take care of patients. And since the art of medicine is a practical art, obviously to teach medical students and residents, we have to do it in the practical manner. And so it consists of practice of medicine.

> And in the course of practice, we also educate students and residents. We are — at the present time we have a residency program in neurosurgery at the university.

Although it is clear that Walker and Patil had some type of professional relationship with UNMC, they were not shown to be employees. The record does not reflect that Schindler objected to the consolidation for trial of the cases against UNMC and Monasebian with the cases against Walker and Patil, nor is there any claim by Schindler that the Walker and Patil cases should be tried to the court on the theory that Walker and Patil were employees of UNMC and, therefore, covered under the Act.

In Schindler's several petitions, she asserts that "[t]he exact relationship between the parties is unknown." Schindler alleged that "the University of Nebraska Medical Center held itself out to the public, specifically these physician Defendants . . . as agents of the University of Nebraska Medical Center possessing special knowledge, skill and training in the treatment of emergency trauma . . . ." In its answer, UNMC acknowledged that Monasebian acted as its agent but specifically denied that Walker and Patil were acting as its agents at any time material to this action. In his separate answer, Patil generally denied the allegations that he acted as an agent of UNMC. The record does not include Walker's responsive pleading with respect to the operative fifth amended petition.

Although the jury instructions were not included in the record, Schindler's counsel stated during closing argument: "You need to consider the lawsuit against Dr. Patil and Dr. Walker as if they are separate. I believe that's reflected in the instructions, and you will need to treat those as if they are two separate lawsuits." The verdict forms submitted to the jury clearly indicated that they were to decide only the claims against Walker and Patil.

In Schindler's appeal, the Court of Appeals relied on the holding in *Kusek v. Burlington Northern RR. Co.*, 4 Neb. App. 924, 552 N.W.2d 778 (1996), which relies on *Burnett v. B. & M. R. R. Co.*, 16 Neb. 332, 20 N.W. 280 (1884). In *Kusek*, the Court of Appeals held that all employees of a party are ineligible to serve on a jury in a case involving their employer. In *Kusek*,

Burlington alleged that the jury selection process was flawed because the trial court allowed Burlington employees to be in the jury pool. The trial court did rule that " 'site specific' " employees, those working in the same craft as Kusek, would not be allowed to serve on the jury. *Kusek v. Burlington Northern RR. Co.*, 4 Neb. App. at 926, 552 N.W.2d at 779. Despite the trial court's exclusion of some Burlington employees, the Court of Appeals found there was error in the jury selection process because "employees of a party to a lawsuit are disqualified for cause and thus ineligible to serve on a jury in a case involving their employer . . . ." *Id.* at 925, 552 N.W.2d at 779.

The Court of Appeals in *Kusek v. Burlington Northern RR. Co., supra*, recognized that the rationale of the *Burnett* court is simply that jurors must be indifferent between parties and that the common-law rule stems from the presumption of loyalty of employees to their employers. The Court of Appeals further expanded the *Burnett v. B. & M. R. R. Co., supra*, holding when it determined:

> It is possible, and sometimes probable, that employees are disloyal, antagonistic, hostile, spiteful, or all of these things toward their employer. And, in some situations, the bond of loyalty between coemployees (including between fellow union members) is far stronger than any loyalty to the employer. While we cannot say for certain that Burlington employees are loyal or disloyal, it seems apparent that the potential is manifest that jurors who are Burlington's employees and Kusek's coemployees are unlikely to hear the case with a "clean slate" and an open mind. If the employee can automatically strike his or her coemployees as jurors, without any showing of partiality . . . the employer should not be required to have its case decided by its employees. In short, the rule ought to run both ways.

*Kusek v. Burlington Northern RR. Co.*, 4 Neb. App. at 931, 552 N.W.2d at 782.

Although in *Kusek v. Burlington Northern RR. Co., supra*, the Court of Appeals recognized that where a party and a juror are coemployees, the juror might not hear the case with a "clean slate" or open mind, in the present case the Court of Appeals

declined to extend its holding in *Kusek* because the claim against UNMC was not decided by the jury and Walker and Patil were not considered employees of UNMC. *Schindler v. Walker*, 7 Neb. App. 300, 582 N.W.2d 369 (1998).

While there may be merit to the contention that the holdings of *Burnett v. B. & M. R. R. Co., supra*, and *Kusek v. Burlington Northern RR. Co., supra*, should be extended to hold that where one of the parties is a coemployee with a juror, working in the same location and, particularly, in the same capacity, the juror should be held ineligible, that is not the case that is presented by this record.

The record clearly reflects that the action was tried on the theory that the claims against Walker and Patil were not governed by the Act. After introducing the parties and their counsel to prospective jurors, the trial judge stated:

> All right. Now is the time I have to explain this to you, ladies and gentlemen. What we're really going to have is two trials simultaneously, one to you, the jury, and one to me, the Court.
>
> The trial to you, the jury, would be the issues between the plaintiffs and Drs. Richard Walker and Arun Patil, and the trial to the Court would be the issues between the plaintiffs and Dr. Douglas Monasebian and the University of Nebraska Medical Center, and the reason is this: The University of Nebraska Medical Center is a state agency. In other words, they are an agency of the State of Nebraska.
>
> The State of Nebraska through the legislature by law has permitted itself . . . to be subjected to suits in certain instances and a suit on what we call a tort claim, and this is a tort claim. They have by law subjected themselves, the State itself and any state agency, to a lawsuit for a tort claim, and it's by law what we call the State Tort Claims Act.
>
> However, any such suits are tried to the Court and not to a jury. And since this suit is brought by the plaintiffs against not only the University of Nebraska Medical Center and Dr. Douglas Monasebian, who was an employee or agent of the UNMC, claiming negligence as

> to all three of the medical doctors, for judicial economy and expedience we try the two together.
>
> So we're going to have a simultaneous trial to you concerning just the issues between the plaintiffs and Drs. Patil and Walker and to the Court concerning the issues between the plaintiffs and the University of Nebraska Medical Center and Dr. Monasebian.

Schindler did not object to this statement or to the ultimate submission of her claims against Walker and Patil to the jury. If Walker and Patil had acted as agents or employees of UNMC when they provided services to Gerald, Schindler's claims against them would have been subject to the Act and she would have had no right to a jury trial. Thus, it necessarily follows that neither the parties nor the trial court considered Walker and Patil to have acted as agents or employees of UNMC at the time of their alleged professional negligence.

Generally, an appellate court will dispose of a case on the theories which were presented in the trial court. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Adherence to this principle precludes an appellate court from regarding Walker and Patil as employees of UNMC for purposes of reviewing the trial court's decision not to remove juror Smith from the panel.

Under the circumstances set out above, we conclude that the trial court did not abuse its discretion in declining to strike Smith from the jury panel.

### AUTOPSY EVIDENCE

Schindler asserts that the Court of Appeals erred in failing to find that the trial court abused its discretion in disallowing Okoye from testifying in her case in chief and in her rebuttal case regarding his findings and results from an autopsy he performed on Gerald's body. Prior to trial, appellees filed motions to strike the testimony of Okoye and any evidence acquired from an autopsy of Gerald's body. A hearing was held on appellees' motions in which numerous exhibits were offered, including discovery documents, the autopsy report, and the deposition of Okoye. After the hearing, the trial court sustained

appellees' motions to the extent that Schindler was prohibited from introducing any evidence relating to the autopsy. At the trial, Schindler made motions during her case in chief and rebuttal to allow testimony regarding the autopsy. The motions were denied.

Beginning in May 1994, appellees served interrogatories on Schindler seeking information regarding each of her expert's opinions. Schindler was also served a request for production in May 1996 seeking information regarding any autopsy or postmortem examination of Gerald. In Schindler's response to the request for production on June 12, 1996, Schindler stated that she was "not aware of any autopsy or postmortem examination." In April 1996, Schindler supplemented her responses to interrogatories to include Okoye as a designated expert. Schindler stated that Okoye's opinions were based on his "review of the medical evidence."

On September 16, 1996, Schindler applied for a disinterment permit. Okoye performed an autopsy on September 26. Schindler amended her discovery responses on October 1 to notify appellees of Okoye's findings resulting from the autopsy. This was the first notice appellees received of the autopsy. Trial was scheduled to begin on October 15.

Neb. Ct. R. of Discovery 26(e) (rev. 1996) provides that a party has a duty to seasonably supplement his or her discovery responses as to any question addressed to the identity of an expert and the subject matter and substance of an expert's testimony and as to any prior responses that he or she knows were incorrect when made or although correct when made are no longer true, and under the circumstances, the failure to amend would be "in substance a knowing concealment."

As a general rule, the range of sanctions imposed for violations of the discovery rules is a matter within the discretion of the trial court. *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994). While there is no applicable rule or statute governing a trial court's exclusion of evidence, a trial court's exclusion of evidence can be sustained as an exercise of a trial court's inherent powers. See, *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir. 1993); *Unigard Sec. Ins. v. Lakewood Engineering & Mfg.*, 982 F.2d 363 (9th Cir. 1992);

*Lewis v. Darce Towing Co., Inc.*, 94 F.R.D. 262 (W.D. La. 1982). The inherent power doctrine has been recognized previously in Nebraska. See, *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939); *Lincoln Lumber Co. v. Elston*, 1 Neb. App. 741, 511 N.W.2d 162 (1993).

A district court's inherent powers include the broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. *Dillon v. Nissan Motor Co., Ltd., supra; Campbell Industries v. M/V Gemini*, 619 F.2d 24 (9th Cir. 1980). Without such inherent power, a court would be powerless to deal with discovery violations that do not specifically involve a court order. *Lewis v. Darce Towing Co., Inc., supra.* "When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap." *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995), citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Appellate review of a district court's use of inherent power is for an abuse of discretion. *Chambers v. NASCO, Inc., supra; Shepherd v. American Broadcasting Companies, Inc., supra.* See, also, *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

Based on the record in this case, we cannot conclude that the trial court abused its discretion in finding that the conduct of Schindler, her counsel, and her expert resulted in the destruction of evidence relevant to the case and in finding that Schindler failed to seasonably amend discovery responses which were no longer accurate. Schindler applied for a disinterment permit on September 16, 1996, with the help of her counsel, and Okoye performed the autopsy on September 26. No notice of the autopsy was provided to appellees until October 1, several days after the autopsy was performed and about 2 weeks before trial. When Schindler decided to have an autopsy performed, her discovery response that she was unaware of any autopsy was no longer accurate. The failure to amend was "in substance a knowing concealment." See rule 26(e).

Appellees presented an affidavit of pathologist Jerry Jones, who stated that in the course of the autopsy, Okoye removed the first and second cervical vertebrae and that in so doing the ver-

tebral and basilar arteries were destroyed, and that it would not be possible to confirm Okoye's findings with a second autopsy. Jones further stated that Okoye did not take any photographs of either the vertebral or basilar arteries and that the two microscopic sections of what were purported to be the vertebral arteries are so extensively decomposed that adequate evaluation and confirmation of the nature and identity of the vessels in this section are impossible. In the summary of Okoye's autopsy report, it was concluded that the "mechanism of death in this patient is cardiorespiratory failure from brainstem and cerebellar infarction due to the thrashing around of the patient which resulted in compression of the basilar-vertebral arterial system . . . ." If, in fact, Okoye's autopsy amounted to destructive testing with no notice of the autopsy being given to appellees to allow appellees to have simultaneous access to Gerald's body, that fact alone would justify the trial court's exclusion of the autopsy results.

We further conclude that the trial court did not abuse its discretion in determining that the exclusion of Okoye's testimony in Schindler's case in chief regarding his findings from the autopsy was the appropriate sanction. While the evidence derived from the autopsy may have had significant probative value to Schindler, Schindler was allowed to present Okoye's opinion as to the cause of Gerald's death without reference to the autopsy findings.

We do not need to discuss the exclusion of the evidence as rebuttal evidence because the reasons supporting the exclusion of the evidence apply with equal force to its exclusion as rebuttal evidence. See *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996) (holding it is within trial court's discretion whether to allow rebuttal evidence). Therefore, Schindler's assignments of error relating to autopsy evidence are without merit, and we affirm the judgment of the Court of Appeals.

## UNMC's "Cross-Appeal"

In its brief, UNMC argued as a "cross-appeal" that the trial court erred in awarding Schindler $15,000 for negligent infliction of emotional distress. The Court of Appeals declined to address the merits of UNMC's cross-appeal because UNMC failed to properly designate its argument as a cross-appeal.

Specifically, UNMC did not designate a cross-appeal on the cover of its brief, as required by rule 9D(4), and it did not set forth the cross-appeal in a separate section of the brief. Further, UNMC did not include a title page, a table of contents, a statement of the case, assigned errors, propositions of law, or a statement of the facts, all of which are required under rule 9D(1). UNMC merely added an additional argument to its brief, and the only indications that it was intended to be a cross-appeal were the capitalized, boldfaced, and centered words "CROSS APPEAL OF UNMC" which preceded UNMC's final argument section. The Court of Appeals further relied on the firmly established proposition of law that in order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. See *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998). The Court of Appeals concluded that UNMC's brief was a violation of this proposition because UNMC failed to assign any errors on cross-appeal, as well as failed to comply with the other procedural rules for bringing a cross-appeal. It is also firmly established that errors which are argued but not assigned will not be considered by an appellate court. *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998).

We conclude that UNMC failed to properly designate its argument as a cross-appeal. As such, the Court of Appeals did not err in declining to address the merits of UNMC's cross-appeal, and we refuse to address such argument here.

## CONCLUSION

The record in this case shows that the parties and the trial court tried this case on the basis that Walker and Patil were not employees of UNMC. To hold otherwise would mean that the claims against Walker and Patil would be under the jurisdiction of the Act and, as such, would have been tried to the trial court rather than the jury. The trial court did not, in this case, abuse its discretion in failing to exclude Smith from the jury panel.

The testimony of Okoye relating to his autopsy findings was properly excluded because Schindler failed to seasonably supplement her discovery responses with respect to the autopsy. The Court of Appeals did not err in concluding that the trial

court did not abuse its discretion in excluding the autopsy evidence. We affirm on this issue.

AFFIRMED.

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## JASON D. SCHINDLER, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

593 N.W.2d 295

Filed April 23, 1999. No. S-98-121.

1. **Administrative Law: Motor Vehicles: Judgments: Final Orders: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 60-6,208 (Reissue 1993), decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act. 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. **Constitutional Law: Statutes: Presumptions: 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. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Equal Protection: Statutes.** If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation.
4. **Constitutional Law: Drunk Driving.** Driving is not a fundamental right, and drunk drivers are not a suspect class.
5. **Administrative Law: Licenses and Permits: Revocation: Equal Protection.** Neb. Rev. Stat. §§ 60-6,205 (Cum. Supp. 1996) and 60-6,206 to 60-6,208 (Reissue 1993) bear a rational relationship to legitimate state interests and do not violate equal protection.
6. **Constitutional Law.** A sanction must be construed as punishment for the Eighth Amendment to be implicated.
7. **Constitutional Law: Administrative Law: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests.** Administrative license revocation imposed for refusing to submit to a chemical test does not constitute punishment and does not constitute cruel and unusual punishment.

Appeal from the District Court for Antelope County: RICHARD P. GARDEN, Judge. Affirmed.

Rodney W. Smith, of The Law Offices of Rodney W. Smith, P.C., for appellant.

Don Stenberg, Attorney General, and Carla Heathershaw Risko for appellee.

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

CONNOLLY, J.

Appellant, Jason D. Schindler, asks this court to determine that Neb. Rev. Stat. §§ 60-6,205 (Cum. Supp. 1996) and 60-6,206 to 60-6,208 (Reissue 1993), the administrative license revocation statutes, are unconstitutional because they violate equal protection and constitute cruel and unusual punishment.

Schindler was arrested and charged with driving under the influence of alcohol or drugs, a Class W misdemeanor. After his arrest, Schindler was read the postarrest chemical test advisement and asked to submit to a blood test for alcohol and a urine test for drugs. Schindler refused.

The Department of Motor Vehicles held an administrative proceeding and revoked Schindler's driving privileges. Schindler appealed the order of the department to the district court under the Administrative Procedure Act, asserting that the administrative license revocation statutes are unconstitutional in that they violate equal protection and constitute cruel and unusual punishment. The district court affirmed the department's order, specifically finding that the arrest was made with probable cause, that Schindler improperly refused to submit to a chemical test, and that the administrative license revocation statutes are not unconstitutional. We affirm.

## ASSIGNMENTS OF ERROR

Schindler asserts that the district court erred in (1) finding that the administrative license revocation statutes did not deny Schindler equal protection of the laws by (a) creating an underinclusive class by excluding persons who drive under the influence of alcohol but are not required to submit to a chemical test, persons who drive under the influence of drugs, and persons who refuse to submit to a chemical test to determine the pres-

ence of drugs and (b) by creating an overinclusive class which includes persons who refuse to submit to a chemical test; (2) finding that the administrative license revocation statutes, which provide a 1-year suspension for refusal to submit to a chemical test, first offense, when a person who submits to a chemical test that reveals an alcohol level in excess of the statutory limit, first offense, is subject only to a 90-day suspension, did not deny Schindler equal protection of the laws; (3) finding that the denial of an employment driving permit authorized in § 60-6,206(2) to persons who refuse to submit to a chemical test was not a violation of the Equal Protection Clause; (4) finding that denial of the reinstatement procedures prescribed in § 60-6,206(4) to persons who refuse to submit to a chemical test was not a violation of the Equal Protection Clause; and (5) finding that the penalties provided by the administrative license revocation statutes which are applicable to a person who refuses to submit to a chemical test, first offense, are not so disproportionate to the offense as to constitute cruel and unusual punishment.

## SCOPE OF REVIEW

Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act. *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998); § 60-6,208. 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. *Id.*

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. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997).

## ANALYSIS

### EQUAL PROTECTION

Schindler argues that the administrative license revocation statutes violated his right to equal protection. In discussing equal protection, we have stated:

> In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. . . . If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. On the other hand, if a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end. . . . Upon a showing that such a rational relationship exists, courts will uphold the legislation.

(Citations omitted.) *State v. Garber*, 249 Neb. 648, 652-53, 545 N.W.2d 75, 78-79 (1996).

This court has held that driving is not a fundamental right and that drunk drivers are not a suspect class. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). Accordingly, we examine the administrative license revocation statutes at issue herein, §§ 60-6,205 and 60-6,206 to 60-6,208, using the rational relationship standard of review. See *State v. Michalski, supra.*

Administrative license revocation serves legitimate state interests. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Thus, the question is whether a rational relationship exists between these legitimate state interests and the statutory means selected by the Legislature to accomplish that end—the administrative license revocation statutes.

In his second, third, and fourth assignments of error, Schindler argues that certain differences in treatment between

persons who refuse to submit to a chemical test and persons who submit to and fail the test violate equal protection. In *Howell*, we addressed these same differences, albeit in the double jeopardy context. We noted that in the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. However, in the context of refusal to submit to a chemical test, administrative license revocation serves the additional purpose of facilitating the gathering of evidence. Accordingly, we held that the remedial scheme imposed upon those who refuse to submit to a chemical test, although harsher than that imposed on those who take and fail the test, is not excessive and is therefore rational in relation to its purpose.

In his first assignment of error, Schindler asserts that the administrative license revocation procedures violated his equal protection rights because they are both overinclusive and underinclusive.

Schindler asserts that the administrative license revocation scheme is overinclusive because it may sanction persons who refuse to submit to a chemical test but were not driving under the influence of alcohol. A similar argument was made in *State v. Howell, supra*, wherein we stated that the probable cause requirement "ensures that those who are asked to submit to a chemical test are only those persons who are likely to be under the influence and, thus, serves to protect public health and safety by removing the threat such persons pose." *Id.* at 255, 575 N.W.2d at 867.

Schindler asserts that the administrative license revocation scheme is underinclusive because it does not apply to those persons who drive under the influence of drugs or those who refuse to submit to a chemical test for drugs. Although such persons may present a hazard to other motorists, the Legislature could rationally have determined that the number of such persons on the roads is significantly less than the number of persons driving under the influence of alcohol and, thus, present a lesser hazard. The Equal Protection Clause does not require the Legislature to eliminate all evils in order to legislate against some. *U.S. v. McDougherty*, 920 F.2d 569 (9th Cir. 1990).

The rational basis standard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. *State v. Garber, supra*, quoting *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). We conclude that the administrative license revocation statutes bear a rational relationship to the legitimate state interests at stake.

Arguably, the State could serve these interests by enacting another revocation scheme. However, strict scrutiny does not apply in the instant case; the means employed by the State need not be the least restrictive. " ' "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." ' " *State v. Garber*, 249 Neb. 648, 653-54, 545 N.W.2d 75, 79 (1996), quoting *Dandridge v. Williams, supra*. Schindler's assignments of error concerning equal protection are without merit.

### CRUEL AND UNUSUAL PUNISHMENT

Finally, Schindler contends that the administrative license revocation scheme imposed on those who refuse to submit to a chemical test constitutes cruel and unusual punishment. However, it is axiomatic that the sanction at issue must be construed as punishment for the Eighth Amendment to be implicated. *U.S. v. Dubose*, 146 F.3d 1141 (9th Cir. 1998). Administrative license revocation imposed for refusing to submit to a chemical test does not constitute punishment. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). This assignment of error is without merit.

## CONCLUSION

The administrative license revocation statutes do not violate equal protection, nor do they constitute cruel and unusual punishment.

AFFIRMED.

GERRARD, J., concurs in this result.

# IN RE INTEREST OF WILLIAM G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. WILLIAM G., APPELLANT.

592 N.W. 2d 499

Filed April 23, 1999. No. S-98-690.

1. **Juvenile Courts: Appeal and Error.** The review of appeals from juvenile proceedings is de novo on the record and thus requires a conclusion independent of the juvenile court's findings.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Standing: Jurisdiction: Appeal and Error.** An appellate court may, on its own motion, examine and determine whether an appellant has satisfied the requirements for appellate jurisdiction, including the requirement of standing.
5. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
6. **Parties: Standing: Appeal and Error.** Only an aggrieved party can take an appeal.
7. ____: ____: ____. It is a general rule that only a person aggrieved or injured by a judgment may take an appeal from it.
8. **Criminal Law: Appeal and Error.** A person who has been released and discharged from further prosecution under a complaint is not legally aggrieved and therefore cannot appeal.
9. **Juvenile Courts: Judgments.** A juvenile who has been released from commitment and no longer has any further contact with the office of juvenile services is no longer legally aggrieved by a judgment of the juvenile court.
10. **Juvenile Courts: Parties: Standing: Appeal and Error.** For purposes of an appeal in a juvenile proceeding, the Nebraska Juvenile Code delineates those persons or entities which may be considered parties and therefore have standing to appeal a judgment from a juvenile court.
11. **Juvenile Courts: Appeal and Error.** Neb. Rev. Stat. § 43-2,106.01 (Reissue 1998) governs appeals in juvenile proceedings.
12. **Attorney and Client: Guardians Ad Litem.** The duties and responsibilities of a guardian ad litem are not coextensive with those of an attorney.
13. ____: ____. While an attorney serving as counsel acts in accordance with a client's wishes within the limits of the law, a guardian ad litem, generally speaking, steps into the position of the ward and, after considering the alternatives, asserts the right of the ward as the guardian ad litem sees fit.
14. **Standing.** In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of others.

15. **Judgments: Collateral Attack.** If a judgment is entered without jurisdiction of the person or the subject matter or in excess of the court's power, it is void and may be collaterally impeached.
16. **Courts.** Where there is no adequate remedy by the ordinary course of the law, a duty is imposed upon the Nebraska Supreme Court to prevent violation of law by inferior tribunals.
17. **Mandamus: Judgments.** A judge of the district court may, if the ordinary remedy is inadequate, be compelled by mandamus to vacate or set aside an order or judgment granted by the judge when done without jurisdiction or authority.

Appeal from County Court for Dakota County: PATRICK G. ROGERS, Judge. Appeal dismissed.

Martin G. Cahill, Dakota County Public Defender, on brief, for appellant.

Mark L. Andrews, Deputy Dakota County Attorney, for appellee.

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

HENDRY, C.J.

## INTRODUCTION

This is an appeal from the commitment of a juvenile, William G., to the Youth Rehabilitation and Treatment Center (Center) at Kearney, Nebraska. This appeal questions the trial court's appointment of a public defender in a juvenile case, claiming it is not statutorily authorized. The main issue on review is whether the appeal was properly brought before this court, thereby vesting appellate jurisdiction.

## BACKGROUND

On February 3, 1998, in the county court for Keith County, Nebraska, William was charged with possession of stolen property, a Class III felony. During his arraignment, William requested court-appointed counsel. On February 13, William appeared in court with his attorney, Edward Steenburg, and requested that the matter be transferred to Keith County Juvenile Court. The court granted the transfer to juvenile court and allowed the felony complaint to serve as the petition in the juvenile court proceeding. The Keith County Court, sitting as a

juvenile court, accepted William's admission of the allegations contained in the complaint and ordered "a predispositional report to be completed by the District 9 Probation Office." On March 25, prior to disposition, the case was transferred to the juvenile court of Dakota County.

Although there is nothing in the record indicating when Martin Cahill, the Dakota County Public Defender, was appointed to the case in the Dakota County Juvenile Court, on April 8, 1998, Cahill filed a motion to withdraw from the representation of the "[n]atural parents [sic]." In support of this motion, Cahill stated that "the office of the public defender is governed by Neb. Rev. Stat. § 23-3401 (Reissue [1997]), and that . . . specifically [Neb. Rev. Stat.] § 23-3402 [(Reissue 1997)] makes no mention of appointment of the office of the public defender in juvenile cases." However stated, it is clear from the record and the acknowledgment of the parties at oral argument that Cahill was requesting relief from the representation of William. On April 9, the motion was denied, with the notation that the "Court finds *this defendant* is an indigent felony defendant under [§] 23-3402." (Emphasis supplied.)

On June 1, 1998, a dispositional hearing was held on behalf of William. Although both William and his natural mother were present at the hearing, Cahill entered his appearance only on behalf of "the [j]uvenile" defendant. Additionally, the county court certificate of transcript indicates that William's mother appeared pro se and that his father never appeared. The hearing was concluded with a court order entered June 1, committing William to the Department of Health and Human Services, Office of Juvenile Services, for commitment to the Center.

On June 30, 1998, Cahill filed a notice of appeal in the county court for Dakota County, giving notice that William intended to prosecute an appeal from the judgment entered on June 1. The only error William assigns in this appeal, however, is the April 9 denial of the public defender's motion to withdraw.

We removed this case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENT OF ERROR

William's only assignment of error is that the trial court abused its discretion by denying the public defender leave to withdraw.

## STANDARD OF REVIEW

The review of appeals from juvenile proceedings is de novo on the record and thus requires a conclusion independent of the juvenile court's findings. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999); *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999); *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

## ANALYSIS

Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998). See, also, *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997). An appellate court may, on its own motion, examine and determine whether an appellant has satisfied the requirements for appellate jurisdiction, including the requirement of standing. *Id.* Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Cotton v. Steele, supra.* Only an aggrieved party can take an appeal. *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995).

We initially note that the record does not indicate whether William remains confined to the Center. However, the parties' briefs indicate that William was discharged from the Center in

August 1998 and no longer has any further contact with the Office of Juvenile Services. This was further acknowledged by the parties at oral argument.

Accordingly, standing does not exist for the reason that William is not legally aggrieved. Once the judgment, William's commitment to the Center, was fully executed, William could not be affected by this appeal. It is a general rule that only a person aggrieved or injured by a judgment may take an appeal from it. See, *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987); *State v. Sports Couriers, Inc.*, 210 Neb. 168, 313 N.W.2d 447 (1981). A person who has been released and discharged from further prosecution under a complaint is not legally aggrieved and therefore cannot appeal. See *State v. Sports Couriers, Inc., supra* (citing *Lewis v. United States*, 216 U.S. 611, 30 S. Ct. 438, 54 L. Ed. 637 (1910)). Likewise, a juvenile who has been released from commitment and no longer has any further contact with the Office of Juvenile Services is no longer legally aggrieved by a judgment of the juvenile court.

Although this appeal appears to have been taken by William, the assignment of error and the record show that in actuality this is an appeal by the office of the public defender from the juvenile court's order denying the public defender's motion to withdraw from representation. The public defender, however, is not a party to this action.

The various interests in the health and welfare of juveniles make it possible for entities and persons, other than the juvenile, to become parties in a juvenile proceeding. For purposes of an appeal in a juvenile proceeding, the Nebraska Juvenile Code delineates those persons or entities which may be considered parties and therefore have standing to appeal a judgment from a juvenile court. Neb. Rev. Stat. § 43-2,106.01 (Reissue 1998) governs appeals in juvenile proceedings and, in pertinent part, provides:

> (2) An appeal may be taken by:
>
> (a) The juvenile;
>
> (b) The guardian ad litem;
>
> (c) The juvenile's parent, custodian, or guardian. For purposes of this subdivision, 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; or

(d) The county attorney or petitioner, except that in any case determining delinquency issues in which the juvenile has been placed legally in jeopardy, an appeal of such issues may only be taken by exception proceedings pursuant to sections 29-2317 and 29-2319.

The record establishes that the public defender was appointed as attorney for William and acted throughout these proceedings in that capacity. Such an appointment is distinct from an appointment as a guardian ad litem. The duties and responsibilities of a guardian ad litem are not coextensive with those of an attorney. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998); *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997). While an attorney serving as counsel acts in accordance with a client's wishes within the limits of the law, a guardian ad litem, generally speaking, steps into the position of the ward and, after considering the alternatives, asserts the right of the ward as the guardian ad litem sees fit. *Billups v. Scott, supra.*

It is evident the public defender does not fall within the scope of any of the statutory categories which are permitted to appeal from a judgment of the juvenile court. The public defender is not a party to a juvenile proceeding and may not claim error to an order that does not affect the disposition of William. In a somewhat analogous case, we approvingly quoted from an opinion of the Supreme Court of Iowa which held that an attorney appointed by the court for the defendant in a criminal prosecution was not a party of record and had no right of appeal from an order setting his attorney's fee. *State v. Berry*, 192 Neb. 826, 224 N.W.2d 767 (1975) (citing *State v. Schmidt*, 259 Iowa 972, 145 N.W.2d 631 (1966)). " 'His claim the trial court erred in the amount allowed does not go to an affirmance or reversal of defendant's conviction. The order was not adverse to defendant. It is an attempt to appeal by the attorney who is not a party herein. This cannot be done.' " *Id.* at 830, 224 N.W.2d at 769 (quoting *State v. Schmidt, supra*). See *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987). Although the proceeding appealed from is not a criminal prosecution, the rea-

soning is the same. In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of others. *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

The juvenile, William, does not have standing to take this appeal and neither does the public defender, Cahill. William is not legally aggrieved, and Cahill is not a party to the juvenile proceedings, nor does he have a statutory right of appeal. Accordingly, there is no right of appeal from the juvenile court's order denying the public defender leave to withdraw from the representation of William in the juvenile proceedings. Consequently, we do not reach the assignment of error in the absence of appellate jurisdiction.

Although there is no right of appeal in this action, if a judgment is entered without jurisdiction of the person or the subject matter or in excess of the court's power, it is void and may be collaterally impeached. *Griffin v. Vandersnick*, 210 Neb. 590, 316 N.W.2d 299 (1982); *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *cert. granted sub nom. Nebraska Press Assn. v. Stuart*, 423 U.S. 1027, 96 S. Ct. 557, 46 L. Ed. 2d 401, *rev'd on other grounds* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). Where there is no adequate remedy by the ordinary course of the law, a duty is imposed upon this court to prevent violation of law by inferior tribunals. *State ex rel. Wolski v. Reed*, 146 Neb. 348, 19 N.W.2d 545 (1945). If, as the public defender argues, the district court was without jurisdiction to appoint the office of the public defender in a juvenile case, then the order was void and subject to collateral attack. See *County of Adams v. Nebraska State Bd. of Equal.*, 252 Neb. 847, 566 N.W.2d 392 (1997). The public defender had two options: (1) ignore the order or, if he wished to avoid the possibility of some effort by the court to start contempt proceedings, (2) collaterally attack the order in some manner as by mandamus or action for declaratory judgment. See, *State v. Simants, supra*; *State ex rel. Wolski v. Reed, supra* (holding that judge of district court may, if ordinary remedy is inadequate, be compelled by mandamus to vacate or set aside order or judgment granted by judge when done without jurisdiction or authority). See, also, *Albers v. Koffman*, 815 S.W.2d 484 (Mo. App. 1991) (granting public

defender's petition for writ to prohibit trial judge from carrying out court's order that public defender represent defendant in civil contempt proceeding where trial court lacked authority to appoint public defender to represent party in civil contempt proceeding); *Vela v. Dist. Court in & for Arapahoe County*, 664 P.2d 243 (Colo. 1983) (granting petition of public defender for relief in nature of mandamus and prohibition requiring court to grant motion to withdraw from representation of defendant in civil contempt proceeding where trial judge exceeded authority in appointing public defender to represent defendant in civil matters).

## CONCLUSION

For the reason that there is no standing, this case is not properly before this court, and we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

CONNOLLY, J., concurring.

I agree that the appeal must be dismissed because of lack of standing. However, I do not join in that part of the opinion discussing collateral impeachment of a judgment or other advisory aspects of the opinion. Because we have dismissed for lack of jurisdiction, any further discussion is dictum.

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STATE OF NEBRASKA, APPELLANT, V.
MICHAEL DORCEY, APPELLEE.
592 N.W.2d 495

Filed April 23, 1999. No. S-98-727.

1. **Courts: Jurisdiction.** An actual case or controversy is a prerequisite to the exercise of judicial power.
2. **Dismissal and Nonsuit.** Parties to a case are incapable of pursuing judicial relief in the case after it has been voluntarily dismissed.
3. **Dismissal and Nonsuit: Final Orders.** Where a case is voluntarily dismissed, there is no final order on the law or facts of the case, nor has there been a decision on the merits.

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. Exception dismissed.

Dean Skokan, Dodge County Attorney, and Kevin J. Slimp for appellant.

Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Appellee, Michael Dorcey, was charged in the county court for Dodge County with driving under the influence of alcohol in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). The county court granted Dorcey's motion to suppress "all evidence." On the State's behalf, the county attorney for Dodge County moved in county court to voluntarily dismiss the complaint, the motion was granted, and the county court's case was dismissed. Thereafter, the State filed in the county court a notice of intent to appeal the county court's order sustaining the motion to suppress to the district court for Dodge County. A series of provisions contained in Neb. Rev. Stat. § 29-2315.01 et seq. (Reissue 1995) allows prosecutorial appeals and the review of certain trial court rulings. The State filed its appeal based on § 29-2317. After hearing, the district court concluded that it had no jurisdiction to consider the State's appeal under § 29-2317 because the notice of appeal was filed by the State in a voluntarily dismissed case and was a nullity.

The Nebraska Court of Appeals granted the State leave to docket error proceedings under § 29-2315.01. The case was moved to the docket of the Nebraska Supreme Court. The State assigns as error the district court's dismissal of its appeal. For the reasons recited below, we conclude that the district court correctly dismissed the appeal and that, accordingly, the State's exception is dismissed.

## STATEMENT OF FACTS

Dorcey was arrested on July 27, 1997, on suspicion of driving under the influence of alcohol, in violation of § 60-6,196. Based on Dorcey's arrest, the State filed a complaint against Dorcey in the county court on August 5.

On December 10, 1997, Dorcey filed a motion in the county court to suppress "all evidence against this Defendant in the above captioned prosecution." In his motion, Dorcey claimed that when he was stopped by law enforcement officers, the officers lacked reasonable suspicion that a crime had been or was being committed or any other appropriate articulable basis for stopping Dorcey. In an order filed March 12, 1998, the county court granted Dorcey's motion to suppress the State's evidence against Dorcey.

The county court's order of March 12, 1998, was limited to the evidentiary relief Dorcey requested, and the county court did not dismiss the complaint filed against Dorcey at that time. In a motion filed on March 20, the State requested that the county court dismiss the complaint against Dorcey. In an order filed the same day, the county court sustained the State's motion and dismissed the county court case against Dorcey.

On March 25, 1998, 5 days after the complaint against Dorcey was dismissed in county court at the State's behest, the State filed a pleading in the county court entitled "Notice of Prosecutor's Intent to Appeal," in which the State indicated that it intended to challenge the county court's order suppressing evidence against Dorcey by appealing this ruling to the district court. The State's notice specifically referred to § 29-2317 as the procedure on which it was relying in seeking an appeal to the district court.

The State's appeal was heard in the district court on May 11, 1998. The district court concluded that it had no jurisdiction to consider the State's appeal of the county court's order because the State filed its notice of appeal in the county court after the county court case against Dorcey had been voluntarily dismissed. The district court, therefore, dismissed the State's appeal. The district court further observed that the procedure under Neb. Rev. Stat. § 29-827 (Reissue 1995), pursuant to

which at that point in time the State could have dismissed the county court case and refiled in district court, was not followed in this case.

The State sought leave to docket the proceedings for review under § 29-2315.01. Leave was granted.

## ASSIGNMENT OF ERROR

The State claims that the district court erred in dismissing the State's appeal of the county court's order which granted Dorcey's motion to suppress.

## ANALYSIS

Pursuant to § 29-2315.01, the county attorney for Dodge County applied for leave to docket an appeal in the Court of Appeals on the issue of the propriety of the district court's dismissal of the State's purported appeal to district court pursuant to § 29-2317. Under § 29-2315.01, the State may request the appellate court to review an adverse decision or ruling in a criminal case in district court after a final order or judgment in the criminal case has been entered. The purpose of this procedure is to provide an authoritative exposition of the law to serve as precedent in future cases. See, *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996); *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976); *State v. Wilen*, 4 Neb. App. 132, 539 N.W.2d 650 (1995).

### Purported Appeal Under § 29-2317

In the instant case, the State invoked § 29-2317 in pursuing its appeal from the county court to the district court and § 29-2315.01 in connection with the docketing of the proceedings now before this court, challenging the ruling of the district court.

Section 29-2317(1) allows a prosecuting attorney to "take exception to any ruling or decision of the county court made during the prosecution of a cause by presenting to the court a notice of intent to take an appeal to the district court." Under § 29-2317(2), such notice to the county court shall be accompanied by documentation showing the ruling which is the subject of the appeal, the basis or reasons for the State's objection, and a statement of the record which the prosecutor proposes to

present to the district court on appeal, which documentation the county court judge shall certify as adequate for review. Section 29-2317(2) further provides that "[t]he notice [filed in county court] shall be presented to the court within twenty days after the final order is entered in the cause." With respect to the effect of an appeal properly brought under § 29-2317, § 29-2319(1) provides:

> The judgment of the court in any action taken under the provisions of sections 29-2317 and 29-2318 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the district court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may thereafter arise in the district.

See, *State v. Sports Couriers, Inc.*, 210 Neb. 168, 313 N.W.2d 447 (1981); *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978).

In the instant case, the district court's dismissal of the State's appeal brought pursuant to § 29-2317 was based on its lack of jurisdiction due to the filing of the notice of appeal in the voluntarily dismissed county court case. The determination of a jurisdictional issue which does not involve a factual dispute is an issue of law which requires an appellate court to reach its conclusion independent from that of the trial court. *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

In this case, the State filed its notice of appeal in the county court after the complaint filed against Dorcey was dismissed at the State's request. An actual case or controversy is a prerequisite to the exercise of judicial power. *State v. Jacob, ante* p. 492, 591 N.W.2d 541 (1999); *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). When a case is dismissed by a party, the controversy between the parties upon which a trial court may act ends. *Plattsmouth Loan & Bldg. Ass'n v. Sedlak*, 128 Neb. 509, 259 N.W. 367 (1935). Parties to a case are incapable of pursuing judicial relief in the case after it has been voluntarily dismissed. *Id.*; *Harris v. Cronk*, 17 Neb. 475, 23 N.W. 341 (1885). Where the case is voluntarily dismissed, there is no final order on the law or facts of the case, *Schroeder v. Schroeder*,

223 Neb. 684, 392 N.W.2d 787 (1986), nor has there been a decision on the merits, *Miller v. Harris*, 195 Neb. 75, 236 N.W.2d 828 (1975). Accordingly, no appeal will lie.

In the instant case, the record is undisputed that the State gave notice of its intent to appeal the county court's order suppressing evidence against Dorcey 5 days after the county court dismissed the complaint against Dorcey at the State's request. The notice of appeal the State filed in the county court was a nullity, as was the county court's certification to the district court under § 29-2317(2). See *Werner v. Werner*, 186 Neb. 558, 184 N.W.2d 646 (1971). Because the case against Dorcey had been dismissed at the State's request, there was no longer a case or controversy pending in which the parties could pursue judicial relief or over which the trial court could exercise jurisdiction. See, *id.*; *Plattsmouth Loan & Bldg. Ass'n v. Sedlak, supra*; *Harris v. Cronk, supra.* See, also, *State v. Jacob, supra.* We agree with the district court's conclusion that it had no jurisdiction over the State's appeal for the reason that the State's notice of appeal filed in a case which it had voluntarily dismissed was a nullity. Where the district court lacks jurisdiction, this court lacks jurisdiction.

### Purported Appeal Under § 29-827

In its argument to this court, the State claims that notwithstanding the fact that its appeal to the district court was premised on § 29-2317, its appeal to the district court was nevertheless proper under § 29-827. Because the State did not pursue the process then available under § 29-827, we reject the State's argument.

Although § 29-827 has been repealed effective July 15, 1998, in the period during which § 29-827 was effective, in criminal cases where jeopardy had not yet attached, § 29-827 allowed a prosecutor to dismiss a criminal complaint filed in county court after an adverse ruling suppressing the State's evidence against a defendant and further authorized the State to commence the case anew by filing an information in the district court. See, *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995); *State v. Chamley*, 223 Neb. 614, 391 N.W.2d 99 (1986). In the instant case, the county court dismissed the case on March 20, 1998.

Section 29-827 was repealed by the Nebraska Legislature effective July 15, 1998. See 1998 Neb. Laws, L.B. 218. Thus, the refiling procedure available under § 29-827 was available to the State at the time relevant to this case, and the State did not avail itself of this procedure.

We reject the State's belated invocation of § 29-827 to justify its appearance in the district court challenging the county court's order granting Dorcey's motion to suppress, which appeal was explicitly taken under § 29-2317.

## CONCLUSION

We conclude the district court's dismissal of the State's appeal under § 29-2317 was correct because the State's notice of appeal which was filed in the county court case which the State had previously voluntarily dismissed was a nullity. The district court lacked jurisdiction, and accordingly, this court lacks jurisdiction. For the foregoing reason, the State's exception brought to this court under § 29-2315.01 is dismissed.

EXCEPTION DISMISSED.

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KIMBERLY RITCHHART, APPELLEE, V. HAL DAUB, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF OMAHA, ET AL., APPELLANTS.

594 N.W.2d 288

Filed April 29, 1999. No. S-98-224.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from those of a trial court.
2. **Standing: Jurisdiction: Parties: Courts.** Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding.
3. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. ____: ____. As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invo-

cation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.

6. **Standing.** Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.
7. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
8. **Municipal Corporations: Actions.** A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded with directions to dismiss.

Thomas O. Mumgaard, Assistant Omaha City Attorney, for appellants.

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

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

GERRARD, J.

## INTRODUCTION

The appellants, Hal Daub, Thomas Graeve, and Mark Conrey, were, respectively, the mayor, the fire chief, and the communications chief for the city of Omaha (collectively the defendants). They appeal from a judgment of the district court purporting to void certain oral agreements that Daub had made with Graeve and Conrey. For the reasons discussed below, we conclude that the appellee, Kimberly Ritchhart, did not have standing to prosecute this action. Accordingly, the district court did not have jurisdiction to consider the issues presented, and we reverse the district court's judgment and remand the cause with directions to dismiss Ritchhart's amended petition.

## FACTUAL BACKGROUND

The Omaha home rule charter, art. III, § 3.11, provides that public safety functions for the city of Omaha shall be performed

by the fire department headed by the fire chief, the police department headed by the police chief, and the communications department headed by the communications chief. The communications chief is responsible for the operation of the city's 911 emergency dispatch service. Each of these department heads is part of the city's "classified service." Omaha home rule charter § 3.11. See, also, Omaha Mun. Code, ch. 23, art. III, §§ 23-92 and 23-93.

An employee in the classified service, if dismissed, has the right to appeal the dismissal within 10 days of receipt of the letter of dismissal. Omaha Mun. Code, ch. 23, art. III, § 23-296. Appeals are taken to the city of Omaha's personnel board, and in such an appeal, the city has the burden to prove, by a preponderance of the evidence, that the action was taken for just cause and in good faith. Omaha home rule charter, art. VI, § 6.04(3). Just cause may include, but is not limited to, substance abuse, conviction of a crime, abuse of a person in custody, offensive conduct or language, insubordination, incompetence, negligence, violation of regulations, willful violation of the city charter, bribery, failure to pay debts, or absence from duty. Omaha Mun. Code, ch. 23, art. III, § 23-291.

Daub became mayor of Omaha on January 9, 1995. On December 31, he appointed Graeve to be the fire chief, and on January 8, 1996, he appointed Conrey to be the communications chief. As part of the hiring process, Daub asked Graeve and Conrey whether they would, if discharged, be willing to waive their right to appeal to the personnel board. They both agreed.

Ritchhart filed suit in the district court against the defendants, alleging that she was a "resident, registered voter, and citizen of Omaha." In her operative amended petition, Ritchhart alleged that the agreements among the defendants violated her right, under the Omaha home rule charter and the Omaha Municipal Code, to have the public safety functions of the city of Omaha performed without political influence or control.

The defendants demurred, arguing that Ritchhart lacked legal capacity to bring the action. The district court found:

> In the present case, [Ritchhart] has alleged that she has a legal or equitable interest in the rights, benefits and protections granted to her by the Charter, as adopted and

> amended by the voters of the City of Omaha. Police protection, fire service, and emergency communications are such essential services of government that any citizen should have the right to sue if these services are not being provided in compliance with applicable law. As such, the Court finds that [Ritchhart] has standing to bring this suit in equity to enjoin city officials from violating the letter and intent of the City Charter.

Based on this determination, the district court overruled the demurrer and set the case for trial.

At trial, Daub testified that his inquiry regarding waiver of the right to appeal was more of a "gentleman's agreement," as opposed to a legally enforceable obligation. Daub stated that his agreements with Graeve and Conrey were not conditions of employment and that Daub understood that the agreements would not have been enforceable or legally binding in any way. Daub also testified that when appointing a police chief, which had not occurred at the time of trial, he did not intend to require a binding agreement from his appointee regarding waiver of the right to appeal, nor was he even certain that he would discuss the issue with the appointee.

The testimony of Graeve and Conrey was generally consistent with that of Daub. Both Graeve and Conrey testified that although they intended to abide by the terms of the agreements, they both understood the agreements not to be legally binding upon them.

The district court, after trial, entered a permanent injunction against Daub. The court found, "regardless of how you label this agreement, that the Defendant Daub's actions constitute an overt effort to rewrite or to change the Charter and that such action would cause irreparable harm to the integrity of the classified positions involved." The court found that the agreements Daub had with Graeve and Conrey were null and void, that Daub should be permanently enjoined from enforcing his agreements with Graeve and Conrey, and that Daub should be enjoined from entering into any agreement with the prospective police chief, or any other prospective member of the classified service, whereby the individual's appeal rights under the

Omaha home rule charter were waived or modified. This appeal followed.

## ASSIGNMENTS OF ERROR

The defendants argue that the district court erred (1) in finding that Ritchhart had standing to sue, (2) in concluding that it had subject matter jurisdiction in the action, and (3) in finding that Ritchhart's amended petition stated facts sufficient to constitute a cause of action.

## STANDARD OF REVIEW

Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from those of a trial court. *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

## ANALYSIS

The first issue we must address is whether Ritchhart had standing to bring this action. Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding. *Id.*

In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999); *Hawkes v. Lewis, supra.* As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Id.* Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. *Cotton v. Steele, supra.*

In the present case, Ritchhart argues that she, as an Omaha resident, "is entitled to the rights, benefits, and protections of the Omaha City Charter which include having the public safety functions performed by individuals who are in the classified service with the protections thereof which insures the discharge of their duties free and unobstructed by political influence." Brief for appellee at 3-4. Ritchhart, however, has not alleged or identified any interest she has in the outcome of this litigation which is not shared equally by all the residents of Omaha.

We have long held that in order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985). Accord *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986). We have further stated: " 'A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.' " *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 899, 327 N.W.2d 595, 602 (1982) (quoting *West Fort Residents Assn. v. Housing Auth. of City of Omaha*, 205 Neb. 397, 288 N.W.2d 27 (1980)).

In the case at bar, neither Ritchhart's pleadings nor her brief identify any special injury independent and aside from that shared by the general public. Ritchhart did not plead an illegal expenditure of public funds or an increase in the burden of taxation, and concedes on appeal that "[t]his case is not a taxpayer's action, and has never been alleged or argued as such." Brief for appellee at 5. Thus, according to the well-established principles of standing set forth by this court, Ritchhart would not have standing to maintain this action.

In overruling the defendants' demurrer on the issue of standing, however, the district court relied on the theory that since police, fire, and emergency communications are "essential services," any citizen should have standing to raise a challenge if those services are allegedly not being provided in accord with legal requirements. The district court erred in this determination.

In a Missouri case presenting similar issues, the court of appeals determined that citizens of a city lacked standing to bring a challenge to the city's decision to contract for municipal law enforcement services. *Worlledge v. City of Greenwood*, 627 S.W.2d 328 (Mo. App. 1982). In that case, the city had dismissed the municipal police force and contracted with the county government for municipal law enforcement in the city. *Id.* A group of residents sued, alleging that the contract "'threatens the safety and well-being of said residents and will result in irreparable harm.'" *Id.* at 330. The plaintiffs argued that the best interests of the city would be served by having a municipal police force instead of the special services of assigned county sheriff's deputies and that the city was without legal authority to contract for the provision of municipal police protection. *Id.*

The appellate court noted that the plaintiffs had pled no more than a generalized injury, had not proved that public funds of the city were to be illegally spent, and had not shown that they would be subjected to an increased tax burden as a result of the contract. *Id.* The court determined that the "plaintiffs' cause failed because plaintiffs lacked standing as aggrieved parties entitled to maintain the action for injunction." *Id.* at 331.

In the present case, Ritchhart has similarly alleged a general interest in the benefits of municipal law enforcement and emergency services. This supposed injury, however, is common to all the citizens of Omaha and is insufficient to confer standing upon Ritchhart to sue.

We are aware of a trend, under certain circumstances, to expand the traditional standing requirements. See, e.g., *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841 (1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 1256, ___ L. Ed. 2d ___ (1999); *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988); *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982); *Alaska Public Defender Agcy. v. Superior Court*, 584 P.2d 1106 (Alaska 1978); *Blondheim v. State*, 84 Wash. 2d 874, 529 P.2d 1096 (1975); *Channel 10 v. Independent School Dist. No. 709*, 298 Minn. 306, 215 N.W.2d 814 (1974).

Even if we were to find this authority to be persuasive, it is evident that the concerns expressed by those courts are not present in the instant case. One of the primary considerations for the courts that have liberalized standing requirements has been whether, if standing were denied, there would be any party that would be able to assert the claim and represent the public interest. See *Sprague v. Casey, supra.* Courts have thus imposed a minimal inquiry of whether the interests of the parties are actually adverse, and those courts have been willing to find standing supported by such an inquiry. See, *Alaska Public Defender Agcy. v. Superior Court, supra*; *Channel 10 v. Independent School Dist. No. 709, supra.*

It has been stated, however, that " '[c]onsideration must be given to other factors such as, for example, the appropriateness of judicial relief, the availability of redress through other channels, or *the existence of other persons better situated to assert the claim.*' " (Emphasis in original.) *Application of Biester*, 487 Pa. 438, 446, 409 A.2d 848, 852 (1979) (quoting *Government of Guam ex rel. Camacho v. Bird*, 398 F.2d 314 (9th Cir. 1968)). The threshold question, then, when a party attempts to base standing on an injury common to the general public, has been whether or not there exists another party whose interests are more at issue in the action, and who is thus more appropriately entitled to present the claim. Compare *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998) (holding that standing cannot be based on asserted rights of third party).

The concern underlying this permutation of the standing doctrine is that in certain cases, judicial review would not otherwise occur. In the present case, however, it is clear that to the extent that a cause of action might exist, the parties capable of asserting it would be the employees of the classified service. It is questionable, under these facts, whether a cause of action would ever accrue, given the doubtful validity of these agreements and the general understanding of the parties that the agreements are not legally enforceable. Nonetheless, if Daub were to attempt legal enforcement of an employee's waiver of the right to appeal from a dismissal, then that employee would clearly have standing to challenge the legal validity of the waiver.

The claim presented by Ritchhart in the instant case would be more appropriately advanced by the employees who have theoretically waived their appellate rights. Ritchhart cannot be afforded standing on the theory that the interests of the public would otherwise go unprotected.

We are also mindful that adopting an "essential services" exception to our standing rule, under these circumstances, would detrimentally alter the proper role of the courts in resolving these disputes. Police and fire protection and emergency services are not only among the most essential services provided by a municipality, but those services are also among the most contentious. The adoption of an "essential services" exception would potentially open the city to litigation over a multitude of disputes regarding the city's public safety policy. The general public certainly has a right to influence the city's policies regarding public safety, but the established mechanism for doing so is through our representative form of government and ultimately through the ballot box, not through the courts. Given the preeminence of public safety in the political life of the average municipality, such an exception, if adopted, would result in the judicial system's interjection into many political issues confronting the community, regardless of whether or not the issues are amenable to judicial review. Thus, we choose not to adopt an "essential services" exception to our well-established requirements for standing.

## CONCLUSION

Because we conclude that Ritchhart does not have standing to maintain this action, we reverse the judgment of the district court and remand this matter with directions to dismiss Ritchhart's amended petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

# GENERAL FIBERGLASS SUPPLY, INC., APPELLEE, V. MARK ROEMER, INDIVIDUALLY, AND PROTECTIVE COATING SPECIALISTS, INC, APPELLANTS.

594 N.W.2d 283

Filed April 29, 1999. No. S-98-236.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Parties: Standing: Appeal and Error.** Only an aggrieved party can take an appeal.
4. **Judgments.** In rendering judgment as the finder of fact in a bench trial, the trial court weighs the evidence in the same manner as does a jury.
5. **Trial: Juries: Witnesses.** Juries have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgments.
6. **Witnesses: Testimony.** The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject as much of it as in its judgment is not entitled to credit.
7. **Usury: Actions.** The claim of usury in this state is a defense to a cause of action.
8. **Usury: Pleadings.** Usury must be pleaded to be available as a defense.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Mark J. Krieger, of Bowman & Krieger, for appellants.

James M. Kelley, of Berry, Kelley & Hansen, for appellee.

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

CONNOLLY, J.

In this breach of contract action, appellants, Protective Coating Specialists, Inc (PCSI), and its president and sole shareholder, Mark Roemer, appeal a judgment from district court against Roemer individually. General Fiberglass Supply, Inc. (GFSI), sued Roemer and PCSI to recover contract damages for payment of goods it delivered. GFSI asserted that the sales were made to Roemer in his individual capacity and

demanded recovery from him or, alternatively, if the court determined the sales were made to PCSI, then it demanded judgment against PCSI. The trial court determined that the sales in question were made to Roemer individually and entered judgment against Roemer. We affirm.

## BACKGROUND

PCSI was organized in 1979 as a Nebraska corporation. PCSI was engaged throughout its existence in the business of commercial roofing. Roemer became PCSI's president and became the sole shareholder in 1989. On April 16, 1994, without Roemer's knowledge, the Secretary of State administratively dissolved PCSI for failing to pay its occupation tax.

On six occasions during September and October 1994, Roemer purchased insulation and other goods on credit from GFSI, most of which were ordered by telephone through GFSI salesman Douglas A. Orcutt. The purchases, including freight costs, totaled $10,620.59. The sales contracts' terms requested full payment within 30 days or a charge of 1½ percent per month would subsequently be assessed on the unpaid balance. The order forms, billing statements, and bills of lading are all addressed to "Protective Coating Spec." and do not list Roemer by name. Roemer testified at trial that he made the purchases in question on behalf of PCSI. Since at least 1991, Roemer purchased products periodically from GFSI and paid for them with PCSI's corporate checks. However, Orcutt, who handled GFSI's account with Roemer and PCSI since 1991, asserted that he dealt with Roemer as an individual. Orcutt stated that Roemer never expressly told him that the orders were for a corporation. However, on cross-examination, Orcutt equivocated. He appeared to agree with a statement from Roemer's counsel that Orcutt always dealt with Roemer as an agent for a corporation.

PCSI and Roemer refused to pay GFSI for the goods ordered and received in September and October 1994. Roemer claimed that the insulation received was defective, as it allegedly deteriorated shortly after it was installed.

GFSI filed suit against Roemer in county court in July 1995. Roemer, now realizing that PCSI was dissolved, filed a certificate of revival with the Secretary of State (dated September 26,

1995) and paid the delinquent occupation tax. About the same time, GFSI amended its petition to include PCSI as a party. GFSI alleged in its amended petition that Roemer ordered the goods in question in his individual capacity and that GFSI delivered the goods to Roemer and demanded judgment for a principal balance of $10,620.59, prejudgment interest, and costs. In the alternative, GFSI demanded the same damages against PCSI if the court found that PCSI had been revived and that the sales were to PCSI. In their amended answer, Roemer and PCSI argued that all goods GFSI provided were provided to PCSI and that the goods were defective. In addition, PCSI counterclaimed for damages totaling $24,522.10, the amount PCSI alleged was the cost of repairs necessary to remove and replace the defective materials. The case was removed to the district court due to the amount requested in the counterclaim.

After a bench trial, the district court entered judgment in favor of GFSI and against Roemer individually, and dismissed PCSI's counterclaim. The trial court determined that "the testimony of Mr. Orcutt was, and the court so finds that with respect to the instant controversy, plaintiff and its representatives dealt with defendant Roemer solely as an individual . . . ." The court awarded GFSI $10,620.59, with interest accruing at 1½ percent per month after October 31, 1994. Roemer and PCSI appeal the judgment, but PCSI does not appeal its dismissed counterclaim.

## ASSIGNMENTS OF ERROR

Roemer assigns the district court erred in holding that (1) GFSI is entitled to judgment against Roemer individually and (2) GFSI is entitled to costs of the proceeding and interest at the contract rate of 1½ percent per month.

## SCOPE OF REVIEW

A suit for damages arising from breach of a contract presents an action at law. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998); *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995). In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Schuelke v. Wilson, supra*; *Richardson v. Mast*, 252

Neb. 114, 560 N.W.2d 488 (1997). The appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See, *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997); *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

## ANALYSIS

Initially, we note that PCSI has joined Roemer in appealing the district court judgment. The district court judgment was against Roemer in his individual capacity, not against PCSI. "Only an aggrieved party can take an appeal." *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 911, 531 N.W.2d 523, 527 (1995). As no judgment was rendered against PCSI, PCSI is not aggrieved and has no standing to appeal. See, *Wrede v. Exchange Bank of Gibbon, supra*; *Swallow v. Eureka Mfg. Co.*, 89 Neb. 467, 131 N.W. 918 (1911) (declining to consider appeal where no judgment was rendered against appellants).

As to his first assignment of error, Roemer argues that the trial court's finding that he ordered the products in question in his individual capacity, rather than in his corporate capacity as PCSI's president, is clearly erroneous. Roemer asserts that the evidence undisputedly proves that he placed all the sales orders in question while acting for and on behalf of PCSI. We conclude that although there is not overwhelming evidence that indicates the sales contracts were between GFSI and Roemer as an individual, there is nonetheless sufficient evidence to preclude us from concluding that the trial court's determination of that issue was clearly erroneous.

Orcutt testified that he believed when he took the orders in question from Roemer, he was dealing with Roemer in his individual capacity. Specifically, Orcutt testified on direct examination as follows: "Q. Did you deal with [Roemer] as an individual? A. Yes." The above-quoted testimony is credible evidence relevant to the formation of the oral sales contracts in question and sufficiently supports the conclusion that the sales were between GFSI and Roemer in his individual capacity. However, Roemer asserts that this evidence is directly contradicted by

Roemer's testimony, by the invoices which state "Protective Coating Spec." and do not state Roemer's name, and by Orcutt's own statements on cross-examination. Roemer testified that all products he ordered from GFSI were ordered on behalf of PCSI. He argues that the invoices reflect that GFSI dealt with PCSI. GFSI's contention regarding the invoices is that because the invoices do not state "Protective Coating Specialists, *Inc*," the invoices reflect that GFSI was dealing with a proprietorship.

Roemer's testimony only creates a conflict in the evidence. His view of what inference should be derived from the invoices is contested by GFSI. In reviewing a judgment awarded in a bench trial, we resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See, *Hilliard v. Robertson, supra*; *Sherrod v. State, supra*. As to Orcutt's statements on cross-examination, we agree that Orcutt contradicted his earlier assertion that he dealt with Roemer as an individual. However, Orcutt did not in any way retract his assertion on direct examination that he dealt with Roemer as an individual, and thus that statement remains in evidence. In rendering judgment as the finder of fact in a bench trial, the trial court weighs the evidence in the same manner as does a jury. See *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). This court has consistently held that juries have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgments. *Rakes v. State*, 158 Neb. 55, 62 N.W.2d 273 (1954); *Baker v. Racine-Sattley Co.*, 86 Neb. 227, 125 N.W. 587 (1910).

In *Baker v. Racine-Sattley Co., supra*, the plaintiff argued that because he successfully provoked a defendant's witness to contradict himself, "the testimony of that witness must either be accepted as a whole, or, if any portion of it be rejected by the jury, they must entirely disregard the whole of it," and if disregarded, then the evidence would be insufficient to sustain the verdict. *Baker v. Racine-Sattley Co.* at 233, 125 N.W. at 590. This court responded:

> This contention cannot be sustained. The credibility of the witness was a question for the jury, and it was within their province to credit the whole of his testimony or any part of

> it which seemed to them to be convincing, and reject so much of it as in their judgment was not entitled to credit.

*Id.* The trial court necessarily discounted Roemer's testimony, discounted the inference Roemer makes from the invoices, and rejected Orcutt's contradictory statement on cross-examination in order to conclude that Roemer individually, rather than PCSI, was a party to the sales contracts. Because the trial court was the trier of fact in a law action, those decisions were within the province of the court's duty to weigh the evidence and judge the credibility of witnesses. Additionally, this court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility. *Equilease Corp. v. Neff Towing Serv.*, 227 Neb. 523, 418 N.W.2d 754 (1988). Credible evidence remained to support the trial court's determination. Therefore, we affirm the court's determination on this issue, as it was not clearly erroneous.

Roemer additionally argues that contrary to the trial court's alternate conclusion that PCSI did not exist at the time the purchases were made and was not effectively revived, PCSI was either effectively revived or existed de jure or de facto at the time the sales in question were made. Because we affirm the trial court's determination that Roemer entered the contracts with GFSI in his individual capacity, whether PCSI was or was not effectively revived is irrelevant. Thus, we do not reach Roemer's argument on that issue.

### Interest and Costs Award

Roemer asserts that if this court affirms the trial court's finding that he entered the contracts in his individual capacity, we must nonetheless reverse the trial court's award to GFSI of costs and interest at 1½ percent per month because, as to Roemer individually, the sales contracts' terms call for GFSI to receive a usurious rate of interest. He asserts that pursuant to Neb. Rev. Stat. § 45-101.03 (Reissue 1998), the maximum legal rate of interest GFSI could assess against Roemer as an individual is 16 percent annually on the unpaid principal balance. Compare *Classen v. Becton, Dickinson & Co.*, 214 Neb. 543, 334 N.W.2d 644 (1983) (interpreting Neb. Rev. Stat. § 45-101.04(2) (Cum.

Supp. 1982), one of the exceptions to § 45-101.03, as providing that *corporation* may agree to pay any rate of interest by agreement in writing). Because the sales contracts' terms provided for 1½ percent per month interest on the unpaid balance, which at a minimum is 18 percent annually if not compounded monthly, Roemer argues that pursuant to Neb. Rev. Stat. § 45-105 (Reissue 1998), GFSI cannot recover any interest or costs in this action.

We cannot consider Roemer's usury argument because he did not plead usury before the trial court. The claim of usury in this state is a defense to a cause of action. *Farmland Enterprises, Inc. v. Schueman*, 212 Neb. 342, 322 N.W.2d 665 (1982); *Seldin v. Northland Mortgage Co.*, 189 Neb. 175, 202 N.W.2d 174 (1972). Usury must be pleaded to be available as a defense. *Stuart v. Durland*, 115 Neb. 211, 212 N.W. 31 (1927); *McCready v. Phillips*, 56 Neb. 446, 76 N.W. 885 (1898); *Bell v. Stowe*, 44 Neb. 210, 62 N.W. 456 (1895). GFSI prayed for prejudgment and postjudgment interest in its operative petition, yet Roemer did not claim the benefit of the usury laws in his operative answer, much less plead facts in his answer that would support a usury defense. See *Stuart v. Durland, supra* (stating under certain circumstances, defendant need only claim benefit of usury statute in its answer to preserve defense, rather than plead specific facts). Because Roemer asserted this defense for the first time on appeal, we do not reach it.

## CONCLUSION

The trial court's finding that the sales in question were made to Roemer in his individual capacity rather than in his corporate capacity as president of PCSI was not clearly erroneous. We do not reach the issue of whether the sales contracts were usurious because Roemer did not plead the defense of usury at the trial level. We therefore affirm the judgment of the trial court.

AFFIRMED.

# IN RE ESTATE OF HAROLD S. MYERS, DECEASED. LESLEY C. MYERS, APPELLANT, V. LESLEY C. MYERS, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD S. MYERS, DECEASED, APPELLEE.

594 N.W.2d 563

Filed April 29, 1999. No. S-98-340.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county 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 determination made by the court below.
3. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
4. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
5. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
6. **Decedents' Estates: Trusts.** A surviving spouse's beneficial interest in an inter vivos trust created by a decedent is property which passes or has passed to the surviving spouse within the meaning of Neb. Rev. Stat. § 30-2319(a) (Reissue 1995) such that it should be charged against the amount of the surviving spouse's elective share of the augmented estate.

Appeal from the County Court for Lancaster County: JOHN V. HENDRY, Judge. Affirmed.

James L. Haszard, of McHenry, Haszard, Hansen & Roth, for appellant.

Thomas J. Fitchett, guardian ad litem.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

## NATURE OF CASE

Lesley C. Myers (Myers), spouse of the decedent, Harold S. Myers, filed a petition in the county court, seeking to take her

elective share of the decedent's augmented estate pursuant to Neb. Rev. Stat. § 30-2313 et seq. (Reissue 1995). The county court determined that Myers' elective share had been satisfied by her interest in an inter vivos trust established by the decedent and that Myers was not entitled to anything further from the decedent's augmented estate. Myers appeals from that determination. For the reasons stated herein, we affirm the judgment of the county court.

## FACTUAL BACKGROUND

The decedent died on December 26, 1996. The decedent's will provided, inter alia, that his tangible personal property was to be left to Myers and that his residuary estate was devised to the Harold S. Myers Trust (the trust), an inter vivos trust, with Norwest Bank Nebraska, N.A. (Norwest), designated as the trustee. Ultimately, the property paid in to the trust was valued at $6,041,712.95.

The trust, as modified by a later amendment, provides, in relevant part, that the trust corpus should be divided between two shares, the marital share and the family share. The allocation of the trust corpus between the marital and family shares is to be determined by the trustee, based on whatever division of the assets would minimize the payment of federal estate taxes. The income from both the marital and family shares is to be paid to Myers, for her benefit, during her lifetime. The trustee also is empowered to invade the trust principal of either share if necessary to provide for Myers' support.

The terms of the trust further provide, in relevant part, that after Myers' death, the remaining assets in the marital share are to be added to the family share. After Myers' death and when the decedent's living children are all at least 22 years of age, the trustee is to divide the trust property to create equal shares for the benefit of each of the decedent's children born as a result of his union with Myers.

If any of those children are at least 35 years of age at the time of Myers' death, the trust property of those shares will be distributed to the children outright. Alternatively, the trustee will distribute one-third of the remaining assets to each child when the child attains the age of 25 years, one-half of the remaining

assets when the child attains the age of 30 years, and all the remaining assets when the child attains the age of 35 years. In the interim, the trustee is directed to pay, to or for the benefit of each child, as much of the income and principal of the trust as is necessary to provide for the child's welfare.

At the time of the decedent's death, he had five living children, the three youngest of whom were born from his union with Myers and were still minors when their father died. The two older children, born of a previous marriage, were intentionally omitted from the will and the trust and are not parties to this appeal.

## PROCEDURAL HISTORY

On January 3, 1997, Myers filed an application in the county court seeking informal probate of the decedent's will and her own appointment as personal representative of the estate. The application was granted on the same day.

On September 24, 1997, Myers timely filed a petition to take her elective share of the decedent's augmented estate. She alleged that she was entitled to 50 percent of the augmented estate, which she valued at $7,249,020.62. The parties to this appeal later stipulated to a value for the augmented estate of $6,578,712.95. Myers did not renounce any provisions of the will or the trust.

In response to Myers' petition for elective share, Norwest filed a motion for the county court to appoint a guardian ad litem to represent the interests of Myers' minor children, because the children, as the remainder beneficiaries of the trust, had an interest potentially adverse to that of Myers and Norwest could not adequately represent that interest due to its duty of impartiality to all the trust beneficiaries. A guardian ad litem was appointed, without objection, to represent the children.

Subsequently, Myers and the guardian ad litem disputed the amount to which Myers was entitled under the elective share provision. In short, Myers claimed that she was entitled to take 50 percent of the augmented estate and still receive the benefit of her interest in the trust. The guardian ad litem asserted that the amount of Myers' elective share should first be offset by the value of her interest in the trust.

The guardian ad litem proposed that the value of Myers' interest in the trust be valued as a life estate in the trust property, using a calculation based on Internal Revenue Service guidelines for establishing, for tax purposes, the present value of a life estate. The guardian ad litem argued that based on such calculations, Myers had already received more than 50 percent of the augmented estate by virtue of her interest in the trust and was not entitled to anything more from the augmented estate.

In response, Myers claimed that even if the value of her interest in the trust was to be offset against her elective share, the court should attempt to value her interest based on a projection of the actual income of the trust. In support of this argument, Myers noted that a significant portion of the trust property was stock in Transcrypt International, Inc. (Transcrypt). At that time, Transcrypt was not paying any dividends and thus not generating any income for Myers as beneficiary of the trust.

The county court ultimately issued a ruling in accord with the suggestions of the guardian ad litem. The court determined that under § 30-2319(a), the present value of Myers' interest in the trust should first be applied in satisfaction of the elective share. The court found that "the correct approach in valuing the present interest created in the surviving spouse is by utilizing the standard mortality tables, IRS Regulations and State Inheritance Tax Regulations that would apply to a property in which a life estate and remainder interest were created." Based on those regulations, the county court determined that Myers' interest in the trust should be valued at 86.127 percent of the value of the trust property.

Consequently, the county court found that Myers' elective share had been fully funded by her present interest in the trust and that she was not entitled to anything further as her share of the augmented estate. Myers appealed from that determination. Her appeal was taken directly from the county court to the Nebraska Court of Appeals pursuant to Neb. Rev. Stat. § 30-1601 (Cum. Supp. 1998) and was moved to our docket pursuant to our authority to regulate our caseload and that of the Court of Appeals.

## ASSIGNMENTS OF ERROR

Myers assigns, consolidated and restated, that the county court erred (1) in determining that her elective share should be offset by the value of her interest in the trust and (2) in determining the value of her interest in the trust.

## STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Foxley*, 254 Neb. 204, 575 N.W.2d 150 (1998). See, also, *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996) (holding challenge to statutory election to be reviewed for error appearing on record).

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. *Central States Found. v. Balka, ante* p. 369, 590 N.W.2d 832 (1999).

## ANALYSIS

### OFFSET OF ELECTIVE SHARE

The right of a surviving spouse to take an elective share of a decedent's estate is established by § 30-2313(a), which states, in relevant part, that "if a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share in any fraction not in excess of one-half of the augmented estate under the limitations and conditions hereinafter stated."

The "augmented estate" is defined by § 30-2314, in material part, as the probate estate, less certain allowances, plus the value of property owned by the spouse at the decedent's death and which would have been includable in the surviving spouse's augmented estate if that spouse had predeceased the decedent, to the extent the owned property was derived by the surviving spouse from the decedent without a full consideration in money or money's worth. See *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982), *abrogated on other grounds, In re Estate of Disney, supra*. The augmented estate also includes several

categories of inter vivos transfers made by a decedent. See § 30-2314.

> The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing to a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements.

Neb. Rev. Stat. Ann. § 30-2314, comment at 83 (Michie 1995).

> The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will.

*In re Estate of Carman*, 213 Neb. at 100, 327 N.W.2d at 613. Accord *In re Estate of Ziegenbein*, 2 Neb. App. 923, 519 N.W.2d 5 (1994).

The parties agree that in this case, the decedent's residual estate, devised to the trust, is part of the decedent's augmented estate. Resolution of Myers' first assignment of error turns on our interpretation of § 30-2319(a), which provides:

> In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced, including that described in section 30-2314, is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

Myers contends that her present interest in the trust is not property which "has passed to the surviving spouse by testate or intestate succession or other means" and that the county court

erred in so determining. Interpretation of this section presents an issue of first impression for this court.

The general effect of § 30-2319 is that

> if the surviving spouse has been provided for by the decedent during his lifetime through outright gifts, joint tenancy property, life insurance, living trust provisions, annuities, or pension plans other than Social Security benefits, the amount of such property received reduces the elective share and may wipe it out entirely. That is, first the amount is included in the augmented estate and then set off against the elective share as having been already received.

Thomas M. Davies and William E. Olson, Jr., *Interspousal Transfers and Augmented Estate*, 9 Creighton L. Rev. 481, 486 (1976) (providing example of inter vivos trust with income interest to surviving spouse for life and remainder to children charged against surviving spouse's elective share).

We believe the better interpretation of § 30-2319 requires the present value of inter vivos trust benefits to be charged against a surviving spouse's elective share. This interpretation is consistent with the function of § 30-2319 and the language and purpose of the elective share statutes.

As noted above, the dual purposes of the elective share provisions of the Nebraska Probate Code are to prevent a spouse from being denied a fair share of the decedent's estate, but also to prevent the surviving spouse from obtaining more than a fair share of the estate when he or she has already received a share of the estate through some other means. To allow a surviving spouse to elect against the will and still retain the benefit of a trust interest that was clearly intended as a testamentary substitute would frustrate the purpose of the elective share statutes. In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Central States Found. v. Balka, ante* p. 369, 590 N.W.2d 832 (1999); *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997).

Furthermore, other provisions of the Nebraska Probate Code indicate that an interest in an inter vivos trust is "property which passes or has passed to the surviving spouse by testate or intestate succession or other means." § 30-2319. "Property," in the Nebraska Probate Code, "includes both real and personal property *or any interest therein* and means anything that can be the subject of ownership." (Emphasis supplied.) Neb. Rev. Stat. § 30-2209(36) (Reissue 1995). It is clear that the beneficiary of an inter vivos trust has an "interest" in the trust property within the meaning of this section.

Similarly, § 30-2314(2)(i) provides that the augmented estate includes "[a]ny property derived from the decedent including, without limitation to, any beneficial interest of the surviving spouse in a trust created by the decedent during his or her lifetime . . . ." To conclude that "property" in the augmented estate calculations of § 30-2314(2)(i) means something different than "property" under § 30-2319(a) would result in inconsistent constructions of the two related sections. A court, however, will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. See, *Central States Found. v. Balka, supra*; *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

Moreover, the inclusion of an inter vivos trust interest in § 30-2314(2)(i) indicates that such interests were also to be included in the calculations required under related sections. The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Central States Found. v. Balka, supra*; *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998).

Nebraska's § 30-2319 was based on Uniform Probate Code § 2-207 (1969). In construing a Maine statute based on the 1975 version of § 2-207, the Supreme Judicial Court of Maine concluded that a surviving spouse's trust interest was chargeable against an elective share. *Estate of Fisher*, 545 A.2d 1266 (Me. 1988).

The Maine statute, Me. Rev. Stat. Ann. tit. 18-A, § 2-207 (West 1998), provided, in relevant part: " 'In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse . . . are applied first to satisfy the elective share . . . .' " *Estate of Fisher*, 545 A.2d at 1271. The surviving spouse argued that his interest in a testamentary trust had not " 'passed' " to him within the meaning of the statute. *Id.* at 1272. The court rejected this argument, concluding that the statute should be interpreted "to include both devises and inter vivos gifts and thus to include the beneficial interest in a trust, whether it is testamentary or inter vivos." *Id.* See, also, Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code*, 62 Iowa L. Rev. 981 (1977) (concluding trust interests "have passed" to surviving spouse within meaning of Uniform Probate Code § 2-207 (1975)).

We find the foregoing authority to be helpful in reaching our own interpretation of § 30-2319. Accordingly, we hold that a surviving spouse's beneficial interest in an inter vivos trust created by the decedent is "property which passes or has passed to the surviving spouse" within the meaning of § 30-2319(a) such that it should be charged against the amount of the surviving spouse's elective share of the augmented estate. Myers' first assignment of error is without merit.

### VALUATION OF TRUST INTEREST

Myers also assigns that the county court erred in valuing her interest in the trust. The county court valued Myers' interest in the trust according to the regulations that would be used to calculate, for tax purposes, the present value of a life estate in the trust property. Resolution of this issue requires us to conduct a comprehensive examination of the tax valuation method relied upon by the county court.

Neb. Rev. Stat. § 77-2008 (Reissue 1996) provides that "[b]equests, devises, or transfers of property or any interest therein in trust or otherwise for the life of the legatee, devisee, or transferee" shall be subject to inheritance taxes and that the "property or interests therein shall be appraised . . . at what was the fair market value thereof at the time of the death of the decedent." The fair market value is the present value as determined

under the Internal Revenue Code and its applicable regulations. 316 Neb. Admin. Code, ch. 17, § 001.01 (1984). "The present value of the annuities, life estates, terms for years, remainders, and reversions is determined under 26 C.F.R. 20.2031-7 (1983) . . . or as subsequently revised." 316 Neb. Admin. Code, ch. 17, *supra*.

It is provided in 26 C.F.R. § 20.2031-7 at 313 (1998), in relevant part:

> [T]he fair market value of . . . life estates . . . is their present value determined by use of standard or special section 7520 actuarial factors. These factors are derived by using the appropriate section 7520 interest rate and, if applicable, the mortality component for the valuation date of the interest that is being valued.

Under 26 C.F.R. § 20.7520-1(b)(1)(i) (1998), in order to determine the present value of a life estate, one should utilize a rate of return, rounded to the nearest two-tenths of 1 percent, that is equal to 120 percent of the applicable federal midterm rate, compounded annually, for the month in which the valuation date falls. For estate tax purposes, the date of valuation is the date of the decedent's death. § 20.7520(b)(1)(ii).

According to the tables published monthly in the Internal Revenue Bulletin, the appropriate interest rate for December 1996 was 7.59 percent. Rev. Rul. 96-57, 1996-2 C.B. 82. This rate rounds up to 7.6 percent. See § 20.7520-1(b)(1)(i). Based on this rate, the single life remainder factor, where the life estate is measured by the life of a 44-year-old person, is .13873. § 20.2031-7(d)(6), table S.

In order to determine the present value of the life estate, the correlative single life remainder factor is subtracted from 1.000000, and the resulting actuarial factor is multiplied by the value of the property. § 20.2031-7(d)(2)(iii). In the present case, the resulting actuarial factor is .86127. See *id.* See, also, § 20-2031-7(d)(5), example 1 (providing example of valuation method for income interest in property).

Based upon that actuarial factor, the present value of Myers' interest in the trust, for estate tax purposes, rounded to the nearest cent, was $5,230,546.11. Based upon those calculations, since the present value of Myers' interest in the trust exceeded

50 percent of the augmented estate, the county court determined that the elective share amount had been fully satisfied by Myers' interest in the trust and that she was entitled to no further compensation.

Myers does not argue that the county court erred in its calculations under the tax valuation method; rather, she claims error in the very use of the tax valuation method. Myers does not claim, for instance, that the county court relied upon the wrong regulations or mortality tables or interest rate calculations, or that the court made a mathematical mistake. In other words, Myers claims that the tax valuation method is itself inadequate under the circumstances but she does not assign error to any particular aspect of the process used in the instant case.

Myers' contention on appeal is that the tax valuation method resulted in an overvaluation of her interest in the trust. Primarily, she notes that at the time of the valuation, much of the trust principal consisted of Transcrypt stock, which at that time was paying no dividends and generating no income for Myers. Thus, Myers claims that the assumption of an income stream of 7.6 percent dramatically overstates the actual return to her as the income beneficiary.

Even assuming this to be the case, we are unpersuaded by Myers' contention that some different method should have been used to calculate the "actual" value of her income interest in the trust. We first note that although Myers has suggested that some alternate method of valuation be used, she has neither proposed such a method nor directed us to any authority that would be helpful in creating one. Myers clearly states that the goal of the valuation should be to predict the actual income of the trust, but she offers no means for achieving this goal, much less a means more appropriate or persuasive than the method used in the instant case. Under such circumstances, Myers has not met her burden of demonstrating error on the record of the county court.

Moreover, we note that the Supreme Judicial Court of Maine used a similar method in a case presenting similar issues. See *Estate of Fisher*, 545 A.2d 1266 (Me. 1988). In that case, the court established the present value of a trust interest providing a fixed income by treating it as an annuity under the appropriate federal tax regulations. *Id.*

We do not hold that the tax valuation method is the only appropriate method for determining the present value of beneficial interests in elective share proceedings. We simply determined that under the facts presented in the instant case, the county court did not err in using the tax valuation method as the basis for its judgment. While we recognize that this method is at best imperfect, "[t]he whole problem of valuing individual life interests by resort to mortality tables is at best a matter of educated guesswork. The courts cannot demand perfection in an area so fraught with speculation and uncertainty." *McMurtry v. Commissioner of Internal Revenue*, 203 F.2d 659, 666 (1st Cir. 1953).

We are not persuaded that under the circumstances, any other method would have provided a better assessment of the present value of Myers' interest in the trust, given that the trust principal can at any time be invaded by the trustee for Myers' support. While the tax valuation method of valuing the present interest of a beneficial interest in a trust may carry the risk of overvaluation of the trust interest, under § 30-2319 the surviving spouse has the option of avoiding that risk by renouncing the benefit of the trust. See Neb. Rev. Stat. § 30-2352(c) (Reissue 1995). Valuation becomes necessary only when the surviving spouse attempts to claim both an elective share and the benefit of a trust, at which point the risk of overvaluation is properly borne by the surviving spouse.

Thus, we determine that the county court did not err in calculating the present value of Myers' interest in the trust. While by no means perfect, the tax valuation method utilized by the county court is grounded in well-reasoned authority and provides for sensible and consistent results under these circumstances. Accordingly, we find Myers' second assignment of error to be without merit.

## CONCLUSION

The county court correctly concluded that § 30-2319 requires that the present value of a beneficial interest in an inter vivos trust established by a decedent must be charged against the surviving spouse's elective share of an augmented estate. The county court committed no reversible error in its determination

of the present value of Myers' interest in the trust. Therefore, we affirm the judgment of the county court.

AFFIRMED.

HENDRY, C.J., and MILLER-LERMAN, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
SCOTT A. HARROLD, APPELLANT.
593 N.W. 2d 299

Filed May 7, 1999. No. S-97-1167.

1. **Constitutional Law: Obscenity.** Obscenity is not within the area of constitutionally protected speech or press. Obscene speech can be prohibited or otherwise regulated without violating the prohibitions of the First Amendment to the U.S. Constitution.
2. **Obscenity: Words and Phrases.** The U.S. Supreme Court, in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), has limited the definition of obscenity to those materials which, taken as a whole, appeal to the prurient interest in sex; which portray sexual conduct in a patently offensive way; and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. Sexually oriented materials are not obscene unless all three elements of the *Miller* test are satisfied.
3. **Obscenity: Evidence: Appeal and Error: Case Disapproved.** An appellate court's independent review of the evidence in obscenity cases does not require the appellate court to determine the issue of obscenity vel non as a matter of law, nor does it bar the appellate court from extending due deference to the trier of fact on essentially factual issues. Any language to the contrary in *State v. American Theater Corp.*, 194 Neb. 84, 230 N.W.2d 209 (1975), is disapproved.
4. **Constitutional Law: Obscenity.** A determination of obscenity requires a two-stage inquiry that focuses first on the substantive content of the materials to see whether they depict or describe "hardcore" types of sexual conduct that the trier of fact could constitutionally label "patently offensive" according to contemporary community standards, i.e., whether it qualifies as possibly obscene; once such threshold condition is satisfied, the trier must then determine whether, as a matter of fact, the material taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion; is patently offensive; and lacks serious literary, artistic, political, or scientific value, as set forth in Neb. Rev. Stat. § 28-807(10) (Reissue 1995).
5. **Constitutional Law: Obscenity: Appeal and Error.** In reviewing a fact finder's determination that certain material is obscene, the first duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the depiction of certain hardcore sexual material that may be constitutionally regulated under the First Amendment. Thereafter, the appellate court must review the determinations of the

trier of fact pursuant to the three-part obscenity standard set forth in *Miller* and Neb. Rev. Stat. § 28-807(10) (Reissue 1995).

6. **Obscenity: Appeal and Error.** In reviewing a fact finder's determination that certain material is obscene, the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the "prurient interest" test and the "patently offensive" test, as they depend on knowledge of contemporary community standards that is uniquely within the province of the trier of fact. The appellate court should apply a de novo review in considering the third prong, i.e., "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review.
7. ____: ____. In an obscenity case, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence regarding the first two prongs of the test set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); such matters are within the fact finder's province for disposition.
8. **Obscenity: Evidence: Juries.** In determining an issue of fact in an obscenity case, each case must be determined on evidence peculiar to it alone and not by comparison to fact determinations made by another jury in a similar case.
9. **Rules of Evidence.** Pursuant to Neb. Rev. Stat. § 27-401 (Reissue 1995), relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
10. ____. All relevant evidence normally is admissible, and conversely, evidence which is not relevant is not admissible.
11. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
12. **Judges: Words and Phrases.** A 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.
13. **Evidence.** Evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case.
14. ____. If evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.
15. **Criminal Law: Trial: Evidence.** A defendant in a criminal obscenity case has a right to introduce evidence pertaining to the community standard.
16. **Criminal Law: Trial: Juries: Evidence: Proof.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
17. **Trial: Evidence.** One does not "open the door" to admit evidence that is inadmissible; instead, the door is opened when evidence that had previously been inadmissible becomes admissible by virtue of some act of counsel or the parties.
18. **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.

19. **Juror Qualifications: Appeal and Error.** The extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby.
20. **Trial: Jurors: Presumptions: Proof.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.
21. **Trial: Jurors.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court.
22. **Juror Qualifications: Appeal and Error.** The finding of the trial court as to the qualifications of a juror will not be set aside unless there has been a clear abuse of judicial discretion.
23. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
24. **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.
25. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
26. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
27. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal thereto from the County Court for Lancaster County, JOHN V. HENDRY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

Bruce A. Taylor, Paul J. McGeady, and Robin S. Whitehead for amici curiae Senator James Exon, Retired; National Law Center for Children and Families, Inc.; and Morality in Media, Inc.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

## I. NATURE OF CASE

Scott A. Harrold was, pursuant to jury verdict, adjudged guilty in the Lancaster County Court of producing or distributing obscene material, in violation of Neb. Rev. Stat. § 28-813(1) (Reissue 1995), and the county court fined Harrold $1,000. On appeal, the district court affirmed the conviction and fine, but the Nebraska Court of Appeals reversed the conviction and dismissed the case, based on its determination that the material produced and distributed by Harrold was not obscene and was consequently protected by the First Amendment to the U.S. Constitution. See *State v. Harrold*, 7 Neb. App. 842, 585 N.W.2d 532 (1998). We granted the State's petition for further review, and for the reasons stated herein, we reverse the judgment of the Court of Appeals and remand this cause with directions to reinstate the judgment of the district court which had affirmed the judgment of the county court.

## II. FACTUAL BACKGROUND

Harrold applied in late 1994 to produce an ongoing local series called "Cosmic Comedy," to be broadcast by TV Transmission, Inc., doing business as CableVision, on a public access channel of Lincoln cable television. The show began to air in January 1995, and Harrold's 6-month contract was renewed in June 1995. Harrold applied for a midnight time slot, indicating in his application that his show would feature sexual and/or excretory activities or organs and include adult movie reviews.

On September 14, 1995, Harrold delivered a videotaped episode of "Cosmic Comedy" to CableVision's Lincoln studios. In addition to delivering the videotape, Harrold also produced and appeared in the videotape. The contents of the videotape can briefly be described as 14 minutes of a costumed man making strange faces, followed by over a minute of a costumed, reclining man masturbating.

Shortly after Harrold delivered the videotape, it was viewed by David Grooman, CableVision's public access coordinator. After viewing the videotape, Grooman made a copy of it and

provided the copy to the police. Alan Townsend, a sergeant in the Lincoln Police Department technical investigations unit, went to Harrold's home on September 23, 1995, and cited Harrold for the production or distribution of obscene material.

On October 3, 1995, a complaint was filed in the county court, charging that Harrold "did knowingly copy, print, manufacture, prepare, produce, or reproduce obscene material for the purpose of distribution; or did knowingly publish, circulate, or distribute, or exhibit obscene material," in violation of § 28-813. After a jury trial in the county court, Harrold was adjudged guilty of violating § 28-813, and the court fined Harrold $1,000. Harrold appealed to the district court, which affirmed the judgment of the county court. The Court of Appeals reversed the judgment, determining that Harrold was prejudiced by the exclusion of evidence, that the videotape itself was not obscene and was protected by the First Amendment, and that the case should therefore be dismissed. *State v. Harrold, supra.* We granted the State's petition for further review of the Court of Appeals' decision.

## III. PETITION FOR FURTHER REVIEW

### 1. Assignments of Error

The State assigns, consolidated and restated, that the Court of Appeals erred by (1) determining that the videotape was "speech" protected by the First Amendment, (2) substituting its judgment for that of the jury on the factual finding that the videotape was obscene, and (3) finding error by the trial court on certain challenged evidentiary rulings.

### 2. Contents of Exhibit 2

A more detailed examination of the subject videotape provides a foundation for our analysis. There were actually two videotapes introduced as exhibits at trial, as "exhibit 1" and "exhibit 2." Exhibit 1, the videotape actually delivered by Harrold, was recorded on ¾-inch videotape, which is a professional grade of tape. Exhibit 2 is the copy of exhibit 1 made by Grooman and given to the police department. Exhibit 2 was made on ½-inch videotape, or VHS tape, which is the grade of tape used in a commercially available, consumer videocassette recorder. Exhibit 2 was shown to the jury, but exhibit 1 was not.

Exhibit 2 is approximately 16 minutes in length. The first 14 minutes 10 seconds of exhibit 2 depicts Harrold in costume, and the character's location and activities are difficult to discern. The testimony at trial indicated that the character depicted was "Cozblah," an extraterrestrial who had become lost in space. The videotape shows nothing except Cozblah's head, as the character makes strange, distorted faces. If there is any meaning or import to the faces being made, we are unable to determine what that might be. To portray Cozblah, Harrold wears sunglasses, a large artificial nose, a white goatee-style beard, a white cap, and some sort of white fabric wrapping around the back of his head.

This visual depiction is accompanied by screeching noises of various pitches, representing no intelligible dialog or melody. Harrold's testimony at trial indicated that the noise was Cozblah's voice, repeatedly saying that he was Cozblah and that he was lost in space. Harrold testified that the voice had been processed and distorted by various techniques.

A little over 14 minutes into the presentation, the picture abruptly changes and another character appears. This is reportedly "Crotchy the Clown," again portrayed by Harrold. This character is reclining and is shown from head to upper thigh, and he appears to be completely nude. His erect genitalia are completely and prominently displayed. Harrold's costume again includes sunglasses and an artificial nose, but these are different from the props used in the Cozblah costume. Harrold is also wearing white makeup around his lips and a bushy black beard, but whether this beard is artificial or Harrold's own beard is unclear.

For the next minute 16 seconds, Harrold is shown masturbating. While he occasionally pauses, he is primarily shown vigorously manipulating his erect genitalia. Harrold's masturbation is introduced by voice-over dialog that is garbled but comprehensible. The dubbed voice says, "Here's a little clip from one of Crotchy's X-rated movies. This is about NC-17 rated show, for the ladies only. Thank you for coming."

After a little more than a minute, the scene ends, and a blue screen appears. Harrold does not ejaculate before the scene ends. The blue screen is accompanied by another voice-over,

which is again garbled but comprehensible. The dubbed voice says, "Well, I hope you enjoyed that, ladies. Cozblah and the Crotchyman, the clown, are copyrighted characters. Hope you enjoyed it. Get lost there, right wingers; you're talking left wing here baby . . . ."

Harrold's testimony at trial provides some context for the comments contained in the videotape. At trial, Harrold testified that the masturbation sequence was not initially created for "Cosmic Comedy," but was in fact a scene from a longer adult movie that Harrold had filmed. Harrold also testified that the sequence was included in response to a comment he received from a female viewer after a previous episode of "Cosmic Comedy" in which he had included footage of a woman removing her clothing and then masturbating. Reportedly, the viewer had complained that the show included a nude woman but not a nude man, and Harrold indicated that the Crotchy character's masturbation was a response to that complaint.

### 3. Contents of Exhibit 1

In examining the videotape, we are cognizant of the Court of Appeals' dissenting judge's concern that material from exhibit 1 had been excluded from exhibit 2. *State v. Harrold*, 7 Neb. App. 842, 585 N.W.2d 532 (1998) (Miller-Lerman, Chief Judge, concurring in part, and in part dissenting). The label for exhibit 1 does indicate that it is 20 minutes in length, while exhibit 2 actually plays for slightly more than 16 minutes. We do not find, however, that this fact is significant to our decision. The testimony at trial indicated that exhibit 2 was an accurate copy of exhibit 1. The record reveals that some material on the exhibit 2 videotape was erased, but our review of the record indicates that this was extraneous material and not part of the copy of exhibit 1.

We find no evidence in the record indicating that any part of exhibit 1 was not accurately copied onto exhibit 2. Neither party has complained of any imprecision, even in their briefs on petition for further review to this court after the opinion from the Court of Appeals called attention to this potential issue. In short, we find nothing in the record indicating that exhibit 2 is not a true and accurate copy of exhibit 1, and absent argument on that point from either party, we will not address the issue further.

### 4. Videotape as Speech

The State assigns as error that the Court of Appeals treated the videotape as speech protected by the First Amendment. The State argues that Harrold is depicted on the videotape engaging in nonexpressive conduct, which is without First Amendment protection. The State's argument is without merit.

If Harrold had masturbated on a street corner rather than in a videotaped program, the State's argument might be worthy of consideration. It is well established, however, that videotape recordings are subject to First Amendment protection. See, e.g., *New York v. P. J. Video, Inc.*, 475 U.S. 868, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986); *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). Moreover, the State's argument ignores the requirements of the very statute it utilized to prosecute Harrold.

Harrold was convicted of distributing obscene material, in violation of § 28-813(1). "Material," for purposes of that statute, is defined as including "any picture, drawing, photograph, figure, image, motion picture . . . television production, other pictorial representation or electric reproduction, recording transcription, mechanical or otherwise . . . ." Neb. Rev. Stat. § 28-807(7) (Reissue 1995). This definition clearly encompasses videotapes. As will be analyzed more completely below, the definition of "obscene" contained in § 28-807(10) is coextensive with the First Amendment standards established by the U.S. Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and developed in subsequent cases. Thus, since the State is required to satisfy First Amendment standards of both the U.S. Constitution and the Nebraska statutes, the State's assignment of error is without merit.

### 5. Obscenity of Exhibit 2

We now turn to the issue that was determinative for the Court of Appeals: whether Harrold's videotape is obscene. The State assigns that the Court of Appeals erred in its obscenity analysis which resulted in the Court of Appeals' determination that the videotape was not legally obscene.

(a) Definition of Obscenity

Initially, we point out that "obscenity is not within the area of constitutionally protected speech or press." *Roth v. United States*, 354 U.S. 476, 485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). Accord *New York v. Ferber*, 458 U.S. 747, 754, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). Thus, "obscene" speech can be prohibited or otherwise regulated without violating the prohibitions of the First Amendment to the U.S. Constitution. The Supreme Court has limited the definition of obscenity to those materials which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. at 24. See, *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977); *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974). Sexually oriented materials are not obscene unless all three elements of the *Miller* test are satisfied. *U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983).

First, a matter is not obscene under Nebraska law unless, taken as a whole, "an average person applying contemporary community standards would find that the work . . . predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion." § 28-807(10)(a). This phraseology varies slightly in detail, but not significantly, from the *Miller* requirement that "'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest." *Miller v. California*, 413 U.S. at 24. To decide this question of fact, the triers of fact must look at the work depicting sexual conduct as a whole and determine whether its dominant theme is one which goes substantially beyond customary limits of candor in appealing to a shameful or morbid interest in sex. See, *Miller v. California, supra*; *Roth v. United States, supra*.

The triers of fact must use an average citizen of that Nebraska community, not a particularly susceptible or particularly insensitive one, as a norm for this determination. See *Miller v. California, supra*. Triers of fact may not use their own

views as appropriate local norms, but may use their knowledge of the views of average people in their own community as an appropriate norm for deciding if a matter "'"appeals to prurient interest."'" *Hamling v. United States*, 418 U.S. 87, 102, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

Second, even though a matter depicts hardcore sexual conduct which appeals to the prurient interest, it is not obscene unless, taken as a whole, "the work . . . depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829." § 28-807(10)(b). In *Miller v. California*, 413 U.S. 15, 25, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the Court took occasion to give examples of the type of sexual conduct that may be regulated by state law:

> It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

The Legislature, taking its cue from *Miller v. California, supra*, has chosen to regulate the patently offensive depiction of certain sexual conduct that includes "acts of masturbation . . . or prolonged physical contact with a person's clothed or unclothed genitals . . . ." § 28-807(15). Consequently, triers of fact must decide whether a local Nebraska citizen of average susceptibilities would be patently offended by depictions of certain defined sexual conduct at issue in a case.

Third, even though the material appeals to the prurient interest and is patently offensive, it cannot be obscene constitutionally unless the work taken as a whole "lacks serious literary, artistic, political, or scientific value." § 28-807(10)(c). *Miller v. California, supra*. Material dealing with sexual conduct in a manner which advocates ideas, which contributes to or illustrates scientific discussion, or which adds to the general body of art and literature in our culture is protected by the 1st and 14th Amendments to the U.S. Constitution. See *Miller v. California,*

*supra*. Therefore, appellate courts examine decisions on this third prong more closely in order to ensure that First Amendment protection of ideas, however unpopular, is maintained. *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977). It is clear that Nebraska's statutory definition of obscenity is patterned upon, and coextensive with, the language of *Miller v. California, supra*. See *State v. Embassy Corp.*, 215 Neb. 631, 340 N.W.2d 160 (1983).

The State bears the burden of proving all three elements of obscenity to the satisfaction of the trier of fact. See *U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983). The critical question in this court, as in the courts below, is whether Harrold's videotape is obscene within the meaning of § 28-807(10) and First Amendment jurisprudence.

(b) Standard of Appellate Review

Recognizing that Harrold was convicted of violating § 28-813 pursuant to a jury verdict, we must next determine what standard of review to apply to the jury's determination. The standard of review is often dispositive of an issue on appeal, and we acknowledge that the question of the proper role of an appellate court in obscenity cases is one which has engendered a variety of opinions. Some courts have held that the appellate court is obligated to make an independent, de novo review of all the evidence. See, e.g., *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974), *cert. denied* 421 U.S. 952, 95 S. Ct. 1687, 44 L. Ed. 2d 106 (1975); *People v. Anderson*, 130 Ill. App. 3d 318, 473 N.E.2d 1345, 85 Ill. Dec. 540 (1985), *aff'd* 112 Ill. 2d 39, 490 N.E.2d 1263, 96 Ill. Dec. 58 (1986). Other jurisdictions review the record only for substantial evidence. See, *United States v. Cutting*, 538 F.2d 835 (9th Cir. 1976), *cert. denied* 429 U.S. 1052, 97 S. Ct. 766, 50 L. Ed. 2d 769 (1977); *Court v. State*, 63 Wis. 2d 570, 217 N.W.2d 676 (1974). The proper standard of review, as noted by Professor Frederick F. Schauer, *The Law of Obscenity* (1976), lies somewhere in between. Professor Schauer accurately points to *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974), as the clearest exposition by the Court of the correct standard of review by appellate courts.

In *Jenkins v. Georgia*, where the Supreme Court reversed the conviction of a theater manager for the exhibition of the motion picture "Carnal Knowledge," the Court turned to the language of *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), to evaluate the standard of review:

> *Miller* states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." [Citation omitted.] "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient' it would be unrealistic to require that the answer be based on some abstract formulation . . . ."

*Jenkins v. Georgia*, 418 U.S. at 159.

The Court went on to state:

> Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary" [citation omitted], but we made it plain that under that holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . ."

*Jenkins v. Georgia*, 418 U.S. at 160.

After the decision in *Jenkins v. Georgia, supra*, this court held that

> the usual test in reviewing a jury verdict, i.e., is the finding supported by sufficient evidence, is not applicable in First Amendment cases and since it is only "obscenity" that is excluded from constitutional protection, the question whether a particular work is obscene is an issue which

must be decided by the court as a matter of law, in reviewing such cases.

*State v. American Theater Corp.*, 194 Neb. 84, 89, 230 N.W.2d 209, 212-13 (1975).

The Supreme Court, however, subsequently refined the requirements for appellate review of obscenity cases, stating:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable. We have stressed before that juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority. . . . The type of conduct depicted must fall within the substantive limitations suggested in *Miller* . . . . The work also must lack serious literary, artistic, political, or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review. Finally, it is always appropriate for the appellate court to review the sufficiency of the evidence.

(Citations omitted.) *Smith v. United States*, 431 U.S. 291, 305-06, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977).

The "substantive limitations" referred to in *Smith v. United States, supra*, include, but are not limited to, "[p]atently offensive representations or descriptions of *masturbation*, excretory functions, and *lewd exhibition of the genitals*." (Emphasis supplied.) *Miller v. California*, 413 U.S. 15, 25, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

A comprehensive reading of *Smith v. United States, supra*, and the Supreme Court's First Amendment jurisprudence leads us to the conclusion that an appellate court's independent review of the evidence in obscenity cases does not require the appellate court to determine the issue of obscenity vel non as a matter of law, nor does it bar the appellate court from extending due deference to the trier of fact on essentially factual issues. Any language to the contrary in *State v. American Theater Corp., supra*, is disapproved.

*Miller v. California, supra*, described, as a matter of substantive constitutional law, the type of "hardcore" sexual material that might be constitutionally regulated under the First Amendment.

> While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in the *Miller* cases.

*Hamling v. United States*, 418 U.S. 87, 114, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974). "While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." *Jenkins v. Georgia*, 418 U.S. 153, 160-61, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).

The Supreme Court has indicated that an appellate court must determine, as a matter of constitutional law, whether particular material is within the "substantive limitations" imposed by the First Amendment. The independent review conducted by an appellate court in First Amendment cases is intended "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485, 505, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

Thus, a determination of obscenity requires a two-stage inquiry that focuses first on the substantive content of the materials to see whether they depict or describe "hardcore" types of sexual conduct that the trier of fact could constitutionally label "patently offensive" according to contemporary community standards, i.e., whether it qualifies as possibly obscene. See *U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983) (citing *Smith v. United States, supra*). In other words, the court initially functions as a constitutional gatekeeper. Once this threshold "substantive component" or condition is satisfied, the trier must then determine whether, as a mat-

ter of fact, the material taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion; is patently offensive; and lacks serious literary, artistic, political, or scientific value, as set forth in § 28-807(10). See *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

Accordingly, if we conclude, as a matter of substantive constitutional law, that the material is within the range of "hardcore" sexual material defined in *Miller v. California, supra*, the three-prong *Miller* obscenity test must then be utilized to determine if the material is outside the ambit of First Amendment protection. The first two prongs of the *Miller* test, however, are primarily factual issues, to be measured by "contemporary community standards." As the trier of fact is obviously better suited to determine the limits of tolerance in a particular community regarding the "prurient interest" test and the "patently offensive" test, a reviewing court should give due deference to the findings of the trier of fact regarding these essentially factual determinations. See *City of Farmington v. Fawcett*, 114 N.M. 537, 843 P.2d 839 (N.M. App. 1992). See, also, *U.S. v. Schein*, 31 F.3d 135 (3d Cir. 1994); *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991); *United States v. Langford*, 688 F.2d 1088 (7th Cir. 1982); *United States v. Cutting*, 538 F.2d 835 (9th Cir. 1976); *Commonwealth v. 707 Main Corp.*, 371 Mass. 374, 357 N.E.2d 753 (1976). In other words, the appellate court must make an independent review of the first two prongs, but the question to be asked is not whether the materials are obscene, but, rather, whether the materials create a jury issue as to obscenity.

The third prong of the *Miller* test, relating to the literary, artistic, political, or scientific value of the work, presents an issue that is, as the Supreme Court noted in *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977), more susceptible to appellate review. See *City of Farmington v. Fawcett, supra*. The Supreme Court has held that the "value" of a work is not to be determined by reference to contemporary community standards. *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987). Since the appellate court possesses expertise and authority on this issue that is at least equal

to that of the trier of fact, and as the Supreme Court has identified this prong of the *Miller* test as being more susceptible to appellate review, we conclude that the third prong, i.e., "value" of the work, must be weighed independently by an appellate court after a de novo review of the relevant evidence.

This standard of review preserves appropriate deference to the trier of fact in determining social consensus regarding the first two prongs of the *Miller* test, while allowing an appellate court, after an independent review of the evidence, to preclude public sentiment from eroding the values of the First Amendment. It has been written that the purpose of the First Amendment is to preserve "the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life." Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601, 684 (1990). If this purpose is to be met, First Amendment jurisprudence must appropriately balance the need for individual expression with the demands of social harmony; one key to achieving this balance is found in appropriate regard for the roles of appellate courts and triers of fact in determining what the government may legally regulate and what the community is prepared to tolerate.

Based on the foregoing authority and analysis, we hold that in reviewing a fact finder's determination that certain material is obscene, the first duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the depiction of certain hardcore sexual material that may be constitutionally regulated under the First Amendment. Thereafter, the appellate court must review the determinations of the trier of fact pursuant to the three-part obscenity standard set forth in *Miller v. California, supra*, and § 28-807(10). In doing so, the appellate court should give appropriate deference to the trier of fact regarding the first two

prongs, i.e., the "prurient interest" test and the "patently offensive" test, as they depend on knowledge of "contemporary community standards" that is uniquely within the province of the trier of fact.

In a criminal obscenity case such as this one, due deference to the trier of fact means that an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are within the fact finder's province for disposition. See *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

Finally, the appellate court should apply a de novo review in considering the third prong, i.e., "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review.

(c) Review of Jury Verdict

Based on the foregoing standard of review, we conclude that the jury's finding of obscenity in this case was proper and supported by the evidence.

*(i) Threshold Determination*

Initially, we note that Harrold's act of masturbation on the videotape is clearly within the range of sexual conduct which the trier of fact could label "patently offensive" in accordance with contemporary community standards. Both *Miller v. California, supra*, and the corresponding Nebraska statute, § 28-807(15), specifically include masturbation as an example of the type of sexual conduct that may be regulated. In addition, *Miller* includes "lewd exhibition of the genitals," 413 U.S. at 25, as another example of sexual conduct that may be regulated, and Harrold's videotape focused on Harrold's prolonged manipulation of the erect male genitalia in a way that falls within the substantive limitations of *Miller*. Therefore, as a threshold matter, Harrold's videotape qualifies "as possibly obscene." See *U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 135 (2d Cir. 1983). We further note that the standard set forth in *Miller* and in § 28-807(10) and (15) was reflected in the trial court's instructions to the jury and that the jury was therefore properly instructed in that regard.

*(ii) Prurient Interest*

We then turn to the three-part *Miller* test and first consider whether the average person, applying contemporary community standards, could find that the videotape, taken as a whole, appeals to the prurient interest. With regard to the definition of prurient interest, the jury was properly instructed as follows:

> You must determine whether the material appeals to a prurient interest in sex, for unless it does it cannot be obscene. A prurient interest in sex is not the same as a candid, wholesome, or healthy interest in sex. Material does not appeal to the prurient interest just because it deals with sex, or shows nude bodies. Prurient interest is a shameful or morbid interest in sex, nudity or excretion which goes beyond the customary limits of candor.

The substance of this definition was taken directly from *Roth v. United States*, 354 U.S. 476, 487 n.20, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), and remains an accurate description of the Supreme Court's definition of "prurient interest." See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). No objection to this instruction was made by either Harrold or the State.

The jury was further instructed, in relevant parts:

> In determining whether or not the material appeals to a prurient interest in sex, you must determine whether the average person in the community would find that the material has such appeal. People have different views as to the propriety of certain material. What may be prurient to some is not prurient to others. Obscenity is not, however, a matter of individual taste. Your personal opinion as a juror about this material is not a proper basis for determining whether or not the material is obscene or appeals to the prurient interest. Thus, whether you personally believe that the material is good or bad is of no concern in determining whether or not it is obscene; so, too, you may not consider whether in your personal opinion the material is moral or immoral or whether it is likely to be helpful or injurious to public morals. Similarly, whether you personally like or dislike the material, whether it offends or shocks you, may not be considered by you. You personally

> may think the material is immoral, shocking or offensive, and yet you must acquit the defendant if the material is not obscene, as the court has defined that term for you. You must judge how the average person in the community would view this material.
>
> . . . .
>
> . . . In determining whether an appeal to the prurient interest is the main and principal appeal of the material, you should consider the intended effect on the intended and probable recipients of the material.

Again, the trial court correctly captured the definition and standards established by the Supreme Court in its instructions with respect to prurient interest. See *Pinkus v. United States*, 436 U.S. 293, 98 S. Ct. 1808, 56 L. Ed. 2d 293 (1978). The question regarding appeal to the prurient interest was properly submitted to the jury for its determination.

An examination of the videotape supports the jury's conclusion that the videotape appealed to a prurient interest. Harrold's masturbation is clearly depicted; in fact, the camera is placed in such a way that Harrold's genitals are prominently displayed and are the primary image visible on the screen during Harrold's masturbation. The masturbation sequence is introduced on the videotape by the statement that it is "for the ladies only." Similarly, when the sequence is complete, the narrator states, "I hope you enjoyed that, ladies." Harrold's trial testimony further establishes that the inclusion of the masturbation scene was intended to address a complaint from a female viewer that "Cosmic Comedy" had not featured enough male sexual activity. Taken together, these facts certainly support the conclusion that Harrold's masturbation was an attempt, however misguided, to sexually appeal to women.

In the instant case, the jury was properly instructed on how to evaluate whether the videotape appealed to an average person's prurient interest in sex, and the record amply supports the jury's determination that the videotape was shameful and went beyond the ordinary limits of candor.

In reaching a different conclusion, the Court of Appeals relied in part on the federal district court's decision in *U.S. v. M-K Enterprises, Inc.*, 719 F. Supp. 871 (D. Neb. 1989). In that

decision, the district court found that in order to appeal to the prurient interest, a work must appeal to the "darker side of sex," and listed the depiction of force, deliberate pain, inanimate insertions, bondage, deception, or the involvement of children or animals as examples of material that would be considered obscene. *Id.* at 878. Based upon that standard, the court determined that certain material presented in that case appealed to the prurient interest, while other material did not.

We determine, however, that the Court of Appeals has misapprehended the context of the federal district court's decision. In that case, the judge was not conducting an appellate review, but was the trier of fact in a bench trial in the U.S. District Court for the District of Nebraska. *Id.* The district court's decision was specifically based on the judge's "understanding of the contemporary community standards of the average person in southeast Nebraska." *Id.* at 878.

In other words, the decision in *U.S. v. M-K Enterprises, Inc., supra*, does not represent a determination that the First Amendment allows only the regulation of sexual material that depicts, for example, force, deliberate pain, inanimate insertions, bondage, deception, or the involvement of children or animals. It is instead a determination, by a trier of fact, of obscenity vel non based upon the trier of fact's understanding of the relevant contemporary community standards.

As such, it is not relevant to our review of the jury's verdict in the present case. It is true that the federal judge's understanding of the contemporary community standard is different from that applied by the jury in the present case, and it is also true that the jury in this case was drawn from essentially the same community whose views the federal judge addressed in *U.S. v. M-K Enterprises, Inc., supra*. The determination of one trier of fact, however, is neither binding nor even relevant to the determination of another trier of fact in a different case.

As noted by the Supreme Court:

> The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. . . . "[I]t is common experience that different juries may reach different results under any crim-

> inal statute. That is one of the consequences we accept under our jury system."

*Miller v. California*, 413 U.S. 15, 26 n.9, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). This principle is even more appropriately applied where the triers of fact are considering different material in different cases. We have also held that in determining an issue of fact in an obscenity case, each case must be determined on evidence peculiar to it alone and not by comparison to fact determinations made by another jury in a similar case. *State v. Embassy Corp.*, 215 Neb. 631, 340 N.W.2d 160 (1983). In the present case, whether Harrold's videotape appealed to the prurient interest of the average person in the community was a determination for the jury to make, and the jury's affirmative determination is supported by the record.

We are also unpersuaded by Harrold's argument, reiterated by the Court of Appeals, that the work "taken as a whole" is not obscene because the sexual conduct depicted occupies little more than the final minute of a 16-minute presentation. The fact that the opening act of Harrold's show is over 14 minutes long does not redeem the whole, given that the first 14 minutes contains no dialog, comprehensible expressive conduct, or, indeed, any meaningful content that this court can discern. Harrold's masturbation can at the very least be recognized for what it is, and it is the only activity depicted on the videotape for which we believe the average person, applying contemporary community standards, would have any frame of reference.

The jury could certainly have found, based upon the record, that the work, as a whole, appealed to the prurient interest. Cozblah the extraterrestrial is hardly Voltaire, and if "[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication," then over a minute of explicit masturbation will not be constitutionally redeemed by over 14 minutes of content-free nonsense. See *Kois v. Wisconsin*, 408 U.S. 229, 231, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972).

*(iii) Patently Offensive Sexual Conduct*

Similarly, we find ample evidence in the record to support the jury's determination that the videotape depicted, in a

patently offensive way, sexual conduct specifically defined by the applicable state law. As noted above, § 28-807(15) specifically defines masturbation and prolonged contact with genitals as being included in "sexual conduct." Harrold's clearly depicted masturbation and prolonged contact with his genitals, in the absence of any context whatsoever, falls within the range of sexual conduct that creates a jury issue as to whether the conduct is "patently offensive" to an " 'average person, applying contemporary community standards.' " See *Miller v. California*, 413 U.S. at 24.

The jury was properly instructed that Harrold's depiction of sexual conduct must go substantially beyond customary limits of candor for it to be considered patently offensive. Suffice it to say, without repeating the visual details, that the evidence presented supports the jury's determination that the videotape depicted proscribed sexual conduct in a manner that was patently offensive when measured against the contemporary community standards.

*(iv) Value of Work*

We next turn to our de novo review of whether the videotape, taken as a whole, lacked serious literary, artistic, political, or scientific value. The Court of Appeals concluded that the videotape lacked serious value, see *State v. Harrold*, 7 Neb. App. 842, 585 N.W.2d 532 (1998), and we agree with this determination.

As described more fully above, Harrold's videotape is virtually devoid of meaningful content. Aside from Harrold's largely repetitious display of contorted facial gestures, the only conduct depicted on the videotape is masturbation. The only discernible dialog on the videotape relates to that act of masturbation. Harrold's work does not express any comprehensible literary, artistic, political, or scientific message, and the videotape does not endeavor to be informative, enlightening, or persuasive in any manner. In short, we agree with both the jury and the Court of Appeals that the work lacks serious value, and it fails the third prong of the *Miller* test.

(d) Conclusion

We determine that exhibit 2 depicted the type of sexual conduct appropriately regulated by state law, see, *Miller v.*

*California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); § 28-807(15), and that the record supports the jury's determination that exhibit 2 was obscene within the meaning of *Miller* and § 28-807(10). Consequently, we conclude that exhibit 2 was obscene material and not entitled to First Amendment protection. The contrary determination of the Court of Appeals was error.

### 6. Challenged Evidentiary Rulings

The Court of Appeals also found that the trial court erred in excluding certain evidence offered by Harrold. Specifically, Harrold offered (1) CableVision's rules and regulations concerning public access programming; (2) testimony from Grooman regarding the CableVision procedures regulating obscene and indecent material submitted for public access broadcast, whether Harrold's videotape was broadcast, and whether Grooman or CableVision was prosecuted for it; and (3) testimony from Harrold regarding his understanding of the CableVision rules and his knowledge of community standards. The trial court found that this evidence was not relevant and excluded it on that basis. The Court of Appeals determined that the county court abused its discretion in excluding the evidence, and the State assigns this determination as error.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1995). All relevant evidence normally is admissible, and conversely, evidence which is not relevant is not admissible. See, Neb. Rev. Stat. § 27-402 (Reissue 1995); *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998). A 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. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

Relevance is a relational concept and carries meaning only in context. A right to introduce evidence depends upon there being an issue of fact that is of consequence to the determination of an action. See § 27-401. First, evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case. Glen Weissenberger, Weissenberger's Federal Evidence Courtroom Manual (1995). Second, if the evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant. *Id.*

(a) CableVision Rules

Harrold offered the CableVision rules governing public access television, arguing that they were (1) relevant evidence of contemporary community standards and (2) relevant to Harrold's intent to distribute obscene, as opposed to indecent, material. We will address each of these arguments in turn.

*(i) Relevance to Contemporary Community Standards*

Harrold first argues that the CableVision rules provide relevant evidence of the contemporary community standards. A defendant in a criminal obscenity case has a right to introduce evidence pertaining to the community standard. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997) (citing *State v. Little Art Corp.*, 189 Neb. 681, 204 N.W.2d 574 (1973), *vacated on other grounds* 414 U.S. 992, 94 S. Ct. 345, 38 L. Ed. 2d 231). The question, then, is whether the CableVision rules pertained to the community standard.

The rules themselves are primarily concerned with technical aspects of public access broadcasting, such as when and where tapes must be provided to CableVision and when CableVision's studio facilities would be made available for the use of potential broadcasters. Section VII of the rules, however, pertains to "Program Content." That section defines obscenity in the exact language of § 28-807(10). The CableVision rules thus mention community standards, as part of the language borrowed from § 28-807(10) and thus secondhand from *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). The rules do not, however, define community standards in any way, nor do the rules provide any examples or substantive guidance

regarding what material might or might not offend the community standards.

Given this fact, we are not persuaded that the CableVision rules would provide relevant evidence of community standards. The rules do nothing more than reiterate the definition of obscenity on which the jury was ultimately instructed by the court. The rules provide no guidance to the jury on how to determine community standards, and thus, they are not relevant to that issue. The trial court did not abuse its discretion in so finding.

*(ii) Relevance to Intent*

Harrold also argues that the rules were relevant to an intent-based defense. To be found guilty of violating § 28-813(1)(a), the State must prove that the defendant "knowingly" printed, copied, manufactured, prepared, produced, or reproduced obscene material. Essentially, Harrold is claiming that he thought the material he produced and distributed was indecent but not obscene, and he offers the CableVision rules concerning indecency and obscenity in furtherance of this argument.

Section 28-807(5) defines "knowingly" as "having general knowledge of, reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry of the character and content of any material, taken as a whole, described in this section, which is reasonably susceptible to examination by the defendant."

We have stated, with reference to this language:

> " 'It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributes, and he knew the character and nature of the materials.' "
>
> . . . "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. . . ."

*State v. American Theatre Corp.*, 196 Neb. 467, 471, 244 N.W.2d 59, 62 (1976) (quoting *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)).

Harrold is attempting to prove, through this and other evidence, that although he was aware of the contents of the videotape, he did not know it to be legally obscene. Even if this were proved, however, it would not provide Harrold with an effective defense to the charge brought against him. The evidence presented at trial overwhelmingly demonstrated that Harrold, as the producer, director, and sole actor in the videotape, had sufficient knowledge of the contents thereof to satisfy the definition from § 28-807(5) set forth above.

The following colloquy from Harrold's trial testimony aptly illustrates the evidence that was presented:

> Q. Did you copy the material onto the tape that was delivered to CableVision on September 14, 1995, and as Exhibit No. 1?
>
> [Harrold]. Yes.
>
> . . . .
>
> Q. And it was you actually that distributed it or gave it to or circulated it to CableVision on September 14, 1995, correct?
>
> [Harrold]. Yes.
>
> Q. And when you did that tape and when you gave it to CableVision, you knew what was on the tape, correct?
>
> [Harrold]. Yes.
>
> Q. And you knew the nature and character of the tape?
>
> [Harrold]. Yes.

In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). Even assuming that the trial court erred in excluding evidence that might be relevant to Harrold's intent, we find that the evidence at trial indisputably establishes that Harrold had general knowledge of, reason to know, or a belief or reasonable ground for belief which warranted further inspection or inquiry of the character and content of the videotape. See § 28-807(5). Consequently, we conclude that any erroneous exclusion of evidence relevant to Harrold's intent was harmless beyond a reasonable doubt.

*(iii) Open Door*

Harrold argued at trial, and the Court of Appeals agreed, that the prosecution "opened the door" to admission of the CableVision rules during its cross-examination of Harrold. The critical exchange is as follows:

> Q. And you wanted your movies shown — or your videos shown after midnight because you thought that that might lessen the possibility that children or juveniles would be exposed to it, correct?
>
> [Harrold]. I couldn't answer that question 'cause I can't — I can't tell who's gonna be watching what.
>
> Q. You just asked to have it run after midnight because you like having it run after midnight, no other reason?

After that question, defense counsel objected and argued that the door had been opened to the introduction of the CableVision rules. Defense counsel argued that the answer to the prosecutor's question was that Harrold had asked to have the videos run after midnight because CableVision rules required indecent materials to show after midnight and that Harrold should be able to answer the question using CableVision rules. Ultimately, the last question was withdrawn, and the trial court reaffirmed its earlier ruling excluding the CableVision rules.

The doctrine of "opening the door," while recognized, has not previously been examined in depth by this court. In other jurisdictions, it has been said that the doctrine is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant, in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection. *Clark v. State*, 332 Md. 77, 629 A.2d 1239 (1993). The rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal. See *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984). As the Maryland Court of Appeals stated:

> Generally, "opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.

. . . .

> In sum, "opening the door" is simply a way of saying: "My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue."

*Clark v. State*, 332 Md. at 85, 629 A.2d at 1243.

We find this analysis helpful to our determination. It seems obvious that one does not open the door to admit evidence that is inadmissible; instead, the door is opened when evidence that had *previously* been inadmissible then *becomes* admissible by virtue of some act of counsel or the parties. Compare *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987) (admission of improper evidence on one side provides no justification for other party to introduce incompetent or improper evidence in rebuttal).

With this in mind, we consider the effect of the question posed by the prosecution in the instant case. We have already determined that the CableVision rules were not relevant to the issue of community standards because they contained no information that would be helpful to the jury in that regard. This fact was in no way altered by the question posed to Harrold by the prosecution. Even after the question was asked, the CableVision rules were still irrelevant to the issue of community standards. Neither did the question inject some new issue into the case to which the rules would be relevant. To the extent that the rules were relevant to Harrold's intent to produce and distribute obscene material, their exclusion was harmless, as noted above, and this is true regardless of the question posed to Harrold on cross-examination.

In sum, while the prosecutor's cross-examination questions might have implicated the existence of the CableVision rules, the rules were not themselves evidence and the questions did not have the effect of causing the previously irrelevant CableVision rules to become relevant to any issue in the case. The trial court did not abuse its discretion in continuing to exclude them.

(b) Grooman's Testimony

Harrold's arguments relating to the testimony of Grooman are to some extent addressed by our resolution of the issues relating

to the CableVision rules. To the extent that Harrold argues that Grooman's testimony would have been relevant to Harrold's intent, any error was harmless beyond a reasonable doubt, as noted above. We therefore consider the possible relevance of Grooman's testimony to the issue of community standards.

At trial, Harrold made an offer of proof on the issues regarding which he wished to examine Grooman. Much of this offer of proof was an attempt to establish foundation for the admission of the CableVision rules, and we have already disposed of this issue. Beyond that, Harrold's offer of proof included questions to Grooman regarding (1) Grooman's and CableVision's opinions regarding the obscenity of the videotape, (2) whether Harrold's videotape was actually broadcast on television, and (3) whether Grooman or CableVision was prosecuted for broadcasting the videotape. After the offer of proof was made, the trial court sustained the State's objection to the testimony.

Initially, we note that when Grooman was asked if he had reached an opinion regarding the obscenity of the videotape, he said that he had not. Since Grooman had no opinion, it could not have been an abuse of discretion for the trial court to exclude it.

Harrold asserts, however, that Grooman's offer of proof establishes that CableVision had a policy against broadcasting obscene materials, that the videotape was reviewed by CableVision, and that CableVision showed the videotape. Therefore, argues Harrold, CableVision did not believe the videotape to be obscene, and this, claims Harrold, is evidence relevant to the community standards. The Court of Appeals evidently agreed, finding that "what CableVision decides to broadcast is both a measurement and source of community standards." *State v. Harrold*, 7 Neb. App. 842, 856, 585 N.W.2d 532, 543 (1998).

This court held in *Main Street Movies v. Wellman*, 251 Neb. 367, 371, 557 N.W.2d 641, 645 (1997), that the testimony of the Sarpy County Attorney was not admissible evidence of contemporary community standards, because his opinion "constitutes nothing more than an expression of his individual sense of the contemporary community standard." We stated that the county attorney's "knowledge, skill, experience, training, and education as a prosecutor do not qualify him as an expert in deter-

mining public opinion." *Id.* Consequently, we held that it was error for the trial court to rely on the county attorney's opinion of contemporary community standards in determining whether work was obscene. *Id.*

In the present case, the foundation for the proffered evidence is even more scant. There is absolutely no evidence that the opinions of the CableVision advisory board would qualify as properly informed guidance regarding community standards. Furthermore, Harrold's offer of proof does not even contain such opinions, but merely offers the inference that since the show was broadcast, the unidentified members of the advisory board must have found the videotape to not be obscene.

The Court of Appeals stated that "one permissible inference for the jury was that CableVision, like Harrold, considered the videotape at issue to be indecent and suitable for broadcast, but not obscene." *State v. Harrold*, 7 Neb. App. at 858, 585 N.W.2d at 544. Even assuming this inference to be permissible, it would be relevant only if CableVision's opinion regarding the videotape was itself admissible. It is not. Based upon the foundation presented in Harrold's offer of proof, we find that the proffered evidence lacked both relevance and foundation and that the trial court did not abuse its discretion in rejecting it.

Similarly, we see no relevance in whether or not Grooman or CableVision was prosecuted for the broadcast of the videotape. The prosecutor's exercise of discretion regarding prosecution provides no guidance to the trier of fact regarding contemporary community standards. Compare *Main Street Movies v. Wellman, supra.* The trial court did not abuse its discretion in excluding this testimony.

(c) Harrold's Testimony

At trial, defense counsel also made an offer of proof relating to Harrold's testimony. Specifically, the defense wanted to ask Harrold questions regarding his knowledge of the CableVision rules and ask Harrold about his knowledge of the sexually explicit material available in the community.

We have previously addressed the relevance of the CableVision rules themselves and Grooman's testimony regarding those rules. For the same reasons, we determine that the trial

court did not abuse its discretion in excluding Harrold's testimony on the same issue. We then turn to Harrold's testimony relating to community standards. In this regard, we must consider the testimony contained in Harrold's offer of proof:

> Q. Okay. Are you familiar with what type of material is available in the community?
>
> A. (There was no audible response.)
>
> Q. As far as sexually explicit material.
>
> [Harrold]. To a degree.
>
> Q. Okay. And how do you come by your knowledge of what is available?
>
> [Harrold]. Just from living in Lincoln, you know. I do it in my life.
>
> Q. Okay. You testified earlier that you had viewed rentals that were available in the market, is that correct?
>
> [Harrold]. Yes.
>
> Q. And did you view materials which you believed to be obscene under the current community standards?
>
> [Harrold]. I came across 'em, you know, I — I rented some videos where I got into 'em and I considered 'em to be obscene then I'd, you know, I kinda lost interest in watchin' it.
>
> Q. Okay. That would conclude my offer of proof, Your Honor.

We find that the foregoing offer of proof lacks the foundational requirements necessary to make the evidence admissible under Nebraska law. Harrold's proffered testimony, even interpreted liberally, is nothing more than one individual's sense of whether certain unidentified videos, that have not been introduced into evidence, may be obscene under current community standards. See *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). If interpreted literally, Harrold said nothing more than that he had rented movies which he believed to be obscene under contemporary community standards, and this testimony says nothing about the content of work that Harrold believes to violate contemporary community standards or what those standards might be. Consequently, nothing in Harrold's offer of proof would be helpful to the jury in evaluating community standards. Harrold's opinion lacked foundation

and relevance, and the trial court did not abuse its discretion in excluding it.

#### (d) Conclusion

We find that the Court of Appeals erred in determining that the trial court abused its discretion in excluding particular evidence. The trial court did not abuse its discretion in the exclusion of evidence purportedly relating to community standards, and any error in excluding evidence relating to intent was harmless beyond a reasonable doubt.

## IV. HARROLD'S REMAINING ASSIGNMENTS OF ERROR

Because of its disposition of the case, the Court of Appeals did not reach the other assignments of error Harrold raised in that court. 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. *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998).

### 1. Assignments of Error

In his brief to the Court of Appeals, Harrold raised 43 assignments of error. Obviously, many of those alleged errors have been resolved in the context of the State's petition for further review. We have consolidated and restated Harrold's remaining assignments of error as follows: (1) The trial court erred in refusing to allow Harrold to ask the jury panel questions regarding community standards during voir dire and in refusing to quash the jury panel thereafter, (2) the trial court erred in refusing a jury instruction offered by Harrold and in overruling Harrold's objection to another jury instruction, (3) the verdict was not supported by sufficient evidence, and (4) Harrold received an excessive sentence.

### 2. Restriction of Voir Dire

During the jury selection process, Harrold sought to ask the members of the venire several questions relating to community standards. Specifically, Harrold sought to ask the panel (1) whether they knew the contemporary community standard, (2)

whether they knew the limits of candor the community finds acceptable in presenting sexually explicit material, (3) how they knew the limits of candor the community finds acceptable in presenting sexually explicit material, (4) how their own views on the acceptable limits of candor in presenting sexually explicit material differed from those of the community, and (5) in what way their own views on the acceptable limits of candor in presenting sexually explicit material differed from those of the community. Based on the trial court's refusal to allow these questions, Harrold moved to quash the jury panel and then moved for mistrial. Harrold alleges that the trial court erred in refusing his questions and in overruling his subsequent motions and that this resulted in a violation of his rights to due process and trial by an impartial jury.

Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby. *Yount v. Seager*, 181 Neb. 665, 150 N.W.2d 245 (1967).

The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Krutilek, supra*. The finding of the trial court as to the qualifications of a juror will not be set aside unless there has been a clear abuse of judicial discretion. *Losieau v. State*, 157 Neb. 115, 58 N.W.2d 824 (1953); *McColley v. State*, 116 Neb. 512, 218 N.W. 129 (1928).

The precise issue raised by Harrold was confronted by the Supreme Court in *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977). In that case, the defendant submitted five questions for voir dire which were rejected by the trial court. *Id.* One question inquired whether the jurors had any knowledge of the relevant contemporary community standards with regard to the depiction of sex and nudity. *Id.* The

remaining questions sought to uncover the source of the jurors' knowledge and their understanding of the community standards and to explore the jurors' knowledge of local law on the subject. *Id.*

On appeal, the defendant complained that the trial court had abused its discretion in refusing to ask the tendered questions. The Supreme Court rejected the argument, stating:

> We also reject petitioner's arguments that the prospective jurors should have been asked about their understanding of Iowa's community standards and Iowa law . . . . The particular inquiries requested by petitioner would not have elicited useful information about the jurors' qualifications to apply contemporary community standards in an objective way. A request for the jurors' description of their understanding of community standards would have been no more appropriate than a request for a description of the meaning of "reasonableness." Neither term lends itself to precise definition. This is not to preclude other more specific and less conclusory questions for *voir dire*. For example, it might be helpful to know how long a juror has been a member of the community, how heavily the juror has been involved in the community, and with what organizations having an interest in the regulation of obscenity the juror has been affiliated. The propriety of a particular question is a decision for the trial court to make in the first instance. In this case, however, we cannot say that the District Court abused its discretion in refusing to ask the specific questions tendered by petitioner.

431 U.S. at 308.

The Supreme Court's reasoning is persuasive, and the factual situation in *Smith v. United States, supra*, is essentially indistinguishable from the case at bar. In addition, we note that the issue of community standards is one which is addressed at trial and in the jury instructions and which is to be decided during the jury's deliberations based on the instructions and the evidence presented. Given that community standards are to be determined at trial, it is disingenuous for Harrold to argue that a juror should be disqualified from serving if he or she has *not* prejudged the issue. As the trial court observed:

> What you want me to do is to make a determination that these jurors, if they say they don't know the community standard, is to conclude then that they're not competent to sit even though we haven't even told them the legal definition [of] what guidelines they're to follow.

The questions Harrold sought to ask the jury panel prior to trial would elicit no useful information and would be premature, where the jurors had not been provided with evidence or instructed on the issue of community standards. The trial court did not abuse its discretion in refusing the tendered questions and committed no error in denying the subsequent motions premised on the court's failure to ask those questions. Harrold's assignment of error is without merit.

### 3. Jury Instructions

Harrold claims that the trial court erred in overruling his objection to jury instruction No. 5. While assigned, however, this assignment of error was not argued in Harrold's brief to the Court of Appeals. Errors that are assigned but not argued will not be addressed by an appellate court. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998). In any event, we note that Harrold's objection was premised on his assertion that "in order for a person to be held criminally liable for an obscene tape, that person has to either know or believe that the material is obscene." This premise was soundly rejected by the Supreme Court in *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

Harrold further claims that the trial court erred in refusing his tendered jury instruction No. 3. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Id.*

Harrold's proposed instruction No. 3 provided:

> Evidence has been adduced that the videotape in question was delivered to Lincoln CableVision for broadcast on the public access channel. Your beliefs about whether sexually explicit materials should be broadcast on the public access channel are not to be considered in determining whether or not this videotape is obscene. In determining whether or not this videotape is obscene, you shall apply the same criteria you would apply for a videotape from a video rental establishment or an adult movie theater.

Assuming that this instruction was a correct statement of the law and was warranted by the evidence, we nonetheless find that Harrold has not demonstrated that he was prejudiced by failure to give the instruction. The instruction to "apply the same criteria" to be applied to a videotape from a rental establishment or adult theater would have been superfluous, as the jury was specifically instructed regarding the criteria necessary for the videotape to be found obscene, and those criteria properly stated the law. The jury was instructed regarding the proper criteria to apply in the present case, and absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

In short, the instructions given, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings. Harrold has demonstrated no prejudice resulting from the refusal of his tendered instruction and, thus, has shown no reversible error. This assignment of error is meritless.

### 4. Sufficiency of Evidence

Harrold assigns several errors that generally challenge the sufficiency of the evidence to sustain his conviction. We have analyzed the evidence presented in this case at length in our discussion of the substantive issues presented on appeal. Based on that analysis, we conclude that the evidence in this case is amply sufficient to support the conviction. Harrold's assignments of error are without merit.

### 5. Excessive Sentence

Harrold claims that the $1,000 fine imposed by the trial court was an excessive sentence. A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Torres, ante* p. 380, 590 N.W.2d 184 (1999).

In this case, the trial court imposed the maximum fine available under the statute, but imposed no incarceration. The sentence imposed was within the statutory limits and was not an abuse of judicial discretion. Harrold's assignment of error is without merit.

## V. CONCLUSION

For the foregoing reasons, we conclude that the Court of Appeals erred in determining that Harrold's videotape was not obscene and that Harrold was prejudiced by certain evidentiary rulings. As a result, the Court of Appeals erred in determining that the cause should be dismissed. The assignments of error unaddressed by the Court of Appeals are without merit. Because we conclude that there was no reversible error by the county court, we reverse the judgment of the Court of Appeals and remand this cause with directions to reinstate the judgment of the district court which had affirmed the judgment of the county court.

Reversed and remanded with directions.

Hendry, C.J., and Miller-Lerman, J., not participating.

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Rex A. Woollen, appellee and cross-appellant, v. The State of Nebraska, appellant and cross-appellee.
593 N.W.2d 729

Filed May 7, 1999. No. S-98-127.

1. **Tort Claims Act: Appeal and Error.** In actions brought under the State Tort Claims Act, findings of fact made by the trial court will not be set aside unless such findings are clearly incorrect.
2. **Tort Claims Act: Liability: Immunity: Appeal and Error.** Where the facts of a case brought pursuant to the State Tort Claims Act are undisputed, the issue of

whether liability is precluded by sovereign immunity is a question of law in which an appellate court reaches a conclusion independent of the lower court's ruling.

3. **Rules of Evidence.** In proceedings where the Nebraska 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.
4. **Trial: Expert Witnesses: Appeal and Error.** Admission of expert witness testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
5. **Tort Claims Act: Damages: Appeal and Error.** The amount of damages awarded in a case pursuant to the State Tort Claims Act is a matter solely for the finder of fact, 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 at trial.
6. **Statutes: Immunity: Waiver: Intent.** Statutes that purport to waive the State's sovereign immunity must be clear in their intent. They are strictly construed in favor of the sovereign and against the waiver.
7. **Governmental Subdivisions: Negligence: Notice.** When a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by it, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.
8. **Governmental Subdivisions: Highways: Liability.** The State's liability for failure to maintain highways is the same as the comparable liability of counties.
9. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
10. **Negligence: Proof.** Foreseeability is a factor in establishing a defendant's duty.
11. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts of a particular case.
12. **Governmental Subdivisions: Negligence: Notice: Proof.** A governmental entity's actual or constructive knowledge of a hazard or dangerous condition coupled with the entity's failure to follow governing statutes, policies, or rules that mandate warning of or correction of the hazard may, in a proper case, provide evidence of the entity's duty to a plaintiff and breach of that duty.
13. **Negligence: Trial.** Determination of causation is ordinarily a matter for the trier of fact.
14. **Torts: Actions: Damages: Attorney Fees.** One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees, and other expenditures thereby suffered or incurred in the earlier action.
15. **Damages.** The measure of recovery for damage to personal property that cannot be repaired and thereby restored to substantially its condition immediately before the damage occurred is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.

Appeal from the District Court for Johnson County: WILLIAM B. RIST, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellant.

Siegfried H. Brauer for appellee.

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

MILLER-LERMAN, J.

## I. NATURE OF CASE

The State of Nebraska appeals from a judgment entered following a bench trial finding the State liable to Rex Woollen, appellee, under the State Tort Claims Act (Act), Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1992), for damages Woollen sustained in a one-car accident on Highway 136 in Johnson County, Nebraska. Woollen cross-appeals, challenging the trial court's conclusion that he was responsible for 40 percent of the negligence that proximately caused the accident, various findings with respect to items of damages, and an evidentiary ruling.

With respect to the State's appeal, we affirm the trial court's finding as to the comparative negligence of the parties. With respect to the cross-appeal, we conclude the trial court erred in striking Woollen's damage claim for legal expenses he paid in proceedings prior to the trial herein that concerned medical bills incurred for the treatment of injuries he sustained in the accident. We reverse, and remand for a new trial in the trial court limited to Woollen's claim for damages in the instant action due to legal expenses incurred in these other prior proceedings, and if such damages are established, they are to be reduced by Woollen's percentage of negligence. We conclude the remainder of the assigned errors in Woollen's cross-appeal are without merit.

## II. STATEMENT OF FACTS

### 1. ACCIDENT

On February 14, 1992, at approximately 4:50 p.m., Woollen was driving his 1985 Buick Skylark west on Highway 136 in

Johnson County when he was involved in a one-car accident. Woollen, a 53-year-old farmer, was alone in his vehicle. There was still daylight, and the temperature was approximately 45 degrees Fahrenheit. At the time of the accident, rain had been falling steadily for some time.

The surface of Highway 136 was deeply rutted, and as Woollen drove he tried to keep his car's tires on the ridges separating the ruts, for better control. Woollen was not familiar with the road conditions on Highway 136. He testified that he had driven on Highway 136 about five times in the 4 years preceding his accident but that he had never driven on Highway 136 in the vicinity of the accident in rainy or otherwise wet conditions.

Driving on the rutted surface, Woollen's car hit a pool of water that had "ponded" over the ruts and covered the entire width of the highway at the bottom of a low-grade slope. Woollen's car hydroplaned, and he lost control of it. The car veered diagonally across the highway, crossing the lane for oncoming traffic before leaving the road and striking a concrete culvert headwall located approximately 12 feet from the edge of the south side of the highway. As a result of the impact, Woollen's car flipped and rolled, and Woollen was ejected from it and sustained injuries.

Woollen sued the State for various damages under the Act. Woollen alleged, inter alia, that the State negligently failed to safely maintain the highway and negligently failed to warn motorists of the hazardous conditions at the accident site. Woollen's claim for damages for legal expenses incurred in prior proceedings brought to collect medical fees incurred for treatment of injuries he sustained in the accident were stricken before trial. Woollen filed his petition against the State in the district court for Johnson County on November 28, 1994.

### 2. Condition of Highway 136 Before Accident

#### (a) Road Ruts

When Woollen's accident occurred in February 1992, the surface of Highway 136 at the accident site was covered with asphaltic pavement. Over time, traffic had formed ruts on the highway's surface. In the westbound lane in which Woollen was

traveling prior to the accident, the depth of the ruts was from one-half inch to over an inch. Trial evidence showed that some ruts were deeper than three-fourths of an inch at the point at which Woollen's car began to hydroplane. As a result of the highway's downward slope and steady rainfall on the day of the accident, water had filled and flowed out of the ruts, forming a pool across the highway. It was at this pool of water that Woollen lost control of his car when it began hydroplaning.

Fact witness Roger Batterscher testified that shortly before the accident, Woollen's car passed Batterscher's car after Batterscher had reduced his speed from 50 m.p.h to approximately 40 m.p.h. because of the highway ruts and the pooling water. Batterscher testified that in his experience, the road's rutted surface made it unsafe to drive at the 55-m.p.h. posted speed limit when the road was wet. The existence and depth of the ruts in the vicinity of the accident were not seriously disputed at trial.

In 1972 and 1973, the State resurfaced Highway 136 at the accident location, applying a new asphaltic surface. No other changes were made to the highway or to the culvert and headwall.

In 1989, the State Department of Roads commenced the "Rehabilitation, Restoration and Reconstruction Project," which came to be known as the 3R Project, for Highway 136 at and near the accident site. As part of the 3R Project, the State extensively studied the highway's condition, and thus, the State was aware prior to Woollen's accident of the highway's slope, its deep surface ruts, and other automobile accidents caused by hydroplaning which had occurred in the approximate location of Woollen's accident.

In 1971 and again in 1991, the State adopted highway design and maintenance standards which specifically addressed, inter alia, the safety risks posed by ruts in road surfaces and the proper situation of culverts in relation to the edges of roadways. The trial court accepted evidence of these and other related standards, including exhibit 18, "Minimum Design Standards"; exhibit 74, "Pavement Management System"; exhibit 75, "Manual on Uniform Traffic Control Devices"; exhibit 232, the State's 1988 supplement to the manual found at exhibit 75; and

exhibit 233, "Standards and Guides for Traffic Controls for Street and Highway Construction, Maintenance, Utility, and Incident Management Operations," published by the Federal Highway Administration. Documents entitled "Nebraska Highway Needs Study" for the years 1988 to 1990 were received as exhibits 86 through 88. For convenience, we refer to these exhibits collectively as "the safety standards." According to the safety standards, ruts three-fourths of an inch deep posed an unacceptable safety risk. Woollen's expert witness, William Berg, also so testified.

(b) Situation of Culvert and Headwall

Highway 136 was designed and originally constructed in 1955. The culvert and concrete headwall into which Woollen's car collided were installed during the highway's original construction. The culvert is a steel pipe, 48 feet long and 72 inches in diameter. The concrete headwall for the culvert was situated approximately 12 feet from the southernmost edge of the highway's paved surface. At the time this portion of Highway 136 was built, no standardized design safety guidelines had been adopted by the State to govern placement of the culvert and headwall in relation to the edge of the roadway. There was no evidence that the original design and construction of Highway 136 were negligent.

The safety standards introduced into evidence at trial addressed proper situation and "clear zone" dimensions for obstacles or structures located off the paved highway surfaces, such as the culvert and headwall into which Woollen's car collided. At all relevant times in the case at bar, the lateral clear zone at the accident site from the southern edge of Highway 136 to the culvert and headwall was 12 feet. According to the safety standards, lateral clearance of at least 20 feet from the pavement edge should be allowed when the average daily traffic (ADT) on a road is between 400 and 480 cars. In 1972 and 1973, when Highway 136 was resurfaced, the ADT was 570 cars, and it was projected that by 1992, the ADT would be 1,025 cars. The 1992 minimum design standards adopted by the State provided that for ADT between 850 and 1,700 vehicles, a 23-foot lateral clearance should be provided for any off-pavement structure.

At the time of the accident, the only warning sign near the culvert was a single post with three reflectors in a vertical configuration that marked the culvert headwall. Batterscher and Kimberly Koch, percipient witnesses to Woollen's accident, were both familiar with Highway 136 and drove it frequently. Both witnesses testified that the culvert and headwall which Woollen's car struck were not easily visible to motorists. Batterscher, a lifelong resident of the area who had driven on Highway 136 for years, testified that before Woollen's accident, he did not know that the culvert and headwall were there.

The evidence showed that the 3R Project was designed, inter alia, to correct these dangerous conditions. The State did not implement the changes recommended by the 3R Project. The State did take steps to warn motorists of the dangerous highway surface after Woollen's accident.

### 3. Trial of Woollen's Claims

Woollen's claims against the State were tried to the court on September 3 through 5, 1997, and the trial court's order entering judgment in favor of Woollen and against the State was filed on January 12, 1998. The judgment order was 16 pages long. In it, the trial court made extensive findings of fact and conclusions of law, relevant portions of which we set forth below.

#### (a) Factual Findings and State's Duty

As noted above, witness Batterscher testified that he had previously seen water pool on Highway 136 at the accident site and Batterscher also stated that on the day of the accident, Woollen passed him on the highway shortly before Woollen lost control of his car. Woollen testified that he did not remember exactly how fast he was going before the accident and that he did not recall seeing the pool of water before he drove into it. Based on the evidence, the trial court found that 40 m.p.h. was the appropriate driving speed for the conditions existing at the time the accident occurred. The trial court further found that a driver traveling at that speed would have seen the pool of water and would reasonably have been able to slow his or her vehicle before entering the pool. The trial court found that Woollen did not decrease his speed prior to driving into the pool of water where the hydroplaning started.

The trial court found that the ruts at and in the vicinity of the accident site rendered the surface of Highway 136 dangerous to motorists, especially during periods of rain and water accumulation. The trial court found that the State had actual notice of the ruts' depth and that according to the State's safety standards, the ruts posed an unacceptable safety risk, but that the State did not repair the ruts as it had a duty to do. The trial court found that the State knew of previous accidents at the location in question.

The trial court concluded that at the time of the accident, the State had no duty to rebuild the culvert and headwall, as there was no evidence that they had been negligently designed and constructed in 1955. However, based upon the minimum design and safety standards adopted by the State and introduced into evidence that showed the culvert and its headwall to be in a "danger area," the trial court concluded that the State had a duty to warn motorists of the hazard posed by the inadequate clear zone between the paved road's edge and the culvert and headwall and of the corresponding need for motorists to travel at a reduced rate of speed, or to construct guardrails or crash cushions to lessen the possibility of a collision with the culvert's headwall.

(b) Determinations Regarding Negligence

Given the foregoing findings of fact and conclusions regarding the State's duty, the trial court held that the State was negligent "in two respects." First, the trial court determined that the State failed to maintain the surface of Highway 136 in the vicinity of the accident and that this negligence facilitated the pooling of water, which created a hazard to drivers. Second, the trial court determined that the State was negligent in failing to warn drivers of the existence of the headwall or to take appropriate action with respect to the location of the headwall of the culvert to minimize the danger posed by the culvert headwall.

The trial court found that Woollen was contributorily negligent in failing to maintain an adequate lookout, in failing to maintain control of his vehicle, and in traveling at an unsafe rate of speed.

The trial court found that Woollen was responsible for 40 percent of the negligence that proximately caused the accident and that the State was responsible for the remaining 60 percent. The trial court apportioned liability for the accident's occurrence and Woollen's resultant damages according to these percentages.

(c) Damages Awarded to Woollen

Woollen sought damages for his past and future medical expenses; past, present, and future pain and suffering; lost earnings and loss of earning capacity; and loss of his vehicle. Woollen also claimed that he had incurred legal expenses defending against claims filed against him by health care providers seeking payment for care provided to Woollen as a result of the accident. In response to the State's motion, the trial court struck Woollen's claim for damages for the attorney fees Woollen incurred in prior proceedings brought by health care providers seeking payment.

Following trial, the trial court found that as a result of the accident, Woollen sustained a total of $881,373.24 in damages, as follows: $145,373.24 in medical expenses, to date of trial; $50,000 in future medical expenses; $100,000 for Woollen's disability to date; $400,000 for Woollen's future disability; $100,000 for Woollen's pain and suffering to date; $50,000 for Woollen's future pain and suffering; $6,000 for Woollen's lost income to date of trial; and $30,000 for Woollen's loss of future earning capacity.

Based upon the court's determination concerning the respective negligence of the parties, judgment was entered against the State in the amount of $528,823.94, plus interest and costs. The trial court determined that Woollen had produced insufficient evidence to justify an award of damages for lost past or future income based upon Woollen's farming operation, although the trial court found that Woollen had proved an annual expense of $1,500 for an agronomist, which expense he had not been forced to incur prior to the accident. The trial court also determined that Woollen had offered insufficient evidence to merit an award of damages for the loss of his vehicle.

The State appeals, and Woollen cross-appeals.

## III. ASSIGNMENTS OF ERROR

### 1. Appeal

The State claims on appeal that the trial court erred in (1) failing to find the State immune from Woollen's claims under § 81-8,219(10) of the Act; (2) determining that the 12-foot clear zone for the roadside culvert struck by Woollen violated State policies; (3) finding the State had a duty to warn motorists of the culvert or to take other action such as installing guardrails or a crash cushion to make the location safer; and (4) failing to find that the State's negligence was not outweighed by Woollen's negligence.

### 2. Cross-Appeal

Woollen cross-appeals, claiming that the trial court erred in (1) striking Woollen's claim for damages for legal fees incurred to defend against actions seeking to collect for health care services provided to Woollen as a result of his injuries from the accident, (2) failing to award Woollen damages for his lost vehicle, (3) failing to award Woollen damages for his loss of earning capacity, (4) determining that Woollen was negligent, (5) determining that Woollen's negligence proximately caused his damages, and (6) allowing the State's expert witness, Dean L. Sicking, to testify on the issue of causation.

## IV. STANDARD OF REVIEW

In actions brought under the Act, findings of fact made by the trial court will not be set aside unless such findings are clearly incorrect. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

Where the facts of a case brought pursuant to the Act are undisputed, the issue of whether liability is precluded by sovereign immunity is a question of law in which an appellate court reaches a conclusion independent of the lower court's ruling. See, *D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997); *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

In proceedings where the Nebraska 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. *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998). Admission of expert witness testimony is ordinarily 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).

The amount of damages awarded in a case pursuant to the Act is a matter solely for the finder of fact, 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 at trial. *Talle, supra.*

## V. ANALYSIS

### 1. State's Direct Appeal

#### (a) Sovereign Immunity

The State claims on appeal that given the evidence at trial, the trial court erred in failing to conclude that the State was immune from Woollen's claims. Neb. Const. art. V, § 22, provides, "The State may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This provision of the Constitution is not self-executing, and legislative action is necessary to waive the State's sovereign immunity. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994), *appeal after remand* 254 Neb. 64, 574 N.W.2d 498 (1998), *cert. denied* ___ U.S. ___, 119 S. Ct. 339, 142 L. Ed. 2d 280 (1998); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993). It is axiomatic that a waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication therefrom as will allow no other reasonable construction. *Hoiengs, supra.* Statutes that purport to waive the State's sovereign immunity must be clear in their intent. They are strictly construed in favor of the sovereign and against the waiver. *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984).

In support of its claim of immunity, the State relies upon § 81-8,219(10), which the State refers to as the "snow and ice" exception to the Act. The Act generally provides that the State

is liable for torts in the same manner and to the same extent as a private entity. § 81-8,215. However, § 81-8,219 sets forth particular claims for which the State has not waived immunity. Section 81-8,219 was amended effective February 8, 1992, subject to an emergency clause. At the time of the accident, § 81-8,219 provided:

> The State Tort Claims Act shall not apply to:
>
> . . . .
>
> (10) Any claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway as defined in section 30-602, bridge, public thoroughfare, or other state-owned public place due to weather conditions. Nothing in this subdivision shall be construed to limit the state's liability for any claim arising out of the operation of a motor vehicle by an employee of the state while acting within the course and scope of his or her employment by the state.

Although not relied upon by the parties, we note that § 81-8,219 further provided:

> The State Tort Claims Act shall not apply to:
>
> . . . .
>
> (12) Any claim arising out of the alleged insufficiency or want of repair of any highway as defined in section 39-602, bridge, or other public thoroughfare. Insufficiency or want of repair shall be construed to refer to the general or overall condition and shall not refer to a spot or localized defect. The state shall be deemed to waive its immunity for a claim due to a spot or localized defect only if the state has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim.

The State argues that the evidence shows that the rain falling on February 14, 1992, created a pool of water which was a " 'temporary condition caused by nature,' " brief for appellant at 14, and that it was this condition which caused Woollen's accident. The State claims it is immune from liability pursuant to § 81-8,219(10) because the evidence shows that this accident was caused by "temporary conditions caused by nature . . . due to weather conditions." We do not agree.

The State raised the immunity issue as an affirmative defense to Woollen's petition. As such, the burden of proving it rested upon the State. See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Thus, the immunity issue must be evaluated on appeal in light of the proof introduced at trial.

The evidence at trial showed and the trial court found that the road surface at the location where Woollen lost control of his car was marred by ruts of three-fourths of an inch or greater depth. The trial court found that the State had actual knowledge of the road's rutted condition before Woollen's accident and that there had been prior accidents at this location. In this regard, the trial court specifically noted that as a result of the State's 3R Project study of the road which began in 1989, the State had actual knowledge of hydroplaning accidents at the same location where Woollen lost control of his car. The evidence also showed that the State knew that the ruts created an unacceptable risk or danger that violated the State's own safety standards, yet the State did not repair the ruts, post a warning, or use other means to alert motorists of the danger caused by the ruts. The trial court determined that because of the ruts at this location, rainwater pooled at the base of a slight slope in the road instead of draining off the road, and that the pooled water increased the underlying dangerous condition of the road caused by the ruts.

Based on these facts, the trial court found that the underlying rutted condition of the road at the location of the accident, and not the weather on February 14, 1992, was a proximate cause of Woollen's loss of control of his vehicle and ensuing collision into the culvert headwall, that is, the ruts on the road were a condition created over time which caused Woollen's accident, and his accident was not due to a temporary condition caused by nature due to the weather. The trial court's findings are supported by evidence in the record, and we cannot say that they are clearly incorrect.

The State directs us to *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998), in support of its claim that it was immune from suit. *Hammond* is distinguishable. In *Hammond*, the Nebraska Court of Appeals, applying § 81-8,219(10), concluded that the State was immune from a suit for damages arising from a motorcycle accident on a rain-slickened, gravel

detour road on which the passenger plaintiff claimed the State had failed to post warnings. The Court of Appeals noted in *Hammond* that the evidence showed that the slickened condition of the road was obvious and that the motorcyclist, an experienced rider, had actual knowledge that the road surface was slick but, nevertheless, continued along the roadway. In *Hammond*, there was no evidence of negligent or defective maintenance of the road upon which the accident occurred. The Court of Appeals concluded that warnings about the conditions, of which the motorcyclist was aware and which were obvious, were not necessary. *Hammond* is inapposite to our analysis of the facts of the instant case.

In the case at bar, it is undisputed that through use and the passage of time Highway 136 was deeply rutted at the spot at which Woollen's car began to hydroplane. The trial court concluded and we agree as a matter of law that under § 81-8,219(10), the State was not immune from suit, because the defective condition of the highway, rather than a temporary condition caused by nature due to weather conditions, caused the accident. This conclusion is consistent with other portions of the Act, which we read in pari materia, see *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998), and, in particular with § 81-8,219(12), which provides that with respect to roadways, "[t]he state shall be deemed to waive its immunity for a claim due to a spot or localized defect only if the state has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim." In the instant case, the State knew that the ruts at the location of the accident constituted an unacceptable safety risk in violation of the State's highway safety standards and that accidents had occurred at this location, but the State nonetheless failed to act to alleviate the hazard caused by the ruts or to warn motorists of the danger the ruts created. The trial court determined that the ruts were the underlying cause of Woollen's accident, separate and independent from the rain that was falling at the time Woollen lost control of his car and as such, that the ruts were a proximate cause of Woollen's accident and injuries. On this record, we conclude the trial court's findings are not clearly incorrect, and based on our independent review of the law, we

affirm the trial court's conclusion that the State was not immune from suit on the basis of the "snow and ice" exception to liability contained in § 81-8,219(10).

(b) Trial Court Findings of State's Negligence

The trial court found that the State was negligent in two respects: (1) The State failed to properly maintain the highway surface, which resulted in the accumulation of a pool of water that constituted a hazard to motorists, and (2) the State failed to warn motorists or take other appropriate action to minimize the danger of the culvert headwall, given its presence in what should have been an unimpeded clear zone. The trial court determined the State's failure to maintain the road and failure to warn of the location of the headwall or to take steps to minimize the danger of the headwall proximately caused Woollen's injury. On appeal, the State claims that the trial court erroneously mandated an onerous " 'state of the art' " standard for all state roads. Brief for appellant at 21. The State's argument is without merit.

The section of Highway 136 upon which the accident occurred was constructed in 1955, when no standardized or official safety criteria governed the road design at issue. The trial court correctly found that the State was immune from liability for the design of the road, but that Woollen's claim against the State for negligent maintenance of the road was actionable and supported by the trial evidence. In *Maresh v. State*, 241 Neb. 496, 518, 489 N.W.2d 298, 314 (1992), we stated that "design is not actionable, as it involves discretionary decisions, but maintenance is actionable, as it does not."

The holding quoted above in *Maresh* was relied upon in *Lemke v. Metropolitan Utilities District*, 243 Neb. 633, 502 N.W.2d 80 (1993), where we held that when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by it, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. In *Lemke*, the defendant, a governmental entity which provided

natural gas and associated products and services, was held liable for the plaintiff's catastrophic injuries resulting from leaking gas hoses which the defendant knew were defective and dangerous, but about which the defendant had issued no warning to alert others of the danger posed by the hoses nor taken steps to minimize the danger.

The State's liability for failure to maintain highways is the same as the comparable liability of counties. *Maresh, supra.* See § 81-8,219(12). Thus, to the extent applicable, we rely on cases involving alleged failure by political subdivisions to maintain highways.

In the case at bar, in order to establish the State's negligence, Woollen had to prove "the four basic elements of negligence, namely, duty, breach of duty, proximate causation, and damages." *Scholl v. County of Boone*, 250 Neb. 283, 289, 549 N.W.2d 144, 148 (1996). We analyze these elements below.

*(i) Foreseeability and State's Duty to Woollen*

We have noted:

> " ' " 'Duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and 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. . . .
>
> " ' "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984).
>
> " 'Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): "[F]oresight of the consequences involves the creation of a duty[.]" . . .' "

*Lemke*, 243 Neb. at 648-49, 502 N.W.2d at 90, quoting *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). See, similarly, *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). Whether a legal duty exists for actionable negligence is a question of law dependent on the facts of a

particular case. *Id.*; *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994); *Lemke, supra.*

For Woollen to recover, it was necessary that Woollen establish that the State could have foreseen the general manner in which the injury or loss occurred. The record on appeal amply demonstrates "'"[f]oresight of the consequences,"'" *Lemke*, 243 Neb. at 649, 502 N.W.2d at 90, sufficient to create a duty for the State to repair the deep ruts, i.e., a localized defect, and to warn of or minimize the dangers created by the inadequate clear zone between the edge of the highway pavement and the culvert headwall.

With respect to the ruts, the State's foresight arose as a result of, inter alia, its promulgation of safety standards, multiple and varied examinations of Highway 136 which confirmed its unacceptable noncompliance with State safety standards at the accident site, and the State's actual knowledge of other automobile accidents, including those caused by hydroplaning, which occurred at the same location where Woollen lost control of his car.

With respect to the concrete headwall, the State's foresight arose primarily from the evidence establishing the State's adoption of the safety standard's clear zones. The record contains evidence that a factor to be considered in analyzing the State's duty to repair and maintain a roadway is the existence of an adequate clear zone. A clear zone is an area beyond the roadway within which a fixed object, such as a utility pole or culvert headwall, is considered a hazard to vehicles. According to the evidence, when a hazard is identified in a clear zone, the State ordinarily has three alternatives: remove the hazard, relocate the hazard beyond the clear zone, or shield motorists from the hazard, customarily by using a guardrail. According to the evidence, once a clear zone is identified, it should be maintained clear of hazards because conduct of drivers, including misconduct of drivers, causing vehicles to leave the roadway is anticipated. The concept of a "forgiving highway" has been developed to allow for driver error, including a driver's leaving the roadway and traveling off the shoulder or into the median. *Goodermote v. State*, 856 S.W.2d 715 (Tenn. App. 1993). See, also, *Martin v. Missouri Highway and Transp.*, 981 S.W.2d 577

(Mo. App. 1998). The safety standards in evidence in this case provide for a clear zone in the area of the accident because it is foreseeable that drivers will leave the roadway and an unimpeded clear zone reduces injuries. Thus, the trial court concluded, the State had a duty to adhere to its clear zone standards by warning of or minimizing the danger of the concrete headwall.

We conclude, as did the trial court, that the likelihood of an automobile accident at this location was foreseeable, thus creating a duty for the State to repair the deep ruts and to warn or minimize the dangers to motorists of the hazards precipitated by the narrow clear zone. See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

*(ii) State's Breach of Duty*

A governmental entity's actual or constructive knowledge of a hazard or dangerous condition coupled with the entity's failure to follow governing statutes, policies, or rules that mandate warning of or correction of the hazard may, in a proper case, provide evidence of the entity's duty to a plaintiff and breach of that duty. For example, in *Millman v. County of Butler*, 244 Neb. 125, 504 N.W.2d 820 (1993), we held that a county was properly adjudged liable for negligently failing to maintain a bridge and warn of this danger where the bridge, like the highway in the case at bar, was built before safety criteria existed to govern the bridge's design and construction. The actionable negligence in *Millman* was not the bridge's design, but the county's actual knowledge of the bridge's unsafe condition and failure to warn motorists of the danger, in light of the facts that the county knew as the result of three prior inspections that the bridge was dangerous and did not meet the county's safety specifications and that the evidence indicated that a warning would have induced caution by drivers.

A similar analysis was applied in *Maresh, supra*, wherein this court concluded that the State negligently breached its duty to the plaintiff by, inter alia, the State's failure to follow its own safety standards in marking the edges of a highway made dangerous by construction. On appeal, we agreed with the *Maresh* trial court that the State's violation of its safety standards was evidence of negligence and stated:

> The State's failure to comply with its own manual as to channelizing device[s], edge markers, or placement of the object markers "in line with the edge of the obstruction," in light of the circumstances presented in this case, is sufficient evidence of breach of duty that it cannot be said the district court was clearly incorrect.

241 Neb. at 513, 489 N.W.2d at 311. See, also, *Oldenburg v. State*, 221 Neb. 1, 374 N.W.2d 341 (1985) (holding that State knew or should have known that its negligent failure to repair road rut in violation of safety standards rendered plaintiff's automobile accident reasonably foreseeable, thereby giving rise to duty by State and breach thereof). We agree with the trial court that the State breached its duty both as to the ruts in the roadway and as to the concrete headwall.

*(iii) Proximate Cause*

Determination of causation is ordinarily a matter for the trier of fact. *Maresh, supra*. See, also, *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998); *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993). It is well established that a cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster. *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960); *Kroeger v. Safranek*, 161 Neb. 182, 72 N.W.2d 831 (1955). In the instant case, the evidence shows that Woollen was traveling too fast for conditions, failed to maintain control of his vehicle, and failed to keep a lookout. The State failed to maintain a roadway that became rutted, posing a danger; the State failed to minimize the danger posed by the headwall in the clear zone; and Woollen's injuries were made more severe by collision into the concrete headwall. Each of these negligent acts combined to cause Woollen's injuries. The test of causation is not that the particular injury could be anticipated, but whether, after the occurrence, the injury appears to be the reasonable and probable consequence of the acts or omissions. *Oldaker v. Peters*, 869 S.W.2d 94 (Mo. App. 1993). See *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 801, 205 N.W.2d 523, 529 (1973) (stating that "[t]he law does not

require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen").

Although we agree with the trial court that the State breached its duty as to the ruts and failed to minimize the impact with the concrete headwall in the clear zone and that these breaches proximately caused the accident, under the circumstances of this case, the trial court's alternative determination with respect to the clear zone, that is, that the State's breach of its duty to warn drivers of the condition of the clear zone was a proximate cause, is clearly incorrect. Our review of the record shows that under the facts of this case, a warning by the State logically placed in the area approaching the location where Woollen's vehicle left the pavement would not have been effective, because although such warning would have alerted oncoming eastbound traffic as to the clear-zone conditions south of the pavement's southern edge, such warning would not have been visible to Woollen as he approached the location of the accident moving in a westerly direction. Thus, the trial judge's alternate finding of fact that the State's failure to warn proximately caused the accident is clearly incorrect. This determination does not require reversal, however, if the remaining evidence supports the trial court's decision regarding the comparative negligence of the parties. See, *Gatewood v. City of Bellevue*, 232 Neb. 525, 441 N.W.2d 585 (1989) (holding that where evidence is in conflict, issues of comparative and contributory negligence are questions of fact, wherein trial court's findings will not be set aside unless clearly wrong or unsupported by evidence); *Phillips v. City of Omaha*, 227 Neb. 233, 417 N.W.2d 12 (1987).

In an action under the Act, determination of whether the plaintiff's contributory negligence exceeds the negligence of the State requires findings of fact by the trial court, which we will not disturb on appeal unless such findings are clearly incorrect. See, e.g., *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Compare *Oldenburg v. State*, 221 Neb. 1, 374 N.W.2d 341 (1985) (holding under former gross/slight negligence statutes that plaintiff who was more than slightly contributorily negligent was barred from recovery, despite State's negligence,

which was less than gross). We have stated, "In Nebraska, a defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them." *Sacco v. Carothers*, 253 Neb. 9, 17, 567 N.W.2d 299, 305 (1997). Thus, for a plaintiff to succeed in an action based on negligence, the evidence must show that there is some reasonable connection between the negligent act or acts of defendant and the damage suffered by the plaintiff. *Id.* See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 (5th ed. 1984). In the instant case, Woollen's evidence established proximate cause as a result of the State's breach of its duties to repair the ruts and to minimize the danger of impact with the headwall in the clear zone. The State's liability predicated on these acts of negligence was amply established.

As detailed more fully elsewhere in this opinion, the facts established that Woollen was traveling in excess of a safe speed for the existing conditions, failed to keep control of his vehicle, and failed to keep a proper lookout. The circumstances of this case support the trial court's determination that Woollen was 40-percent negligent. Thus, the trial court's attribution of 60-percent negligence to the State is correct. On this record, we affirm the trial court's findings that the State's negligence with respect to the ruts and the condition of the headwall in the clear zone were proximate causes of Woollen's injury and that the State's negligence exceeded Woollen's contributory negligence.

We are not persuaded by the State's argument that because the trial court found Woollen responsible for 40 percent of the negligence which caused his injuries, the State must be absolved of all liability for its negligence. Even given Woollen's contributory negligence, the trial court did not err in finding negligence on the part of the State which was a proximate cause of the accident. See, similarly, *Maresh, supra*. Under current comparative negligence principles, see Neb. Rev. Stat. § 25-21,185 et seq. (Reissue 1995), a plaintiff's contributory negligence as a contributing proximate cause of an accident may but does not necessarily discharge the other tort-feasor or tort-feasors, including the State, of liability for damages resulting from its or their negligence.

The State contends that the trial court's order imposing liability upon the State for Woollen's damages as a result of the State's negligence "seems to confer upon the State to have 'state of the art' highways, in other words that all highways must be at the cutting edge of safety design." Brief for appellant at 21. We do not agree with this characterization of the trial court's order.

We have previously stated: "'If there is a legal duty to protect the public by warning of a danger or by taking preventing measures, or both, the choice of means may be discretionary, but the decision whether or not to do so at all is, by definition, not discretionary.'" *Lemke v. Metropolitan Utilities District*, 243 Neb. 633, 647, 502 N.W.2d 80, 89 (1993). Here, the trial court determined the liability of the State on the facts of this case; however, it did not order the State to bring the entirety of Highway 136 into compliance with the safety standards, nor did the trial court dictate the means or mode by which adequate compliance with the standards should be achieved.

It is true that a county is not an insurer of the safety of travelers on its roads. *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996). This proposition logically extends to roads and highways over which the State exercises control. Nonetheless, the State has certain duties with respect to roadways, and breaches of such duties which proximately cause injury can give rise to liability.

The trial court's findings that the State breached its duties to repair the ruts and minimize the danger of impact with the headwall and that such breaches proximately caused the injuries are supported by evidence in the record. The evidence also supports the determination that Woollen was 40-percent negligent. Accordingly, we affirm the trial court's findings and order indicating that the State was 60-percent negligent.

### 2. Woollen's Cross-Appeal

For his cross-appeal, Woollen has raised six assignments of error. We will address these assignments in the order raised by Woollen.

(a) Legal Expenses in Prior Proceedings

Woollen claims the trial court erred in granting the State's motion to strike his claim for damages for legal expenses incurred by Woollen in prior proceedings brought to collect medical fees he incurred for the treatment of injuries he sustained in the accident. Because the trial court acted on a motion to strike, it heard no evidence as to the allegations in the petition for damages for attorney fees in prior proceedings, and we assume the truth of the allegations. See *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975). We conclude the trial court erred in striking this claim, and we reverse, and remand for further proceedings with respect to this item of damages.

The State observes in its brief that with regard to the recovery of attorney fees in Nebraska, the general rule is that such fees are recoverable only when provided for by statute or allowed in the uniform course of procedure. See, *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998); *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998). The rule applies, however, only when the party to litigation is seeking to recover attorney fees in the very case being litigated. See, *Zimmerman v. FirsTier Bank, supra*; *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986).

In *Tetherow*, we held that the trial court correctly allowed as an item of the plaintiff's damages certain attorney fees which the plaintiff had incurred in defending an earlier legal action which were occasioned by the tort of the defendant. Thus, in *Tetherow*, the plaintiff vendor sued the defendant real estate broker for the broker's failure to properly prepare a real estate sale contract. We approved as an item of damages the attorney fees the vendor had expended defending a suit brought by the purchaser of the real estate to recover the downpayment. In support of our conclusion, we quoted the Restatement (Second) of Torts § 914(2) (1979), which states:

> "One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action."

*Tetherow*, 223 Neb. at 638, 392 N.W.2d at 379.

In response to Woollen's assignment of error, the State relies upon *Brochner v. Western Ins. Co.*, 724 P.2d 1293 (Colo. 1986). The *Brochner* court held that a primarily liable, joint tort-feasor was not obligated in a contribution action to pay the attorney fees and costs incurred by the secondarily liable tort-feasor, in defending the original action filed by the injured plaintiff. *Id.* *Brochner* is inapposite to the instant case. Woollen is seeking as an item of *damages* in the instant case, i.e., legal expenses he paid in prior proceedings brought as a result of medical fees he incurred for the treatment of injuries he sustained as a result of the accident, as distinguished from attorney fees incurred to determine liability in the instant case. In accordance with our analysis in *Tetherow, supra*, Woollen's legal costs are recoverable as an item of damages in the instant case.

The trial court struck this claim for damages, and the record contains no evidence concerning the amount of these attorney fees and expenses incurred by Woollen. Because we have concluded that Woollen established liability against the State, he is entitled to an award of damages including the reasonable amount of attorney fees and expenses suffered by him due to his defense of the prior medical claims, to the extent his evidence may establish those damages, reduced by the percentage of Woollen's comparative fault.

We reverse, and remand the cause for a damages trial limited to the presentation of evidence and a determination of the actual expenditures for reasonable attorney fees and other necessary costs directly arising out of Woollen's defense of the health care claims and, if damages are established, they are to be reduced by 40 percent, representing the percentage of negligence attributable to Woollen as determined in the first trial. See *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998).

(b) Damages for Personal Property: Woollen's Vehicle

In his second assignment of error, Woollen claims the trial court erred in denying him recovery of damages for his vehicle, which Woollen claims was totally destroyed in the accident. In support of his damage claim, Woollen relies upon the following trial evidence: (1) photos of the automobile at the accident site,

(2) an accident report, and (3) Woollen's testimony that he purchased the car for $3,000 several weeks before the accident and that he had paid sales tax on the purchase. Woollen concedes on appeal that his evidence is "not as precise as it might have been." Brief for appellee at 25.

Under Nebraska law, the measure of recovery for damage to personal property that cannot be repaired and thereby restored to substantially its condition immediately before the damage occurred "is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement." *Chlopek v. Schmall*, 224 Neb. 78, 89, 396 N.W.2d 103, 110 (1986). In order to recover this "lost market value," a party must show

> (1) that the damage to the property is such that it cannot be repaired and thereby restored to substantially its condition immediately before the damage occurred or that the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, (2) the reasonable market value of the property immediately before the accident, and (3) the reasonable market value of the property immediately after the accident.

*Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 463, 455 N.W.2d 777, 782 (1990). Compare NJI2d Civ. 4.20.

A review of the record shows that the proof of the vehicle's value before the accident is thin and that, other than photographs of the vehicle, there is no evidence of the vehicle's value after the accident. We find no error in the trial court's determination that absent evidence of the car's value after the accident, it could not award damages to Woollen for the loss of his vehicle. We affirm the decision of the trial court on this item of damages.

### (c) Lost Earnings

The court found that as a result of the accident, Woollen had sustained lost income to the date of trial in the amount of $6,000 and a $30,000 loss of future earning capacity. Woollen claims as error the trial court's award of past and future loss of earning capacity.

With respect to an award of damages under the State Tort Claims Act, we recently stated that the determination of the amount of damages is "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." *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 829, 572 N.W.2d 790, 796 (1998). In *Talle*, we held:

> 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. . . . 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.

(Citation omitted.) *Id.*

At trial, Woollen's evidence regarding loss of earning capacity consisted generally of Woollen's testimony regarding expenses and income. Given the evidence adduced at the trial concerning Woollen's claimed loss of past and future earning capacity, we cannot say the district court's award is so inadequate as to shock the conscience. This assignment of error is without merit.

(d) Contributory Negligence

Woollen's fourth and fifth assignments of error can be restated as one assignment of error: Woollen challenges the trial court's finding that he was contributorily negligent.

In our consideration of the State's appeal, we have addressed the trial court's determination concerning the parties' comparative negligence. The trial court found that Woollen was aware of water collecting on the highway and was driving on the outer edges of the ruts so as to avoid driving in the accumulated water. The court further found the pool of water was visible to drivers traveling west. The court did not determine whether Woollen saw the pool, but found he failed to maintain control of his vehicle and was traveling at an unsafe rate of speed for the conditions then and there existing. These findings are amply supported by the record. We determine that the trial court did

not err in finding that Woollen was contributorily negligent and that he was responsible for 40 percent of the negligence that proximately caused the accident. These assignments of error are without merit.

### (e) Admission of Testimony of State's Expert on Causation

Woollen claims that the State's expert, Sicking, should not have been permitted to testify. Woollen's argument appears to be that Sicking's testimony did not agree with that of other witnesses and that it should, therefore, have been excluded. We do not agree.

The admission of expert testimony is ordinarily within the discretion of the trial court. *Childers v. Phelps County*, 252 Neb. 945, 568 N.W.2d 463 (1997). Here, Sicking indicated that his qualifications included a Ph.D. degree in civil engineering from Texas A&M University, 12 years of work with the Texas Transportation Institute researching roadside safety issues, and a position as the director of the Midwest Roadside Safety Facility, which conducts safety research and advises state highway departments on safety issues. Sicking testified that he has written over 100 publications, primarily in the area of roadside and roadway safety. He is a member of the American Society of Civil Engineers and the American Society of Mechanical Engineers, and he is an active participant on the Transportation Research Board. Sicking received the Federal Highway Administration Safety Award for his development of a roadside safety device. Sicking stated that he had reviewed the accident report, photos of the scene at the time of the accident, photos of the highway after the accident, photologs from the Nebraska Department of Roads photolog system, Woollen's deposition, witness statements, and climatological data in reaching his opinion. The record demonstrates that Sicking was qualified to render relevant expert testimony and had a basis for so doing. Woollen's complaint about Sicking goes to the weight to be accorded to Sicking's testimony, not its admissibility.

Our review of the record shows that the trial court did not err in admitting Sicking's testimony. This assignment of error is without merit.

## VI. CONCLUSION

The trial court found Woollen 40-percent negligent and the State 60-percent negligent for the injuries Woollen suffered in this one-car accident. With respect to the State's appeal, we affirm the trial court's finding as to the comparative negligence of the parties. With respect to the cross-appeal, we conclude the trial court erred in striking Woollen's damage claim for legal expenses he paid in proceedings prior to the trial herein that concerned medical bills incurred for the treatment of injuries he sustained in the accident. We reverse, and remand for a new trial in the trial court limited to Woollen's claim for damages in the instant action due to legal expenses incurred in prior proceedings, with directions that if such damages are established, such damages shall be reduced by 40 percent, representing the percentage of negligence attributable to Woollen as determined in the first trial. We conclude the remainder of the assigned errors in Woolen's cross-appeal are without merit.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

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JOHN W. DECAMP, RELATOR, V.
STATE OF NEBRASKA ET AL., RESPONDENTS.
594 N.W.2d 571

Filed May 7, 1999. No. S-98-941.

1. **Constitutional Law: Courts.** The construction and interpretation of the Constitution is a judicial function.
2. **Constitutional Law: Initiative and Referendum: Intent.** The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself.
3. **Constitutional Law: Courts: Intent.** In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Legislature: Supreme Court.** Where no definitive guidance is provided by the Constitution, the Nebraska Supreme Court is required to give deference to the actions of the legislative branch in determining whether a statute was validly enacted.

Original action. Petition dismissed.

John W. DeCamp and John E. Beltzer, of DeCamp Legal Services, P.C., for relator.

Don Stenberg, Attorney General, and L. Steven Grasz for respondents.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for amici curiae Nebraska Chamber of Commerce & Industry, Lincoln Chamber of Commerce, and Greater Omaha Chamber of Commerce.

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

WRIGHT, J.

## NATURE OF CASE

John W. DeCamp (relator) filed this original action against the State of Nebraska; E. Benjamin Nelson, Governor; Kim Robak, Lieutenant Governor; and Don Stenberg, Attorney General (respondents), challenging the validity of 1998 Neb. Laws, L.B. 939. The petition alleges that the Legislature failed to comply with the procedural rules set forth in article III, § 14, of the Nebraska Constitution and rule 6, § 7, of the Rules of the Nebraska Unicameral Legislature, Ninety-Fifth Legislature, Second Session, in that L.B. 939 did not stay on file for final reading at least 1 legislative day before the vote was taken by the Legislature.

## STIPULATION OF FACTS

L.B. 939 was advanced from select file to enrollment and review for engrossment on February 5, 1998. On February 9, L.B. 939 was reported as "correctly engrossed" and placed on final reading. L.B. 939 was returned from final reading to select file for a specific amendment on March 4. The legislative business opened on March 10 with L.B. 939 on select file and a motion pending to strike the enacting clause of L.B. 939. Within that same day, a motion to bracket the bill failed; the motion to strike the enacting clause was withdrawn; and the bill was advanced for final reading, passed on final reading, signed by

the president of the Legislature Robak, and presented to Governor Nelson for signature. No amendments to L.B. 939 were adopted between its initial advancement to final reading on February 9 and its passage on March 10. The Governor signed the bill the next day. The Legislature adjourned sine die on April 14.

## ANALYSIS

The issue presented is whether L.B. 939 satisfied the requirements of article III, § 14, and rule 6, § 7(b) and (c).

The applicable portion of article III, § 14, states: "No such vote upon the final passage of any bill shall be taken . . . until five legislative days after its introduction nor until it has been on file for final reading and passage for at least one legislative day." Rule 6, § 7, provides in part: "No bill shall be voted on for final passage until . . . (b) One legislative day after its reference to Final Reading. (c) Printed copies of the bill in its final form, as amended, shall have been available to members and on their desks for at least one legislative day."

Relator alleges that the Legislature violated both article III, § 14, and rule 6, § 7(b) and (c), because L.B. 939 did not stay on file for final reading for at least 1 legislative day after its return from select file on March 10, 1998. Relator asserts that even though the bill was on file for final reading from February 9 through March 4 and was readmitted on March 10 for final reading in an unchanged form from the original offering, that does not cure the alleged violation. In summary, relator asserts that the phrase "final reading" for purposes of article III and rule 6 means the final reading just before the vote is taken. Relator argues that since L.B. 939 was on final reading for only a few hours before the vote was taken, L.B. 939 was passed in violation of article III, § 14, and rule 6, § 7(b) and (c).

It is respondents' position that L.B. 939 was on final reading for over 20 legislative days between February 9 and March 4, 1998, and that since the bill was readvanced to final reading and no amendments were adopted between its initial advancement to final reading on February 9 and its passage on March 10, it was on file for final reading for more than the requisite 1 legislative day prior to its passage.

We first address whether the passage of L.B. 939 comports with article III, § 14. It is a settled principle of constitutional law that the construction and interpretation of the Constitution is a judicial function. *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). Article III, § 14, was adopted by means of an initiative petition, and the intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself. See *Pig Pro Nonstock Co-op v. Moore, supra.* In ascertaining the intent of a constitutional provision from its language, "'"[t]he court may not supply any supposed omission, or add words to or take words from the provision as framed. . . ."'" *Id.* at 83, 568 N.W.2d at 224, quoting *State ex rel. Spire v. Beermann*, 235 Neb. 384, 455 N.W.2d 749 (1990).

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997); *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997). Where no definitive guidance is provided by the Constitution, we are required to give deference to the actions of the legislative branch in determining whether the statute was validly enacted.

We have not previously addressed whether the requirements of article III, § 14, demand that a bill remain uninterrupted on final reading for at least 1 legislative day immediately prior to its passage. In *In re Forsythe et al. Application*, 185 N.J. Super. 582, 450 A.2d 594 (1982), the court addressed a somewhat similar constitutional provision which mandated that no bill be read a third time in either house until after the intervention of 1 full calendar day following the day of second reading. In that case, a bill had technically been moved from second to third reading and passed the same day because an identical bill had been before the legislature for the requisite period of time, and it was alleged that the bill had been improperly advanced to its third reading before the passage of 1 full calendar day following the second reading.

The New Jersey court concluded that the purpose of the constitutional provision was to cure the evils of rushing bills from second to third readings without giving the members of the leg-

islature an opportunity to study the contents of the bills. The provision did not require that any particular procedure be followed in the adoption of the legislation as long as the content of the bill remained unchanged for 1 calendar day before third reading and passage.

In the present case, prior to the vote on L.B. 939, the president of the Legislature stated: "All provisions of law relative to procedure having been complied with, the question is, shall LB 939 pass?" Floor Debate, 95th Leg., 2d Sess. 13189 (Mar. 10, 1998). The record of the legislative vote shows 39 "ayes" and 1 "nay." *Id.* According to the Clerk of the Legislature, four senators were present but not voting and five were excused and not voting. The president of the Legislature subsequently announced that L.B. 939 had passed. *Id.*

Our reading of article III, § 14, does not disclose any requirement that L.B. 939 had to be on final reading for 1 legislative day immediately before the actual vote. Since the bill was on file for final reading for 20 legislative days and it was readvanced to final reading without amendment, we conclude that the passage of L.B. 939 complied with the requirements of article III, § 14.

We next briefly address whether the passage of L.B. 939 complied with the rules of the Legislature. We refer to Neb. Const. art. III, § 10, which states in part: "[T]he Legislature shall determine the rules of its proceedings . . . ." Under the facts of this case, the Legislature has determined that the passage of L.B. 939 complied with rule 6, and absent a constitutional issue, we decline to review that determination.

For the foregoing reasons, we dismiss relator's petition.

PETITION DISMISSED.

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## LOREN ACKERMAN, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONS APPEALS BOARD ET AL., APPELLEES.

593 N.W.2d 728

Filed May 7, 1999. No. A-99-029.

1. **Rules of the Supreme Court: Time: Appeal and Error.** Under Neb. Ct. R. of Prac. 2F(1) (rev. 1996) of the rules of the Nebraska Supreme Court, a party may petition

for further review by this court, and the petition must be filed with the clerk within 30 days after the release of the opinion of the Nebraska Court of Appeals or the entry of the order of the Court of Appeals finally disposing of the appeal, whichever occurs later.

2. **Time: Appeal and Error.** An untimely motion for rehearing from a Nebraska Court of Appeals' decision does not toll the time during which a petition for further review shall be filed with the clerk.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Petition for further review dismissed.

Loren Ackerman, pro se.

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

PER CURIAM.

This matter is before us on a petition for further review filed by Loren Ackerman, appellant. Because we conclude the petition was not timely filed, the petition is dismissed.

On January 29, 1999, the Nebraska Court of Appeals dismissed Ackerman's appeal for lack of jurisdiction. On February 10, Ackerman filed a motion for rehearing. On March 10, the Court of Appeals overruled Ackerman's motion for rehearing as being filed out of time. On March 23, Ackerman filed a second motion for rehearing. On April 13, the Court of Appeals overruled Ackerman's second motion for rehearing as being filed out of time. On March 31, Ackerman filed his petition for further review.

Under Neb. Ct. R. of Prac. 2F(1) (rev. 1996) of the rules of this court, a party may petition for further review by this court, and the petition "must be filed within 30 days after the release of the opinion of the Court of Appeals or the entry of the order of the Court of Appeals finally disposing of the appeal, whichever occurs later." In the instant case, the order finally disposing of the case was the order of dismissal entered on January 29, 1999. The petition for further review filed on March 31 was not filed within 30 days as required under rule 2F(1) and was, therefore, untimely.

We note that Ackerman filed two motions for rehearing. Under Neb. Ct. R. of Prac. 13A (rev. 1998), a motion for rehearing "must be filed within 10 days after the release of the opinion of the court or the entry of the order of the court disposing of the appeal." The order of the court disposing of the appeal was entered on January 29, 1999. Ackerman's first motion for rehearing, filed on February 10, was not timely filed with the clerk. The first motion for rehearing was a nullity. An untimely motion for rehearing from a Court of Appeals' decision does not toll the time during which a petition for further review shall be filed with the clerk. Similarly, Ackerman's second motion for rehearing was untimely, a nullity, and did not toll the time during which a petition for further review should be filed, which time began on January 29.

Ackerman's petition for further review is untimely. Accordingly, the petition is dismissed.

PETITION FOR FURTHER REVIEW DISMISSED.

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## RAYMOND L. FRANK, APPELLEE, V. A & L INSULATION AND FARMERS INSURANCE GROUP, ITS WORKERS' COMPENSATION CARRIER, APPELLANTS.

594 N.W.2d 586

Filed May 14, 1999. No. S-98-082.

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. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court.
4. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court.

5. **Expert Witnesses.** A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
7. **Evidence: Appeal and Error.** A trial court's ruling accepting or rejecting evidence will not be disturbed unless there is shown to be a clear abuse of discretion.
8. **Expert Witnesses.** Expert testimony should be stricken if it appears that the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from mere guess or conjecture.
9. ____. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable the witness to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
10. ____. There is nothing wrong with an expert witness expressing an opinion based on facts perceived by or made known to him. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.
11. **Workers' Compensation: Proof.** In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment.
12. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
13. ____: ____. Although expert medical testimony need not be couched in the magic words of "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.
14. **Workers' Compensation: Statutes.** While it is quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease, the compensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the statutory definition of accident.
15. **Workers' Compensation: Words and Phrases.** Under Neb. Rev. Stat. § 48-151(2) (Reissue 1998), an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."
16. ____: ____. The "unexpected or unforeseen" requirement of Neb. Rev. Stat. § 48-151(2) (Reissue 1998) is satisfied if either the cause was of an accidental nature or the effect was unexpected or unforeseen.
17. ____: ____. The second specification of Neb. Rev. Stat. § 48-151(2) (Reissue 1998) requires that an employee's injury must occur "suddenly and violently" to be compensable.
18. ____: ____. "Suddenly and violently" does not mean "instantaneously and with force." The specification "suddenly and violently" is satisfied if an injury occurs at

an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.

19. ____: ____. The third specification in Neb. Rev. Stat. § 48-151(2) (Reissue 1998), that an accident produced objective symptoms, is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause.

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

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

Samuel W. Segrist, of Meister & Segrist, for appellee.

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

HENDRY, C.J.

## PROCEDURAL HISTORY

Raymond L. Frank worked for A & L Insulation (A & L) from 1990 until August 1995. Frank claims that during this time he sustained injuries to his wrists, elbows, and shoulders due to the repetitive motions he was required to use while employed at A & L. As a result, Frank filed suit against A & L in the Nebraska Workers' Compensation Court for the injuries he allegedly sustained during the course of his employment. The compensation court determined the evidence established causation and awarded Frank $347.50 per week starting from the date of his disability, August 8. The compensation court also ordered A & L to pay for all future medical expenses relating to Frank's wrists, elbows, and shoulders. The Workers' Compensation Court review panel affirmed. A & L thereafter appealed to the Nebraska Court of Appeals and argued that Frank failed to prove his injuries were caused by or arose out of and in the course of his employment. The Court of Appeals reversed, finding no evidence of causation. *Frank v. A & L Insulation*, No. A-98-082, 1988 WL 755461 (Neb. App. Oct. 27, 1998) (not designated for permanent publication).

Frank subsequently filed a petition for further review. We granted Frank's petition for further review and now reverse the Court of Appeals' decision and remand the cause with directions.

## SUMMARY OF FACTS

Frank was 58 years old at the time of trial. After high school, Frank worked as a plumber, served in the military for a short time, then worked as a farmer until approximately 1963. From 1964 to 1972, Frank delivered beer to stores for a living. He then worked as a contractor in the building trade until 1983. From 1983 until 1990, Frank was employed doing cement work, roofing, and general carpentry. In 1990, Frank went to work for A & L, where he worked until August 8, 1995. Frank testified that when he went to work for A & L he was in good physical condition, having no problems with his wrists, elbows, or shoulders.

Frank's work for A & L involved various tasks such as installing vinyl windows, door replacements, new doors, and kitchen cabinets; putting up drywall; sanding; painting; and breaking up concrete and stucco. A large part of Frank's work required him to use his hands and arms, including prying out old windows, installing new windows, sanding and painting drywall, and using various tools such as hammers, pry bars, nail pullers, saws, and high-torque screw guns. Almost all of Frank's daily work required hammering, lifting, and using a screw gun above his head and in other awkward positions. When Frank initially worked for A & L, he installed windows ranging from 20 to 25 pounds each. However, beginning in 1993 or 1994, Frank was required to install larger and heavier windows. On some of the larger windows, Frank used a screw gun to install up to 200 2½-inch and 3½-inch screws.

In 1993, Frank went to see Thomas Rohrick, D.C., a chiropractor, complaining of generalized pain in his shoulders. Frank was first treated by Dr. Rohrick from March 3 through 29. During this period of treatment, Frank stated that he was experiencing shoulder pain in the area where the shoulders meet the neck, later explained by Dr. Rohrick as the trapezius muscle. Given the location of the pain, Dr. Rohrick ruled out any rotator cuff problems or hand or wrist injuries. Instead, Dr. Rohrick

diagnosed Frank as having brachial neuritis/radiculitis dislocation (subluxation) of the cervical spine, myofibrositis and myofascitis, and rib strain/sprain.

Dr. Rohrick also treated Frank for a lower back injury he sustained while lifting a window. The injury occurred on October 7, 1994, and Frank was treated by Dr. Rohrick from October 10 through December 2. Dr. Rohrick diagnosed Frank with a dislocation (subluxation) of the lumbar spine and spondylarthritis and lumbar strain/sprain.

Dr. Rohrick and Frank both testified that Frank recovered from these injuries at the conclusion of Dr. Rohrick's treatment. The record also shows that there was no permanent impairment or disability after the March 1993 and December 1994 treatments. During both series of treatments, Frank never complained of any problems with his wrists or shoulders, which might have indicated rotator cuff tears or carpal tunnel syndrome, and Dr. Rohrick never diagnosed him with any such injuries. In fact, Dr. Rohrick testified that none of Frank's complaints led him to test or examine Frank for rotator cuff tears or carpal tunnel syndrome.

Beginning in 1995, Frank noticed his right wrist was hurting. He initially attempted to treat himself with hotpacks, and continued working. When Frank started having problems with his right wrist, he began using his left arm to compensate for the pain in his right hand. As a result, Frank began to feel discomfort in his left hand as well. A short time later, Frank also noticed some tingling in the fingers of his right hand. The tingling would come and go, but as time went on the pain became more constant. While continuing to work, Frank also began feeling discomfort in his right shoulder and noticing symptoms of neck discomfort.

In the spring of 1995, Frank told his employer about these problems. By July, the pain was so bad that Frank decided he needed to consult a physician. On August 8, Frank consulted Diane E. Gilles, M.D., an orthopedic surgeon. Frank complained of pain in both shoulders, his left elbow, and his right wrist. He also complained of experiencing a grinding sensation in his neck, having trouble grasping a hammer, and starting to drop things. After examining Frank, Dr. Gilles diagnosed him

with "degenerative joint disease of the cervical spine; impingement syndrome both shoulders with possible rotator cuff tears . . . nonunion right scaphoid with post-traumatic arthritis of the wrist; carpal tunnel syndrome, right wrist and mild cubital tunnel syndrome, left elbow." Frank has not worked since August 7.

Based on Dr. Gilles' initial diagnosis, she ordered an MRI scan of Frank's left shoulder and advised him to remain off work. The MRI showed a complete tear of the left rotator cuff, and, as such, Dr. Gilles recommended Frank undergo surgery on the left shoulder. On August 30, 1995, an MRI was performed on Frank's right shoulder, which showed a tendonopathy/partial tearing of the anterior supraspinous tendon. On August 31, Frank underwent surgery on the left rotator cuff tear and an anterior acromioplasty of the left shoulder. On November 15, Dr. Gilles performed an anterior acromioplasty of the right shoulder and repair of the right rotator cuff.

Despite surgery, Frank continued to have problems with his left shoulder. On January 30, 1996, Dr. Gilles ordered another MRI on the left shoulder, which revealed tendonopathy subacromial bursitis versus focal retear of the anterior supraspinous tendon. On February 23, Dr. Gilles also ordered an MRI of the cervical spine, which indicated there might be some changes occurring in the cervical spine. In order to ensure that Frank's shoulder pain was originating from the shoulders and not another area such as the neck, Dr. Gilles referred Frank to Earnest W. Beehler, M.D. Dr. Beehler found no spinal abnormalities and therefore performed no further treatment.

On April 3, 1996, Dr. Gilles discussed with Frank the possibility of arthrodesis of the right wrist (wrist fusion). Dr. Gilles also recommended conducting EMG studies. The EMG studies showed clear evidence of carpal tunnel syndrome on the right hand and a mild problem with the ulnar nerve in the left elbow. On April 18, Gilles recommended a right carpal tunnel release surgery. On June 24, the results of an arthrogram of the left shoulder showed recurrent left rotator cuff tear. Gilles opined that there should be a reexploration and a rerepair of the left shoulder to ameliorate the retorn tendon.

A & L refused to pay for either the carpal tunnel release surgery or the rerepair of the left rotator cuff. Frank has yet to

receive these recommended treatments, and Dr. Gilles refuses to release Frank for work until he receives these surgeries.

## ASSIGNMENTS OF ERROR

Frank argues the Nebraska Court of Appeals erred in (1) concluding Dr. Gilles' expert opinion lacked sufficient factual foundation, (2) determining Frank failed to provide sufficient medical causation between his injuries and employment at A & L, and (3) concluding there was no evidence proving his injuries arose out of and in the course of his employment at A & L.

## STANDARD OF REVIEW

An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999).

Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Crouch v. Goodyear Tire & Rubber Co.*, 255 Neb. 128, 582 N.W.2d 356 (1998). If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court. *McBee v. Goodyear Tire & Rubber Co., supra.*

Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court. *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. *Id.*

In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to

the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *McBee v. Goodyear Tire & Rubber Co., supra*; *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

A trial court's ruling accepting or rejecting evidence will not be disturbed unless there is shown to be a clear abuse of discretion. *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974). Expert testimony should be stricken if it appears that the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from mere guess or conjecture. *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985).

## ANALYSIS

### FOUNDATION

Frank first argues the Court of Appeals erred in concluding Dr. Gilles' expert opinion lacked sufficient factual foundation.

The Court of Appeals found Dr. Gilles ill-equipped to offer an expert opinion regarding the cause of Frank's injuries because Frank never conveyed to Dr. Gilles the type of work he performed at A & L other than "general knowledge of what carpenters do." The Court of Appeals concluded that "[s]ince the evidence does not show that Frank communicated to Gilles the information he testified to about the trauma he suffered, any opinion Gilles might have given would necessarily have been based upon her general knowledge of the hard physical labor performed by carpenters."

Dr. Gilles' medical records show that Frank was a carpenter; yet the records contain no details regarding his work at A & L. In her deposition, Dr. Gilles was asked what history Frank conveyed to her on August 8, 1995. Dr. Gilles answered, "That he had worked as a carpenter for approximately a 25-year period of time . . . ." However, when later asked if she took "some additional information from [Frank] as to what his work involved as a carpenter," Dr. Gilles responded, "I think that at some point in time we later had a job description . . . that involved more detail." Dr. Gilles also stated that on February 23, 1996, "we discussed his work and the complaints of pain that he was still

having in the shoulder." Furthermore, at one point during Dr. Gilles' deposition she was asked to assume the hypothesis that Frank was required to do "a lot of hammering, a lot of work with screw drivers, a lot of work lifting, [and] a lot of work with his hands outstretched or over his arms [sic]" while employed at A & L.

We are cognizant of the rule providing that expert testimony should not be received if it appears the witness is not in possession of such facts as will enable the witness to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. See, Neb. Rev. Stat. § 27-702 (Reissue 1998); *Tank v. Peterson, supra.*

> "However, there is nothing wrong with an expert witness expressing an opinion based on facts 'perceived by or made known to him.' . . . If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient."

(Citation omitted.) *Bernadt v. Suburban Air, Inc.*, 221 Neb. 537, 541, 378 N.W.2d 852, 855 (1985) (quoting *Morris v. Laaker*, 213 Neb. 868, 331 N.W.2d 807 (1983)).

Based on our review of the record, we determine that Frank's attorney framed an appropriate hypothetical question reflecting facts proved by the record as a whole and, as such, that Dr. Gilles possessed sufficient facts to express a reasonably accurate opinion. See *Bernadt v. Suburban Air, Inc., supra.* We therefore determine the compensation court did not clearly abuse its discretion in admitting Dr. Gilles' testimony. See, *Tank v. Peterson, supra*; *Duffy v. Physicians Mut. Ins. Co., supra.*

### Medical Causation

Frank next argues the Court of Appeals erred in determining he failed to prove medical causation between his injuries and his employment at A & L. Frank relies exclusively on Dr. Gilles' statement in exhibit 2 in which she related his need for treatment to his work at A & L. In response, A & L contends the compensation court ignored Dr. Gilles' deposition testimony, which it alleges contradicted her statement in exhibit 2.

The Court of Appeals ruled that Dr. Gilles' testimony failed to prove medical causation between Frank's injuries and his employment at A & L. The Court of Appeals specifically relied on two statements Dr. Gilles made in her deposition. First, the court found that Dr. Gilles' statement that an additional 3 or 4 years of work "could have" caused the injuries lacked sufficient definiteness to support a workers' compensation award. Second, the court relied on Dr. Gilles' statement that Frank's injuries "are consistent with someone who has been a heavy laborer" to hold that she was unable to say whether Frank's injuries were caused by his work at A & L.

In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment. Neb. Rev. Stat. § 48-151(2) (Reissue 1993); *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992). If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Catlin v. Prairie Marketing*, 239 Neb. 363, 476 N.W.2d 234 (1991). In *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 533, 476 N.W.2d 854, 860 (1991), we held that a statement in a physician's notes was sufficient to indicate a conclusion to a reasonable degree of medical certainty when viewing the statement in the "larger context" of the physician's entire opinion. See, e.g., *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992) (holding that expert's opinion must be examined in context of expert's entire testimony). "Although expert medical testimony need not be couched in the magic words of 'reasonable medical certainty' or 'reasonable probability,' it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence." *Doe v. Zedek*, 255 Neb. 963, 975, 587 N.W.2d 885, 893-94 (1999).

Dr. Gilles diagnosed Frank with numerous physical problems affecting his spine, shoulders, wrists, and elbows. As a result, Dr. Gilles performed surgery on both of Frank's shoulders and later recommended he undergo a second surgery on the left shoulder and carpal tunnel surgery on the right hand. Dr. Gilles

related the need for these treatments to Frank's work at A & L. Dr. Gilles' statement, contained in exhibit 2, provides, "In answer to your question, yes I do relate the need for the medical treatment to be related to the work he performed for A & L while working as a carpenter." Exhibit 2 was received into evidence during trial without objection.

During Dr. Gilles' deposition, she was initially asked, based on Frank's medical history, the examination and tests performed on Frank, and her education and experience, if she had an opinion, with a reasonable degree of medical certainty or probability, "whether the medical conditions you have diagnosed for Mr. Frank were caused by the work he was performing at A & L Insulation." After objection, arguments, and assertions by both attorneys, the following colloquy occurred:

> Q. Did he advise you as to the length of time he had been with A & L Construction?
>
> A. He said that he had worked as a carpenter for 25 years.
>
> Q. But didn't say how many of those years had been with A & L?
>
> A. I assumed that it was the whole time, but I can — I'm not 100 percent certain.

However, Frank's attorney then asked Dr. Gilles whether any of her opinions would change "if the evidence showed that he went to work for A & L in 1990 and worked for them up until 1995 . . . ." Dr. Gilles replied, "My opinions as to his problems are still the same."

Frank's attorney then asked, "And knowing he worked at A & L from 1990 up until the time you saw him in 1995, does that at all change your opinion as to the causation opinion concerning the cause of the medical condition that you've diagnosed?" After objection, arguments, and assertions by both attorneys, Frank's counsel rephrased the question and asked Dr. Gilles whether Frank could "have worked for five years in the condition he was in . . . ." After further objection and argument, Dr. Gilles stated, "I could not have worked for five years in the shape his joints were in . . . ."

Dr. Gilles then opined that Frank's "injuries are consistent with somebody who has been a heavy laborer." Frank's attorney

attempted to rephrase the question in terms of the progressive effects of being a heavy laborer. However, opposing counsel objected, stating, "I think she testified his symptoms were consistent with an individual that performed heavy labor for 25 years." Frank's attorney then asked, "Was that your opinion?" and Dr. Gilles responded, "Yes."

At this point, Frank's attorney asked Dr. Gilles a hypothetical question: If Dr. Gilles were to assume that Frank had been employed by A & L for 5 years and had been required to do a lot of hammering, working with screwdrivers, lifting, and working with his hands outstretched or "over his arms," and based upon the tests she administered in August 1995, did she have an opinion, with a reasonable degree of medical certainty or probability, for the cause of the medical condition she diagnosed? After objection, Frank's counsel expanded the hypothetical question to include the fact that Frank had been a carpenter for 25 years. When asked to give her opinion, Dr. Gilles answered:

> I think that the patient obviously related that he had had some problems a couple years before, that he did seek chiropractic treatment for his neck. The severity of those problems, I don't know. I do not have his x-rays, if any were done at that time, to compare.
>
> Even if he saw [the chiropractor] two or three years — you know, prior to that point in time but yet had been working with no complaints of pain, could an additional three or four years of work caused enough attrition on his shoulders to cause rotator cuff tears? And the answer is yes, it could have.

Frank's attorney then asked Dr. Gilles several questions regarding the timeframe of the accident. At first, Dr. Gilles conceded she was unable to pinpoint when exactly Frank sustained his injuries, stating, "Can I tell you when exactly in that 25-year period of time did his rotator cuff tears occur? The answer is, No, I can't." Dr. Gilles further stated:

> I can say that I did not specifically ask the patient how he felt in 1990, versus 1991, versus 1992. You know, I don't have a time frame and I wish I had a crystal ball to say when did your shoulder start bothering you? I don't have that exact information . . . .

However, Dr. Gilles continued:

> But I can say that it was probably unlikely that it happened 20 years ago, that it was more likely in the recent past, because of the size of the tear and the amount of pulling away of that, *that it was more likely recent than in the remote past.*

(Emphasis supplied.)

Attempting to solidify the timeframe of the injuries, Frank's attorney asked, "I think the time frame that you mentioned earlier was six months to a year. Was that what you referred to as 'recent'?" After an objection by opposing counsel, Dr. Gilles responded:

> The patient by his own history gave the history of having seen a chiropractor a couple years before. Was that his neck or shoulders at that time? I'm not sure. But obviously, he had had problems for at least two years before, but that his symptoms has [sic] gotten dramatically worse in the last six months. So in the course of 1995, the pain that he was having had gotten to the point that he sought medical treatment for it.
>
> I can't tell you how he felt in 1990 since I didn't see him in 1990. If the patient told me that he was perfectly asymptomatic and had no problems in 1990, then I can go back and say then yes, if he started employment in 1990 and didn't have problems till 1996, then I could say, Fine, it happened within that six year period of time.

Pursuant to our holding in *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991), we are required to examine the sufficiency of Dr. Gilles' statement contained in exhibit 2 within the "larger context" of her entire opinion and the record as a whole. See, also, *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992). In so doing, and in reviewing the compensation court's findings of fact and considering the evidence in the light most favorable to Frank, we find that the record supports the compensation court's factual findings. See, *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999); *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

The Court of Appeals determined that Dr. Gilles' opinion that Frank's injuries were consistent with someone who has been a heavy laborer rendered her statement in exhibit 2 legally ineffective. However, the fact that Dr. Gilles testified that Frank's injuries were consistent with his being a heavy laborer could just as easily indicate that Frank's injuries were consistent with his work at A & L. See *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). Moreover, the fact that Dr. Gilles testified that an additional 2 to 3 years "could have" caused Frank's injuries is not dispositive when viewed in the context of the entire record. See, *Renne v. Moser, supra*; *Miner v. Robertson Home Furnishing, supra.* For example, Dr. Gilles also testified that it was "more likely" the injuries occurred in the "recent past" and that she herself could not have worked for 5 years in Frank's condition. See *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996) (holding that physician's opinion that it was "more likely" that claimant's exposure to solvents at work contributed to onset of his seizures was sufficient to establish causation required for workers' compensation award).

Dr. Rohrick's and Frank's testimony buttresses our conclusion. Dr. Gilles stated that if Frank started working at A & L in 1990 and did not have problems until 1996, "I could say, Fine, it happened within that six year period of time." Frank testified that when he went to work for A & L in 1990, he was in good physical condition, having no problems with his wrists, elbows, or shoulders. Dr. Rohrick testified that throughout his treatment of Frank, from March 1993 through December 1994, there was no indication Frank had any problems with his arms or shoulders. Frank consulted Dr. Gilles for the injuries in question on August 8, 1995. Given this record, the compensation court could find that Frank's injuries occurred in 1995. See, *McBee v. Goodyear Tire & Rubber Co., supra*; *Crouch v. Goodyear Tire & Rubber Co.*, 255 Neb. 128, 582 N.W.2d 356 (1998); *Wilson v. Larkins & Sons, supra.* The Court of Appeals' opinion supports this conclusion. The court stated:

> The record establishes that in 1993, Frank went to see Rohrick, complaining of pain in his shoulders and arms, radiating into his fingers. However, both Frank and

> Rohrick testified that Frank had recovered from this pain, and therefore we will not summarize that evidence on the basis that the trial judge's finding for Frank contains an implied finding that the 1993 and 1995 [sic] complaints are not significant.

The record reveals that Dr. Gilles initially believed Frank had worked for A & L for 25 years. However, after being informed that Frank had worked for A & L for only 5 years, Dr. Gilles stated, "My opinions as to his problems are still the same." As a result, Dr. Gilles' statement in exhibit 2, in which she related Frank's need for treatments to his work at A & L, was competent evidence for consideration by the trier of fact. Dr. Gilles' statement in exhibit 2 was therefore sufficient to establish medical causation if believed by the trier of fact. See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). The weight to be given to exhibit 2 was also a determination for the trier of fact. See *Fremont Farmers Union Coop. Assn. v. City of Fremont*, 179 Neb. 576, 139 N.W.2d 369 (1966) (holding that expert opinion evidence is to be considered and weighed by trier of fact). The compensation court found Dr. Gilles' testimony sufficient. We cannot say that this determination was clearly wrong. See *Crouch v. Goodyear Tire & Rubber Co., supra.*

Reviewing the entirety of Dr. Gilles' opinion and viewing the evidence in the light most favorable to Frank, we determine the Court of Appeals erred in finding that Frank failed to establish medical causation between his injuries and his employment at A & L. See, *McBee v. Goodyear Tire & Rubber Co., supra*; *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996); *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992); *Miner v. Robertson Home Furnishing, supra.* As we have repeatedly held, this court will not substitute its judgment for that of the Workers' Compensation Court where the record presents nothing more than a good faith conflict due to self-contradiction of an expert's opinion. *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). See, *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 350 N.W.2d 7 (1984); *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984).

ARISING OUT OF AND IN COURSE OF EMPLOYMENT

Frank finally argues the Court of Appeals erred in concluding there was no evidence proving his injuries arose out of and in the course of his employment at A & L.

The Court of Appeals observed that the record sufficiently demonstrated that Frank's general carpentry work over the last 25 years subjected his arms, hands, and shoulders to numerous traumas each day. However, the Court of Appeals determined that "[w]hile there may be sufficient evidence of trauma, there is no evidence showing the significance of that trauma or that it was greater then [sic] the ordinary wear and tear suffered by carpenters generally." Essentially, the court concluded there was no evidence of an "accident" warranting a workers' compensation award.

Even though A & L's counsel stated during oral argument that "I suspect . . . there's enough information for [the judge] to determine that there was an accident," we will address Frank's contention given the absence of a clear indication of waiver. Compare *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992) (holding that where counsel concedes at oral argument that record does not support alleged error, error is waived).

In *Schlup v. Auburn Needleworks*, 239 Neb. 854, 860, 479 N.W.2d 440, 445 (1992), we addressed a situation similar to the case at bar, where we stated:

> "While it is . . . quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease . . . the compensability of . . . a condition [resulting from the cumulative effects of repeated work-related trauma] is to be tested under the statutory definition of accident."

(Quoting *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991).)

Under § 48-151(2), an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." See, also, *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

The "unexpected or unforeseen" requirement of § 48-151(2) is satisfied if either the cause was of an accidental nature or the effect was unexpected or unforeseen. See *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985). Here, there is no indication that Frank's condition was either expected or foreseeable. While he had complained of pain in the trapezius muscle for a time in 1993 and of a lower back injury in late 1994, Frank had no complaints about his wrists, elbows, or shoulders until 1995. From the evidence, the Workers' Compensation Court could properly conclude that Frank's injuries, which were diagnosed in August of 1995, were not expected or foreseen. Based on Dr. Rohrick's opinions, the court could also properly conclude that Frank's 1995 treatment was not causally connected with his complaints of 1993 and 1994.

The second specification of § 48-151(2) requires that an employee's injury must occur "suddenly and violently" to be compensable. We have held that "suddenly and violently" does not mean "instantaneously and with force." The specification "suddenly and violently" is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Sandel v. Packaging Co. of America, supra.*

Frank was asked during trial, "[C]an you tell me when in 1995 you started having some physical difficulties while you were working," and Frank replied, "[I]n the spring." Frank was then asked what type of activities he was performing when he first noticed these difficulties. Frank testified he had been doing some "stucco work," which involved taking out windows and "beating [the stucco] off with a hammer." Frank testified that he first noticed his right wrist began hurting while he was performing the stucco work. Frank also testified that within a week of the initial onset his left arm, along with his right and left shoulders, began hurting. These physical difficulties ultimately became so intolerable that Frank was forced to consult Dr. Gilles on August 8, 1995. Based on these facts, we find the record sufficient to satisfy the second specification.

The third specification in § 48-151(2), that the accident produced objective symptoms, is satisfied if the symptoms mani-

fest themselves according to the natural course of such things without any independent intervening cause. *Schlup v. Auburn Needleworks, supra*; *Sandel v. Packaging Co. of America, supra.*

> " 'We are of the opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.' "

*Sandel*, 211 Neb. at 157, 317 N.W.2d at 915-16.

Frank clearly manifested such symptoms when he found he could not continue to work, given the pain he was experiencing. The injuries in his upper extremities manifested themselves when his right wrist and left hand began hurting, his right-hand fingers started tingling, and his right shoulder and neck began hurting. When he consulted Dr. Gilles, he complained of pain in both shoulders, his left elbow, and his right wrist. After thoroughly examining him, Dr. Gilles diagnosed Frank with numerous problems affecting his spine, shoulders, and wrists.

We find the facts of this case sufficient to support the Workers' Compensation Court's finding that Frank suffered a work-related accident. We therefore reverse the Court of Appeals' finding that Frank's injuries did not arise out of and in the course of his employment at A & L.

## CONCLUSION

Having addressed each of Frank's assignments of error and finding each of them meritorious, we reverse the Court of Appeals' decision and remand the cause with directions to reinstate the compensation court's May 29, 1997, order.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., dissenting.

I agree with the Court of Appeals that the evidence in this case is insufficient as a matter of law to support the award and therefore respectfully dissent. 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. *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998); *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997). While the medical evidence in this case may be construed to relate Frank's injury to his employment in general, it does not in my view establish the essential causal link between the injuries and an accident arising out of and in the course and scope of that employment, as the Nebraska Workers' Compensation Act requires.

I agree with the majority that this case presents a claim based upon the alleged cumulative effects of repeated work-related trauma and thus must be analyzed under the definition of "accident" as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1993). See, *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992); *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991). Under our jurisprudence, the statutory requirement that a compensable accident must occur "suddenly and violently" is satisfied if injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). This court has stated that "specification of 'suddenly and violently' is to distinguish compensable injuries such as those in *Sandel* from chronic conditions which develop over a period of many years where the injury cannot be traced to a particular job or activity of the worker." *Schlup*, 239 Neb. at 861, 479 N.W.2d at 446. See, *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991); *Maxson v. Michael Todd & Co., supra*.

The majority determines that the repetitive trauma constituting the accident in this case was the "stucco work" which Frank performed in the spring of 1995 when he first noticed symptoms of pain in his wrist and shoulders. I find this conclusion somewhat tenuous in that Frank admits that the work he did in the spring of 1995 was "pretty much the same work" he performed during 1994 and 1993. However, assuming arguendo that the majority has correctly defined the accident, I view the medical evidence as insufficient to support a reasonable inference that the accident caused Frank's injuries.

This can be seen by comparing the medical evidence in this case to that presented in two cases where we have affirmed

compensation awards based upon repetitive-trauma injuries. In *Schlup, supra*, the plaintiff, an experienced seamstress, was assigned to a task on the sewing assembly line which was different from what she had done previously. The new position required her to repetitively pull, tug, and push denim through a machine in order to attach collars, cuffs, pockets, and zippers to denim jackets and jeans. After working at this new position for less than 3 months, she developed symptoms which were diagnosed as bilateral carpal tunnel syndrome and which ultimately required surgery and prevented her from working. We held that the evidence supported a finding that the repetitive hand movements associated with the new position constituted an accident within the scope of the Nebraska Workers' Compensation Act and that causation was established by a physician's testimony, based upon reasonable medical certainty, that the plaintiff's carpal tunnel syndrome problems were caused or worsened by the repetitive heavy hand movements she was required to make in her most recent assignment.

In *Sandel, supra*, a worker in a manufacturing plant was transferred from her job as a forklift driver to that of operating a "slitter-scorer" machine used to make cardboard boxes. Upon assuming her new duties, she began experiencing symptoms of bursitis which, over a 5-month period, rendered her unable to work. A medical expert testified that in his opinion, the work done by Sandel on the slitter-scorer machine caused the bursitis, because no other job which she had held required her to constantly move and bend her wrist and arm and she did not do any kind of repetitive motion of this nature while at home. Based upon these facts, we affirmed an award of compensation.

In the present case, the medical evidence does not connect Frank's injuries with the particular job or activity which the majority deems to constitute an accident. Frank could not recall telling Dr. Gilles the specific nature of the work he performed at A & L. Dr. Gilles testified that when she first examined Frank on August 8, 1995, he stated that his symptoms had become progressively worse during the preceding 6 months, but Dr. Gilles admitted: "I don't know what activity he was doing specifically in that six months, no." The hypothetical question posed to Dr. Gilles by Frank's counsel did not focus on the

stucco work performed by Frank in the spring of 1995, but, rather, on his general duties and activities throughout his employment with A & L Insulation beginning in 1990.

At best, the medical evidence would support an inference of a general causal relationship between Frank's employment and his injuries. However, the pertinent inquiry in this case is not whether Frank's injury was caused by his *employment*, but whether it was caused by an *accident arising out of and in the course of* that employment. I can find no evidence establishing the necessary causal link between the accident identified by the majority and the injuries for which it concludes that Frank is entitled to compensation. Accordingly, I agree with the Court of Appeals that the award of the Workers' Compensation Court was based upon a clearly erroneous factual determination and should therefore be reversed with directions to dismiss.

MILLER-LERMAN, J., joins in this dissent.

CONNOLLY, J., dissenting.

I agree with the preceding dissent's "accident" analysis. However, in my opinion, it is time for this court to recognize that arbitrarily requiring the victims of work-related, repetitive-stress injuries to demonstrate an "identifiable point in time" at which the "accident" occurred is to carry on a legal charade. There is no satisfactory rationale, statutory or otherwise, for pigeonholing repetitive-stress injuries into the "accident" category and disallowing any showing that such an injury is an "'occupational disease.'" See *Schlup v. Auburn Needleworks*, 239 Neb. 854, 869, 479 N.W.2d 440, 450 (1992) (Shanahan, J., concurring). An occupational disease is properly defined as "a condition which causes impairment, deviation, or interruption of the normal structure or function of a worker's body and which results from hazards or conditions peculiar to a particular occupation or employment." *Id.* I believe that Justice Shanahan's well-reasoned concurrence in *Schlup* was correct: A work-related, repetitive-stress injury may be compensable as an "occupational disease" under Neb. Rev. Stat. §§ 48-101 (Reissue 1998) and 48-151(3) (Reissue 1993). Therefore, I would overrule *Schlup* and *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), and allow the compensation

court to consider whether Frank's injuries were the result of an occupational disease. The decision of the Court of Appeals should be reversed and the cause remanded to the compensation court for a new trial in accordance with this opinion. I respectfully dissent.

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## FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLANT, V. IRMA WITTE, APPELLEE, AND JENNIFER JOY BORGMEYER, INDIVIDUALLY, AND ALEXANDER ERIC WITTE, BY HIS GUARDIAN AND NEXT BEST FRIEND, JENNIFER JOY BORGMEYER, INTERVENORS-APPELLEES.

594 N.W.2d 574

Filed May 14, 1999. No. S-98-297.

1. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
2. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. The party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Insurance: Contracts: Liability: Public Policy.** A policy of insurance is a contract. Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
4. **Insurance: Contracts.** An insurer's duties to its insured are defined and governed by the terms of the insurance policy.
5. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning.
6. **Insurance: Contracts.** Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.
7. **Insurance: Contracts: Proof.** Under Nebraska law, the burden to prove that an exclusionary clause applies rests upon the insurer.

8. **Intent.** If an intentional act causes injuries which are the natural and probable consequences of the act, the injuries as well as the act itself may be deemed intentional.
9. **Insurance: Mental Health: Intent.** Although an insured may suffer from a diagnosed mental illness, symptoms of which may negate the insured's ability to form the requisite intent for culpability in a criminal prosecution, the insured may still commit an act from which an intent to harm may be inferred as a matter of law in a civil action.
10. **Insurance: Intent: Evidence.** Presented with adequate evidence, an insured's intent to injure may be inferred as a matter of law from the shaking of an infant or a young child, regardless of the insured's subjective intent.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., for appellant.

Patrick M. Flood, of Hotz & Weaver, for intervenors-appellees.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Appellant, Farm Bureau Insurance Company of Nebraska (Farm Bureau), filed a petition in the district court for Lancaster County seeking a declaratory judgment that the exclusionary clause in a policy of homeowner's insurance issued by Farm Bureau to appellee Irma Witte excluded coverage for damages she inflicted on Alexander Eric Witte, an infant child, by shaking him, causing shaken baby syndrome. The mother of Alexander, appellee Jennifer Joy Borgmeyer, intervened.

Farm Bureau moved for a directed verdict at the conclusion of the evidence. The trial court denied the motion. Thereafter, the jury determined that the exclusionary clause in the Farm Bureau policy did not exclude coverage under that policy. Judgment was entered accordingly. Farm Bureau appeals. We reverse the order of the district court denying Farm Bureau's motion for directed verdict and remand the cause to the district court with directions to vacate the judgment entered upon the

jury's verdict and to enter judgment granting Farm Bureau the relief specified in its amended petition for declaratory judgment.

## STATEMENT OF FACTS

*Injuries to Alexander.*

During the period of September through December 1994, Irma occasionally babysat her infant nephew, Alexander. Irma agreed to babysit Alexander on December 15, and Alexander's mother, Borgmeyer, brought Alexander to Irma's home at approximately 7 p.m. Irma had been in contact with Borgmeyer earlier that day. Borgmeyer sold "crank," or methamphetamine, to Irma, and the two women used the drug together. In addition to her methamphetamine consumption, Irma consumed at least two beers while she was caring for Alexander.

Irma testified that she felt depressed and frustrated that evening about her recently failed marriage and her use of alcohol and illegal drugs. At some point after her two young children were in bed, Irma was holding Alexander in her arms, trying to get him settled. Alexander was fussy and would not sleep. Irma shook Alexander. Although she readily admitted shaking Alexander, Irma testified at trial that she could not remember exactly how long she shook him and that she did not recall whether Alexander's head struck any hard surface during the shaking. Irma added, "I was frustrated, but not with Alex." Irma stated that she did not intend to harm the baby and that she was not thinking about him when she shook him.

Irma's ex-husband, Jim Witte, and his brother, Eric Witte, Alexander's father, arrived at Irma's home at about midnight. Jim and Eric fixed a snack to eat, and they watched television. Irma dressed Alexander in his snowsuit and placed him in his car seat. Eric left with Alexander at approximately 1 or 1:30 a.m.

The record does not reveal Alexander's condition when he left Irma's home. The trial evidence indicates, however, that Alexander's parents sought medical care for him soon after retrieving him from Irma's care. Alexander was admitted to Children's Hospital in Omaha on December 16, 1994.

Dr. Fred Kader, a pediatric neurologist, examined and treated Alexander in the hospital. Dr. Kader diagnosed Alexander with

"neurological difficulties as a result of having child abuse from a significant closed head injury and trauma due to shaken baby syndrome." Dr. Kader described shaken baby syndrome as "a constellation of findings in a child who has evidence of neurological deficit," including, inter alia, evidence of retinal hemorrhages and bleeding within the brain or between the brain tissue and the bone of the skull. Dr. Kader found that Alexander had evidence of seizures, intercranial and retinal hemorrhages, and neurological depression, all of which had occurred within 24 hours of Dr. Kader's examination of Alexander on December 16, 1994. Dr. Kader found that Alexander had sustained a skull fracture injury on the right side of his brain which had occurred within 24 hours of Dr. Kader's examination. It was uncontroverted that as described above, Irma had cared for Alexander during part of that 24-hour period. Other than Irma's admitted shaking of Alexander, there was no trial evidence of any event which could have caused Alexander's injuries.

According to Dr. Kader, many but not all infants afflicted with shaken baby syndrome show associated direct evidence of trauma, such as a skull fracture or a focal contusion under the site of a blow to the child's head. Dr. Kader testified that skull fractures on an infant cannot be caused by shaking the baby and that in order for a skull fracture to occur, the child's skull must come into contact with a hard surface or object. Dr. Kader testified that although he could diagnose shaken baby syndrome, he could not state whether the injury was a result of intentional conduct by another person.

In addition to the new head injuries to the right side of Alexander's brain described above, in Dr. Kader's examination of Alexander, Dr. Kader also found that Alexander had lesions on the left side of his brain. Unlike the fracture on the right side of Alexander's brain which was recent in origin, Dr. Kader stated that the lesions on the left side of Alexander's brain were several days to 1 week old and that these lesions were healing. Dr. Kader opined that "there were possibly multiple reasons" for the lesions on the left side of Alexander's brain, including shaking or a more significant direct contusion to that part of Alexander's brain. Dr. Kader testified that in diagnosing

Alexander with the cluster of symptoms he referred to as "shaken baby syndrome," he included both the new injuries to the right side of Alexander's brain as well as the healing injuries to the left side of Alexander's brain. Dr. Kader noted that the fracture injury to the right side of Alexander's brain affected the left side of Alexander's brain in "the subsequent evolution of the event." Dr. Kader testified that if a child was already suffering from an underlying brain injury which was drawing upon the neurological reserves in the child's body in order to heal, a subsequent brain injury to the child could be caused by an impact of less force than that which caused the first injury, because the child's neurological resources would already be taxed by healing the preexisting injury.

Irma was interviewed by Nebraska State Patrol Investigator Michael Malmstrom on December 16, 1994, at Children's Hospital, where she had gone to see Alexander. Irma fabricated three different versions of how Alexander's injuries occurred before telling Malmstrom the truth. Irma admitted that she had shaken Alexander and that she had consumed alcohol and used methamphetamine on December 15 in the hours before she shook Alexander.

*Issues Framed in Declaratory Judgment Proceeding.*

Farm Bureau filed a petition for declaratory judgment against Irma on November 26, 1996. The petition was subsequently amended, and Farm Bureau filed its final amended petition on February 23, 1998, the first day of trial in this case. In its amended petition, Farm Bureau alleged that it issued a policy of homeowner's insurance to Irma and Jim which was in effect on December 15, 1994, the date upon which Irma admitted shaking Alexander.

The Farm Bureau policy was admitted in evidence at trial as exhibit 8. It contained the following pertinent provisions:

> SECTION 2 — LIABILITY COVERAGES
> COVERAGE G
> PERSONAL LIABILITY
>
> If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **prop-**

> **erty damage** caused by an **occurrence** to which this coverage applies, we will:
>
> a. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
>
> b. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the **occurrence** equals our limit of liability.
>
> . . . .
>
> EXCLUSIONS — SECTION 2
>
> 1. Coverage G-Personal Liability, Coverage H-Medical Payments to Others, Coverage I-Watercraft Liability, and Coverage J-Watercraft Medical do not apply to **bodily injury** or **property damage**:
>
> a. which is expected or intended by any **insured**.

(Emphasis in original.)

The Farm Bureau policy defined "bodily injury" as "bodily harm, sickness or disease, including required care, loss of services and death resulting therefrom." The policy defined "occurrence" as "an accident and includes exposure to conditions which result in **bodily injury** or **property damage** during the policy period, provided the cause is accidental." The terms "accident" and "accidental" were not defined in the policy.

In its amended petition for declaratory judgment, Farm Bureau alleged that Irma "intentionally, deliberately and willfully shook [Alexander] and struck his head against a hard object" and that Irma intended to injure Alexander when she shook him. Farm Bureau requested that the court adjudicate Farm Bureau's claim and declare that the homeowner's insurance policy issued by Farm Bureau to Irma and Jim "[did] not furnish any coverage with respect to the incident which occurred on December 15, 1994, resulting in injuries to Alexander Eric Witte." Irma did not file an answer to Farm Bureau's amended petition or to any pleadings or motions filed by Farm Bureau before trial. Irma testified as a witness at the trial, but she was not represented by counsel. Her trial partici-

pation was limited to her testimony as a witness called by Farm Bureau.

Borgmeyer was granted leave to intervene in Farm Bureau's declaratory judgment case on her own behalf and on Alexander's behalf as his guardian and "next best friend." In her amended petition in intervention filed on February 23, 1998, Borgmeyer alleged that she had filed a petition for damages against Irma in the district court for Dodge County and that therefore, she possessed an interest in the outcome of the declaratory judgment action commenced by Farm Bureau against Irma. A copy of Borgmeyer's petition for damages against Irma filed in Dodge County is not contained in the record on appeal. In her amended petition in intervention, Borgmeyer requested an affirmative declaration by the trial court that the homeowner's insurance policy issued by Farm Bureau to Irma and Jim furnished "coverage" with respect to Irma's conduct in shaking Alexander on December 15, 1994.

The trial court conducted a pretrial conference on September 25, 1997. Farm Bureau and Borgmeyer were represented by counsel at the pretrial conference. Irma was not present or represented by counsel at the pretrial conference. The pretrial order resulting from the pretrial conference is contained in the record on appeal. In the portion of the pretrial order pertaining to a statement of Farm Bureau's trial issues, the pretrial order refers to Farm Bureau's pretrial memorandum, in which Farm Bureau stated that "there is no coverage under the Farm Bureau policy because there was no 'occurrence' as that term is defined in the policy and for the further reason [that] the coverage is specifically excluded for bodily injury or property damage 'which is expected or intended . . . .'" Pursuant to the "Pretrial Order," Farm Bureau claimed that the controverted issues of fact and law were whether Alexander's injuries were the result of an "accident," as that term was used in the Farm Bureau policy, and whether coverage for Borgmeyer's claim against Irma was excluded because Irma expected or intended to injure Alexander. At oral argument, counsel for Farm Bureau stated that it raised no issue on appeal regarding whether the shaking was or was not an "accident." On appeal, Farm Bureau argues

only that coverage is excluded because the bodily injury was expected or intended.

*Trial and Presentation of Case to Jury.*

A jury trial was conducted February 23 through 25, 1998. The Farm Bureau homeowner's insurance policy issued to Irma and Jim was received in evidence without objection. Dr. Kader's testimony regarding Alexander's diagnosis and condition was introduced by deposition. Irma testified live at the trial, as did Malmstrom and Borgmeyer. Borgmeyer's testimony was essentially limited to a description of Alexander as a well child before December 15, 1994, and foundation for a videotape showing Alexander less than 1 week before the incident.

Irma admitted that when Malmstrom first questioned her about Alexander's injuries, she lied about shaking Alexander. Irma admitted that she shook Alexander and stated that she could not remember how long she did so or whether Alexander struck his head against a hard surface or object while she was shaking him. Irma denied that she had shaken or abused Alexander at any other time, and she denied that she had ever shaken or abused her own two young children. Irma testified that she did not know how Alexander received the healing lesions which Dr. Kader detected on the left side of Alexander's brain.

The trial court allowed the parties to inform the jury that Borgmeyer had filed a "claim" for damages against Irma based on Alexander's injuries, but the court did not allow the parties to introduce evidence of the separate petition for damages Borgmeyer had filed against Irma in the district court for Dodge County.

The trial court also refused to allow specific evidence of the nature and scope of Alexander's injuries. The court did, however, allow the jury to view a silent videotape of Borgmeyer playing with and feeding Alexander on December 12, 1994, less than 1 week before Irma shook Alexander.

At the close of Farm Bureau's presentation of evidence, Borgmeyer moved the court for a directed verdict on the basis that Farm Bureau had failed to prove, as a matter of law, that

Irma intentionally injured Alexander. The trial court denied Borgmeyer's motion.

After Borgmeyer completed the presentation of her evidence, Farm Bureau moved for a directed verdict and for the court "to find as a matter of law that the exclusion to the insurance policy is applicable in this case and precludes coverage because the insured's act was of a character that an intention to inflict an injury can be inferred as a matter of law." The trial court denied Farm Bureau's motion for directed verdict. The case was submitted to the jury.

The jury rendered its verdict on February 25, 1998. Using a typed, prepared verdict form signed and dated by the jury foreperson, the jury stated that it "[does] find in favor of defendant and intervenor finding that the insurance policy does furnish coverage for injuries to Alexander Witte." Judgment was entered thereon. Farm Bureau appeals.

## ASSIGNMENTS OF ERROR

Farm Bureau claims on appeal that the trial court erred in denying Farm Bureau's motion for directed verdict and in failing to conclude that the character of Irma's act was such that her intent to inflict injury on Alexander could be inferred as a matter of law.

## STANDARD OF REVIEW

The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Shivvers v. American Family Ins. Co., ante* p. 159, 589 N.W.2d 129 (1999).

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. The party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Haag v. Bongers, ante* p. 170, 589 N.W.2d 318 (1999).

## ANALYSIS

*Nebraska Insurance Law Regarding Exclusions for Intentional Acts.*

A policy of insurance is a contract. Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Shivvers v. American Family Ins. Co., supra.*

An insurer's duties to its insured are defined and governed by the terms of the insurance policy. See *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993). An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993).

Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured. See, *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). The coverage issue in the instant case is of the latter variety.

Under Nebraska law, the burden to prove that an exclusionary clause applies rests upon the insurer. *Economy Preferred Ins. Co. v. Mass, supra.* An insurer may petition a court to declare, pursuant to Neb. Rev. Stat. § 25-21,149 (Reissue 1995) of Nebraska's Uniform Declaratory Judgments Act, whether an insured's conduct or a specific event is excluded from coverage under a policy of insurance. See, *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995); *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). A court may not enter declaratory judgment where there is an unknown potential for liability to an insured and the

declaratory judgment would not end the controversy between the parties, or where another equally serviceable remedy is available to the insurer. See, *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998); *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). Where it is proved, however, that a specific event or type of conduct is beyond the terms of an insurance policy, a court may enter a declaratory judgment that the insurer is not obligated to provide coverage to the insured for the event or conduct. See, *Columbia Nat. Ins. v. Pacesetter Homes, supra*; *State Farm Fire & Cas. Co. v. van Gorder, supra*; *State Farm Fire & Cas. Co. v. Victor*, 232 Neb. 942, 442 N.W.2d 880 (1989); *Bisgard v. Johnson*, 3 Neb. App. 198, 525 N.W.2d 225 (1994).

It is the law in Nebraska, generally, that where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured. See, *State Farm Fire & Cas. Co. v. van Gorder, supra*; *State Farm Fire & Cas. Co. v. Victor, supra*; *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979). In particular, an insured party's infliction of bodily harm upon another person may be deemed conduct from which an intent to injure can be inferred as a matter of law, regardless of the subjective intent of the insured party, and such conduct will not be covered under a policy which excludes coverage for " 'bodily injury . . . which is either expected or intended from the standpoint of the Insured.' " *Jones v. Norval*, 203 Neb. at 551, 279 N.W.2d at 392.

This court stated in *Jones v. Norval*, " 'The term "expected" when used in association with "intended" carries the connotation of a high degree of certainty or probability and seems to be used to practically equate with "intended," because one expects the consequences of what one intends.' " 203 Neb. at 552, 279 N.W.2d at 390, quoting *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973). Relying on numerous cases not repeated here, in *Jones v. Norval, supra*, we stated that an injury is expected or intended from the standpoint of the insured if a reason for the insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict

an injury can be inferred as a matter of law. If an intentional act causes injuries which are the natural and probable consequences of the act, the injuries as well as the act itself may be deemed intentional. In *Jones v. Norval*, we stated:

> "'Superficial analysis would suggest that this is an acceptance of the "natural consequences of the act" rule, but it is not. It is a much more narrow gauge that recognizes the correlation only where reason mandates that from the very nature of the act, harm to the injured party must have been intended. . . .'"

203 Neb. at 554, 279 N.W.2d at 391, quoting *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885 (Minn. 1978). See, also, *Home Ins. Co. v. Neilsen et al.*, 165 Ind. App. 445, 332 N.E.2d 240 (1975).

Examples of conduct relative to which this court has found that an insured's intent to injure another party may be inferred as a matter of law include battery by striking a third person in the face, using a closed fist, see *Jones v. Norval, supra*; killing a third person by intentionally aiming a gun and firing at him, see *State Farm Fire & Cas. Co. v. Victor, supra*; and sexual assault upon a minor child by an adult clergyman sexually molesting the victim, see *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). In each of these cases, we concluded that the insured's subjective intent to cause the resulting harm was immaterial, because as we have stated, the insured's act "'is one which we recognize as an act so certain to cause a particular kind of harm that we can say a person who performed the act intended the resulting harm, and his statement to the contrary does nothing to refute that rule of law.'" *Jones v. Norval*, 203 Neb. at 554, 279 N.W.2d at 391 (quoting with approval *Clark v. Allstate Insurance Company*, 22 Ariz. App. 601, 529 P.2d 1195 (1975), *modified on other grounds, St. Paul Property & Liability v. Eymann*, 166 Ariz. 344, 802 P.2d 1043 (Ariz. App. 1990)).

*Exclusion of Coverage for Acts in This Case.*

In the case at bar, the homeowner's insurance policy issued by Farm Bureau to Irma and Jim expressly provided that bodily injury or property damage "which is expected or intended by

any **insured**" is not covered by the policy. Farm Bureau contended in the trial court, and argues on appeal, that Irma's conduct in shaking Alexander resulted in bodily injury expected or intended by the insured and that therefore, Irma's conduct and the harm resulting therefrom are not included in the coverage provided by the policy.

Whether bodily injury is expected or intended or whether the character of an act is such that an intention to inflict a bodily injury may be inferred as a matter of law in the act of an adult shaking a 7-month-old infant are questions of first impression in Nebraska. Farm Bureau maintains that the character of Irma's act was such that the trial court should have found as a matter of law not only that Irma intended to shake Alexander but that she intended to cause or should have expected to cause his injuries as well. Farm Bureau maintains that the trial court erred in denying Farm Bureau's motion for directed verdict. As noted above, Irma admitted that on December 15, 1994, she shook Alexander, although she denied that she intended to harm him and that she had shaken or struck Alexander in the past. Borgmeyer maintains that Irma's emotional state on December 15 and Irma's inability to completely recall the shaking incident preclude a finding that Irma intended or expected to cause bodily harm as a matter of law. On the facts of this case, we can say as a matter of law that Irma's act was so certain to cause the particular harm which ensued that we conclude that by performing the act of shaking Alexander, Irma intended the resulting harm, and coverage for the damages inflicted by her is excluded under the policy.

The following colloquy between Irma and Farm Bureau's counsel at trial provides a portion of the factual basis surrounding the coverage dispute in this case:

> Q. You have an answer for Dr. Kader's testimony that this child's skull was fractured on December 15th?
>
> . . . .
>
> A. I don't remember. I remember that I shook him and I — I just — I don't remember anything too much about that night.
>
> Q. Were you angry at Alexander Witte?
>
> A. No.

Q. You weren't angry at him, but you shook him?
A. Yes.
Q. That's your testimony?
A. I was frustrated, but not at Alex. And — not at Alex at all.
Q. How long did you shake him?
A. A matter of seconds, I don't know.
Q. You heard Dr. Kader testify about the damage that he observed to Alexander Witte. And you're suggesting to this jury that this happened with just a couple of seconds of shaking?
A. I don't know how long I did it. I don't.
Q. Why did you do it?
A. I was frustrated and depressed.
Q. Is that an excuse for doing what you did to the baby?
A. No — no.
Q. Is there any excuse for what you did to that baby?
A. No.

Based on all the trial testimony, we note that although Irma testified that she was "frustrated and depressed" when she shook Alexander, she offered no evidence at trial that her psychological or mental status was so compromised that she could not make a meaningful choice about how to handle Alexander or that she could not or did not comprehend the grave nature of her actions and the likelihood of causing harm to Alexander by shaking him.

In this regard, we note that this court has held that although an insured may suffer from a diagnosed mental illness, symptoms of which may negate the insured's ability to form the requisite intent for culpability in a criminal prosecution, the insured may still commit an act from which an intent to harm may be inferred as a matter of law in a civil action. In *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993), the insured murdered his father with a rifle, and shot and wounded his father's friend. Although the insured was determined to be not competent to stand trial for the crimes of killing his father and assaulting his father's friend, this court determined that the insured's conduct was, as a matter of law, an intentional act which was excluded from coverage under his

policy of homeowner's insurance because the insured was aware of what he was doing and he intended the resulting injuries.

Other courts which have examined the question of whether an insured's emotional distress can negate his or her capacity to commit an intentional act as a matter of law, thereby precluding exclusion, have evaluated this claim largely on the evidence of the nature and scope of the mental disability claimed by the insured, much as we did in *Economy Preferred Ins. Co. v. Mass, supra.* For example, in *Allied Mutual Ins. Co. v. Costello*, 557 N.W.2d 284 (Iowa 1996), Costello, the insured, aggressively assaulted his secretary. The Iowa Supreme Court concluded such an act was excluded from Costello's employer liability insurance coverage. In this case, Costello admitted striking the secretary, but claimed, " '[T]here's about five, seven minutes in there, maybe ten minutes or whatever that I just had completely come unglued. I just lost it. I don't — it's a bad situation, and I was wrong.' " 557 N.W.2d at 285. Notwithstanding his admitted wrongdoing, Costello claimed his act was not excluded. Costello maintained that his act could not be considered intentional as a matter of law because, " 'I don't really remember very much.' " *Id.* Costello introduced evidence from mental health professionals who testified that Costello was depressed; that Costello's self-control was " 'diminished,' " *id.*, when he committed the assault; and that it was a one-time occurrence rather than an episode in a pattern of such assaults. Only Costello testified that he neither understood nor intended to commit the assault.

The *Costello* court held that Costello's act and the harm resulting therefrom were intentional as a matter of law and that therefore, there was no coverage, stating:

> We are satisfied that Costello is not mentally ill, only that he experienced difficulty controlling his temper. Whatever superficial attraction there is to be found in Costello's theory, it is derived from his bizarre behavior. His assault could scarcely be considered rational, but it does not follow that it was unintentional. Costello showed only that his anger was so strong as to prompt him to his conduct. We are however unpersuaded that the anger caused a lack

> of understanding on his part. His elevated anger seems rather to have elevated his intent.

557 N.W.2d at 288.

Like the *Costello* court, we find in the instant case that there is no evidence in the record that establishes that Irma was incapable of understanding the nature of her act of shaking Alexander, that she was genuinely unable to formulate the intent to shake Alexander, or that she failed to understand that her act would cause the particular harm which resulted. Under the facts of this case, Irma's act of shaking Alexander " 'is one which we recognize as an act so certain to cause a particular kind of harm that we can say a person who performed the act intended the resulting harm, and [her] statement to the contrary does nothing to refute that rule of law.' " *Jones v. Norval*, 203 Neb. 549, 554, 279 N.W.2d 388, 391 (1979). In this connection, we note that other courts have rejected insureds' arguments that various acts such as molestations and assaults on minor children were not intentional as a matter of law because of the insureds' alleged diminished capacities or uncontrollable urges due to pedophilia, melancholia, or other mental disorders. See, *J.C. Penney Cas. Ins. Co. v. M.K.*, 52 Cal. 3d 1009, 804 P.2d 689, 278 Cal. Rptr. 64 (1991), *cert. denied* 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232; *Allstate Ins. Co. v. Troelstrup*, 789 P.2d 415 (Colo. 1990); *L.M. v. J.P.M.*, 714 So. 2d 809 (La. App. 1998), *writ denied* 725 So. 2d 487 (La. 1998); *United Services Auto. Ass'n v. Marburg*, 46 Conn. App. 99, 698 A.2d 914 (1997).

In an attempt to prevent a declaration that Irma's act and the harm resulting therefrom are intentional as a matter of law and thereby excluded from coverage, Borgmeyer directs us to *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). *State v. Parks* is inapposite. *State v. Parks* is a criminal prosecution for child abuse, in violation of Neb. Rev. Stat. § 28-707(1) (Reissue 1995). In *State v. Parks, supra*, Parks, while changing his infant son's diaper, admitted that he abruptly rolled the baby over in the crib, resulting in a spiral fracture of the baby's femur. Parks claimed in the criminal prosecution that his act was negligently, not intentionally, committed during an argument with the baby's mother. The trial court submitted the case to the jury on

the theory that Parks had " 'cruelly punished' " the baby. *Id.* at 943, 573 N.W.2d at 457. The court refused Parks' request to have the jury instructed on negligent child abuse and instead instructed the jury only on intentional child abuse. On appeal, we held that negligent child abuse is a lesser-included offense of intentional child abuse and that given the evidence in *State v. Parks*, the jury could have concluded that the abuse occurred as a result of negligence rather than an intentional act.

The analysis in *State v. Parks* does not control our determination of the issues in this case. *State v. Parks* is a criminal case, in which there is a different, higher standard of proof than in the civil case sub judice. Further, the issues in the cases are not the same. The act of changing a diaper is an innocent act and is not ordinarily harmful, whereas an adult's shaking of a baby has no innocent purpose, and the harm therefrom is obvious. While Parks, like Irma in the instant case, admitted abusing the baby, Parks claimed no loss of memory of the event or other mental condition that purportedly precluded his intent to commit the harmful actions, as Irma and Borgmeyer claim in the case at bar.

Other courts which have examined civil cases involving the shaking of an infant or young child have determined that presented with adequate evidence, an insured's intent to injure may be inferred as a matter of law from the shaking of an infant or a young child, regardless of the insured's subjective intent. See, e.g., *Allstate Ins. Co. v. Davis*, 6 F. Supp. 2d 992 (S.D. Ind. 1998) (holding in coverage case that actions of babysitter who caused infant's death by bouncing child repeatedly on her knee, causing acceleration-deceleration injury which generated concussion and subdural hematoma, were not "accident" as matter of law); *American Family Mut. Ins. Co. v. De Groot*, 543 N.W.2d 870 (Iowa 1996) (holding in farm liability policy coverage case that repetitious nature of babysitter's act in striking infant's head on floor three times supported inference that babysitter's actions were intentional). See, also, *Smith v. Estrade*, 589 So. 2d 1158 (La. App. 1991) (holding that father's excessive shaking of daughter in automobile was intentional, not negligent, act excluded from automobile liability insurance coverage because, inter alia, act was not within foreseeable use of automobile).

An appellate court treats a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. A directed verdict is proper at the close of all evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Haag v. Bongers, ante* p. 170, 589 N.W.2d 318 (1999).

We conclude that Farm Bureau was entitled to a directed verdict in its favor. On this record, Irma admittedly shook Alexander, and his resulting bodily injuries were expected or intended as a matter of law. We, therefore, reverse the order of the trial court denying Farm Bureau's motion for directed verdict and remand the cause to the district court with directions to vacate the judgment entered in favor of Irma and Borgmeyer and to enter judgment on Farm Bureau's amended petition for declaratory judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

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KERRY CORCORAN, APPELLANT, V.
NATHANIEL LOVERCHECK, APPELLEE.
594 N.W.2d 615

Filed May 21, 1999. No. S-97-359.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Negligence: Words and Phrases.** Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.

4. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
5. **Juries: Verdicts: Negligence: Jury Instructions: Appeal and Error.** Where a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiff's contributory negligence, any error in giving a contributory negligence instruction is harmless and does not require reversal of a verdict in favor of the defendant.
6. **Judgments: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct merely because it may disagree with the reasoning employed by the Court of Appeals.
7. **Motor Vehicles: Highways: Right-of-Way.** A motorist is required to yield the right-of-way to a vehicle traveling on a street protected by stop signs if the vehicle on the protected street is close enough to the intersection to pose an immediate hazard. Additionally, a motorist has a duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others.
8. **Motor Vehicles: Highways: Right-of-Way: Public Health and Welfare.** One traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection.
9. **Motor Vehicles: Highways: Right-of-Way: Public Health and Welfare: Negligence.** A motorist approaching an intersection is not in a favored position and entitled to proceed merely because that motorist has the right-of-way. While a driver who fails to see another who is in a favored position is negligent as a matter of law, the failure to see an approaching vehicle is not negligence as a matter of law unless the approaching vehicle is undisputably located in a favored position.
10. **Motor Vehicles: Highways: Words and Phrases.** A vehicle is located in a favored position when it is within that radius which denotes the limit of danger, a definition which focuses upon the vehicle's geographical proximity to the collision point and the vehicle's favored status under the applicable rules of the road.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals affirmed as modified.

Dan L. McCord, of McCord & Burns Law Firm, for appellant.

Stephanie Frazier Stacy and Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

STEPHAN, J.

This is a personal injury action arising from a traffic accident which occurred in Lincoln, Nebraska, on July 7, 1994, involving a motorcycle operated by Kerry Corcoran and an automobile operated by Nathaniel Lovercheck. Corcoran alleged that the accident was proximately caused by Lovercheck's negligence and sought damages for injuries he sustained. Lovercheck denied that he was negligent and alleged that Corcoran was contributorily negligent. At trial, the district court for Lancaster County denied both parties' motions for a directed verdict, and a jury returned a verdict in favor of Lovercheck upon which judgment was entered. Following denial of Corcoran's motion for a new trial, Corcoran perfected this appeal. In an unpublished opinion, the Nebraska Court of Appeals reversed, and remanded for a new trial based upon its determination that the trial court erred in instructing the jury on the issue of contributory negligence. See *Corcoran v. Lovercheck*, No. A-97-359, 1998 WL 800966 (Neb. App. Nov. 10, 1998) (not designated for permanent publication). We granted Lovercheck's petition for further review and affirm the judgment of the Court of Appeals as modified.

## FACTS

The accident occurred at approximately 3:20 p.m. at the intersection of South 24th Street and Randolph Bypass in Lincoln. Immediately prior to the accident, Lovercheck was operating a 1985 Chevrolet Celebrity northbound on South 24th Street, and Corcoran was operating a 1986 Yamaha Fazer motorcycle eastbound on Randolph Bypass. The intersection was controlled by a stop sign for northbound traffic on South 24th Street.

Lovercheck testified that he stopped at the stop sign and looked to his left and right. He had an unobstructed view to his right, but his view of eastbound traffic approaching from his left was partially obstructed by vehicles parked along the south curb of Randolph Bypass. Lovercheck proceeded forward and

looked to his left again but did not see an approaching vehicle. Lovercheck then rolled forward while continuing to look to his left, and when his vehicle was "about a third of the way over the center line" of Randolph Bypass, he observed the motorcycle operated by Corcoran approaching from his left at a distance of 60 to 80 feet. At that point, Lovercheck realized that an accident would probably occur and responded by accelerating to get out of the way of the approaching motorcycle. As he did so, he looked to his left and observed the motorcycle "wobbling."

Corcoran, an experienced motorcyclist, testified that he was proceeding east on Randolph Bypass, approaching its intersection with South 24th Street at the posted speed limit of 25 m.p.h. with the high beam of the motorcycle's headlight illuminated. When he was 35 to 40 feet away from the intersection, he observed the vehicle operated by Lovercheck proceed into the intersection and stop. He immediately applied his brakes and, upon making eye contact with Lovercheck, steered his motorcycle hard to the right while continuing to apply his brakes in an effort to avoid a collision with Lovercheck's vehicle. As he executed this maneuver, the motorcycle "went into slide and laid down and slid past the rear" of Lovercheck's vehicle, throwing Corcoran from the motorcycle and causing injury to the right side of his body.

A Lincoln police officer who investigated the accident testified that it occurred within the intersection in Corcoran's lane of travel and that Corcoran had to take quick evasive action in order to avoid a collision with Lovercheck's vehicle.

## ASSIGNMENTS OF ERROR

In his petition for further review, Lovercheck asserts that the Court of Appeals erred (1) in concluding that the evidence did not support the trial court's giving an instruction regarding contributory negligence and (2) in reversing and remanding for a new trial when any error in the trial court's instructing the jury regarding contributory negligence was harmless as a matter of law.

## STANDARD OF REVIEW

A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but

one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

In reviewing the action of a trial court, an appellate court must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Id.*

## ANALYSIS

Although Lovercheck's answer included four specific allegations of contributory negligence, the jury was instructed to determine only whether Corcoran was negligent in failing to keep the motorcycle he was operating under reasonable and proper control and in failing to maintain a proper lookout. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. *Kappenman v. Heule*, 241 Neb. 54, 486 N.W.2d 27 (1992).

In *Kappenman*, a motorcyclist was injured when he intentionally laid down his motorcycle in order to avoid a collision with a vehicle which had pulled out from a stop sign as the motorcyclist approached the intersection. The motorcyclist testified that when he was faced with the potentially dangerous situation, he acted in a manner most likely to spare himself injury. We concluded that there was no competent evidence that the motorcyclist acted in breach of his duty to protect himself from injury and that therefore, the trial court's instructing the jury on contributory negligence constituted reversible error.

In an attempt to distinguish *Kappenman*, Lovercheck argues that that case did not involve an issue of reasonable control because "when one lays their motorcycle down intentionally, it cannot be said that they 'lost control' of the bike. Instead, it is more accurate to say they chose to control the bike by laying it

down." Memorandum brief for appellee in support of petition for further review at 5. This argument ignores the fact that in *Kappenman*, there was evidence that as the plaintiff was attempting to "lay down" his motorcycle in order to avoid being hit by the defendant's vehicle, he "lost control just before the motorcycle he was riding tipped over while he was still on it," resulting in injury. 241 Neb. at 56, 486 N.W.2d at 29.

Similarly, it is clear from the record in this case that Corcoran lost control of his motorcycle *after* initiating an evasive maneuver in an effort to avoid colliding with Lovercheck's vehicle after it had entered the intersection. When asked if he could have done anything else to avoid the accident, Corcoran testified:

> Honestly, no. Actually, I feel more lucky that I reacted as quickly as I did due to the simple fact that there was no way for me to go forward. There was no reaction time other than for me to apply the brakes and try to avoid collision with [Lovercheck's] vehicle, that's why I did pull as quickly to the right. I was just glad I was paying attention when I was and not focused away or my attention was drawn to anything else other than his vehicle.

There is no evidence contradicting Corcoran's testimony that he was maintaining a proper lookout and traveling at a lawful and reasonable rate of speed immediately prior to the accident. There is also no evidence that Corcoran did not act reasonably to protect himself from injury. Thus, the Court of Appeals was correct in concluding on the basis of *Kappenman* that the trial court erred in submitting the issue of contributory negligence to the jury.

However, there is merit to Lovercheck's argument that this error did not require reversal. Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995). Where a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiff's contributory negligence,

any error in giving a contributory negligence instruction is harmless and does not require reversal of a verdict in favor of the defendant. *Hoover, supra.* See *Bunnell, supra.*

In the present case, the jury was instructed to return a verdict for Lovercheck utilizing "Verdict Form No. 2" if it concluded that Corcoran had not met his burden of proof. Separate verdict forms and corresponding instructions were provided for the jury's use if it reached the issue of contributory negligence. The jury returned Verdict Form No. 2, which necessarily meant that it found no negligence on the part of Lovercheck and that it therefore did not need to consider the issue of contributory negligence. Under *Hoover* and *Bunnell*, the trial court's instruction on contributory negligence was harmless error.

In Corcoran's response to Lovercheck's petition for further review, filed pursuant to Neb. Ct. R. of Prac. 2F(4) (rev. 1997), Corcoran argues that reversal for a new trial is nevertheless required because the district court erred in not finding Lovercheck negligent as a matter of law and in not directing a verdict on the issue of liability. Although these errors were assigned by Corcoran and rejected by the Court of Appeals, Corcoran did not petition for further review of that determination. We have held that upon granting further review which results in the reversal of a decision of the Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998); *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). However, we have not addressed the question posed by Corcoran's argument, which is whether, upon determining that the Court of Appeals erred in ordering reversal on one of several assignments of error, we may then consider whether reversal is nevertheless required under an assignment of error which the Court of Appeals considered and determined to be without merit, in the absence of a petition for further review with respect to that determination.

The statutory basis for our review of judgments of the Court of Appeals is Neb. Rev. Stat. § 24-1107 (Reissue 1995), which provides: "Within thirty days after the Court of Appeals has

issued its decision in a case, any party to the case may petition the Supreme Court for further review of the decision in the manner prescribed by the rules of the Supreme Court." Further review by this court is not a matter of right, but of judicial discretion. See Neb. Ct. R. of Prac. 2G (rev. 1999). Our rules permit a party to file a written response to another party's petition for further review but do not specifically provide for a cross-petition for further review. See rule 2F(4). No mandate will issue during the time allowed for filing a petition for further review or, if a petition for further review is sustained, during the pendency of the appeal in the Supreme Court. Neb. Ct. R. of Prac. 2F(7) (rev. 1996). If further review is granted, the Supreme Court will review only the errors assigned in the petition for further review and discussed in the supporting memorandum brief. The Supreme Court may limit the issues to one or more of those raised by the parties, and may notice plain error at its discretion. See rule 2G.

When reviewing judgments of the trial courts, we have long adhered to the principle that a proper result will not be reversed merely because it was reached for the wrong reasons. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). In other jurisdictions, state supreme courts have applied the same rule when reviewing a judgment of an intermediate appellate court. See, *Robinson, Admx. v. Workman*, 9 Ill. 2d 420, 137 N.E.2d 804 (1956); *Const. and Gen. Labor Union v. Stephenson*, 148 Tex. 434, 225 S.W.2d 958 (1950); *Hetrick v. Power Co.*, 141 Ohio St. 347, 48 N.E.2d 103 (1943); 5 C.J.S. *Appeal and Error* § 843 (1993). While an opinion setting forth the reasoning of the Court of Appeals is entitled to our serious consideration, it is the judgment entered by that court which we must ultimately address when a petition for further review is granted. We conclude that the interests of justice are best served by following the same principle which governs our review of the trial courts and therefore hold that upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which we deem to be correct merely because we may disagree with the reasoning employed by the Court of

Appeals. We therefore address Corcoran's argument that reversal and a new trial are required because the trial court erred in not finding Lovercheck negligent as a matter of law and in not directing a verdict on liability, notwithstanding the Court of Appeals' disposition of this issue.

A motorist is required to yield the right-of-way to a vehicle traveling on a street protected by stop signs if the vehicle on the protected street is close enough to the intersection to pose an immediate hazard. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995); *Kasper v. Carlson*, 232 Neb. 170, 440 N.W.2d 195 (1989). Additionally, a motorist has a duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others. *Id.* A motorist in this circumstance must look at a time when looking would have been effective and must see what is in plain sight. *Floyd, supra*; *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). Consequently, one traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection. *Floyd, supra*; *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986).

However, a motorist approaching an intersection is not in a favored position and entitled to proceed merely because that motorist has the right-of-way. *Floyd, supra*. While a driver who fails to see another who is in a favored position is negligent as a matter of law, the failure to see an approaching vehicle is not negligence as a matter of law unless the approaching vehicle is undisputably located in a favored position. *Floyd, supra*, citing *Jones v. Goeden*, 232 Neb. 177, 440 N.W.2d 199 (1989), and *Getzschman v. Yard Co.*, 229 Neb. 231, 426 N.W.2d 499 (1988).

In addition, Neb. Rev. Stat. § 60-6,148(2) (Reissue 1998) provides in part:

> [E]very driver of a vehicle approaching an intersection where a stop is indicated by a stop sign shall stop at a clearly marked stop line or shall stop, if there is no such

> line, before entering the crosswalk on the near side of the intersection or, if no crosswalk is indicated, at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, such driver shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on such highway as to constitute an immediate hazard if such driver moved across or into such intersection.

Whether Lovercheck was negligent as a matter of law therefore depends upon whether Corcoran was undisputably located in a favored position. " 'A vehicle is located in a " ' "favored position" ' " when it is " ' "within that radius which denotes the limit of danger," ' " . . . a definition which focuses upon the vehicle's geographical proximity to the collision point and the vehicle's favored status under the applicable rules of the road.' " *Floyd*, 248 Neb. at 611, 537 N.W.2d at 516, quoting *Krul v. Harless*, 222 Neb. 313, 383 N.W.2d 744 (1986).

In *Floyd, supra*, the defendant came to a complete stop at a stop sign and did not see any approaching vehicles when he looked to his left. A truck parked near the intersection obstructed the defendant's view to his right, but he nevertheless proceeded into the intersection slowly, continuing to keep a lookout for traffic. The defendant did not see the plaintiff's vehicle approaching from his right prior to colliding with it in the middle of the intersection. The plaintiff initially stated that she was 25 feet from the defendant's vehicle when she first observed it but later stated that the distance was 100 feet. We stated that notwithstanding the plaintiff's contradictory testimony regarding the distance between her vehicle and that of the defendant when she first observed it, there was no evidence from which it could be inferred that she violated any rule of the road so as to forfeit her favored position or that her vehicle was other than within the radius of danger when the defendant proceeded into the intersection. We further stated that the existence of the parked vehicle which blocked the defendant's view of traffic approaching the intersection from the direction that the plaintiff was traveling "merely provided a condition, the exis-

tence of which [the defendant] was obligated to take into account." 248 Neb. at 611, 537 N.W.2d at 516. Based upon these facts, we concluded that the defendant was negligent as a matter of law and that the district court erred in not granting the plaintiff's motion for directed verdict.

The facts in the present case are directly parallel to those in *Floyd* on the question of whether the plaintiff was undisputably located in a favored position when the defendant entered the intersection. The parked vehicles which partially obstructed Lovercheck's view of traffic approaching the intersection from the west constituted a condition which he was obligated to take into account before proceeding into the intersection. See *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). There is no evidence that Corcoran was traveling at an excessive rate of speed or that he violated any rule of the road prior to the accident. Each party thought a collision was imminent when he first observed the other. Lovercheck testified that upon entering the intersection, he first observed Corcoran 60 to 80 feet away. At his undisputed rate of speed of 25 m.p.h., or 36.67 feet per second, Corcoran was no more than 2.18 seconds away from the intersection when Lovercheck first saw him. Giving Lovercheck the benefit of all reasonable inferences, we conclude that Corcoran was undisputably located in a favored position and that Lovercheck was therefore negligent as a matter of law. Although there is a question as to whether the vehicles actually collided, it is clear from the record that Corcoran was injured while taking reasonable measures to protect himself from the danger created by the negligence of Lovercheck. Accordingly, we conclude that the district court erred in denying Corcoran's motion for a directed verdict on the issue of liability.

We therefore affirm the judgment of the Court of Appeals which reversed, and remanded the cause to the district court for a new trial, but modify the judgment to require that the district court be directed to enter a directed verdict in favor of Corcoran on the issue of liability and conduct a new trial on the issue of damages only.

AFFIRMED AS MODIFIED.

MICHELLE JONES, APPELLANT, V. SCOTT A. MEYER, APPELLEE.
594 N.W.2d 610

Filed May 21, 1999. No. S-98-495.

1. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
2. **Trial: Evidence.** The admission of medical bills into evidence without objection does not amount to a concession by the opposing party that these services were necessitated by the accident.
3. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of witnesses.
4. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them.
5. ____: ____. Determining the weight that should be given expert testimony is uniquely the province of the fact finder.

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

Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Thomas B. Wood, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Michelle Jones, also known as Michelle Moeller, appeals the decision of the district court for Lancaster County, Nebraska, in which the jury awarded Jones $10,000 in damages for an automobile accident involving Jones and appellee Scott A. Meyer. Jones is challenging the adequacy of the damages. We affirm.

## BACKGROUND

This appeal arises from an automobile collision which occurred on April 9, 1995, at the intersection of 15th and F Streets in Lincoln, Nebraska, involving a vehicle operated by Jones and a vehicle operated by Meyer. Jones was taken to

Lincoln General Hospital but was discharged the same night after tests returned normal results and she was referred to her family physician, a Dr. Grenier. Rather than seeing Grenier, Jones went to see Dr. David L. Timperley, a chiropractor, on April 14. Over the next 2 years 7 months, Timperley treated Jones on approximately 100 occasions.

Jones commenced this action against Meyer, claiming that the collision was caused by Meyer's negligence, that Jones was injured as a result of that negligence, and that Jones sustained damages. Meyer admitted in his amended answer that his negligence was the proximate cause of the collision, but denied that his negligence was the proximate cause of Jones' injuries and denied that Jones' injuries were of the nature, severity, or extent alleged by Jones.

Trial was held in the Lancaster County District Court. Timperley was called by Jones to testify. Timperley testified that when he saw Jones for the first time on April 14, 1995, Jones told him she had been in a car accident and complained of neck pain, headaches, nausea, back pain, and pain in her left arm. Jones' subsequent visits to Timperley continued to be for back pain, neck pain, and headaches. Timperley gave the opinion that Jones has some permanent impairment to the cervical and thoracic spine. Timperley also gave the opinion that the collision that occurred on April 9 was the proximate cause of the injuries for which he had treated Jones. Timperley testified that he believed his charges for treating Jones were fair, reasonable, and necessitated by the injuries Jones suffered in the April 9 collision. On cross-examination, Timperley testified that he was not aware of any history of headaches Jones had prior to the accident, nor was he aware of any treatments or medications Jones had received for headaches prior to the accident.

Jones testified on her own behalf. On direct examination, Jones testified that prior to the accident, she had never been treated for any neck or back injuries and that she had never been treated by a physician for any headaches. On cross-examination, however, she admitted that she saw a Dr. Schneider, a family physician, in February 1995 for a headache she had had for several weeks and for problems in her neck and back. Schneider prescribed Darvocet for her. Jones testified that Schneider told

her the symptoms were caused by a cold that had settled in her chest and back area and that the Darvocet was prescribed to alleviate the cold symptoms. Jones also testified that she was treated by Timperley because of pain she incurred after performing various activities, including moving out of her apartment, cleaning, and sitting on bleachers at a football game, as well as from bronchitis and work-related stress. In addition, Jones' treatment by Timperley was disrupted by three breaks in time: There was a 3-month gap from October 1995 until January 1996, a 2½-month gap from February to May 1996, and another 2½-month gap from August to November 1996.

Jones presented evidence of the following expenses arising from Meyer's negligence:

| | |
|---|---|
| Auto damage | $ 7,021.74 |
| Auto rental | 1,072.27 |
| Lincoln General Hospital | 240.70 |
| Radiology Associates, P.C. | 47.00 |
| Promed Services | 73.50 |
| David L. Timperley, P.C. | 4,360.00 |
| Total | $12,815.21 |

In the pretrial order, the parties stipulated as to the fairness and reasonableness of the bills of Lincoln General Hospital and Radiology Associates. During the trial, the parties stipulated to the amount of the property damage. The jury was subsequently instructed that the reasonable value of the cost of repair of Jones' automobile was $7,021.74 and that the cost to rent a substitute vehicle was $1,072.27. The other expenses were enumerated by the respective bills which were received into evidence. After the trial, the jury returned a verdict in favor of Jones for $10,000.

Jones filed a motion for new trial alleging, in part, inadequacy of the verdict. The motion was overruled, and Jones perfected this appeal. On our own motion, we moved this case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## ASSIGNMENT OF ERROR

Jones assigns that the jury's award of damages shows a disregard of the evidence and is inadequate as a matter of law.

## STANDARD OF REVIEW

The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998).

## ANALYSIS

Jones argues that the jury's award of $10,000 was inadequate as a matter of law because she clearly established at trial medical and automobile-related expenses totaling $12,815.21. Jones asserts that the award must be inadequate because without even considering pain and suffering, it is less than the amount of special damages arising from the accident.

Jones relies on *Murrish v. Burkey*, 1 Neb. App. 650, 510 N.W.2d 366 (1993), which is a personal injury case resulting from a car accident wherein the Court of Appeals found the jury verdict to be inadequate. In *Murrish*, the parties stipulated that a medical expert would have testified that the following medical expenses for treatment of Murrish's broken arm were fair, reasonable, and *necessitated* by the accident: $5,753.09 for the hospital stay, $980 for the surgeon, $240 for the anesthesiologist, $198 for the radiologist, and $175 for physical therapy. After the trial court accepted and approved the stipulation during the trial, the trial court instructed the jury to accept the stipulation as fact. The jury found in favor of Murrish in the amount of $5,753.09, the cost of the hospital stay. The Court of Appeals concluded that it was not possible for the jury to find that the defendant was liable for Murrish's injury, but not liable for all of the undisputed medical expenses related to the injury.

The decision in *Murrish v. Burkey, supra*, was based on *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982), also a personal injury case resulting from a car accident wherein the court found the jury verdict to be inadequate. Both parties in *O'Neil* stipulated that a medical expert would have testified that the plaintiff's fair and reasonable medical expenses as a result of the accident were $1,641.18. The plaintiff appealed the jury's verdict awarding the plaintiff $1,000 as being clearly inadequate. The defendant argued that the figures for medical expenses in the stip-

ulation were no more binding on the jury than they would have been if they had been presented by an expert witness in person. This court agreed, but pointed out that "the testimony was undisputed, and that fact may be considered in determining whether or not the verdict was inadequate." *Id.* at 377, 322 N.W.2d at 793.

This court addressed a similar but different situation in *Reiser v. Coburn, supra.* In *Reiser*, the parties stipulated that medical and funeral bills in the amount of $33,747.72 were necessitated as a result of the accident. The stipulation was different from that in *Murrish v. Burkey, supra*, and *O'Neil v. Behrendt, supra*, where the parties stipulated that a medical expert would have testified that the plaintiff's medical expenses were fair, reasonable, and necessitated by the accident. The stipulated expenses in *Reiser v. Coburn, supra*, were incorporated into a jury instruction to which neither party objected. Following trial, the jury found that Reiser's estate was entitled to damages in the amount of $17,000. The trial court then reduced this award by the percentage of Reiser's negligence, 49.9 percent, as determined by the jury, which resulted in a judgment of $8,517. This court concluded that the damage award was inadequate, holding that "there is no logical correlation between the stipulated and uncontroverted evidence regarding medical expenses and funeral and burial expenses incorporated in the trial court's instruction and the amount of the verdict returned by the jury . . . ." *Id.* at 665, 587 N.W.2d at 343.

The present case is distinguishable from *Murrish v. Burkey*, 1 Neb. App. 650, 510 N.W.2d 366 (1993); *O'Neil v. Behrendt, supra*; and *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998). It is different from *Reiser* because the parties in the case at bar did not stipulate to the amount of any medical expenses necessitated by the accident. The parties stipulated that the $240.70 bill of Lincoln General Hospital and the $47 bill of Radiology Associates were fair and reasonable. There was not a stipulation as to the balance of the medical bills.

The present case is different from *Murrish v. Burkey, supra*, and *O'Neil v. Behrendt, supra*, because in both of those cases, the parties stipulated that a medical expert would have testified that a certain dollar amount of medical expenses was fair, reasonable, and necessitated by the respective accidents. In the

present case, there was no such stipulation. The parties did not stipulate that a medical expert would testify that the cost of Jones' medical treatment was fair, reasonable, and necessitated by the accident. Rather, a medical expert, Timperley, testified at trial that his charges for treating Jones were fair, reasonable, and necessitated by the injuries Jones suffered in the accident. Obviously, the jury did not believe that Timperley's bill for services was fair, reasonable, or necessitated. In addition, in *Murrish v. Burkey, supra*, and *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982), both courts acknowledged that the figures for medical expenses in the stipulation were no more binding on the jury than they would have been if they had been presented by an expert witness in person. However, this court pointed out in *O'Neil* that the stipulated medical expenses were undisputed and that that fact could be considered in determining whether or not the verdict was inadequate.

Jones argues that her medical expenses are undisputed because her expenses were evidenced by the appropriate bills and there was no testimony or evidence to contradict Timperley's testimony that his charges for treating Jones were necessitated by the injuries Jones suffered in the April 9, 1995, accident. However, the admission of medical bills into evidence without objection does not amount to a concession by the opposing party that these services were necessitated by the accident. See *Schutt v. Schumacher*, 548 N.W.2d 381 (N.D. 1996). In addition, we determine that there is evidence to dispute Timperley's testimony that all of Jones' expenses resulting from her treatments by Timperley were necessitated by the injuries Jones suffered in the accident. Jones testified that in February 1995, before the accident, she went to see a family physician concerning a headache she had had for several weeks and for problems in her neck and back. Jones also testified that she was treated by Timperley because of pain she incurred after performing various activities, including moving out of her apartment, cleaning, and sitting on bleachers at a football game, as well as from bronchitis and work-related stress. In addition, Jones' treatment by Timperley was disrupted by the three breaks in time previously stated in this opinion. From this testimony, the jury could conclude that not all of the medical treatments

Jones has received since the accident were necessitated by the accident.

It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of witnesses. *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987). In addition, triers of fact are not required to take opinions of experts as binding upon them. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). Determining the weight that should be given expert testimony is uniquely the province of the fact finder. *Id.*

There is conflicting evidence as to whether all of Jones' medical bills were necessitated by the April 9, 1995, accident. The jury's award exceeded the amount of the stipulated damages and the expenses from Lincoln General Hospital and Radiology Associates. Therefore, the jury could have reasonably concluded that the evidence did not support the finding that all of Jones' chiropractic expenses were a result of the accident. We conclude that the jury's award is supported by the evidence and bears a reasonable relationship to the elements of damages proved.

## CONCLUSION

For the foregoing reasons, we find the jury's award of damages is not inadequate as a matter of law.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHRISTOPHER B. AUPPERLE, RESPONDENT.

594 N.W.2d 602

Filed May 21, 1999. No. S-98-524.

1. **Disciplinary Proceedings: Proof.** The relator's burden of proof in attorney disciplinary proceedings is to establish the allegations set forth in the formal charges against the attorney by clear and convincing evidence.
2. **Disciplinary Proceedings.** If, in an attorney disciplinary proceeding, the respondent's answer raises no issue of fact, the matter may be disposed of by the Nebraska Supreme Court on its own motion.

3. ____. To determine whether and to what extent discipline should be imposed in an attorney proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. Each case must be evaluated individually in light of its particular facts and circumstances.
4. ____. For purposes of determining the proper discipline, the Nebraska Supreme Court considers the respondent's acts both underlying the events of the case and throughout the disciplinary proceeding.
5. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.
6. ____. An attorney who neglects an entrusted matter has failed to act competently and is guilty of unprofessional conduct. Where there is a pattern of neglect, protection of the public and the maintenance of the reputation of the bar as a whole are of paramount concern.
7. ____. Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility. While substance abuse neither justifies nor excuses attorney misconduct, the fact that an attorney has acknowledged the condition, voluntarily sought treatment, and terminated use of the substance may under some circumstances be considered as a mitigating factor in a disciplinary proceeding. However, whether such facts warrant mitigation of discipline in any particular case depends upon the particular facts and circumstances of the attorney's misconduct.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Paul M. Gnabasik for respondent.

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

PER CURIAM.

This is an original action brought by the relator, Nebraska State Bar Association (NSBA), seeking assessment of discipline against the respondent, Christopher B. Aupperle, an attorney admitted to practice law in Nebraska. On November 10, 1997, the NSBA filed charges against Aupperle with the Committee on Inquiry of the Second Disciplinary District pursuant to Neb. Ct. R. of Discipline 9(G) (rev. 1996). After conducting a hearing on March 3, 1998, the Committee on Inquiry transmitted formal charges to the Disciplinary Review Board pursuant to Neb. Ct. R. of Discipline 9(H)(3)(h). Acting upon an application

by the Committee on Inquiry, this court, on May 29, 1998, temporarily suspended Aupperle from practicing law in the State of Nebraska until further order of the court. See Neb. Ct. R. of Discipline 12 (rev. 1996).

On July 30, 1998, the Disciplinary Review Board filed formal charges, consisting of five counts, in this court. On August 25, an additional formal charge was filed pursuant to Neb. Ct. R. of Discipline 10(F) (rev. 1996). Each of the formal charges alleged violations of one or more of the following provisions of the Code of Professional Responsibility, Canons 1, 2, 6, and 7:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> . . . .
>
> DR 2-110 Withdrawal from Employment.
>
> . . . .
>
> (B) Mandatory withdrawal.
>
> A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:
>
> . . . .
>
> (4) The lawyer is discharged by his or her client.
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> . . . .
>
> (3) Neglect a legal matter entrusted to him or her.
>
> . . . .
>
> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his or her representation of a client, a lawyer shall not:
>
> . . . .
>
> (5) Knowingly make a false statement of law or fact.

In answers to the original and additional formal charges, Aupperle admitted most of the factual allegations contained therein. Because the answers did not raise issues of fact, this court did not appoint a referee but directed the parties to file briefs and subsequently heard oral argument.

The relator's burden of proof in disciplinary proceedings is to establish the allegations set forth in the formal charges against the attorney by clear and convincing evidence. See, *State ex rel. NSBA v. Johnson, ante* p. 495, 590 N.W.2d 849 (1999); *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997). If, in an attorney disciplinary proceeding, the respondent's answer raises no issue of fact, the matter may be disposed of by the court on its own motion. Neb. Ct. R. of Discipline 10(I).

## FACTS

Aupperle was admitted to the practice of law in the State of Nebraska on September 14, 1992, and during the period when the alleged disciplinary violations occurred, he was engaged in the private practice of law in Douglas County, Nebraska.

### FORMAL CHARGES: COUNT I

In August 1996, Neal Grabow retained Aupperle to represent his business, Wild Ventures, Inc., in commercial litigation. Aupperle informed Grabow that a petition had been filed and that a trial would be held. At the time this representation was made, Aupperle had not filed any petition on behalf of Grabow or his company. Aupperle subsequently informed Grabow that a trial date had been set for June 26, 1997. When he made this representation, Aupperle had not filed any petition on Grabow's behalf.

Grabow appeared for trial at the Sarpy County Courthouse on June 26, 1997, as instructed by Aupperle, but neither Aupperle nor the intended defendant appeared. Grabow attempted to reach Aupperle by telephone and left a message with Aupperle's answering service to call Grabow at the courthouse. Grabow then inquired with the clerk of the court and discovered that no petition had been filed on his behalf and that no trial had been scheduled. On the same day, Aupperle telephoned Grabow and advised him that the intended defendant had filed for bankruptcy protection. When Aupperle made this statement, he

had not received notice of any such bankruptcy. Later the same day, Aupperle again telephoned Grabow and stated that he would either have a judgment against the intended defendant or have a check from the intended defendant yet that day. Aupperle had no basis in fact for making these statements.

FORMAL CHARGES: COUNT II

In June 1996, Jennifer Kempkes retained Aupperle to represent her in marriage dissolution proceedings. Aupperle filed a petition for dissolution on her behalf and served discovery requests upon the attorney representing her husband. Aupperle was involved in the case through 1996. Because Kempkes had been unable to contact Aupperle or communicate with him about her case, she wrote to him on July 8, 1997, instructing him to withdraw as her attorney. In his October 23 response to Kempkes' complaint filed with the NSBA, Aupperle admitted that he failed to withdraw from Kempkes' case when he received her letter instructing him to do so. He further stated in the response that he would immediately file a motion to withdraw. Aupperle sought leave to withdraw from the case in a motion dated February 28, 1998, which was granted by the court on March 2.

FORMAL CHARGES: COUNT III

In March 1997, Kristen Esper retained Aupperle to represent her in a marriage dissolution proceeding. He filed a petition for dissolution on her behalf on April 7. Being unable to contact Aupperle or communicate with him about her case, Esper sent him a letter on August 25, instructing him to withdraw from the case and to refund a $500 retainer. In his October 23 response to Esper's complaint filed with the NSBA, Aupperle admitted that he had failed to withdraw upon receiving Esper's letter instructing him to do so, but that he had "taken action to withdraw from the case at this time." However, Aupperle did not file a motion to withdraw until late February 1998.

FORMAL CHARGES: COUNT IV

In November 1996, Tamara Kathrens retained Aupperle to represent her in a marriage dissolution proceeding. He filed a petition for dissolution on her behalf on December 31. During

the months of June, July, and August 1997, Aupperle failed to communicate with Kathrens or keep her advised concerning her case, despite her repeated attempts to contact him. On July 7, the administrator for the district court for Douglas County sent notice to Aupperle that Kathrens' case would be dismissed in 30 days unless certified for trial. Aupperle did not advise Kathrens of this notice or take any steps to protect her interests. On August 7, the court dismissed Kathrens' case and sent notice to Aupperle. However, Aupperle did not notify Kathrens of the dismissal. In August, Kathrens sent a letter to Aupperle requesting that he withdraw as her attorney and retained substitute counsel in order to have her case reinstated to allow her to proceed with the dissolution. Aupperle did not file a motion for leave to withdraw as Kathrens' counsel until late February 1998.

FORMAL CHARGES: COUNT V

In December 1995, Bradley S. Doyle retained Aupperle to represent him and his wife in litigation involving their home. Aupperle assumed responsibility for the case from the Doyles' previous attorney, who had filed a petition and begun discovery. However, Aupperle did not file an appearance on behalf of the Doyles in the pending action. On January 8, 1996, the administrator for the district court for Douglas County sent notice to the attorneys of record in the Doyles' case that it would be dismissed in 30 days unless a certificate of readiness for trial was filed. Because Aupperle had not entered his appearance, he did not receive this notice from the court. Despite the fact that the case had been dismissed without his knowledge, Aupperle continued to assure Bradley Doyle that it was still pending and that he was waiting for the court to set a trial date. From May through August 1997, Bradley Doyle was unable to reach Aupperle by telephone despite repeatedly leaving messages with his answering service. Aupperle did not return these calls.

ADDITIONAL FORMAL CHARGE

On August 6, 1996, as attorney for Gary Maddox, Aupperle filed an application to modify a decree of dissolution entered by the district court for Douglas County. April Maddox filed a pro se response on August 27. On October 18, Aupperle filed a certificate of readiness for trial in this proceeding and sent a copy

to April Maddox. On the same date, he also filed a notice of serving requests for production of documents, indicating that he had mailed said request to April Maddox. On December 10, attorney Rebecca Schmitt entered her appearance for April Maddox and mailed a copy of the entry of appearance and a request for production of documents to Aupperle.

In January 1997, Gary Maddox instructed Aupperle to dismiss his application to modify. On or about January 13, Aupperle prepared and submitted an order of dismissal, which was entered by the court on the same date. On January 27, Schmitt filed a motion to vacate the order of dismissal, scheduled a hearing on the motion for February 5, and mailed the notice of the hearing to Aupperle as attorney for Gary Maddox. Prior to the hearing, Aupperle contacted Schmitt and indicated to her that he did not have grounds to oppose her motion and would not attend the hearing. They agreed that Schmitt would file an amended answer and cross-petition on behalf of April Maddox. At the hearing on February 5, the court ruled that Gary Maddox's application to modify would remain dismissed, but gave April Maddox leave to file an amended cross-application seeking modification of the decree, which was filed on February 13.

On that day, Schmitt wrote to Aupperle, inquiring about Aupperle's responding to the document production requests she had served on December 9, 1996. On March 11, 1997, Schmitt filed a motion to compel production of documents and scheduled a hearing for March 21. On March 19, Aupperle agreed that the documents would be produced by March 31, and an order was entered to that effect. However, he did not inform Gary Maddox that the motion to compel had been filed and did not inform him thereafter of his agreement that the documents would be produced by March 31. On April 7, Schmitt wrote to Aupperle, requesting production of the documents which had not been produced. Aupperle did not immediately respond to Schmitt's letter.

On May 1, 1997, Schmitt filed a second motion to compel production, which also requested attorney fees. At a hearing on May 15, Aupperle appeared with Gary Maddox and the court entered an order requiring that the documents be produced by May 19 and deferred a ruling on the request for attorney fees.

Aupperle did not produce the documents by May 19, and Schmitt filed a third motion to compel production on May 21. Aupperle delivered the documents to Schmitt on the following day.

Aupperle appeared with Gary Maddox at the trial on April Maddox's cross-application to modify on August 12, 1997. At the conclusion of trial, the court instructed counsel to submit briefs on any additional issues they wished the court to address. Aupperle did not submit a brief.

On August 21, 1997, the court wrote a letter to Aupperle and Schmitt instructing them to appear in court on Monday, August 25, to hear its findings and decision in the Maddox case. The letter was received at Aupperle's office on Friday, August 22, while he was out of town, and he did not learn of the letter until the afternoon of August 25. Aupperle did not appear at the hearing at which the court entered its findings and instructed Schmitt to prepare a proposed order, which included an award of attorney fees to April Maddox from Gary Maddox. On August 27, the court entered the order modifying the decree, and a signed copy was mailed to Aupperle. Aupperle had not informed Gary Maddox of the August 25 hearing and did not send a copy of the August 27 order to him.

### Prior Disciplinary Action

On October 1, 1996, Aupperle received a private reprimand from the Committee on Inquiry for violations of DR 1-102(A)(1), and Canon 9, DR 9-102(A)(1) and (2), of the Code of Professional Responsibility. On September 29, 1997, Aupperle received a private reprimand from the Committee on Inquiry for violations of DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B)(4) of the Code of Professional Responsibility.

## FINDINGS AND ASSESSMENT OF DISCIPLINE

### Disciplinary Rule Violations

With respect to count I, we find that the admitted facts clearly and convincingly establish that Aupperle engaged in conduct involving dishonesty, fraud, and misrepresentation, in violation of DR 1-102(A)(4); he neglected the legal matter entrusted to him by Grabow, in violation of DR 6-101(A)(3);

and he made false statements to Grabow while acting as his attorney, in violation of DR 7-102(A)(5). With regard to count II, we find on the basis of clear and convincing evidence that Aupperle neglected the legal matter entrusted to him by Kempkes, in violation of DR 6-101(A)(3); that he violated DR 2-110(B)(4) by not promptly withdrawing from the case when instructed by his client to do so; and that such conduct, viewed as a whole, was prejudicial to the administration of justice and thus violated DR 1-102(A)(2). Regarding count III, we find on the basis of clear and convincing evidence that Aupperle neglected the legal matter entrusted to him by Esper, that he did not promptly withdraw from the case when instructed to do so by his client, and that such conduct was prejudicial to the administration of justice, thereby violating DR 6-101(A)(3), DR 2-110(B)(4), and DR 1-102(A)(5). As to count IV, we find on the basis of clear and convincing evidence that Aupperle neglected the legal matter entrusted to him by Kathrens, that he failed to withdraw promptly when instructed by his client to do so, and that such conduct was prejudicial to the administration of justice, in violation of DR 6-101(A)(3), DR 2-110(B)(4), and DR 1-102(A)(5). With respect to count V, we find on the basis of clear and convincing evidence that Aupperle neglected the legal matter entrusted to him by the Doyles, in violation of DR 6-101(A)(3). The NSBA argues with respect to this count that Aupperle should be found to have also violated DR 1-102(A)(4) by engaging in conduct involving dishonesty, deceit, and misrepresentation and DR 7-102(A)(5) by knowingly making a false statement of fact to his clients. However, these allegations were not set forth in the formal charges, and we conclude that in any event, they are not proved by clear and convincing evidence, since Aupperle did not admit actual knowledge of the dismissal of the Doyles' case at the time of the representations at issue. With respect to the additional charge, we conclude on the basis of clear and convincing evidence that Aupperle's neglect of the matter entrusted to him by Gary Maddox violated DR 6-101(A)(3). We further find that Aupperle's violation of the disciplinary rules as set forth herein constitutes a violation of DR 1-102(A)(1).

DISCIPLINE

To determine whether and to what extent discipline should be imposed in an attorney proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Johnson, ante* p. 495, 590 N.W.2d 849 (1999); *State ex rel. NSBA v. Schleich*, 254 Neb. 872, 580 N.W.2d 108 (1998). Each case must be evaluated individually in light of its particular facts and circumstances. *Id.* For purposes of determining the proper discipline, we consider the respondent's acts both underlying the events of the case and throughout the disciplinary proceeding. See, *State ex rel. NSBA v. Johnson, supra*; *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995). Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. *State ex rel. NSBA v. Johnson, supra*; *State ex rel. NSBA v. Schmeling, supra.*

Of the multiple disciplinary violations which occurred in this case, Aupperle's repeated false statements to Grabow regarding the legal matter which Grabow had entrusted to him are the most serious and troubling. A lawyer's integrity and the client's right to rely upon the lawyer's word form the bedrock of an attorney-client relationship. A knowingly false statement made by a lawyer to a client not only constitutes a breach of trust but also taints the reputation of the bar as a whole and requires firm disciplinary action in order to protect the public, as well as deter others from engaging in such conduct. We note that Aupperle recognized the significance of his false statements to Grabow in his testimony before the Committee on Inquiry. When asked to explain his failure to communicate with various clients as alleged in counts II through V of the formal charges, Aupperle stated:

> At that time, you know, to be perfectly honest, the majority of this culminated with Mr. Grabow's situation and my misrepresentation to him. In June when that occurred, I realized what I had done and what detriment I had done to

my ability to probably practice law and to represent clients at that time.

While this may explain Aupperle's subsequent conduct, it does not excuse it. Six persons experienced the frustration and prejudicial consequences of a lawyer who neglected the matters they had entrusted to him and failed to communicate with them when they sought explanations. Without question, a lawyer who neglects an entrusted matter has failed to act competently and is guilty of unprofessional conduct, for which we have imposed sanctions up to and including disbarment. *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997); *State ex rel. NSBA v. Calinger*, 248 Neb. 903, 539 N.W.2d 846 (1995); *State ex rel. NSBA v. Schmeling, supra.* Where there is a pattern of neglect, as in this case, protection of the public and the maintenance of the reputation of the bar as a whole are of paramount concern.

In proceedings before the Committee on Inquiry and this court, Aupperle has readily admitted his misconduct and acknowledged responsibility for his actions. This reflects positively upon his attitude and character and is a factor which we consider in determining the appropriate discipline, bearing in mind that the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice. See *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

During the hearing before the Committee on Inquiry, Aupperle was specifically asked whether he had a "problem with alcohol" during 1997 and he responded in the negative. In an affidavit dated November 2, 1998, which Aupperle filed in this proceeding with leave of this court, he stated that he had been "in denial regarding my drinking problem" at the time of this hearing. He further stated that he was ticketed for driving under the influence of alcohol in May 1998, and he disclosed that with the assistance of the Nebraska Lawyers Assistance Program (NLAP), he admitted himself to an inpatient alcoholism treatment program at a facility in Lincoln for 17 days. Aupperle stated that he satisfactorily completed outpatient therapy in September 1998 and that he continues to attend at least

five Alcoholics Anonymous meetings per week. In his affidavit, Aupperle disclosed the fact that he has sought the assistance of NLAP in dealing with his alcoholism and concludes: "Since my in-patient stay and my continued out-patient therapy, I have learned to accept my alcoholism and have worked at reversing its negative impact on my personal and professional life." Our record also includes medical records which corroborate Aupperle's statements concerning his treatment. In his brief filed with this court, Aupperle represents that NLAP "has agreed to monitor [Aupperle] in conjunction with the Council for Discipline under guidelines (to be established) which would effectively guarantee the protection of the public, as well as protect the reputation of the Bar as a whole." Brief for respondent at 10.

Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995). We have recognized that while substance abuse in no way justifies or excuses attorney misconduct, the fact that an attorney has acknowledged the condition, voluntarily sought treatment, and terminated use of the substance may under some circumstances be considered as a mitigating factor in a disciplinary proceeding. *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987). However, whether such facts warrant mitigation of discipline in any particular case depends upon the particular facts and circumstances of the attorney's misconduct. *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995).

All of the disciplinary violations which we consider in this case occurred during a period of approximately 1 year. Although Aupperle's behavior appears to have been significantly affected by his alcoholism during this time, he was unable or unwilling to recognize this relationship and now admits that he was "in denial." It has been noted that "[o]ne of the baffling characteristics of alcoholism is that alcoholics having full knowledge of the [effect of alcohol upon behavior and cognitive capabilities], with life problems escalating, will deny

the relationship between alcohol and their problems." Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 Creighton L. Rev. 265, 268 (1997).

Aupperle voluntarily ceased practicing law in July 1997, several months prior to his temporary suspension, and appears to have made sincere and productive efforts to confront his condition and obtain the necessary professional treatment. Finally, we note that while Aupperle's disciplinary violations are serious, none involved the misappropriation or commingling of client funds. Compare *State ex rel. NSBA v. Woodard, supra.* We therefore conclude that Aupperle's alcoholism and his efforts to deal with it should be considered in mitigation of the discipline to be imposed.

Accordingly, we hereby suspend Aupperle from the practice of law for an indefinite period retroactive to the date of his temporary suspension on May 29, 1998, with no possibility of reinstatement prior to May 29, 2000. Upon application for reinstatement, Aupperle shall have the burden of proving that he has not practiced law during the period of suspension and that he has met the requirements of Neb. Ct. R. of Discipline 16 (rev. 1996). In addition, reinstatement shall be conditioned upon (1) the payment of all costs of this action, which are hereby taxed to Aupperle; (2) a showing by independent third-party proof that Aupperle has continued active participation in a recovery program and has maintained abstinence from the use of alcohol during the period of suspension; and (3) the submission by Aupperle and approval by this court of a probation plan, to be in effect for a period of 2 years following reinstatement, whereby Aupperle's recovery program and his compliance with the Code of Professional Responsibility will be monitored by NLAP and the Counsel for Discipline. Failure to comply with the terms of the probation plan would constitute grounds for further disciplinary action. See *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

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